IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

AT WHEELING

CHRISTINE STENGER,

Plaintiff,

v. **Civil Action No. 5:07-CV-146**
(Judge Frederick P. Stamp, Jr.)

CARELINK HEALTH PLANS, INC., and
PATRICK W. DOWD,

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO REMAND

I. INTRODUCTION

COME NOW Defendants, Carelink Health Plans, Inc. ("Carelink"), and Patrick W. Dowd (sometimes collectively referred to herein as "Defendants"), by counsel, and respectfully submit this response to Plaintiff's Motion to Remand ("Plaintiff's Motion"). Succinctly, Plaintiff's Motion and the attached affidavit from Plaintiff leave little doubt that Plaintiff's claims are completely preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq. Plaintiff's argument ignores the fact that Defendants removed this case on the basis of complete preemption under both 29 U.S.C. § 1132(a) and 29 U.S.C. § 1140.[1] Accordingly, Plaintiff's reliance upon only 29 U.S.C. § 1132(a) in making her argument is sorely misplaced. More importantly, however, Plaintiff's affidavit makes it clear that her claims arise as a result of the administrative proceedings before the Insurance

[1] This issue is made crystalline in the Memorandum of Law in Support of Defendants' Motion to Dismiss. Plaintiff, of course, chose not to respond to this Motion in a timely fashion, instead filing a late and deficient motion to extend or stay the deadline to respond. Nevertheless, it appears that Plaintiff has also elected to ignore the contents of Defendants' filings, including the Notice of Removal.

Commissioner of the State of West Virginia (the "Commissioner"). These proceedings were entirely premised upon Carelink's denial of Plaintiff's request for benefits pursuant to an ERISA plan. As such, any claim flowing from the administrative proceedings is related entirely to the manner in which Carelink administered the ERISA plan at issue, and its conduct with regard to the denial of benefits at issue in that matter. Therefore, this Court should deny Plaintiff's Motion to Remand.

II. STATEMENT OF FACTS

What is the mystery underlying Plaintiff's claims, and why does Plaintiff feel the need to obscure her claims from this Court and Defendants? Plaintiff has filed a Complaint that fails to state a claim upon which relief may be granted. She has filed an affidavit that does not, in any way, expand upon the allegations contained in the Complaint except in the most generic way. It is progressively clear that Plaintiff has taken a very clear course of action to avoid satisfying even the most basic requirements of federal pleading in order to avoid ERISA preemption, but despite her best efforts, she cannot so do so.

Plaintiff is a subscriber—more properly a beneficiary—of a "group health care plan" issued by Carelink in the State of West Virginia. (Complaint ¶ 4). Apart from the identity of the parties, jurisdictional allegations, and the allegation that the Social Security Administration determined that Plaintiff is disabled, the only other "fact" pled by Plaintiff is that Mr. Dowd sent Plaintiff a letter dated November 1, 2005. (Id. at ¶ 15). The entirety of the remainder of the Complaint is filled with bare legal conclusions and restatements of the law. However, the letter from Mr. Dowd is an appropriate starting point for a discussion of the underlying history of this case.

It is true, as Plaintiff alleges, that Mr. Dowd sent Plaintiff a letter on November 1, 2005. (See Letter from Patrick W. Dowd to Christine O. Stenger, attached hereto as Exhibit A). Mr. Dowd's letter states, in its entirety, as follows:

> The records of the Carelink Customer Service Organization (CSO) indicate that a phone call was received on the morning of Thursday October 27, 2005 from your home phone number. The CSO representative who handled the call was under the impression that she was speaking to Dena Wildman of the West Virginia Insurance Commissioner's office based on information you gave her, and the way you expressed the purpose of the phone call. It could be said that you attempted to misrepresent yourself as Ms. Wildman. Indeed, the CSO representative had no indication from you that you were not Ms. Wildman.
>
> Please be advised that if you phoned the CSO representing yourself as Ms. Wildman, such behavior would be deemed fraud, and possibly a violation of state law which makes it a misdemeanor to "knowingly impersonate or purport to exercise any function of a public official, employee, tribunal or official proceeding without legal authority to do so and with the intent to induce a person to submit to or rely on the fraudulent authority of the person." Further, such actions would be fraud under your HMO benefit plan, and grounds for termination. Section 4.1 of the HMO Evidence of Coverage (EOC) states that Carelink can terminate you, with at least 15 days written notice, if you participate in fraudulent or criminal behavior. We have handed this matter over to the State for investigation, and have confirmed with Ms. Wildman that the information you conveyed to the CSO representative was inaccurate and untrue.
>
> This letter shall serve as a warning that any similar behavior by you in the future will be grounds for your termination. We have apprised you of your rights to contact the Department of Insurance to review your appeal, and we have informed you countless times that your appeal rights with Carelink regarding your request for a lefort graft have been exhausted.

(Exhibit A) (emphasis added). In other words, this letter was a further response by Carelink to Plaintiff's repeated inquiries regarding a denial of requested benefits under her ERISA plan. Indeed, as the letter states, Carelink informed Plaintiff of her rights to appeal Carelink's decision

numerous times, and it also apprised her of her right under the plan to seek redress before the Commissioner.

Subsequently, Plaintiff did, in fact, complain to the Commissioner. A hearing was held on the matter, in which Plaintiff—who was represented by counsel for the Office of the Consumer Advocate—testified at great length.[2] At no time during the course of the hearing did Plaintiff or her counsel indicate that any discrimination or intimidation was taking place.[3] Thereafter, the Commissioner adopted the recommendations of the ALJ, who determined, among other things, that Carelink must "cease and desist from failing to certify as covered procedures all five of the procedures requested in Dr. Costello's letter of May 16, 2005." (Final Order No. 06-AP-024, attached hereto as Exhibit B, at 2). Carelink subsequently sought reconsideration of the Final Order from the Commissioner, which was denied. Carelink then appealed the Final Order to the Circuit Court of Kanawha County, West Virginia. Notably, however, Carelink did not appeal the portion of the Final Order concerning Plaintiff's benefit denial. In fact, in compliance with the Final Order, Carelink authorized the services requested by Plaintiff that were the subject of the administrative complaint. The Commissioner and Carelink resolved their outstanding issues regarding the procedural elements of the Final Order, and Carelink voluntarily dismissed its appeal.

In Plaintiff's Memorandum in Support of Motion to Remand ("Plaintiff's Memorandum"), Plaintiff "acknowledges that the plan as to which all benefits issues have previously been adjudicated by the West Virginia Insurance Commissioner is an ERISA plan."

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[2] In fact, Plaintiff's testimony takes up approximately forty-eight pages of a hearing transcript that is one hundred and ninety-nine pages in length. In other words, Plaintiff testified for nearly one quarter of the entirety of the proceedings.

[3] In fact, this assertion is absurd and lacks a good faith basis. The hearing took place in front of an Administrative Law Judge ("ALJ") duly appointed by the Commissioner. Plaintiff's husband, her counsel—the former consumer advocate for the Commissioner—and others were present during the hearing.

(Plaintiff's Memorandum, at 5) (emphasis added). Thus, there is no question that the plan at issue is an ERISA plan. Moreover, Plaintiff states in her affidavit that "[t]he acts of discrimination and intimidation which form the basis of my Complaint in the present action occurred during the course of the administrative proceeding before the West Virginia Insurance Commissioner." (Affidavit of Christine Stenger ("Stenger Aff."), ¶ 5). Two more points must be made, however. First, the purpose of the administrative proceeding before the Commissioner was for Plaintiff to seek her benefits under an ERISA plan, which, in turn, she received as a result. (Stenger Aff., ¶ 3). Second, recourse to the Commissioner is one of the terms of the ERISA plan at issue. Indeed, the plan itself states that "[a]t any time during the internal appeal process, you or your representative may appeal to the West Virginia Insurance Commissioner." (See Group Contract Execution Page and Certificate of Insurance, attached hereto as Exhibit C, at 37). Accordingly, the procedure under which Plaintiff sought review from the Commissioner is, in fact, a term of Plaintiff's ERISA plan. With these facts in place, it is apparent that Plaintiff's claims are each completely preempted by ERISA.

III. DISCUSSION

A. Standard of review.

"Typically, an action initiated in a state court can be removed to federal court only if it might have been brought in federal court originally." Sonoco Prod. Co. v. Physicians Health Plan, Inc., 338 F.3d 366, 370 (4th Cir. 2003). The party seeking removal bears the burden of showing that the district court has original jurisdiction. Mulcahey v. Columbia Organic Chems. Co., 29 F.3d 148, 151 (4th Cir.1994). "[C]ourts should resolve all doubts about the propriety of removal in favor of retained state court jurisdiction." Hartley v. CSX Transp., Inc., 187 F.3d 422, 425 (4th Cir.1999).

Under these standards, Plaintiff's Motion should be denied. Plaintiff's claims are each completely preempted by ERISA. Jurisdiction in this Court is proper.

B. Each of Plaintiff's claims for intimidation and discrimination are completely preempted by ERISA.

1. Plaintiff misapprehends the nature of the "well-pleaded complaint" rule within the context of complete preemption doctrine.

Although Plaintiff relies upon this Court's decision in Stonewall Jackson Mem. Hosp. v. American United Life Ins. Co., 963 F. Supp. 553 (N.D.W.Va. 1997), it is obvious that Plaintiff misunderstands the nature of the well-pleaded complaint rule. In Stonewall Jackson, this Court observed that:

> There is, however, an established exception to the rule which derives from the notion that Congress may so completely preempt a certain area of law that any claim which effectively implicates this area is necessarily federal in character, regardless of the nominal theory under which the plaintiff elects to pursue prosecution.

Stonewall Jackson, 963 F. Supp. at 560 (citation omitted; emphasis added). It is indisputable that ERISA is such an area of law. The only question, therefore, is whether Plaintiff's claims fit within the civil enforcement provision of ERISA.

Plaintiff argues, in essence, that she is not seeking relief under 29 U.S.C. § 1132(a)(1), and that she has asserted only state court claims. Thus, Plaintiff believes that the well-pleaded complaint rule bars removal of this action. Plaintiff is wrong. As an initial matter, Defendants removed this case under both 29 U.S.C. § 1132(a) and 29 U.S.C. § 1140. (See Notice of Removal, ¶ 6). Plaintiff totally ignores 29 U.S.C. § 1140. Moreover, Plaintiff's allegations concerning the nature of her claims are entirely self-serving, and, in any event, such allegations do not control this Court's analysis. See, e.g Radcliff v. El Paso Corp., 377 F. Supp. 2d 558, 566 (S.D.W.Va. 2005) ("under the rubric of the ERISA complete preemption doctrine

discussed above, I look beyond the form of plaintiff's complaint to determine whether the substance is preempted by ERISA's civil enforcement provisions."); Mercado Collazo v. Life Ins. Co. of North Am., 217 F. Supp. 2d 189, 192 (D.P.R. 2002) ("We must then look into the true nature of the claim asserted in this action without regard to plaintiff's characterization thereof and determine whether or not it falls within the ambit of § 502(a), ERISA's complete preemption domain, capable of conferring removal jurisdiction."). Consequently, if Plaintiff's claims are completely preempted by ERISA, then the well-pleaded complaint rule does not apply and this Court may look beyond the nominal theories set forth by Plaintiff in her Complaint to determine whether it has subject matter jurisdiction. In this case, there is no question that Plaintiff's claims are completely preempted by both 29 U.S.C. § 1132(a) and 29 U.S.C. § 1140. Thus, Plaintiff's reliance on the well-pleaded complaint rule is misplaced.

2. Plaintiff's claims for intimidation and discrimination are completely preempted by 29 U.S.C. § 1132(a) and 29 U.S.C. § 1140.

For whatever reason, Plaintiff wholly ignores the fact that Defendants expressly removed this case on the basis of complete preemption under 29 U.S.C.§ 1140. Section 1140 states as follows:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. In the case of a multiemployer plan, it shall be unlawful for the plan sponsor or any other person to discriminate against any contributing employer

> for exercising rights under this chapter or for giving information or testifying in any inquiry or proceeding relating to this chapter before Congress. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

(emphasis added). A plain reading of this section discloses that is applies directly to Plaintiff's claims.

The United States Court of Appeals has identified three essential requirements for complete preemption to apply: (1) the plaintiff must have standing to pursue a claim under 29 U.S.C. § 1132(a); (2) his or her claim must fall within the scope of an ERISA provision that can be enforced via 29 U.SC § 1132(a); and (3) the claim must not be capable of resolution without an interpretation of an ERISA-governed employee benefit plan. Sunoco Prod., 338 F.3d at 372. Each of these requirements is met in this case.

As an initial matter, Plaintiff would have had standing to bring such a claim under 29 U.S.C. § 1132(a) as a beneficiary of the ERISA plan at issue. See, e.g., Tessendorf v. Edward Hines Lumber Co., 393 F. Supp. 2d 686, 693 (N.D. Ill. 2005) (stating that section 1140 "protects a participant or beneficiary"); Straus v. Prudential Employee Savings Plan, 253 F. Supp. 2d 438, 448 (E.D.N.Y. 2003) ("we hold that plaintiffs, even the non-employee plaintiffs, are entitled to bring a § 510 claim."). Indeed, the applicable plan expressly states as follows:

> **As a participant or beneficiary of an employee welfare benefit plan under ERISA, you may have the right to bring a claim under ERISA Section 502(a) after you have completed all Health Plan internal appeal requirements. Appeals to the Insurance Commissioner or to a certified external review organization are voluntary and not part of the Health Plan internal appeal requirements. Please see your Evidence of Coverage or Summary Plan Description for a complete statement of your rights.**

(Exhibit C, at 37) (emphasis in original). Thus, there is no question that Plaintiff could bring an action under 29 U.S.C. § 1132(a).

Likewise, there is no question that 29 U.S.C. § 1140 encompasses claims for, among other things, threats, retaliation, interference and discrimination with respect to a beneficiary obtaining benefits under an ERISA plan. See Borneman v. Principal Life Ins. Co., 291 F. Supp. 2d 935, 962 (S.D. Iowa 2003). Section 1140 applies directly to actions alleging that "any person" discriminated against a beneficiary for exercising his or her rights under the provisions of an employee welfare benefit plan or ERISA itself. As noted above, Plaintiff's right to appeal to the Commissioner is an express term of her ERISA plan. Therefore, to the extent Plaintiff's argument is that Defendants discriminated against her for seeking recourse from the Commissioner, there is no question that this claim is completely preempted inasmuch as it is premised upon the terms of the ERISA plan itself. Likewise, if Plaintiff's argument is that Defendants discriminated against her because she sought benefits pursuant to the terms of the plan and ERISA, this claim would also be completely preempted because, again, it would implicate the terms of the plan and the provisions of ERISA. After all, the administrative proceeding before the Commissioner was really a dispute about Plaintiff's entitlement to benefits under an ERISA plan.

Plaintiff's claim for intimidation pursuant to West Virginia Code § 61-5-27(f) is completely preempted by 29 U.S.C. § 1140 for the same reasons. As noted by the court in Borneman, section 1140 encompasses claims for threats and retaliation. In fact, section 1140 expressly prohibits discrimination against any person because he has given information, has testified or is about to testify in any inquiry or proceeding relating to ERISA. In this case, there is no question that the plan at issue is an ERISA plan. There is likewise no doubt that benefits at issue are ERISA benefits. Furthermore, the administrative proceeding at issue relates to ERISA inasmuch as the main thrust of the Commissioner's proceeding was Plaintiff's entitlement to

ERISA benefits. Finally, the Commissioner's proceeding constitutes a "proceeding" within the meaning of 29 U.S.C. § 1140. See King v. Marriott Int'l, Inc., 337 F.3d 421, 427 (4th Cir. 2003) ("the use of the phrase 'inquir[ies] or proceeding[s]' referenced in section 510 is limited to the legal or administrative, or at least something more formal than written or oral complaints made to a supervisor."). It is absolutely beyond cavil that the Commissioner's hearings are administrative in nature. Thus, Plaintiff's claims for discrimination and intimidation certainly fall within the scope of 29 U.S.C. § 1140.

Plaintiff's claims also fall within the scope of 29 U.S.C. § 1132(a). The United States Supreme Court has stated that:

> Not only is § 502(a) the exclusive remedy for vindicating § 510-protected rights, but there is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek "pension benefits." It is clear that the relief requested here is well within the power of federal courts to provide. Consequently, it is no answer to a pre-emption argument that a particular plaintiff is not seeking recovery of pension benefits.

Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 145, 111 S.Ct. 478, 486, 112 L.Ed.2d 474 (1990); see also Harris v. Michigan Consol. Gas Co., 117 F. Supp. 2d 642, 645 (E.D. Mich. 2000). In other words, the only way in which a participant or beneficiary can enforce his or her rights under 29 U.S.C. § 1140 is through the vehicle of 29 U.S.C. § 1132(a). Plaintiff argues that complete preemption only applies to claims for benefits. (Plaintiff's Memorandum, at 7). This assertion is simply wrong. See Wood v. Prudential Ins. Co. of Am., 207 F.3d 674 (3rd Cir. 2000) ("[s]ection 510 of ERISA does not stand alone; by its terms it gains its enforcement vitality from Section 502. Section 510 provides: "The provisions of [section 502] of this title shall be applicable in the enforcement of this section." § 510, 29 U.S.C. § 1140. Thus, any state claim that falls within Section 510 is necessarily within Section 502."); Kalo v. Moen Inc., 93 F.

Supp. 2d 869, 875 (N.D. Ohio 2000) ("[t]hus, despite Kalo's artful attempt to style the third claim as a violation of Ohio public policy, it necessarily arises under § 1140 and, accordingly, the enforcement provisions of § 1132(a)."); Hoops v. Elk Run Coal Co., 95 F. Supp. 2d 612, 614 n.4 (S.D.W.Va. 2000) ("[s]everal courts have recognized section 510 claims are subject to complete preemption, a exception to the well-pleaded complaint rule."). Indeed, 29 U.S.C. § 1140 explicitly states that "[t]he provisions of section 1132 of this title shall be applicable in the enforcement of this section." Consequently, Plaintiff cannot reasonably argue that claims under 29 U.S.C. § 1140 do not fall within the civil enforcement provision codified in 29 U.S.C. § 1132(a).

Finally, there is no question that Plaintiff's claims for discrimination and intimidation require the interpretation of an ERISA plan. As an initial and fundamental matter, Plaintiff has stated that "[t]he acts of discrimination and intimidation which form the basis of my Complaint in the present action occurred during the course of the administrative proceeding before the West Virginia Insurance Commissioner." (Stenger Aff., ¶ 5). As discussed above, the administrative proceeding before the Commissioner arose because the process is contained in a term of the ERISA plan itself. See Radcliff, 377 F. Supp. 2d at 563 ("[b]ecause the plaintiffs' claims were in fact dependent on the terms of the respective ERISA plans, their claims were preempted by the civil enforcement provisions of ERISA.").[4] Moreover, Plaintiff plainly states that the acts of discrimination and intimidation occurred during the course of the proceeding before the Commissioner. The proceeding before the Commissioner is related to Carelink's

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[4] To the extent that this element does not expressly discuss whether Plaintiff's claim arises from an independent legal duty separate and apart from ERISA, it is evident that all of Plaintiff's claims are entirely dependent upon ERISA and the terms of an ERISA plan. Indeed, reference to an ERISA plan is necessary insofar as the proceeding before the Commissioner is a term of the ERISA plan itself. Moreover, Plaintiff has asserted claims that fall directly within the preemptive scope of ERISA. Accordingly, any argument that Plaintiff's claims arise independently from ERISA overlooks the procedural history of this case, not to mention to the factual reality of Plaintiff's assertions.

denial of Plaintiff's claim for benefits. As such, in order to show discrimination or intimidation, it is apparent that Plaintiff must show that Carelink engaged in some conduct that was contrary to or in contravention of the terms of the plan itself. This analysis would, of course, require the consideration and interpretation of the terms of the ERISA plan. Finally, at bottom, this case is about Defendants' alleged conduct regarding a benefit denial. As discussed below, there is no doubt that the only real harm to Plaintiff was that her claim for benefits was denied. Accordingly, the entire basis of Defendants' purported liability is a benefits denial, and, as such, the existence and administration of an ERISA plan are critical elements of any claim made by Plaintiff in this regard. See Radcliff, 377 F. Supp. 2d at 564. ("[t]he basis for the alleged liability, therefore, depends entirely upon the existence and administration of the defendants' ERISA-governed LTD Plan and Severance Pay Plan. The only stated injury is the defendants' alleged refusal to pay benefits to the plaintiff under those plans.").

Based on the foregoing, it is evident that Plaintiff's claims for intimidation and discrimination fall within the doctrine of complete preemption under both 29 U.S.C. § 1132(a) and 29 U.S.C. § 1140. Plaintiff has standing to bring an ERISA claim, her claim falls within the scope of an ERISA provision that can be enforced via 29 U.SC § 1132(a) and her claim is not capable of resolution without an interpretation of an ERISA-governed employee benefit plan. Therefore, Plaintiff's Motion must be denied with regard to her claims for discrimination and intimidation.

3. Plaintiff's claims for intentional and negligent infliction of emotional distress are completely preempted by 29 U.S.C. 1132(a).

Plaintiff's claims for intentional and negligent infliction of emotional distress are, in fact, claims regarding the alleged maladministration of an ERISA plan.[5] These are classic examples of claims that are preempted by ERISA both under 29 U.S.C. § 1144(a) and 29 U.S.C. § 1132(a).

In this Court, a two-step inquiry is necessary to establish that a claim is completely preempted by ERISA. First, this Court determines whether a claim is preempted by 29 U.S.C. § 1144(a) as an initial matter. Stonewall Jackson , 963 F. Supp. at 560.[6] Next, this Court considers "a more individualized assessment of the degree to which ERISA precludes state court consideration of the particular claims." Id. In other words, the relevant analysis is whether Congress intended a particular enforcement provision within ERISA to be the exclusive avenue by which the substance of the claims may be addressed. Id. at 560, n.4. As discussed below, Plaintiff's claims for emotional distress satisfy this test.

[5] Plaintiff avers that these claims derive from the same "factual predicate" as her claims for intimidation and harassment. (Plaintiff's Memorandum, at 3 n. 1). In other words, they derive from Plaintiff's efforts to seek her benefits pursuant to an ERISA plan. To the extent that these claims are merely damages resulting from Plaintiff's claims for intimidation and discrimination, they are completely preempted for the same reasons discussed above. To the extent that Plaintiff is seeking extracontractual damages for the denial of her claim for benefits, these claims are preempted for the reasons discussed further below. See Farrie v. Charles Tow Races, Inc., 901 F. Supp. 1101, 1106 (N.D.W.Va. 1995) (extracontractual damages are not permissible under 29 U.S.C. § 1132(a)).

[6] Plaintiff relies heavily on this case—together with Custer v. Sweeney, 89 F.3d 1166 (4th Cir. 1996) and Coyne & Delaney Co. v. Selman, 98 F.3d 1457 (4th Cir. 1996)—to support her argument that complete preemption is not appropriate in this case. Put simply, Plaintiff could not have found three more factually distinguishable decisions from the case at bar. None of the cases cited by Plaintiff have anything to do with claims by an ERISA participant or beneficiary arising from a denial of benefits under ERISA. Indeed, Stonewall Jackson dealt with claims stemming from the transfer of pension plan assets to a different investment medium. Likewise, Selman concerned the failure to obtain appropriate replacement insurance coverage. Finally, Sweeney related to issues concerning the misuse of plan assets by an attorney who was determined not to be a fiduciary under ERISA. None of these cases were brought by a participant or beneficiary of an ERISA plan. Thus, each of these cases is clearly distinguishable from this case. It appears that Plaintiff cited these cases due to their result, rather than any applicability to the matters at bar.

a. ERISA preempts Plaintiff's claims under 29 U.S.C. § 1144(a).

29 U.S.C. § 1144 provides that "the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). A state law "'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." Shaw v. Delta Airlines, Inc., 463 U.S. 85, 96-97, 103 S.Ct. 2890, 2900, 77 L.Ed.2d 490, 501 (1983). Indeed, "ERISA pre-empts any state law that refers to or has a connection with covered benefit plans . . . 'even if the law is not specifically designed to affect such plans, or the effect is only indirect.'" District of Columbia v. Greater Washington Bd. of Trade, 506 U.S. 125, 129-30, 113 S.Ct. 580, 121 L.Ed.2d 513, 520 (1992) (quoting Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139, 111 S.Ct. 478, 483, 112 L.Ed.2d 474, 484 (1990)). "Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." Shaw, 463 U.S. at 100 n. 21, 103 S.Ct. at 2890 n. 21, 77 L.Ed.2d at 501 n.21. "But, as long as the nexus between state law and the employee benefit plan is not too tangential, 'a state law of general application, with only an indirect effect on a pension plan, may nevertheless be considered to 'relate to' that plan for preemption purposes.'" Griggs v. E.I. DuPont de Nemours & Co., 237 F.3d 371, 378 (4th Cir. 2001) (quoting Smith v. Dunham-Bush, Inc., 959 F.2d 6, 9 (2nd Cir. 1992)). Accordingly, "in appropriate circumstances, state common law claims fall within the category of state laws subject to ERISA preemption." Id. (citation omitted). Thus, "[w]hen a cause of action under state law is 'premised on' the existence of an employee benefit plan so that 'in order to prevail, a plaintiff must plead, and the court must find, that an ERISA plan exists . . . ERISA preemption will apply.'" Id. (quoting Ingersoll-Rand, 498 U.S. at 140).

In this regard, there are "at least three categories of state law that can be said to have a connection with an ERISA plan." Coyne & Delany Co. v. Selman, 98 F.3d 1457, 1468 (4th Cir. 1996). First, "Congress intended ERISA to preempt state laws that mandate employee benefit structures or their administration." Id. (internal quotations and cites omitted). Second, "Congress intended to preempt state laws that bind employers or plan administrators to particular choices or preclude uniform administrative practice, thereby functioning as a regulation of an ERISA plan itself." Id. (cite omitted). Third, "in keeping with the purpose of ERISA's preemption clause, Congress intended to preempt state laws providing alternate enforcement mechanisms for employees to obtain ERISA plan benefits." Id. (internal quotations and cites omitted). However, the Fourth Circuit has also noted that "in *Coyne & Delany* we restated this Court's position that if a state law of general applicability was in question, it would not be preempted unless it affected relations between traditional plan entities including the principals, the employer, the plan, the plan fiduciaries, and the beneficiaries." Metropolitan Life Ins. Co. v. Pettit, 164 F.3d 857, 862 (4th Cir. 1998).

Plaintiff asserts state law claims for intentional and negligent infliction of emotional distress against Defendants. Although Plaintiff has not done the Court or Defendants any favors in setting forth the factual predicate for her claims, she does identify the November 1, 2005 letter from Mr. Dowd and Defendants' actions subsequent thereto as the basis for her relief. As noted above, there is no relationship between Plaintiff and Defendants separate and apart from Carelink's role in determining and providing covered benefits under an ERISA plan.[7] In this regard, the United States Court of Appeals for the Fourth Circuit has considered state law causes of action similar to those asserted by Plaintiff, and it determined that ERISA preempts claims of the same nature. In Stiltner v. Baretta U.S.A. Corp., 74 F.3d 1473 (4th Cir. 1996), the

[7] Indeed, Plaintiff has admitted that the plan at issue is an ERISA plan.

court considered a case in which the plaintiff brought a claim that, among other things, his employer's "refusal to pay him the disability benefits and its threat to cut off his health insurance benefits if he did not drop his claim for those disability benefits constituted intentional infliction of emotional distress under Maryland law." Stiltner, 74 F.3d at 1478. The court disagreed, stating that "the lower courts uniformly have held that state-law claims of intentional infliction of emotional distress which are based on the allegedly wrongful denial or termination of benefits under an ERISA plan are preempted by ERISA." Id. at 1480 (citations omitted; collecting cases).

The same analysis applies here. The only conduct in which Defendants could have engaged with respect to Plaintiff "relates" entirely to an employee welfare benefit plan governed by ERISA. Based on the November 1, 2005 letter, the only matters at issue were whether Carelink would terminate Plaintiff's coverage under an ERISA plan due to her allegedly fraudulent conduct and Carelink's denial of her claim for benefits. Furthermore, the matters at issue in the proceeding before the Commissioner related to Carelink's denial of Plaintiff's claim for benefits. Despite Plaintiff's obfuscation, this is the gravamen of Plaintiff's claims in Count Three and Count Four of the Complaint.[8] Consequently, Plaintiff's claims for the intentional and negligent infliction of emotional distress constitute alternate enforcement mechanisms within the meaning of Coyne & Delaney, and, as a result, these claims are preempted by 29 U.S.C. § 1144(a).

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[8] It is true that Stiltner does not expressly reference a claim for negligent infliction of emotional distress. However, any alleged "emotional distress"suf fered by Plaintiff is tied to the same factual nexus by her own admission. As such, the same analysis applies. Moreover, Plaintiff has not even pled the elements—much less the facts—of a claim for negligent infliction of emotional distress. See Stump v. Ashland, Inc., 201 W. Va. 541, 499 S.E.2d 41 (1997). Thus, this claim is completely preempted.

b. Plaintiff's claims are completely preempted by 29 U.S.C. § 1132(a).

Plaintiff's claims against Defendants for intentional and negligent infliction of emotional distress—no matter how couched—are completely preempted by ERISA pursuant to 29 U.S.C. § 1132. The complete preemption doctrine posits that "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in nature." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64, 107 S.Ct. 1542, 1546, 95 L.Ed.2d 55, 60 (1987). ERISA is just such an area of federal law. The United States Supreme Court has long held that all claims relating to the improper denial of benefits under ERISA are completely preempted. See Pilot Life Ins. Co v. Dedeaux, 481 U.S. 41, 56, 107 S.Ct. 1549, 1558, 95 L.Ed.2d 39, 50 (1987). Indeed, the Court has held, "all suits brought by beneficiaries or participants asserting improper processing of claims under ERISA-regulated plans [should] be treated as federal questions governed by [§ 1132(a)]." Id. There is no question that Plaintiff's claims for intentional and negligent infliction of emotional distress are, in fact, thinly veiled claims asserting improper processing of claims and/or maladministration of an ERISA plan.

As the United States Supreme Court has observed, "[t]he purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans." Aetna Health Inc. v. Davila, 542 U.S. 200, 201, 124 S.Ct. 2488, 2495, 159 L.Ed.2d 312 (2004). To this end, Congress created an integrated enforcement mechanism—namely, 29 U.S.C. § 1132—which is "a distinctive feature of ERISA, and essential to accomplish Congress' purpose of creating a comprehensive statute for the regulation of employee benefit plans." Id. Accordingly, "[a]ny state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is

therefore preempted." Id. (citations omitted). As the Court noted, 29 U.S.C. § 1132(a) is "relatively straightforward." In essence, 29 U.S.C. § 1132(a) states:

> If a participant or a beneficiary believes that benefits promised to him under the terms of the plan are not provided, he can bring suit seeking provision of those benefits. A participant or beneficiary can also bring suit generically to "enforce his rights" under the plan, or to clarify any of his rights to future benefits.

Id. 200 U.S. at 201, 124 S.Ct. at 2496, 312 L.Ed.2d at 326. Thus, "[w]hen a complaint contains state law claims that fit within the scope of ERISA's [§ 1132] civil enforcement provision, those claims are converted into federal claims, and the action can be removed to federal court." Darcangelo v. Verizon Communications, Inc., 292 F.3d 181, 187 (4th Cir. 2002). In light of Davila, the United States District Court for the Southern District of West Virginia recently observed that:

> [W]hen determining whether a cause of action is completely preempted by ERISA, a district court must inquire into the two following factors: (1) whether the plaintiff could have originally brought his cause of action under ERISA's civil enforcement provisions and (2) whether the cause of action involves any independent legal duty on the part of the defendants.

Radcliff, 377 F. Supp. 2d at 563.[9] As discussed below, Plaintiff's claims for intentional and negligent infliction of emotional distress are clearly completely preempted by ERISA.

To begin, there is no question that Plaintiff could have brought her claims under ERISA's civil enforcement provision. At bottom, Plaintiff's claims relate to the denial of her claim for benefits and Defendants' conduct therewith. The November 1, 2005 letter explicitly references the termination of Plaintiff's coverage and the denial of her claim for benefits. If

[9] Defendants rely on the Davila/Radcliff analysis—rather than the Sunoco analysis—as it relates to Plaintiff's claims for intentional and negligent infliction of emotional distress because those claims more closely fall into the scope of complete preemption pursuant to 29 U.S.C. § 1132(a). For the same reason, Defendants have relied on the Stonewall Jackson analysis for these claims. In any event, however, for the reasons set forth herein, all four claims would qualify as completely preempted under either Davila or Sunoco.

Plaintiff legitimately feared that her coverage would be terminated, or that her claim for benefits was denied improperly, she could have brought a claim under 29 U.S.C. § 1132(a)(1) at any time. (See Exhibit C, at 37). Plaintiff herself chose to pursue relief before the Commissioner, which was permitted by an express term in her ERISA plan. In fact, she received all of the relief to which she would be entitled under ERISA from the Commissioner; namely, her requested benefit. Indeed, this conclusion is borne out by a decision of the Fourth Circuit, in which the court stated that:

> Claims challenging the administration of an employee welfare benefit plan fall squarely within the scope of [§1132(a)] of ERISA. Such claims include allegations that a plan benefit was denied based on noncompliance with the terms of a plan or allegations that an ERISA fiduciary breached a duty to a plaintiff by improperly denying a benefit based solely on financial motivations. The core allegation underlying a [§ 1132(a)] claim is that a plan participant or beneficiary was denied a benefit to which the participant or beneficiary was entitled under an ERISA plan or that the manner of administering the benefits caused the participants or beneficiaries some injury.

Marks v. Watters, 322 F.3d 316, 326 (4th Cir. 2003) (emphasis added). Thus it is evident that Plaintiff's claim is that she suffered an injury as a result of a denial of benefits and Carelink's administration of the plan. Indeed, because Plaintiff opted for relief from the Commissioner—which is an express term of her ERISA plan—Defendants' alleged conduct with regard to that proceeding directly relates to the manner in which the plan was administered. Plaintiff's allegations, therefore, constitute "core allegations" underlying a claim under 29 U.S.C. § 1132. Plaintiff's claims are completely preempted on this basis alone. Thus, not only could Plaintiff bring her claims under ERISA's civil enforcement provisions, she must bring her claims under ERISA's civil enforcement provision.

Turning now to the second element of the test set forth in Radcliff, it is evident that Plaintiff's causes of action do not implicate an independent legal duty on the part of Defendants. In Davila, the plaintiffs alleged violations of the Texas Health Care Liability Act ("THCLA"), and they alleged that this law created an independent legal duty arising independently of the terms of an ERISA plan. Davila, 200 U.S. at 212, 124 S.Ct. at 2497, 312 L.Ed.2d at 328. The Court in Davila disagreed and concluded that the interpretation of the benefit plans formed an essential part of plaintiffs' THCLA claim, and THCLA liability would only exist because of the administration of the ERISA-regulated plans. Id., 200 U.S. at 212, 124 S.Ct. at 2498, 312 L.Ed.2d at 328. Thus, "[b]ecause the plaintiffs' claims were in fact dependent on the terms of the respective ERISA plans, their claims were preempted by the civil enforcement provisions of ERISA." Radcliff, 377 F. Supp. 2d at 563. Similarly, Plaintiff's claims against Defendants do not implicate an independent duty apart from ERISA, and ERISA completely preempts each of these claims. Under the only valid reading of Plaintiff's Complaint apparent to Defendants, Plaintiff's allegations are that the Defendants' actions in adjudicating her benefit claims and administering the plan at issue caused her emotional distress. In short, each of these claims is entirely dependent upon the existence and administration of an ERISA plan, and, therefore, ERISA completely preempts each of these claims. See Radcliff, 377 F. Supp. 2d at 564. ("[t]he basis for the alleged liability, therefore, depends entirely upon the existence and administration of the defendants' ERISA-governed LTD Plan and Severance Pay Plan. The only stated injury is the defendants' alleged refusal to pay benefits to the plaintiff under those plans."). In fact, Plaintiff's ERISA plan expressly gives her recourse to the Commissioner. Without the existence of the plan at issue, Plaintiff would not have had any occasion to complain to the Commissioner in the first instance. Thus, Plaintiff's claims for

intentional and/or negligent infliction of emotional distress are completely preempted by ERISA, and Plaintiff's Motion must be denied with regard to these claims.

IV. CONCLUSION

Based on the foregoing, it is apparent that each of Plaintiff's claims is completely preempted by ERISA. As such, Plaintiff's Motion fails as a matter of course. Plaintiff has gone out of her way to try to plead around ERISA, but, in the end, her attempts are unsuccessful. Plaintiff cannot attempt to launch an end-run around ERISA by dressing her claims up in the guise of state law when it is obvious that the crux of Plaintiff's claims relates to Defendants' conduct with regard to a benefit denial. The fact that Plaintiff already received benefits does not authorize her to go back to the well in an attempt to collect extracontractual damages to which she is not entitled.[10] Therefore, this Court should enter an Order denying Plaintiff's Motion.

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[10] Indeed, Plaintiff misconstrues the fact that her benefit claim has already been adjudicated as a license to seek extracontractual damages. However, it is abundantly clear that complete preemption depends on the existence of a cause of action, not a remedy. See Caterpillar, Inc. v. Williams, 482 U.S. 386, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987); Danca v. Private HealthCare Systems, Inc., 185 F.3d 1, 5 n. 4 (1st Cir. 1999); Schmeling v. NORDAM, 97 F.3d 1336, 1343 (10th Cir. 1996). Thus, the fact that Plaintiff seeks damages that she cannot recover is of no moment.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

AT WHEELING

CHRISTINE STENGER,

Plaintiff,

v.

Civil Action No. 5:07-CV-146
(Judge Frederick P. Stamp, Jr.)

CARELINK HEALTH PLANS, INC., and
PATRICK W. DOWD,

Defendants.

CERTIFICATE OF SERVICE

I, Grant P. H. Shuman, do hereby certify that on January 2, 2008, I electronically filed the foregoing **Defendants' Response to Plaintiff's Motion to Remand** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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