IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHRISTINA BROWN, a minor, by and through NADINE MARASCO, her Parent and Natural Guardian, Plaintiffs,	:	CIVIL ACTION
v.	:	NO. 03-CV-1759
STEPHEN D. WIENER, M.D., et al., Defendants.	:	

ORDER

AND NOW, this day of June, 2003, upon consideration of: (i) Plaintiffs' Motion for Remand (Document No. 6, filed April 24, 2003); and (ii) Defendant Aetna Inc.'s Response in Opposition to Plaintiffs' Motion for Remand (Document No. 7, filed May 8, 2003) it is hereby **ORDERED** as follows.

During the summer of 1991, Plaintiff Nadine Marasco ("Marasco") was in her third trimester of pregnancy with her then unborn child, Plaintiff Christina Brown ("Brown"). On June 6, 1991, Marasco contends that she showed symptoms of vomiting, diarrhea, swelling, kidney pain, and yellow appearing skin, and that Marasco presented the condition to Defendant Dr. Wiener ("Wiener"), her family physician. Wiener diagnosed Marasco with gastroenteritis and concluded that Marasco did not require a referral to an obstetrician. Thereafter, Marasco contacted her obstetrician, Defendant Dr. McGlumphy ("McGlumphy"), who also refused to see Marasco. Marasco called her HMO Aetna ("Aetna"),[1] who similarly refused for Marasco to meet McGlumphy. On June 12, 1991, McGlumphy finally agreed to see Marasco, and shortly

[1] Herein Aetna refers to the HMO Defendant: Aetna, Inc. f/d/b/a/ United States Healthcare Systems, Inc., U.S. Healthcare, U.S. Healthcare, Inc., Aetna U.S. Healthcare, Inc., HMO PA, and HMO PA Foundation.

thereafter diagnosed her with severe preeclampsia and rushed her to Abington Memorial Hospital. Brown was subsequently delivered the same day via emergency caesarean section at Abington Memorial Hospital. However, as a result of in-utero hypoxia in the days immediately preceding the delivery, Brown suffered severe brain damage and subsequently developed spastic cerebral palsy and mental retardation. Thereafter, Plaintiffs filed a negligence action on January 19, 2003, in the Court of Common Pleas for Philadelphia County ("C.C.P."). On March 25, 2003, Aetna timely removed the action, pursuant to 28 U.S.C. §§ 1331 and 1441(b), to the United States District Court for the Eastern District of Pennsylvania (Document No. 1, March 25, 2003). Plaintiffs now seek to remand to the C.C.P.

A removal proceeding is proper if the recipient court would have had original jurisdiction had the plaintiff initially filed the complaint in that court. Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 13, 103 S. Ct. 2841, 2848, 77 L. Ed. 2d 420 (1983). Federal district courts have "original jurisdiction over all civil actions arising under the Constitutions, laws, or treaties of the United States," 28 U.S.C. § 1331, and the plaintiff's "well-pleaded complaint" establishes whether the cause of action "arises under" federal law. See Franchise Tax Bd., 463 U.S. at 10 ("Whether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute, . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration")(citation omitted).

The "well-pleaded complaint rule" precludes a defendant from removing a case to federal court based upon the assertion of a federal defense to plaintiff's state law claim. Pryzbowski v. U.S. Healthcare, Inc., 245 F.3d 266, 271 (3d Cir. 2001). Therefore, the defense of federal pre-emption to a state law claim is ordinarily an insufficient justification for asserting federal

question jurisdiction in a federal district court. See Caterpillar Inc. v. Williams, 482 U.S. 386, 393, 107 S. Ct. 2425, 2430, 96 L. Ed. 2d 318 (1987)("it is now settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue."). However, the "complete pre-emption doctrine" serves as an exception to "well-pleaded complaint rule." The "complete pre-emption" doctrine overrides the "well-pleaded complaint rule" when "the pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" Caterpillar, 482 U.S. at 393 (quoting Metropolitan Life Ins. Co., v. Taylor, 481 U.S. 58, 65, 107 S. Ct. 1542, 1547, 95 L. Ed. 2d 55 (1987)). See also Franchise Tax Bd., 463 U.S. at 24 ("[I]f a federal cause of action completely pre-empts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law.").

The complete pre-emption doctrine applies to ERISA's civil enforcement provisions. In Metropolitan, the Supreme Court held that state law causes of action which fit within the realm of the ERISA civil-enforcement provisions, as set forth in § 502 of ERISA, 29 U.S.C. § 1132(a)(1)(B), were clearly intended to be presented as "federal questions for the purpose of federal court jurisdiction in like manner as § 301 of the LMRA." 481 U.S. at 66. Specifically, § 502(a)(1)(B) provides:

> A civil action may be brought--
>
> (1) by a participant or beneficiary--
>
> (B) to recover benefits due to him under the terms of the

> plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan . . . .

Therefore, managed care determinations classified as "treatment decisions," which are defined as "choices in 'diagnosing and treating a patient's condition," do not fall within the scope of ERISA's civil enforcement provisions, while "eligibility decisions" which "'turn on the plan's coverage of a particular condition or medical procedure for its treatment'" are completely pre-empted by § 502. Pryzbowski, 245 F.3d at 273 (quoting Pegram v. Herdrich, 530 U.S. 211, 228, 120 S. Ct. 2143, 2154, 147 L. Ed. 2d 164 (2000).

"Treatment decisions" typically ask, "given a patient's constellation of symptoms, what is the appropriate medical response?" Pegram, 530 U.S. at 228. This question is directly applicable to the facts before the Court. Marasco presented her family doctor, Wiener, with various symptoms, and after a medical evaluation, Wiener chose not to refer Marasco to McGlumphy, her obstetrician. Similarly, Aetna refused to issue Marasco a referral to McGlumphy, ostensibly based upon Wiener's medical recommendation. Given Marasco's "constellation of symptoms," Wiener decided that the appropriate medical response did not entail referring Marasco to McGlumphy. Aetna concurred with Wiener's decision. These are treatment decisions, and not an eligibility decision; Wiener and Aetna did not refuse to refer Marasco to McGlumphy because her health plan forbid the referral, but rather Marasco was not referred to McGlumphy because Wiener made a treatment decision, which included diagnosing Marasco with gastroenteritis and refusing her a referral to McGlumphy. Aetna agreed. Therefore, the claim does not fall within the scope of ERISA's civil enforcement provisions, and the "complete pre-emption doctrine" will not provide an exception to the "well-pleaded complaint rule."

On its face, Plaintiffs' complaint asserts state law medical malpractice claims against all Defendants and provides no basis for § 1331 federal question jurisdiction. Furthermore, the parties cannot successfully allege § 1332 jurisdiction because the parties lack complete diversity. Accordingly, pursuant to 28 U.S.C. § 1447(c), it is hereby **ORDERED** that this case is **REMANDED**. The Clerk of Court is directed to statistically close this matter and transfer all relevant pleadings and submissions to the C.C.P. of Philadelphia County.

BY THE COURT:

Legrome D. Davis, U.S.D.J.