Not intended for print publication.

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

PARKERSBURG DIVISION

DANIEL TINGLER,

Plaintiff,

v. CIVIL ACTION NO. 6:02-1285

UNUM LIFE INSURANCE COMPANY OF AMERICA, dba UNUM Provident; and JOHN DOE PLAN ADMINISTRATOR,

Defendants.

MEMORANDUM OPINION AND ORDER

Pending before the court is the defendants' motion to dismiss the plaintiff's first amended and supplemental complaint. [Docket 16]. The court **FINDS** that all of the plaintiff's various claims are either completely or substantively preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq*. Accordingly, the court (1) **GRANTS** the defendants' motion to recharacterize Count I as a claim for benefits under § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B); (2) **GRANTS** the defendants' motion to dismiss Count II, III, and V with prejudice because such claims are not authorized under ERISA's civil enforcement provisions; (3) **GRANTS** the defendants' motion to dismiss Count IV because it relates to the processing of the plaintiff's benefits under an ERISA plan; and (4) **GRANTS** the defendants' motion to strike the plaintiff's request for extracontractual compensatory and punitive damages and a jury trial.

I. Background

On September 20, 2002, the plaintiff, David Tingler, filed his original complaint in the Circuit Court of Wood County seeking the payment of long-term disability benefits under an ERISA-covered employee benefit plan (Nova Plan) sponsored by the plaintiff's employer, Nova Chemicals, Inc. (Nova), and insured and administered by the defendant, Unum Life Insurance Company of America (Unum). The plaintiff's complaint asserted claims for breach of contract, breach of fiduciary duty, and negligence against Nova, Unum, and/or "John Doe," as plan administrator. All of the claims were based on Unum's denial of long-term disability benefits.

On October 25, 2002, the defendants removed the action to this court on the ground that the plaintiff's state law claims were completely preempted by ERISA. Although the plaintiff's complaint facially stated only state law claims, the plaintiff failed to file a motion to remand. On November 22, 2002, Unum filed its answer to the complaint. Thereafter, the plaintiff voluntarily dismissed Nova as a defendant and was granted leave to file an amended complaint. The first amended and supplemental complaint (amended complaint), filed on February 18, 2003, reasserts the state law claims alleged in the original complaint and adds two state law counts against Unum, charging violations of the West Virginia Unfair Trade Practices Act (WVUTPA), W. Va. Code § 33-11-1 *et seq.*, and West Virginia common law.

II. Standard of Review

Before reaching the defendants' motion to dismiss, this court must first consider whether it has jurisdiction. *Roach v. W. Va. Reg'l Jail & Corr. Facility Auth.*, 74 F.3d 46, 48 (4th Cir. 1996). Consideration of jurisdiction is a continuing obligation of the court because the removal statute explicitly commands that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). Thus, even though the plaintiff has not filed a motion to remand, out of an abundance of caution, the court will first consider the defendant's assertion of this court's subject matter jurisdiction.

When a court considers a motion to dismiss pursuant to Rule 12(b)(6) of the *Federal Rules of Civil Procedure*, all well-pled allegations are taken as true, with all inferences resolved in the plaintiff's favor. *Randall v. United States,* 30 F.3d 518, 521 (4th Cir.1994). The standard on a motion to dismiss is rigorous. "In general, a motion to dismiss for failure to state a claim should not be granted unless it appears certain that the plaintiff can prove no set of facts which would support its claim and entitle it to relief." *Mylan Labs., Inc. v. Matkari,* 7 F.3d 1130, 1134 (4th Cir.1993). For the limited purpose of ruling on the defendants' motion, the court has accepted as true the facts alleged by the plaintiff in his amended complaint and has viewed them in a light most favorable to the plaintiff. Viewed in such a light, the plaintiff contends that Unum and the plan administrator wrongfully withheld the plaintiff's request for long-term disability benefits pursuant to the Nova Plan.

III. Discussion

The defendant argues that the state law claims asserted by the plaintiff in his amended complaint are completely preempted because the Nova Plan, which is the subject of this action, is a plan regulated by ERISA. The defendant thus asserts that the plaintiff's state law causes of action should be either dismissed or recharacterized as a claim for benefits under either ERISA § 514(a), 29 U.S.C. § 1144(a), or ERISA § 502(a), 29 U.S.C. § 1132(a)(1)(B), and that the plaintiff's ERISA claim for breach of fiduciary duty should be dismissed. Additionally, the defendant argues that the plaintiff's requests for extracontractual damages and a jury trial should be stricken, as neither are available under ERISA. The court will address each of the asserted causes of actions in turn.

A. "State Law" Claims

Although the plaintiff has not filed a motion to remand, the court must nevertheless determine whether removal jurisdiction exists in this case. In their removal notice, the defendants assert that the plaintiff's state law claims are preempted by ERISA. Specifically, the defendants assert that the plaintiff's

state law claims are substantively preempted by § 514(a) and/or completely preempted by ERISA's civil enforcement scheme.

An action may be removed to a federal district court if it is one over which the district court would have original jurisdiction. 28 U.S.C. § 1441(b). District courts have original jurisdiction over actions arising under the laws of the United States. *Id.* § 1331. An action arises under the laws of the United States for purposes of § 1331 if the federal claim appears on the face of a well pleaded complaint. *Franchise Tax Bd. v. Constr. Laborers Vacation Trust,* 463 U.S. 1, 9-12 (1983). Here, defendants argue that removal is proper under the complete preemption exception to the well-pleaded complaint rule. Where federal law completely preempts state law claims, this exception allows removal to federal court even if no federal claims appear in the complaint. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987).

Complete preemption contrasts with substantive preemption, which preempts state law but does not, as a defense, confer federal jurisdiction. ERISA's preemption provision declares that, with limited exceptions, "the provisions of this title . . . shall supercede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan." 29 U.S.C. § 1144(a) (emphasis added). "The phrase 'relates to' is given its common sense meaning as having '[1] connection with or [2] reference to such a plan.'" *Am. Med. Security, Inc. v. Bartlett*, 111 F.3d 358, 361 (4th Cir. 1997) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983)).

Alternatively, claims that fall under ERISA's civil enforcement provision, § 502(a)(1)(B), are completely preempted. *See McCutcheon v. Valley Rich Dairy*, 81 F. Supp.2d 657, 659 n.2 (S.D. W. Va. 2000) (Haden, C.J.). Under this provision, a plan participant or beneficiary may sue to recover benefits due under a plan, to enforce the participant's rights under the plan, or to clarify rights to future benefits. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 53 (1987). Accordingly, the question before the court is whether the plaintiff's state law claims are substantively or completely preempted by ERISA.

1. Motion to Recharacterize Breach of Contract Claim

In Count I of his amended complaint, the plaintiff asserts a claim for breach of contract for the defendants' alleged wrongful denial of long-term disability benefits under the Nova Plan. Because the contract in question is an ERISA plan, this claim is clearly preempted.[1] ERISA § 502 provides that a civil action may be brought by a participant or beneficiary "to recover benefits due to him under the terms of his 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." 29 U.S.C. § 1132(a)(1)(B). Clearly, an action to enforce the terms of a contract that is an ERISA plan is necessarily an alternate mechanism for ERISA and therefore is completely preempted by ERISA. *See Darcangelo v. Verizon Communications Inc.*, 292 F.3d 181, 195 (4th Cir. 2002); *Allif v. BP Am. Inc.*, 26 F.3d 486 (4th Cir. 1994).

Nevertheless, as the Fourth Circuit has stated, "when a claim under state law is completely preempted and is removed to federal court because it falls within the scope of § 502, the federal court should not dismiss the claim as preempted, but should treat it as a federal claim under § 502." *Darcangelo*, 292 F.3d at 195. Thus, "[w]hat was a state claim for breach of contract becomes a federal claim for the enforcement of contractual rights under § 502(a)(1)(B)." *Id.* Accordingly, the court **GRANTS** the defendant's motion to recharacterize the plaintiff's breach of contract claim as a claim for benefits under ERISA § 502(a)(1)(B.

2. Motion to Dismiss Breach of Fiduciary Duty, Negligence, and West Virginia Common Law Claims

In Count II of his amended complaint, the plaintiff alleges that the plan administrator "breached the fiduciary duties owed to the plaintiff" under ERISA. (1st Am. Compl. at ¶ 30). In Count III, the plaintiff asserts a negligence claim against the plan administrator for breaching his "affirmative duty to act in the best

[1] Although the plaintiff now contends that the Unum policy at issue is not an ERISA plan, the plaintiff has stated in both his complaint and amended complaint that "[u]pon information and belief, the long term disability benefits provided to Daniel Tingler were part of an ERISA plan." (Compl. at ¶ 17, 1st Am. Compl. at ¶ 13). The plaintiff claims entitlement to long term disability benefits payable under a group long term disability plan maintained by his employer. This is a classic "welfare benefit plan" within the meaning of ERISA § 3(1), 29 U.S.C. § 1002(1).

interests of the plan beneficiaries, including, but not limited to this plaintiff." (1st Am. Compl. at ¶ 32). In Count V, the plaintiff asserts West Virginia common law claims against Unum for "knowingly, wrongfully, intentionally and maliciously refusing to act in conformity with the rulings of the West Virginia Supreme Court of Appeals in the manner in which it treated plaintiff and handled his insurance claim." (1st Am. Compl. at ¶ 56). The court reads Counts II, III, and V of the amended complaint to all state the same claim for enforcement of the fiduciary requirements of ERISA and of the ERISA plan. Thus, the court will simply address whether the amended complaint states a claim for breach of fiduciary duty against the defendants pursuant to ERISA § 502(a), 29 U.S.C. § 1132(a).[2]

ERISA claims for breach of fiduciary duty are cognizable, if at all, under either § 502(a)(2) or § 502(a)(3). *Coyne & Delany Co. v. Blue Cross & Blue Shield of Va., Inc.*, 102 F.3d 712 (4th Cir. 1996). Section 502(a)(2) provides that a civil action may be brought "by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1009 of this title." 29 U.S.C. § 1132(a)(2). Section 502(a)(2), however, does not provide any assistance to the plaintiff. It has long been settled that "any recovery under section 502(a)(2) must be for the plan as a whole rather than for individual beneficiaries." *Coyne & Delaney*, 102 F.3d at 714 (citing *Mass. Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985)). In this case, the plaintiff seeks disability benefits for himself alone. Accordingly, the court **FINDS** that the plaintiff has not stated a claim under ERISA § 502(a)(2).

As an alternative, § 502(a)(3) allows a participant or beneficiary to bring suit to obtain "appropriate equitable relief (i) to redress . . . violations or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3). In *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), the Supreme Court observed that "appropriate equitable relief" under § 502(a)(3) does not encompass legal remedies, such as money damages. 508 U.S. at 256. The court has further explained that "appropriate equitable relief"

[2] In his reply brief to the defendants' motion to dismiss and strike, the plaintiff makes reference to a West Virginia state law bad faith insurance claim. No such claim appears in either the original or amended complaint.

under § 503(a)(2) only includes such forms of equitable relief "*typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Id.* (emphasis in original).

In this case, the plaintiff requests "the payment of the disability benefits, past, present and future compensatory damages for his economic loss." (1st Am. Compl. at 7). This relief is the same relief already sought by the plaintiff in his § 502(a)(1)(B) claim. Significantly, where a participant is provided adequate relief by the right to bring a claim for benefits under § 502(a)(1)(B), the plaintiff does not have a cause of action to seek the same remedy in a breach of fiduciary duty claim under § 502(a)(3). *See, e.g., Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996); *Griggs v. E.I. Dupont de Nemours & Co.*, 237 F.3d 371, 385 (4th Cir. 2001); *Wilkins v. Baptist Healthcare Sys.*, 150 F.3d 609, 615-16 (6th Cir. 1998); *Tolson v. Avondale Wald v. Southwestern Bell Corp. Customcare Med. Plan*, 83 F.3d 1002, 1006 (8th Cir. 1996); *Coffman v. Metropolitan Life Ins. Co.*, 138 F. Supp.2d 764, 766 (S.D. W. Va. 2001) (Haden, C.J.). The court **FINDS** that the plaintiff's claim is clearly one for benefits that can redressed, if at all, under § 502(a)(1)(B). Accordingly, the court **GRANTS** the defendant's motion to dismiss Counts II, III, and V.

3. Motion to Dismiss Unfair Trade Practices Claim

Count IV sets forth a claim for unfair settlement practices in violation of the West Virginia Unfair Trade Practices Act (WVUTPA), W. Va. Code § 33-11-4(9). Claims under the WVUTPA that are "related to" the processing of benefits pursuant to an ERISA plan are preempted by ERISA. *Custer v. Pan Am. Life Ins. Co.*, 12 F.3d 410, 419-20 (4th Cir. 1993); *Tri-State Mach., Inc. v. Nationwide Life Ins. Co.*, 33 F.3d 309, 315 (4th Cir. 1994); *Coffman*, 138 F. Supp. at 766. In this case, the plaintiff alleges that the defendants failed to conduct a reasonable investigation of his long-term disability claim. While this allegation may constitute a violation of the WVUTPA, it also represents an attempt to recover benefits allegedly due under the Nova Plan. Accordingly, the court **FINDS** that Count IV of the plaintiff's complaint is preempted by ERISA's broad preemption provision, 29 U.S.C. § 1144(a).

Concluding that the plaintiff's claims relate to an ERISA plan and thus fall under ERISA's broad preemption provision does not, however, end the inquiry. The plaintiff also argues that ERISA's savings clause saves the claim because the WVUTPA regulates the business of insurance. ERISA § 1144(b)(2)(A) permits the states to enact any law "which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A). The Fourth Circuit, however, has already applied § 1144(a) to a beneficiary's attempt to assert WVUTPA claims arising out of a plan's denial of benefits and has held that those claims "are not saved from preemption by the savings clause." *Custer*, 12 F.3d at 420; *see also Nationwide*, 33 F.3d at 315 (4th Cir. 1994) (stating that "[t]he holding in *Custer* applies here"); *Coffman*, 138 F. Supp.2d at 766 (noting that *Custer* and *Nationwide* control and that the district court cannot "alter the force and effect of settled circuit law"). Thus, the court **FINDS** that ERISA's savings clause does not save the plaintiff's WVUTPA claims from preemption. Accordingly, the court **GRANTS** the defendants' motion to dismiss Count IV of the amended complaint.

B. Defendants' Motions to Strike

1. Motion to Strike Demands for Extracontractual and Punitive Damages

The defendants move to strike the plaintiff's demands for extracontractual and punitive damages on the grounds that such damages have been precluded in ERISA cases. It is well-established case law that extracontractual damages are not available under ERISA. *Mass. Mutual Life Ins. Co. v. Russel*, 473 U.S. 134, 148 (1985) (holding that ERISA does not provide a cause of action for extracontractual damages caused by improper handling of claims); *Reinking v. Phila. Am. Life Ins. Co.*, 910 F.2d 1210, 1219-20 (4th Cir. 1990) (denying claim for extracontractual damages for emotional distress), *overruled in part on other grounds, Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1030 (4th Cir. 1993); *Grover v. Cent. Benefits Nat'l Life Ins. Co.*, 876 F. Supp. 826, 829 (S.D. W. Va. 1995) (Haden, C.J.); *Farrie v. Charles Town Races Inc.*, 901 F. Supp. 1101, 1105-06 (N.D. W. Va. 1995) (allowing motion to strike ERISA claims for

extracontractual and punitive damages). Accordingly, the court **GRANTS** the defendant's motion to strike the plaintiff's claims for extracontractual and punitive damages.

2. Motion to Strike Jury Demand

The defendants have moved to strike the plaintiff's jury demand. Plaintiffs are not entitled to a jury trial for ERISA claims. *See Grover*, 876 F. Supp. at 826; *Abels v. Kaiser Aluminum & Chem. Corp.*, 803 F. Supp. 1151, 1152-53 (S.D. W. Va. 1992) (Haden, C.J.) (neither punitive damages nor trial by jury are available under ERISA (citing *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003, 1007 (4th Cir. 1985)). Accordingly, the court **GRANTS** the defendant's motion to strike the plaintiff's jury demand.

III. Conclusion

In sum, the court **FINDS** that all of the plaintiff's various claims are either completely or substantively preempted by ERISA. Accordingly, the court (1) **GRANTS** the defendants' motion to recharacterize Count I as a claim for benefits under § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B); (2) **GRANTS** the defendants' motion to dismiss Count II, III, and V with prejudice because such claims are not authorized under ERISA's civil enforcement provisions; (3) **GRANTS** the defendants' motion to dismiss Count IV because it relates to the processing of the plaintiff's benefits under an ERISA plan; and (4) **GRANTS** the defendants' motion to strike the plaintiff's request for extracontractual compensatory and punitive damages and a jury trial.

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: April 2, 2003

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JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE