IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

J. KEVIN GARVEY,

Plaintiff,

v.

PIPER RUDNICK LLP LONG TERM DISABILITY INSURANCE PLAN; STANDARD INSURANCE COMPANY, a subsidiary of STANCORP FINANCIAL GROUP, INC.,

Defendants.

CV. 07-886-AS

FINDINGS AND RECOMMENDATION

ASHMANSKAS, Magistrate Judge:

Defendants Piper Rudnick LLP Long Term Disability Insurance Plan (the "Plan") and Standard Insurance Company, a subsidiary of Stancorp Financial Group, Inc. ("Standard")(hereinafter collectively referred to as "Defendants"), seek a transfer of venue from the District of Oregon to the Northern District of Illinois. Defendants argue that Standard is not a proper party to this action, that plaintiff J. Kevin Garvey ("Plaintiff") engaged in improper forum shopping by naming Standard as a party and filing this action in this court, and that the appropriate venue for

this action is the Northern District of Illinois.

Background

Plaintiff was a partner in the downtown Chicago, Illinois, office of the law firm of Piper Marbury Rudnick & Wolfe, LLP, currently known as DLA Piper ("DLA Piper") and was a "member" entitled to long-term disability benefits under the terms of the Plan. The Plan is administered by DLA Piper and insured by Standard. Plaintiff is a resident of Chicago, Illinois, DLA Piper has a presence in Chicago, Illinois, and Standard is an Oregon corporation with its principal place of business in Portland, Oregon.

In March 2004, Plaintiff applied for and received short-term disability benefits for a twelve-month period. In January 2005, Plaintiff quit working and applied for long-term disability benefits. Plaintiff's application was denied and the denial became final in January 2006, when Plaintiff exhausted his administrative remedies. Plaintiff filed this action seeking a determination that he is entitled to benefits under the Plan and that his retirement plan benefits are not "deductible income" under the terms of the Plan.

Defendants sought the dismissal of Standard as an improper party in their motion to transfer this case to the Northern District of Illinois. Included in Defendants' motion was an argument that Plaintiff is not entitled to pursue both his claim for an award of benefits under 29 U.S.C. §1132(a)(1)(B)("Section 1132(a)(1)(B)") and his request for equitable relief under 29 U.S.C. §1132(a)(3)("Section 1132(a)(3)"). However, it was unclear whether Defendants were asking the court to dismiss the Section 1132(a)(3) claim. At oral argument, the court directed Defendants to supplement their motion to transfer and specifically address their motion to dismiss the Section 1132(a)(3) claim. In response, Plaintiff moved to amend his Section 1132(a)(3) claim to add

allegations that Standard breached its fiduciary duty of loyalty to Plaintiff.

Legal Standards

Defendants ask this court to: (1) dismiss this action for improper venue under Fed.R.Civ.P. 12(b)(3) or transfer it to the United States District Court for the Northern District of Illinois pursuant to 28 U.S.C. § 1406(a); or (2) transfer the action for the convenience of the parties to the Northern District of Illinois pursuant to 28 U.S.C. § 1404(a). In their supplemental reply, Defendants also ask the court to dismiss Standard as an improper party and to dismiss Plaintiff's Section 11321(a)(3) claim for failure to state a claim under Fed.R.Civ.P. 12(b)(6). Plaintiff seeks to amend the complaint under Fed. R. Civ. P. 15(a).

Motion to Dismiss - Fed.R.Civ.P. 12(b)(6)

Fed. R. Civ. P. 8 sets forth the basic rules for pleadings filed in this court. The rule requires parties to set forth their claims or defenses in short and plain terms and that such claims or defenses shall be simple, concise and direct. However, this plain statement "must possess enough heft to 'sho[w] that the pleader is entitled to relief.'" Bell Atlantic Corp. v. Twombly, ___ U.S. ___, 127 S.Ct. 1955, 1966 (2007).

A party may attack the sufficiency of the allegations in a pleading by filing a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. While a federal claimant is not required to set out in detail the facts upon which he bases a claim under the liberal system of notice pleading, a party's "obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Id. at 1965

(citations omitted). In other words, the party must allege sufficient facts to raise a reasonable expectation that additional discovery will reveal evidence to support each element of the claim alleged, even if the court finds that proof of such factual allegations is improbable.

The courts are obligated to weed out those pleadings which allege a mere possibility of the prima facie elements of a claim to prevent "a plaintiff with 'a largely groundless claim to simply take up time of a number of other people, with the right to do so representing a *in terrorem* increment of the settlement value rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence.'" Dura Pharmaceuticals, Inc., v. Broudo, 544 U.S. 336, 347 (2005)(quoting Blue Chip Stamps v. Manor Drug Store, 421 U.S. 723, 741 (1975)). "So, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should * * * be exposed at the point of minimum expenditure time and money by the parties and the court. Bell Atlantic Corp., ___ U.S. at ___, 127 S.Ct. at 1966 (quoting Wright & Miller, §1216 at 233-234).

Improper Venue - 28 U.S.C. §1406(a)

Plaintiff has alleged that jurisdiction is founded on the Employee Retirement Income Security Act of 1974 ("ERISA"). Consequently, the issue of proper venue must be determined pursuant to 19 U.S.C. §1132(e)(2) which provides:

> Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and the process may be served in any other district where a defendant resides or may be found.

If an action is filed in the improper venue, the court is required to dismiss the action or transfer it to a judicial district or division where venue is authorized.

> The district court of a district in which is filed a case laying venue in

> the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

28 U.S.C. §1406(a). The plaintiff bears the burden of proving that venue is proper in the court in which the complaint was filed. Piedmont Label Co. v. Sun Garden Packing Co., 598 F.2d 491, 496 (9th Cir. 1979).

Inconvenient Venue - 28 U.S.C. §1014(a)

In the alternative, Defendants asks the court to transfer this action pursuant to 28 U.S.C. §1404(a), which provides that:

> For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

A decision to transfer is committed to the sound discretion of the trial judge. Commodity Futures Trading Com. v. Savage, 611 F.2d 270, 279 (9th Cir. 1979). The moving party must show that a balance of interests weights heavily in favor of transfer. Galli v. Travelhost, Inc., 603 F.Supp. 1260, 1262 (D.Nev. 1985), citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255 (1981). It is not enough to merely shift the inconvenience from one party to another. Van Dusen v. Barrack, 376 U.S. 612, 645-646 (1964).

The relevant factors for consideration on whether to transfer a case are: the convenience of the parties and witnesses; the relative ease of access to sources of proof; the availability of process to compel the presence of unwilling witnesses; the practical problems indicating that the case can be tried more expeditiously and inexpensively elsewhere; and the interests of justice. See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947).

Motion to Amend - Fed.R.Civ.P. 15(a)

After the initial pleading stage, a party may amend his "pleading only by leave of court or by written consent of the adverse party; and leave shall be given freely when justice so requires." Fed. R. Civ. P. 15(a). The decision whether to grant or deny leave to amend is within the discretion of the District Court. California v. Neville Chemical Co., 358 F.3d 661, 673 (9th Cir. 2003). Leave to amend, however, "is not to be granted automatically." Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387 (9th Cir. 1990). Factors considered in determining whether to grant a motion to amend include bad faith, undue delay, prejudice to the opposing party, futility of the amendment and whether the party has previously amended his pleadings. Bonin v. Calderon 59 F.3d 815, 845 (9th Cir. 1995), cert. denied, 516 U.S. 1051 (1996).

Discussion

Defendants assert that the Northern District of Illinois is the proper forum for this case because Plaintiff is a resident of Chicago, Illinois, and both the Plan and Plan Administrator can be found in that district. Defendants further contend that Plaintiff has named Standard, the insurance underwriter and claims administrator for the Plan, as a party to the action for the sole purpose of establishing venue in the District of Oregon. Defendants argue that Standard is not a proper party to this action, that Standard should be dismissed and that this action should be transferred to the Northern District of Illinois for resolution.

Standard as a Proper Party

Plaintiff asserts two claims in his complaint. In his first claim, Plaintiff asks the court to order Defendants to "pay long term disability income benefits to plaintiff in an amount equal to the contractual amount of benefits to which he is entitled under the Plan." First Amended Complaint, Page 6. This claim is authorized by Section 1132(a)(1)(B) which allows a plan participant to file

a civil action "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."

In his second claim, as alleged in his proposed Second Amended Complaint, Plaintiff seeks a declaration from the court that "the benefits received under the Partner's Retirement Equity Plan and his independent disability insurance policy insured by Unum are not 'deductible income' for purposes of the disability plan" and that "Standard breached its fiduciary duty by: 1) not advising Garvey of the appeal process; [and] 2) not treating plan participants the same with respect to offsets." Proposed Second Amended Complaint, Page 9. Plaintiff contends that he is entitled to this relief under the catchall provision found in Section 1132(a)(3) which authorizes a participant to "(A) to enjoin any act or practice which violates any provision of this title or terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provisions of this title or the terms of the plan."

Originally, Plaintiff conceded that Standard was not a proper party under Plaintiff's first claim for relief under Section 1132(a)(1)(B). However, during the supplemental briefing period, Plaintiff changed this position and argued that Standard was a proper party to the Section(a)(1)(B) claim based on the recently decided case of Cyr v. Reliance Standard Life Insurance Co., Case No. CV 06-1585 DDP (RCx)(C.D. Cal., November 19, 2007).

The Ninth Circuit has clearly held that Section 1132(a)(1)(B) "does not permit suits against a third-party insurer to recover benefits when the insurer is not functioning as the plan administrator." Everhart v. Allmerica Financial Life Ins. Co., 275 F.3d 751, 756 (9th Cir. 2001). Plaintiff argues that Cyr creates an exception to Everhart in circumstances where "the insurer, while not the named plan administrator, was effectively the plan administrator because it performed

virtually all of the services that a plan administrator performs including providing plan documents to participants, receiving benefit claims, evaluating them and making benefit determinations, interpreting the terms of the plan and making and administering benefit payments." Plaintiff's Notice of Citation of Supplement Authority, Page 2.

First, the alleged "new" exception relied upon by Plaintiff is not new at all. The court in Everhart clearly limited its holding to insurers who were effectively acting as a plan administrators. Second, Cyr is distinguishable from the case presently before the court. Here, Plaintiff's employer, DLA Piper, is specifically designated as the Plan Administrator in the plan documents.[1] In Cyr, the court relied on the fact that all of the plan documents failed to identify a plan administrator. Cyr at 14. Only in the absence of a designated plan administrator did the court look to the actions of the parties to determine who was acting as the plan administrator and the proper defendant under Section 1132(a)(1)(B).

The court finds that the clear designation of DLA Piper as the plan administrator in the plan document controls and that DLA Piper is the only proper party to Plaintiff's claim under Section 1132(a)(1)(B). Standard should be dismissed as a defendant from this claim.

The next issue before the court is whether Plaintiff is entitled to pursue his claim under Section 1132(a)(3) when he has also stated a claim under Section 1132(a)(1)(B). The Supreme Court first addressed the relationship between Section 1132(a)(1)(B) and Section 1132(a)(3) in Varity Corp v. Howe, 516 U.S. 489 (1996). In Varity, the employer (who was also the plan administrator) deliberately induced several thousand employees to switch to another employer/plan

[1]Declaration of Warren Von Schleicher in Support of Defendants' Motion to Transfer Venue, Exhibit A, Page 9.

by falsely reassuring the employees that the other employer/plan was financially sound, when the administrator knew the second employer/plan was insolvent from the day it was created and had knowingly deceived the employees regarding this material fact in order to reduce its own costs. The Court held that the deceived employees could bring an action for breach of fiduciary duty under 29 U.S.C. § 1132(a)(3).

The Court then sought to allay fears that authorizing an action for breach of fiduciary duty in this particular instance would have dire consequences if plaintiffs were allowed to "complicate ordinary benefit claims by dressing them up in 'fiduciary duty' clothing." Varity, 516 U.S. at 514. Much of this discussion was unnecessary, because -- as the Court eventually acknowledged -- the Varity plaintiffs could *not* proceed under Section 1132(a)(1)(B) as they were no longer members of the plan. Rather, the heart of their complaint was that they had been deceived into surrendering their rights under the plan. Id. at 515. An action for breach of fiduciary duty was permissible in Varity because the plaintiffs had no other cause of action. They were not attempting to "dress up" a claim for denial of benefits by styling it as a claim for breach of fiduciary duty. Breach of fiduciary duty was their only claim. However, the Court did mention, in passing, that:

> We should expect that where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief normally would not be "appropriate."

Id. at 515.

Varity's progeny addressed the relationship between the sections more directly. In Forsyth v. Humana, 114 F.3d 1467 (9th Cir. 1997), plan participants filed an action to recover benefits under their health insurance plan after discovering the plan was involved in a "classic kickback scheme" which resulted in the participants paying significantly more than their 20% co-payment share. The

participants alleged that the insurance company breached the terms of the plan and were liable to the participants under Section 1132(a)(1)(B) for co-payments in excess of 20% of the cost of the medical services provided. The participants also alleged other claims, including breach of fiduciary duty under Section 1132(a)(3). The district court granted summary judgment in favor of the participants on their claim for benefits under Section 1132(a)(1)(B) and dismissed the other claims. Id. at 1473.

On appeal, the participants attempted to revive their claim for breach of fiduciary duty under Section 1132(a)(3). The Ninth Circuit noted that the Supreme Court had recently "interpreted the statute to allow individual relief for a breach of fiduciary duty in an ERISA action only where no other adequate relief is available" and affirmed the district courts dismissal of the breach of fiduciary duty claim based on the fact that the participants had already won a judgment for damages under their Section 1132(a)(1)(B) claim. Id. at 1475.

> In these circumstances, Varity Corp. does not authorize equitable relief under the catchall provision of section 1132(a)(3). Equitable relief under section 1132(a)(3) is not "appropriate" because section 1132(a)(1) provides an adequate remedy in this case.

Id.

The Ninth Circuit recently addressed a case virtually identical to that currently before the court in Ford v. MCI Communications Corp. Health and Welfare Plan, 399 F.3d 1076 (2005). The plaintiff filed an action against a claims administrator[2] for damages resulting from the wrongful denial of her application for long-term disability benefits. Plaintiff asserted claims under Section 1132(a)(1)(B) and 29 U.S.C. §1132(a)(2) for wrongful denial of LTD benefits and Section

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[2]The plaintiff also named the plan administrator as a defendant. The claims against the plan administrator were stayed when it filed bankruptcy.

1132(a)(3) for general equitable relief.[3] Id. at 1078. The district court granted summary judgment in favor of the plan administrator finding that it was not a proper party to the action. Id. The Ninth Circuit affirmed the district court holding that the plaintiff could not obtain relief under Section 1132(a)(3) because she had asserted claims under Section 1132(a)(1)(B) and 1132(a)(2) and that the claims administrator was not a proper party under those statutes. Id. at 1082-3.

Plaintiff has stated a claim for recovery of benefits under Section 1132(a)(1)(B). In this claim, Plaintiff asks the court to order defendants to pay benefits "in an amount equal to the contractual amount of benefits to which [Plaintiff] is entitled under the Plan." Under Varity, and its progeny as discussed above, Plaintiff is not entitled to pursue a claim for equitable relief under Section 1132(a)(3) as well. Plaintiff's argument that he is seeking "additional equitable relief" in his second claim and that his Section 1132(a)(1)(B) claim does not provide an adequate remedy is not well taken.

In his Section 1132(a)(3) claim, Plaintiff asks the court to find that Plaintiff's benefits under the Partner's Retirement Equity Plan and his independent insurance policy are not considered deductible income for the purposes of the Plan and do not affect the amount of disability benefits Plaintiff is entitled to under the Plan. Restated, Plaintiff is asking the court to interpret specific language in the Plan and determine the specific amount of benefits available to Plaintiff under the terms of the Plan. This is virtually identical to the remedy sought by Plaintiff in his claim for relief under Section 1132(a)(1)(B) where he asks the court to award all benefits to which he is entitled under the Plan. Additionally, claims of this type are clearly included in the coverage of Section

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[3]The plaintiff also alleged claims under 29 U.S.C. §§1025(c) and 1132(a)(4) but abandoned those claims on appeal.

1132(a)(1)(B), which authorizes a court to enforce the terms of a plan or clarify rights to future benefits under a plan in addition to awarding benefits under the plan. Determining whether Plaintiff's other retirements benefits decrease the amount Plaintiff is due under the Plan involves enforcing the terms of the Plan as well as clarifying Plaintiff's right to future benefits.

The same can be said of Plaintiff's new allegations. In his proposed Second Amended Complaint, Plaintiff seeks a finding that Standard breached its fiduciary duty by not advising Plaintiff of the appeal process and by not treating plan participants the same with respect to offsets. Plaintiff asserts that the Plan provides that DLA Piper is entitled to review Standard's decision that Plaintiff was not disabled and that Standard failed to advise him of this final appeal option. He asks the court to direct Standard to provide proper notification of Plaintiff's appeal rights. Assuming that the Plan provides Plaintiff with final appeal rights under these circumstances, Plaintiff is merely asking the court to enforce the terms of the Plan, a remedy to which he is entitled under Section 1132(a)(1)(B). To remedy Standard's failure to treat Plan participants similarly with respect to offsets, Plaintiff seeks an order prohibiting Standard from offsetting benefits specifically excluded from deductible income by the terms of the Plan. Again, Plaintiff is asking the court to enforce the terms of the Plan or, arguably, clarify rights to future benefits under the Plan.

The fact that Plaintiff has identified these claims as breaches of fiduciary duty does not mean that he is not entitled to assert these claims under Section 1132(a)(1)(B). In Varity, the Supreme Court acknowledged that Section 1132(a)(1)(B) "specifically provides a remedy for breaches of fiduciary duty with respect to the interpretation of plan documents and the payment of claims. Varity, 516 U.S. at 512. Similarly, the fact that Plaintiff is seeking equitable remedies does not prevent him from asserting his claims under Section 1132(a)(1)(B). Finally, the remedies Plaintiff

is seeking – an order from the court directing Standard to "offer proper notification to Plaintiff of his rights to a final appeal with DLA Piper" and prohibiting Standard "from offsetting benefits specifically excluded from deductible income in the Plan" are remedies that run directly to the benefit of Plaintiff, not to the Plan as a whole. The Ninth Circuit has held that Section 1132(a)(3) "does not provide an action for an individual beneficiary to recover extra-contractual remedies." Horan v. Kaiser Steel Retirement Plan, 947 F.2d 1412 (9th Cir. 1991).

Because all of Plaintiff's claims relate to his entitlement to benefits and the enforcement or clarification of the terms of the Plan, which he may pursue under Section 1132(a)(1)(B), Plaintiff is not entitled to also assert a claim under Section 1132(a)(3) as well. Plaintiff's Section 1132(a)(3) should be dismissed. In the absence of a Section 1132(a)(3) claim, Standard is not a proper party and should also be dismissed.

Proposed Second Amended Complaint

Plaintiff moves to amend his complaint to add allegations with respect to his Section 1132(a)(3) claim. The court has addressed these allegations in its discussion above and recommends dismissing the claim as duplicative of Plaintiff's Section 1132(a)(1)(B) claim. Accordingly, the court has determined that Plaintiff's proposed amendments are futile and now recommends denying Plaintiff's motion to amend his complaint.

Section 1406(a)

Even in the absence of Standard as a party, Plaintiff argues that Oregon is the proper venue because the breach occurred in Oregon. Plaintiff asserts that the breach of a insurance contract occurs in the state where the insurance company processed and denied the claim. Defendant argues that a breach occurs at the location where plaintiff was to receive benefits.

The cases cited by the parties define where the breach occurred differently depending on the type of claim alleged. If the claim is for breach of contract, the breach occurs where the plaintiff was to receive the benefits due them under the contract. On the other hand, if the claim is for breach of a fiduciary duty, the breach occurs where the defendants acted or failed to act in accordance with their duties. Cross v. Fleet Reserve Ass'n. Pension Plan, 383 F.Supp.2d 852 (D.Md. 2005); McFarland v. Yegen, 699 F.Supp. 10 (D.N.H. 1988). The court acknowledges that a few courts have held that, even in a breach of contract context, the breach occurs where the plan was administered or where decisions regarding payments were made. See Turner v. CF&I Steel Corp., 510 F.Supp. 537 (E.D.Pa. 1981); Boyer v. J.A. Majors Co. Employees' Profit Sharing Plan, 481 F.Supp. 454 (N.D.Ga. 1979). However, for the most part, the cases following this line of thinking are older and fewer than those finding that the breach occurred where the plan beneficiary was to receive payments on his claim. See, Stickland v. Trion Group, Inc., 463 F.Supp.2d 921 (E.D.Wis. 2006); Cole v. Central States Southeast and Southwest Areas Health and Welfare Fund, 227 F.Supp.2d 190 (D.Mass. 2001); Wallace v. American Petrofina, Inc., 659 F.Supp. 829 (E.D.Tex. 1987); Bostic v. Ohio River Co. (Ohio Division) Basic Pension Plan, 517 F.Supp. 627 (D.C.W.Va. 1981). And the more recent cases cited by Plaintiff in support of his assertion that a breach occurs where the claim was administered or processed are easily distinguished.

In Cohn v. Metropolitan Life Ins., Co., 2007 U.S. Dist. Lexis 39161 (S.D.N.Y. 2007), the court did not address the question of where breach occurred but relied solely on the agreement of the parties that the alleged breach occurred at the place defendant processed and denied plaintiff's claim. In Seitz v. Board of Trustees of the Pension Plan of the New York State Teamsters Conference Pension and Retirement Fund, 953 F.Supp. 100 (S.D.N.Y. 1997), the plaintiffs were

seeking to force the defendant to comply with the terms of a plan more favorable to plaintiffs. Accordingly, the court was faced with an equitable claim for breach of duty rather than the breach of contract claim currently before the court.

In keeping with the majority and more recent decisions that have addressed this issue, the court finds that the breach occurred in Chicago, Illinois, where Plaintiff lived and received, or would have received, long-term disability benefits under the Plan. Accordingly, venue is not appropriate in this district and this case should be transferred to the Northern District of Illinois.

Conclusion

Plaintiff's motion (22) to amend his complaint should be DENIED based on the futility of the proposed amendment. Defendants' motion (19) to dismiss Standard and Plaintiff's second claim for relief under Section 1132(a)(3) and Defendants' motion (7) to transfer this action to the Northern District of Illinois should both be GRANTED.

Scheduling Order

The above Findings and Recommendation will be referred to a United States District Judge for review. Objections, if any, are due no later than **January 18, 2008**. If no objections are filed, review of the Findings and Recommendation will go under advisement on that date.

If objections are filed, any party may file a response within fourteen days after the date the objections are filed. Review of the Findings and Recommendation will go under advisement when the response is due or filed, whichever date is earlier.

DATED this 3rd day of January, 2008.

/s/ Donald C. Ashmanskas
DONALD C. ASHMANSKAS
United States Magistrate Judge