

IN THE UNITED STATES DISTRICT COURT FOR  
THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION

DAVID ALLEN TEBBETTS, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CASE NO. 2:07-cv-925-MEF
	)	
BLUE CROSS BLUE SHIELD OF	)	(WO)
ALABAMA, <i>et al.</i> ,	)	
	)	
Defendants.	)	

**MEMORANDUM OPINION AND ORDER**

This is a civil action in which Plaintiffs seek damages from Defendant insurance companies for their alleged wrongful denial of benefits under Plaintiffs' health insurance plan. The action was removed from the Circuit Court of Montgomery County, Alabama on October 15, 2007 pursuant to 28 U.S.C. § 1441 on the basis that Defendants argue the Plaintiffs' health insurance plan is governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, and, therefore, that this Court has jurisdiction under the doctrine of complete preemption. This cause is before the Court on Plaintiffs' Motion to Remand (Doc. # 9), filed October 24, 2007, and Defendants' Motion to Strike Jury Demand (Doc. # 5), filed October 22, 2007. For the reasons stated below, the Plaintiffs' Motion to Remand is due to be DENIED and the Defendants' Motion to Strike Jury Demand is due to be GRANTED.

**I. FACTS AND PROCEDURAL HISTORY**

Plaintiff Cynthia Ingram Tebbetts ("Mrs. Tebbetts") is an employee of Montgomery

Imaging, LLC. Mrs. Tebbetts purchased a Blue Cross Blue Shield family health insurance plan entitled “Medical Association of the State of Alabama Group Health Care Plan” (“MASA”). This plan provided coverage to Mrs. Tebbetts and her husband, Plaintiff David Tebbetts (“Mr. Tebbetts”). The MASA policy was issued by Defendant Blue Cross Blue Shield (“Blue Cross”) and administered in part by Defendant CareCore National, LLC (“CareCore”).

Montgomery Imaging chose MASA as the sole health insurance plan offered to its employees. Montgomery Imaging established eligibility requirements its employees must meet in order to qualify to purchase the plan, including working at least thirty-two hours per week and having worked for Montgomery Imaging for at least sixty days. In addition, Montgomery Imaging pays 100% of the employee’s individual premium. If an employee elects family coverage, the employee pays the incremental premium for that additional coverage through payroll deduction. Montgomery Imaging also distributes enrollment forms and plan descriptions, which are provided by Blue Cross, to its employees. Blue Cross invoices Montgomery Imaging for all of its employees’ premiums each month, and Montgomery Imaging remits a check to Blue Cross each month to pay the premiums.

On September 13, 2006, Mr. Tebbetts consulted with a doctor because he was experiencing pain in his abdomen, and the doctor ordered a CT scan of Mr. Tebbetts’ abdomen. The doctor sought pre-approval from Defendants of the CT scan, but Defendants declined coverage. Several days later, Mr. Tebbetts was taken to the hospital where a CT

scan and ultrasound revealed that Mr. Tebbetts had a cyst on his pancreas that had caused his spleen to rupture. Mr. Tebbetts' spleen was removed.

Plaintiffs filed the Complaint in the Circuit Court for Montgomery County, Alabama on September 10, 2007 for damages arising out of Defendants' failure to approve the original request for a CT scan. Blue Cross filed its Notice of Removal in this Court on October 15, 2007. Plaintiff has moved for remand on the grounds that the MASA group health insurance policy is not an "employee benefit plan" within the meaning of ERISA, and that Defendants' removal was procedurally defective.

## **II. DISCUSSION**

### **A. Motion to Remand**

#### **1. Subject Matter Jurisdiction**

Federal courts are courts of limited jurisdiction. *See, e.g., Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Burns v. Windsor Ins. Co.*, 31 F.3d 1092, 1095 (11th Cir. 1994). As such, they may only hear cases that they have been authorized to hear by the Constitution or the Congress of the United States. *Kokkonen*, 511 U.S. at 377. The burden of establishing that subject matter jurisdiction exists rests upon the party asserting jurisdiction. *Id.* Defendants therefore bear the burden of proving federal jurisdiction in this case. *See, e.g., Leonard v. Enterprise Rent a Car*, 279 F.3d 967, 972 (11th Cir. 2002). Defendants argue that federal jurisdiction exists in this case because the health insurance plan at issue is governed by ERISA, which they argue completely preempts Plaintiffs' state law

claims. *See, e.g., Butero v. Royal Maccabees Life Ins. Co.*, 174 F.3d 1207, 1211-12 (11th Cir. 1999).

A civil action filed in a state court may be removed to federal court if the claim is one “arising under” federal law. *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 6 (2003). In order to determine whether a complaint “arises under” federal law, a court must examine the “well pleaded” allegations of the complaint and ignore potential defenses. *Id.* A suit arises under the Constitution and laws of the United States only when the plaintiffs statement of his own cause of action shows that it is based upon federal law or the Constitution. *Id.* As a general rule, absent diversity jurisdiction, a case will not be removable if the complaint does not affirmatively allege a federal claim. *Id.* However, a state claim may be removed to federal court under two narrow exceptions to the well pleaded complaint rule: (1) when Congress expressly provides for removal, or (2) when a federal statute wholly displaces the state-law cause of action through complete preemption. *Id.* at 8.

The parties do not dispute that, if ERISA governs the health insurance policy in this case, then the doctrine of complete preemption applies. *See Butero*, 174 F.3d at 1211 (“Superpreemption [or complete preemption] arises from Congress’s creation of a comprehensive remedial scheme in 29 U.S.C. § 1132 for loss or denial of employee benefits.”). The only dispute in this case related to the governance of ERISA is whether the MASA plan is an “employee welfare benefit plan” within the definition of 29 U.S.C. § 1002(1).

## 2. ERISA

Plaintiffs argue that the MASA plan is not an “employee welfare benefit plan” as required to be governed by ERISA because it is not a plan “established or maintained by an employer or by an employee organization, or by both.” 29 U.S.C. § 1002(1); *Donovan v. Dillingham*, 688 F.2d 1367, 1371 (11th Cir. 1982). Plaintiffs argue that the plan is established or maintained by MASA and that Montgomery Imaging, Mrs. Tebbets’ employer, does not establish or maintain the plan.

In this case, it is clear that Montgomery Imaging has “established or maintained” the MASA plan. Montgomery Imaging selected MASA as the sole health insurance plan offered to its employees. Montgomery Imaging established eligibility requirements its employees must meet in order to qualify to purchase the plan. Montgomery Imaging pays 100% of the employee’s individual premium; the employee is only responsible for the premiums of family members. Montgomery Imaging also distributes enrollment forms and plan descriptions. Finally, Montgomery Imaging collects employees’ premiums via payroll deduction. Blue Cross invoices Montgomery Imaging directly for the premiums of its employees, and Montgomery Imaging remits a check to Blue Cross each month to pay the premiums.

These actions taken by Montgomery Imaging are more than sufficient to establish or maintain an ERISA plan. *See Butero*, 174 F.3d at 1214 (holding employer “established or maintained” an ERISA plan where the employer had “consulted an insurance agent, selected the terms of the group policy it wished to purchase for its employees, completed an

application form for the policy, solicited enrollments from its employees, collected money through payroll deductions, and remitted premium checks”); *McDonald v. Provident Indemnity Life Ins. Co.*, 60 F.3d 234, 236 (5th Cir. 1995) (finding employer had established or maintained an ERISA plan by “purchasing the insurance, selecting the benefits, identifying the employee-participants, and distributing enrollment and claim forms”). Accordingly, ERISA completely preempts Plaintiffs’ claims and this Court has subject matter jurisdiction to hear the case. The only jurisdictional issue left for resolution by this Court is whether Defendants’ removal was procedurally defective.

### **3. Procedural Issues Related to Removal**

Plaintiffs claim that Defendants’ removal was improper because they failed to include copies of the return on service for either Defendant. The procedure for removal is set forth in 28 U.S.C. § 1446, which provides:

A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, *together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.*

(emphasis added). Plaintiff cites *Kisor v. Collins*, 338 F. Supp. 2d 1279 (N.D. Ala. 2004) in support of their argument that the failure to file returns on service with a notice of removal violates § 1446. However, *Kisor* is not on point because in that case the defendants failed to file both the returns on service *and the summons*. Summons are served upon a defendant,

