UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

BETH BARNETT, by and through her husband and next friend LARRY BARNETT; LARRY BARNETT, individually and as Guardian Ad Litem of BETH BARNETT,	)	
Plaintiffs-Appellants,	)	
v.	)	No. 89-5072
GENERAL AMERICAN LIFE INSURANCE COMPANY, a foreign insurance corporation,	)	(D.C. No. 87-C-803-B) (N.D. Okla.)
Defendant-Appellee,	)	
LAKE ERIE INSTITUTE OF REHABILITATION,	)	
Intervenor.	)	

ORDER AND JUDGMENT*

Before SEYMOUR, BRORBY, and EBEL, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Plaintiffs-appellants Beth and Larry Barnett originally filed this bad faith insurance action against defendant-appellee General American Insurance Company (General American) seeking damages for the alleged failure to afford Beth Barnett benefits under a group health policy General American administered. The district court ruled as follows: (1) that plaintiffs' claims were preempted under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, (2) that under ERISA, General American did not abuse its discretion in refusing to continue full payment of Beth Barnett's expenses, and (3) that General American was not obligated to indemnify the plaintiffs for certain expenses Beth Barnett incurred at Lake Erie Institute of Rehabilitation (LEIR) after General American's coverage denial on September 31, 1987. Barnetts appeal these rulings. We affirm.

FACTS

Beth Barnett was seriously injured in a motor vehicle accident on July 7, 1985. She sustained closed head injuries which left her with significant cognitive impairment. At the time of the accident, she was covered under a group health insurance plan obtained through NORDAM, her husband's employer. NORDAM was insured through a group health policy which General American administered. The NORDAM insurance plan was implemented pursuant to the requirements of ERISA.

Following her initial hospitalization, Beth Barnett was admitted to LEIR. LEIR is a facility which specializes in rehabilitation of head trauma patients. From February 12, 1986,

through September 21, 1987, General American paid all of Beth Barnett's expenses at LEIR at a cost of approximately $20,000 per month. On August 21, 1987, General American sent Larry Barnett a letter indicating that it would no longer pay these expenses because recovery had plateaued and the policy did not cover "custodial care." All the physicians reviewing the file agreed that as of September, 1987, Beth Barnett had plateaued and did not require the intense treatment she was receiving at LEIR. Plaintiffs' counsel responded that a bad faith lawsuit would be filed if General American did not agree to continue covering the LEIR expenses. Suit was filed on September 30, 1987.[1]

In August, 1988, Beth Barnett was transferred to "Winning Wheels," an Illinois licensed skilled nursing home.[2] When General American discontinued total coverage at LEIR, it also indicated the policy would not cover all expenses at Winning Wheels because the care there would be largely custodial and was not "medically necessary" as defined in the insurance policy. Further, General American determined that Winning Wheels was not a covered facility. However, General American did agree to pay for

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[1] Early in the case, General American filed a motion for partial summary judgment seeking a ruling that the bad faith claims Barnetts filed were preempted under ERISA. The parties agreed that if ERISA applied, plaintiffs' only claim would be for benefits under the policy. They also agreed that if ERISA applied, Barnetts would be required to proceed with the appeals procedures of ERISA. On March 3, 1988, the district court granted General American's motion. Plaintiffs then appealed the benefits denial under ERISA. General American affirmed its earlier decision and this case proceeded to trial.

[2] The transfer was the result of a partial settlement between the parties which was executed without prejudice to either side.

"medically necessary" treatment such as physical therapy, psychiatry, and prescriptions, which were covered under the policy.

The remaining cost of Beth Barnett's treatment at LEIR from September, 1987, through August, 1988, was $107,805.50. LEIR intervened in this action and brought a claim for this amount. The district court entered judgment against Barnetts alone on this claim. Barnetts now seek indemnification of the $107,805.50 from General American and a determination that General American wrongly denied coverage for Beth Barnett's care at Winning Wheels.

DISCUSSION

We turn first to the preemption issue. Barnetts' argument is really twofold. First, they argue that this is not an ERISA governed plan because Larry Barnett paid a portion of the cost of Beth's dependent coverage. Second, they argue that their common law bad faith claims are not preempted. Because these are issues of law, we review them de novo. In re Ruti-Sweetwater, Inc., 836 F.2d 1263, 1266 (10th Cir. 1988).

It is undisputed that NORDAM implemented its group health insurance plan pursuant to the statutory requirements of ERISA. Beth Barnett was a beneficiary under NORDAM's plan. Facts indicating Larry Barnett paid part of the premium for her dependent coverage do not alter the assessment that her benefits came from an ERISA plan. See Roe v. General Am. Life Ins. Co., 712 F.2d 450, 451-52 (10th Cir. 1983)(holding that group disability insurance was part of ERISA plan even where employee

paid premium); Brundage-Peterson v. Compcare Health Servs. Ins. Corp., 877 F.2d 509, 510-11 (7th Cir. 1989)(holding that plan which allowed choice of insurers and required employee payment of dependent coverage premium was ERISA plan). Consequently, we affirm the district court's ruling on this issue.

Second, pursuant to recognized precedent, ERISA preempts Barnetts' common law bad faith claims. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 57 (1987); Kelley v. Sears, Roebuck & Co., 882 F.2d 453, 456 (10th Cir. 1989). Any common law cause of action which "relates to" an employment benefit plan falls under the broad preemptive sweep of ERISA. Pilot Life, 481 U.S. at 45. Therefore, we affirm this ruling as well. As a consequence of the preemption, the only claim Barnetts have is for the failure to provide insurance benefits under 29 U.S.C. § 1132(a)(1)(B).

In this regard, Barnetts argue that the district court erred in determining that General American acted within its discretion in denying coverage for expenses at LEIR after September, 1987, and in failing to cover expenses at Winning Wheels. Specifically, plaintiffs assert General American breached the policy because it failed to find appropriate placement for Beth Barnett after she left LEIR. We review the district court's findings of fact under a clearly erroneous standard. Butler v. Hamilton, 542 F.2d 835, 838 (10th Cir. 1976).

The Supreme Court's recent decision in Firestone Tire & Rubber Co. v. Bruch, 109 S. Ct. 948 (1989), governs the standard of review to be applied when evaluating General American's decisionmaking. There, the Court stated:

> Consistent with established principles of trust law, we hold that a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.

Id. at 956. The district court here correctly found that General American's policy does afford discretion in making eligibility determinations.[3] Therefore, the appropriate standard of review for considering General American's actions is whether they were arbitrary and capricious. Id. Using this standard, the district court found General American acted within its discretion in denying benefits. The court determined that it was not unreasonable for General American to reject Winning Wheels because it did not qualify as "a hospital or medically necessary" facility under the definition section of the policy. This finding is not clearly erroneous.

The General American policy gives the company discretion in deciding what is medically necessary. The policy defines the term "hospital" and specifically excludes nursing homes from the definition. See Rec. Vol. I doc. 56 at 9 ¶ 15. Further, Larry Barnett was aware General American had determined Winning Wheels was not a covered facility. As the Supreme Court recently stated, "[a] court of appeals would be justified in concluding that a

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[3] The policy states: "In order to determine if care and treatment is medically necessary, the Company shall use a program which is run by the Company or by its authorized representative, with the specific goal of assessing the need for medical care and treatment and determining whether or not such care or treatment is appropriate."

district court had abused its discretion in making a factual finding only if the finding was clearly erroneous." Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2458 (1990). Here, the findings are not erroneous. In light of our ruling on this issue, we also conclude the district court was correct in determining that General American was not required to indemnify Barnetts for the judgment LEIR obtained against them.

LEIR, as intervenor, argues that General American is operating under a conflict of interest because it has a financial stake in the outcome of its claims handling.[4] In Firestone, the Court noted that where an ERISA plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a factor in determining whether the company abused its discretion in making a benefits determination. 109 S. Ct. at 956. The conflict here is minimal, at best. NORDAM's plan is not "funded" with a General American policy. Rather, the company acts only as a claims administrator. Claims are paid from NORDAM's general account. To the extent any conflict existed, the district court considered it in determining whether the company abused its discretion. We find no error.

Accordingly, the judgment of the United States District Court for the Northern District of Oklahoma is AFFIRMED.

ENTERED FOR THE COURT
PER CURIAM

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[4] We agree with General American that LEIR lacks standing to attack the district court's ruling with respect to General American. However, we will briefly address this issue because it is a central component of the Firestone decision.