NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 12 2014

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U.S. COURT OF APPEALS

HOOMAN MELAMED, M.D., an individual and HOOMAN M MELAMED MD, INC., a California Professional Corporation,

Plaintiffs - Appellants,

v.

BLUE CROSS OF CALIFORNIA and ANTHEM BLUE CROSS LIFE AND HEALTH INSURANCE COMPANY,

Defendants - Appellees.

No. 12-55284

D.C. No. 2:11-cv-04540-PSG-FFM

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Philip S. Gutierrez, District Judge, Presiding

Submitted February 5, 2014**
Pasadena, California

Before: KLEINFELD, SILVERMAN, and HURWITZ, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

In the last six years, plaintiff-appellant Dr. Hooman Melamed[1] has filed three lawsuits against Blue Cross of California and Anthem Blue Cross Life and Health Insurance Company, collectively, the "WellPoint defendants." After he voluntarily dismissed the first and second lawsuits, Melamed filed the present action in California state court. Under various legal theories, Melamed's present lawsuit alleges that the WellPoint defendants systematically underpaid him as an out-of-network provider. His previous two voluntarily dismissed lawsuits made the same general allegations. After determining that some of the patients at issue in this case were covered by an ERISA plan at the time of treatment, the WellPoint defendants removed the case to federal district court on the ground that at least one claim was completely preempted by ERISA.

The district court held that removal was proper based on ERISA's powerful complete preemption. The district court then dismissed Melamed's complaint with prejudice under Rule 41's "two dismissal" rule. Melamed appeals both of these determinations. We have jurisdiction under 28 U.S.C. § 1291, and we review both determinations de novo. Marin Gen. Hosp. v. Modesto & Empire Traction Co., 581

[1] Dr. Melamed's medical practice, Hooman Melamed MD., Inc., is also a named plaintiff in this present suit. We refer to both plaintiffs as Dr. Melamed for brevity.

F.3d 941, 944 (9th Cir. 2009); Lake at Las Vegas Investors Grp., Inc. v. Pac. Malibu Dev. Corp., 933 F.2d 724, 725 (9th Cir. 1991). We affirm.

ERISA has two separate preemption doctrines, conflict preemption and complete preemption. It is complete preemption that we are concerned with in this case. When one of a plaintiff's state-law claims is completely preempted by ERISA, the case may be removed to federal court even though the complaint does not state a federal cause of action on its face. See Marin, 581 F.3d at 944–45.

Here, Melamed's breach of implied contract claim is completely preempted because through that claim, Melamed seeks reimbursement for benefits that exist "only because of [the defendant's] administration of ERISA-regulated benefit plans." Cleghorn v. Blue Shield of Cal., 408 F.3d 1222, 1226 (9th Cir. 2005) (internal quotation marks omitted). In the operative complaint, Melamed alleges that as "a direct and proximate result of Defendants' breach of its obligations under the written contracts between Defendants and Defendants' members, to which Plaintiffs are third-party beneficiaries, Plaintiffs have suffered damages." Because some of these "written contracts" are ERISA plans, Melamed is claiming that he is owed money under the terms of an ERISA plan. This claim is completely

preempted under Cleghorn v. Blue Shield of California, giving the district court subject matter jurisdiction over this case. See id.

In his argument to the contrary, Melamed relies heavily on our decision in Marin General Hospital v. Modesto & Empire Traction Co. 581 F.3d 941. But Marin is not applicable to this case. In Marin, we explained that a hospital's oral contract claim was not preempted because the hospital did "not contend that it [was] owed this additional amount because it [was] owed under the patient's ERISA plan. *Quite the opposite*. The Hospital [was] claiming this amount precisely because it [was] *not* owed under the patient's ERISA plan." Id. at 947 (emphasis added). Melamed, by contrast, does claim that he is owed money as a third-party beneficiary under the terms of his patient's ERISA plan. Thus his case is squarely covered by the rule in Cleghorn. His claims are preempted.

Melamed also argues that removal was improper "because ERISA does not govern all of the underlying medical claims." He is mistaken. We evaluate whether an individual claim is completely preempted. If it is, the existence of other nonpreempted claims will not save the case from federal removal jurisdiction. See

Fossen v. Blue Cross & Blue Shield of Mont., Inc., 660 F.3d 1102, 1109–10 (9th Cir. 2011).

Having concluded that the case was properly removed, we now consider whether it was properly dismissed. Rule 41(a)(1)(B) provides that if a plaintiff "previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication upon the merits."

The record reveals that the claims Melamed asserts in his present lawsuit are substantially the same as those he twice voluntarily dismissed under Rule 41, namely, that the WellPoint defendants failed to pay him the usual, customary, and reasonable rate for the care he provided as an out-of-network provider. These claims arose out of "the same transactional nucleus of facts," involve infringements of the same rights, and would involve the same evidence. Accordingly, we hold that the district court did not err by dismissing his case with prejudice under the two dismissal rule. See Costantini v. Trans World Airlines, 681 F.2d 1199, 1201–02 (9th Cir. 1982). We reject Melamed's argument that because his second dismissal may have been in response to a court order, it was not "voluntary,"

because in both of his notices of dismissal, he stated that he "voluntarily dismiss[ed]" his claims "pursuant to Federal Rule of Civil Procedure 41(a)(1)."

We also reject Melamed's argument that because the present action contains claims based on patient treatment that postdates the dismissal of his first voluntarily dismissed complaint, he is saved from the two dismissal rule. This argument fails because it is the dismissal of the second action that operates as an adjudication on the merits, not the first. See Fed. R. Civ. P. 41(a)(1)(B). Thus, the fact that certain claims may not have been included in Melamed's first voluntarily dismissed action is irrelevant. While he also points out that two of the claims he identified in the operative complaint also postdate the filing of his second voluntarily dismissed action, those claims arose before Melamed dismissed that action and fall within the allegations he made in that case. Thus, they were within the scope of the claims barred by his dismissal of that action.

The judgment of the district court is **AFFIRMED**.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ▶ A material point of fact or law was overlooked in the decision;
  - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs ..... ***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
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* Costs per page may not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page.

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk