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U.S. DISTRICT COURT
EASTERN DISTRICT OF LA

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LORETTA G. WHYTE
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROSALIND and HAROLD ZOBLOTSKY

CIVIL ACTION

VERSUS

NO. 03-2957

TENET CHOICES, INC.

SECTION "J" (3)

ORDER AND REASONS

Before the Court is Defendant's Motion for Summary Judgment.¹ The motion is opposed.² After considering the motion, opposition, the parties' arguments presented at the hearing held March 30, 2005, and the supplemental memoranda, the Court finds that Defendant's motion should be GRANTED IN PART and DENIED IN PART.

BACKGROUND

Rosalind Zoblotsky ("Mrs. Zoblotsky") was diagnosed with primary biliary cirrhosis in 1998. She underwent two liver transplants, the first was performed in June of 1998 and she

¹ Rec. Doc. 45.

² Rec. Doc. 60.

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underwent a second transplant in July of 1998 because of bile duct failure following the first transplant.³ After some initial problems following the second transplant, Mrs. Zoblotsky did well.⁴ Luis Balart, M.D. ("Dr. Balart") became Zoblotsky's treating physician in December of 2002.⁵ According to the medical assistant's notes, in December of 2002 Mrs. Zoblotsky was taking Neoral, a brand name for the immunosuppressive drug Cyclosporine, to regulate her liver.⁶

In December of 2002, Harry Zoblotsky, Mrs. Zoblotsky's husband, began working part time and lost his group health insurance. To supplement their Medicare coverage, Plaintiffs enrolled in the Tenet Choice 65 plan. Plaintiffs contend that Tenet's salesperson told them that Tenet would continue to provide the generic form of Cyclosporine, known as Gengraf, with a \$10 co-pay. Further, Plaintiffs assert that Tenet's salesperson did not discuss Medicare coverage for the

³ Plaintiffs's Opposition to Motion for Summary Judgment, pp.1-2 (Rec. Doc. 60).

⁴ Plaintiffs's Opposition to Motion for Summary Judgment, p.2 (Rec. Doc. 60).

⁵ Defendant's Memo in Support of Summary Judgment, Exh. "B", pp. 8-9 (Rec. Doc. 45).

⁶ Defendant's Memo in Support of Summary Judgment, Exh. "B", pp. 10-13 (Rec. Doc. 45).

immunosuppressant drugs and Plaintiffs never thought that Medicare had anything to do with her prescription drug coverage once she became a Tenet Choices 65 member.⁷

Mrs. Zoblotsky continued to receive Gengraf at a \$10 co-pay from her enrollment with Tenet in December 2002, until June 2003.⁸ Plaintiffs assert that in June of 2003 Tenet refused to pay the full amount of the cost of Gengraf because another generic alternative became available that was cheaper than Gengraf. The pharmacy manager, Dodie Clark, telephoned Dr. Balart's office and explained that there was a reimbursement problem. Consequently, on July 16, 2003, the prescription was changed from Gengraf to generic Cyclosporine by transplant nurse Katherine North, which was signed by Dr. Balart.⁹

Within three weeks of the change, Mrs. Zoblotsky suffered an acute liver rejection episode and spent nine days in the hospital

⁷ Plaintiffs's Opposition to Motion for Summary Judgment, p.2 (Rec. Doc. 60).

⁸ Plaintiffs's Opposition to Motion for Summary Judgment, p.2 (Rec. Doc. 60).

⁹ Dr. Balart testified that he, personally, was not contacted about changing the prescription from Gengraf to Cyclosporine, however, someone in his office could have been. Defendant's Memo in Support of Summary Judgment, Exh. "B", pp.21-28 (Rec. Doc. 45).

for treatment.¹⁰ Subsequently, Plaintiffs moved to Arkansas. Mrs. Zoblotsky alleges that she has suffered significant clinical problems and has become physically debilitated since the acute rejection episode following the drug change.¹¹

LAW

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.¹² The moving party bears the initial burden of demonstrating to the court that there is an absence of genuine factual issues.¹³ Once the movant meets that burden, the non-moving party must produce evidence sufficient to establish that there is a genuine issue of material fact in dispute.¹⁴ Accordingly, a factual controversy exists

¹⁰ Plaintiffs's Opposition to Motion for Summary Judgment, p.3 (Rec. Doc. 60).

¹¹ Plaintiffs's Opposition to Motion for Summary Judgment, p.4 (Rec. Doc. 60).

¹² Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir. 1994) (citing Fed. R. Civ. Proc. 56(c)).

¹³ Topalian v. Ehrmann, 954 F.2d 1125, 1132 (5th Cir. 1992).

¹⁴ *Id.*

when both parties have submitted evidence of contradictory facts.¹⁵ On summary judgment, factual controversies are resolved in favor of the non-moving party.¹⁶

DISCUSSION

Defendant contends that its summary judgment motion should be granted (A) with respect to Plaintiffs' state law negligence claims because Mrs. Zoblotsky's treating physician prescribed the generic drug, not Defendant, therefore Defendant cannot be said to have "forced" Mrs. Zoblotsky to ingest the drug; and, Mrs. Zoblotsky's coverage paid for both the generic and name brand drug, therefore it was Mrs. Zoblotsky's choice to purchase the "generic" drug. Further, Defendant contends that its summary judgment motion should be granted (B) with respect to Plaintiffs' claims based on Louisiana Revised Statute § 22:2001, et seq. because the statute does not afford Plaintiffs a private right of action.

(A) Did Defendant "force" Mrs. Zoblotsky to take the drug or did Mrs. Zoblotsky have a choice between purchasing Gengraf and the other generic form of Cyclosporine?

Defendant explains that Mrs. Zoblotsky's treating physician, Dr. Balart, prescribed the "cyclosporine - generic", not the

¹⁵ *Little*, 37 F.3d at 1075.

¹⁶ *Id.*

Defendant.¹⁷ Further, Dr. Balart testified that from a medical standpoint, generic Cyclosporine was identical to the branded generic version, Gengraf, and the brand name version, Neoral.¹⁸

Plaintiffs contend that Defendant's insistence on only providing coverage for a cheaper brand of the immunosuppressant drug led to Mrs. Zoblotsky's treating physician "to write a prescription that Chateau Drugs was forced to fill with the EON Cyclosporine."¹⁹ Plaintiffs assert that the decision to prescribe the generic brand was not a voluntary or conscious decision on Dr. Balart's part and he never knowingly authorized a change in Mrs. Zoblotsky's drug.²⁰ Dr. Balart testified that he expected a generic form of Cyclosporine would be used -

Q: If there is any interruption in the medication for whatever reason, from your standpoint, that could cause serious problems in the patient?

A: Correct.

Q: If that's the script that was written at the time that the drug was changed from Gengraf to something else, given what you see written there

¹⁷ Defendant's Memo in Support of Summary Judgment, Exh. "B", pp.46-48 (Rec. Doc. 45).

¹⁸ Defendant's Memo in Support of Summary Judgment, Exh. "B", pp.40-43 (Rec. Doc. 45).

¹⁹ Plaintiffs' Opposition to Motion for Summary Judgment, p.6 (Rec. Doc. 60).

²⁰ Plaintiffs' Opposition to Motion for Summary Judgment, p.6 (Rec. Doc. 60).

and that you signed it, were you expecting a change from Gengraf?

A: Well, I mean the prescription is written Cyclosporine, then dash generic. My expectation would be that a generic form of Cyclosporine would be used, yes.

Q: All right.

A: But as far as whether it's Gengraf or something else, I wouldn't know.

Q: It's not something you requested in terms of a switch in generic from one brand to another?

A: No.

Q: From a clinical standpoint, up to the time that the prescription was written, did you see any clinical need to change her immunosuppressant medicine?

A: No, not at all.²¹

As indicated by his deposition testimony, Dr. Balart did not feel there was any reason to change Mrs. Zoblotsky's medication and he did not request a change be made.

To explain why the change was made to Mrs. Zoblotsky's prescription, Plaintiffs provide the affidavit of Dodie Clark, the pharmacy manager responsible for filling Mrs. Zoblotsky's prescription.²² In her affidavit, Clark explains that the insurance company told the pharmacy that it would only pay the pharmacy the full amount of the cost of the generic Cyclosporine, and it would not reimburse the pharmacy the full amount of the

²¹ Defendant's Memo in Support of Summary Judgment, Exh. "B", pp.42-43 (Rec. Doc. 45).

²² Supplemental Opposition to Motion for Summary Judgment (Rec. Doc. 70).

cost of Gengraf.²³ Further, Clark noted that the insurance company paid for the cost of Gengraf prescriptions from January 13, 2005 until sometime in June 2003, but then changed its position in July.²⁴ Consequently, the pharmacy contacted Dr. Balart's office and filled a prescription for the generic Cyclosporine.²⁵

Q: ... In terms of the first phone call, would that call have been made by you to Dr. Balart's office?

A: Yes. ... The gist of it would have been that her Gengraf was not being covered by the insurance company, that they would like a cheaper generic, that there was a cheaper generic available and we needed to doctor's authorization to change it from the Gengraf to the cheaper generic.²⁶

Although Mrs. Zoblotsky's treating physician prescribed the generic prescription, the Court finds that the prescription was changed only as a result of the pharmacy contacting Dr. Balart's office and informing him that the insurance would no longer cover Gengraf. Dr. Balart did not consciously desire to switch Mrs.

²³ Supplemental Opposition to Motion for Summary Judgment, Affidavit, ¶¶4-5 (Rec. Doc. 70).

²⁴ Supplemental Opposition to Motion for Summary Judgment, Affidavit, ¶¶6-7 (Rec. Doc. 70).

²⁵ Supplemental Opposition to Motion for Summary Judgment, Affidavit, ¶8 (Rec. Doc. 70).

²⁶ Plaintiffs's Opposition to Motion for Summary Judgment, Exh. "D", p.16 (Rec. Doc. 60).

Zoblotsky's medication from Gengraf to generic Cyclosporine.

Next, Defendant contends that it authorized payment for the drug of Mrs. Zoblotsky's choice and, therefore, cannot be liable for providing the drug prescribed or any other drug of her choice.²⁷ Defendant submitted the affidavit of Alan Bayham ("Bayham"), Defendant's pharmacy manager, which states that when filling Mrs. Zoblotsky's prescription, the pharmacists could have entered Gengraf and the prescription would have been processed at the same benefit level as generic Cyclosporine or brand name Neoral.²⁸ And, by selecting any one of the drugs, Mrs. Zoblotsky would have been charged 10% of the cost of the drug. Further, Bayham explained that on July 16, 2003 the cost of generic Cyclosporine was \$224.21 for a bottle of sixty 100 milligram capsules and Gengraf cost \$229.38 for a bottle of fifty of the 100 milligram capsules, therefore, the cost to Mrs. Zoblotsky would have been \$22.42 or \$22.94, respectively. Moreover, Bayham stated that Mrs. Zoblotsky's pharmacy was provided an authorization number that would have allowed it to fill Dr. Balart's prescription with the drug of the prescribing doctor's

²⁷ Post Hearing Memorandum in Support of Defendant's Motion for Summary Judgment, pp.5-7 (Rec. Doc. 71).

²⁸ Defendant's Memo in Support of Summary Judgment, Exh. "D" (Rec. Doc. 45).

choice - generic Cyclosporine, branded generic Gengraf, or brand name Neoral.²⁹

Further, Bayham states that during the authorization process, Tenet does not authorize a particular drug, but rather issues a blanket approval code that is satisfied by the pharmacy's request to fill the prescription with the approved chemical, regardless of the drug's manufacturer, strength, brand name or generic.³⁰ While this increased the cost that Mrs. Zoblotsky would pay, Defendant argues that she was left with a choice, which amounted to paying either \$22.42 for Cyclosporine or \$22.94 for Gengraf, a difference of \$0.52. Further, the pharmacy records indicate that Mrs. Zoblotsky paid \$22.42 on July 17 for the generic Cyclosporine, not a \$10.00 co-pay.³¹ Thus, Defendant contends that the fifty-two cent difference cannot be said to have impliedly forced the generic Cyclosporine upon the

²⁹ Defendant's Memo in Support of Summary Judgment, Exh. "D" (Rec. Doc. 45).

³⁰ Post Hearing Memorandum in Support of Defendant's Motion for Summary Judgment, Exh. "D" (Rec. Doc. 71). Bayham's affidavit states that "Tenet Choices 65's pharmacy department entered authorization number 1366857 for Rozalind F. Zoblotsky for Hierarchical Ingredient Cost List sequent number ("HICL") 010086." Post Hearing Memorandum in Support of Defendant's Motion for Summary Judgment, Exh. "D" (Rec. Doc. 71).

³¹ Post Hearing Memorandum in Support of Defendant's Motion for Summary Judgment, Exh. "E", Exh. "5 " thereto (Rec. Doc. 71).

Defendant.

In its supplemental memorandum, Defendant cites *AETNA Health, Inc. v. Davila*, for the proposition that injuries caused by the refusal of coverage are properly attributed to the terms of the plan itself, not the managed care entity that applied those terms.³² In other words, Defendant asserts that Mrs. Zoblotsky's plan provided coverage for the drug sought, and Tenet approved the drug of her choice, therefore, Tenet cannot be the proximate cause of her alleged harm. Page 39 of the plan states "If you or your physician choose to have your prescription filled with a Generic drug, you will pay a \$10 co-payment for the Generic drug for up to a 34-day supply. There is **no** yearly maximum for Generic prescription drugs,"³³ yet Mrs. Zoblotsky paid \$22.42 for generic Cyclosporine on July 17, 2003.³⁴ Apparently, what the plan did or did not provide for caused confusion on the part of either Tenet or the pharmacy when Mrs. Zoblotsky went to fill her prescription on July 16, 2003,

³² *AETNA Health, Inc. v. Davila*, 124 S.Ct. 2488, 2498 n.3 (2004).

³³ Post Hearing Memorandum in Support of Defendant's Motion for Summary Judgment, Exh. "B", p.39 (Rec. Doc. 71).

³⁴ Post Hearing Memorandum in Support of Defendant's Motion for Summary Judgment, Exh. "E", Exh. "5 " thereto (Rec. Doc. 71).

ultimately leading to the switch from Gengraf to generic Cyclosporine.

Plaintiffs argue that six months before they became members of Defendant's health plan, Bayham instituted a change in the manner in which Tenet covered Medicare Part B prescription drugs (i.e. Cyclosporine). Plaintiffs contend that they did not know that Medicare came into play with respect to the prescription drug issue. Plaintiffs purchased insurance coverage in order to continue to receive Gengraf at a \$10 co-pay, not as a 10% co-pay, which would have more than doubled the prescription cost. Plaintiffs point out that the plan provides that Plaintiffs' "will pay a \$10 co-payment for the Generic drug for up to a 34-day supply."³⁵

While Bayham states that the approval code authorized the purchase of Gengraf, the testimony of Clark indicates that Gengraf was not available for the ten dollars as stated in the policy or the ten percent as Defendant contends. Consequently, the court finds that a genuine issue of material fact exists as to whether Mrs. Zoblotsky could have purchased Gengraf for a price relatively similar to that of the generic Cyclosporine.

³⁵ Opposition to Motion for Summary Judgment, Exh. "I" p.38 (Rec. Doc. 60).

Thus, with respect to Plaintiffs' state law negligence claims, Defendant's motion for summary judgment should be DENIED.

(B) Do Plaintiffs have a private right of action under Louisiana Revised Statute § 22:2001, et seq.?

Defendant points out that Plaintiffs' second, third and fourth cause of action generally allege that Defendant violated the Louisiana Health Maintenance Organization Act, La. R.S. 22:2001 et seq., by denying Plaintiff necessary and appropriate immunosuppressant drug therapy. Defendant contends that enforcement of the standards under the Act lies exclusively with the Commissioner of Insurance.³⁶ Plaintiffs contend that the Act creates a private right of action, based in tort, for persons enrolled in health care plans.³⁷

Notably, the Act is silent on the right of an enrollee to sue for damages caused by a violation. Section 2022 of the Act provides that every health maintenance organization must create a procedure so that plan enrollees may submit their grievances.³⁸ The enforcement of the standards set forth in the Act do not lie

³⁶ Defendant's Memo in Support of Summary Judgment, pp. 17-18 (Rec. Doc. 45).

³⁷ Plaintiffs' Opposition to Motion for Summary Judgment, p.10 (Rec. Doc. 60).

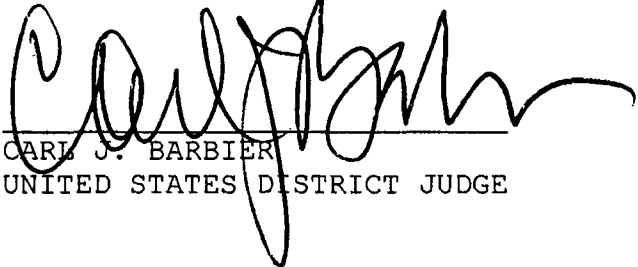
³⁸ LA. REV. STAT. ANN. § 22:2022 (West 2004).

with private litigants, but with the Louisiana Commissioner of Insurance.³⁹ Therefore, the Act does not provide a new cause of action in tort to plan enrollees and Plaintiffs' claims based on the Act should be dismissed. Accordingly,

IT IS ORDERED that Defendant's Motion for Summary Judgment should be and hereby is **DENIED** as to Plaintiffs' claims based in negligence;

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment should be and hereby is **GRANTED** as to Plaintiffs' claims based on Louisiana Revised Statute § 22:2001, et seq., and those claims should be and hereby are **DISMISSED**.

New Orleans, Louisiana this the 26th day of April, 2005.



CARL J. BARBIER
UNITED STATES DISTRICT JUDGE

³⁹ LA. REV. STAT. ANN. § 22:2013 (West 2004).