IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LARRY L. BROWN, JR., Plaintiff, v. MAYA T. TAYLOR, ANDRE TAYLOR UNUM LIFE INSURANCE COMPANY OF AMERICA, PNC BANK, NATIONAL ASSOCIATION, and BANK OF AMERICA, N.A., Defendants.	Civil Action No. 12-1710-GMS

AMENDED ORDER

WHEREAS presently before the court are the Motion to Dismiss filed by UNUM Life Insurance Company of America ("UNUM") (D.I. 5), the Motion to Dismiss filed by PNC Bank, National Association ("PNC") (D.I. 10), and the Motion for Leave to File Amended Complaint filed by Larry L. Brown ("Brown") (D.I. 13); and

WHEREAS the court has considered the parties' submissions as well as the applicable law;

IT IS HEREBY ORDERED THAT:

1. UNUM's Motion to Dismiss (D.I. 5) is DENIED;[1]

[1] Brown alleges that UNUM has failed to pay life insurance benefits owed to him under a group policy issued by UNUM, insuring the life of his mother, Tarice Ann Brown. (D.I. 1, Ex. 1 at ¶¶ 6–9.) He states that he had no knowledge of the policy but that the individual defendants, Maya Taylor and Andre Taylor ("the Taylors"), knew of it and requested that UNUM pay the benefits to Maya Taylor. (*Id.* at ¶¶10-12.) Brown further alleges that, while UNUM refused this request and instead made the payment check payable to him, it actually sent the check to the Taylors' address. (*Id.* at ¶¶13–14.) Brown contends that the Taylors then fraudulently endorsed the check with the name "Larry Brown" and deposited it with defendant PNC. (*Id.* at ¶¶ 17–21.) PNC then allegedly collected the funds at issue from the defendant Bank of America, N.A. ("Bank of America"). (*Id.* at ¶ 22.)

2. PNC's Motion to Dismiss (D.I. 10) is GRANTED;[2]

UNUM removed this case from the Superior Court of the State of Delaware, arguing that Brown's state law claims against were preempted by the Employee Retirement Income Security Act of 1974 ("ERISA") and that the case therefore fell within the court's federal question jurisdiction. (D.I. 1.) UNUM then moved to dismiss the state law claims as preempted and further suggested that Brown had failed to exhaust his ERISA administrative remedies. (D.I. 5.)

In his Answering Brief, Brown conceded that his state law claims against UNUM were preempted but argued that, rather than dismissing them, the court should simply treat those claims as if they were made under ERISA. (D.I. 14 at 1, 4.) Brown also noted that he had moved for leave to amend his Complaint to formally state claims under ERISA, (D.I. 13), and that, if the court were to allow amendment, it would resolve the "substance of [UNUM's] motion" (D.I. 14 at 4).

UNUM's Reply Brief then addressed Brown's new positions as set forth in his proposed Amended Complaint. As an initial matter. UNUM abandoned its administrative exhaustion argument, agreeing that it had already made a benefits determination. (D.I. 15 at 2.) UNUM also argued, however, that Brown's newly submitted ERISA claim under 29 U.S.C. § 1132(a)(1)(B) must fail because the owed benefits had already been paid. (*Id.* at 1.) UNUM maintained that it paid the benefits and satisfied its obligations under the group policy and ERISA when it made the check payable to Brown. (*Id.* at 2.) Finally, UNUM argued that Brown's § 1132(a)(2) claim fails because that subsection only allows for derivative actions against plan fiduciaries in which the plaintiff asserts a loss to the ERISA plan itself. (*Id.*)

While the court agrees with UNUM as to the § 1132(a)(2) claim, *see infra* note 4, it cannot dismiss Brown's § 1132(a)(1)(B) claim at this time. Section 1132(a)(1)(B) provides that an employee welfare benefit plan participant or beneficiary may bring 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." 29 U.S.C. § 1132(a)(1)(B). Given that Brown, as a plan beneficiary, is entitled to bring such a claim, the operative question here is simply whether he can still recover benefits from UNUM under the terms of the group policy. UNUM assumes that by making the benefits check payable to Brown it "paid" him in satisfaction of its obligations under the plan. (D.I. 15 at 2.) UNUM, however, offers no authority for the proposition that a plan administrator satisfies its benefit payment responsibilities merely by executing a check. In the absence of authority addressing the question of when benefits are "paid" under ERISA, the court looks to state law governing the rights and obligations surrounding negotiable instruments.

Delaware has adopted Article 3 of the Uniform Commercial Code, which governs the use of negotiable instruments. *See* 6 Del. C. § 3-101 *et seq.* The commentary to § 3-420 addresses the parties' rights in a case of fraudulent endorsement similar to that alleged to have occurred here. The note makes clear that a payee to whom a check has not been delivered maintains his right to "enforce the underlying obligation." 6 Del. C. § 3-101 cmt. 1. It is for precisely this reason that the intended payee is not regarded as being injured by the fraud:

> Normally the drawer of a check intends to pay an obligation owed to the payee. But if the check is never delivered to the payee, the obligation owed to the payee is not affected. If the check falls into the hands of a thief who obtains payment after forging the signature of the payee as an indorsement, the obligation owed to the payee continues to exist after the thief receives payment.

Id. The commentary further clarifies that "[t]he payee receives delivery when the check comes into the payee's possession, as for example when it is put into the payee's mailbox." *Id.*

In the absence of federal authority on the question of what constitutes "payment" of ERISA benefits, the court is persuaded by the UCC's general guidance as to when an obligation is satisfied through a negotiable instrument such as a check. Accepting Brown's well-pleaded allegations as true, the court cannot find that UNUM has already paid him the owed benefits—the check was delivered to the Taylors and thus never came into Brown's possession. While UNUM may be able to take action against the drawee bank, Bank of America, its obligation to Brown is unaffected by the alleged fraudulent endorsement. *See id.*

[2] Count V of Brown's Complaint alleges conversion of the check by the Taylors and PNC under 6 Del. C. § 3-420 and seeks recovery of the deposited funds from PNC. (D.I. 1, Ex. 1 at ¶ 44.) PNC's Motion to Dismiss raises

3. The claim against Bank of America is DISMISSED;[3] and

4. Brown's Motion for Leave to File Amended Complaint is GRANTED-IN-PART.[4]

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two challenges to this claim. First, PNC argues that § 3-420 prohibits a payee from "assert[ing] a claim for conversion for a check paid over a forged endorsement if the payee never received possession of the instrument." (D.I. 10 at 2.) PNC contends that Brown never received the check and thus cannot claim conversion. (*Id.*) PNC also asserts that Brown's claim is time barred by the three year statute of limitations set forth in 6 Del. C. § 3-118.

Given the "delivery" requirement of § 3-420, the court agrees with PNC that Brown has failed to state a claim for conversion. Section 3-420 provides that "[a]n action for conversion of an instrument may not be brought by . . . a payee or indorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a co-payee." 6 Del. C. § 3-420(a). As discussed above, the comments clarify that "[t]he payee receives delivery when the check comes into the payee's possession, as for example when it is put into the payee's mailbox." 6 Del. C. § 3-420 cmt. 1. Since Brown's Complaint indicates that the check was sent to the Taylors' address rather than his own, it appears that he could not have "receive[d] delivery of the instrument" under the statute and thus cannot bring an action for conversion. 6 Del. C. § 3-420(a). Brown contends that delivery occurred when UNUM "[placed] the check in the hands of the United States Postal Service." (D.I. 11 at 4.) The plaintiff fails, however, to address the commentary language discussed above and, in support of his position, offers only a nineteenth-century Superior Court jury charge discussing the delivery of goods and chattels. (*Id.* (citing *Brown v. Dickerson*, 42 A. 421, 422 (Del. Super. 1895).) The court finds the UCC comments far more persuasive. As such, the court will dismiss the § 3-420 claim against PNC and will not reach the statute of limitations question.

[3] For the reasons discussed above with respect to the § 3-420 claim against PNC, the court will also dismiss the conversion claim brought against Bank of America. *See supra* note 2.

[4] As indicated above, *see supra* note 1, Brown now seeks leave to amend his Complaint to state claims under ERISA, (D.I. 13). His proposed Amended Complaint sets forth the following claims: (1) an unspecified tort claim against the Taylors stemming from their alleged fraudulent endorsement of the UNUM check; (2) a claim against UNUM under 29 U.S.C. § 1132(a)(1)(B); (3) a claim against UNUM under 29 U.S.C. § 1132(a)(2); (4) a claim against PNC under §6 Del. C. § 3-420; and (5) a claim against Bank of America under 6 Del. C. § 3-420. (D.I. 13, Ex. A.)

Rule 15(a) allows a party to amend its pleading without leave within "(A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Fed. R. Civ. P. 15(a)(1). "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2).

The Third Circuit has adopted a liberal approach to the amendment of pleadings to ensure that "a particular claim will be decided on the merits rather than on technicalities." *Dole v. Arco Chem. Co.*, 921 F.2d 484, 486–87 (3d Cir. 1990) (citations omitted). Amendment, however, is not automatic. *See Dover Steel Co., Inc. v. Hartford Accident and Indem.*, 151 F.R.D. 570, 574 (E.D.Pa. 1993). Leave to amend should be granted absent a showing of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc." *Foman v. Davis,* 371 U.S. 178, 182 (1962). Futility of amendment occurs when the complaint, as amended, does not state a claim upon which relief can be granted. *See In re Burlington Coat Factory Sec. Litig.,* 114 F.3d 1410, 1434 (3d Cir. 1997). If the proposed amendment "is frivolous or advances a claim or defense that is legally insufficient on its face, the court may deny leave to amend." *Harrison Beverage Co. v. Dribeck Importers, Inc.*, 133 F.R.D. 463, 468 (D.N.J. 1990).

While the court cannot find undue delay, bad faith, or dilatory motive on Brown's part, amendment would be futile with respect to the proposed claim against UNUM under 29 U.S.C. § 1132(a)(2). "Section 1132(a)(2) actions are derivative in nature inasmuch as the plaintiff must assert a loss to the ERISA plan itself (not merely an individual claim for extracontractual damages)." *Leckey v. Stefano*, 501 F.3d 212, 217 (3d Cir. 2007). Brown's

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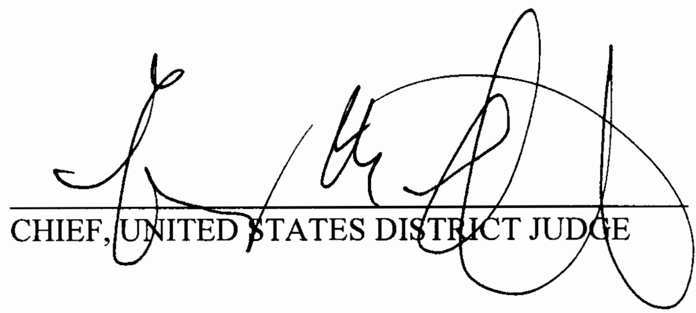

CHIEF, UNITED STATES DISTRICT JUDGE

Amended Complaint, however, alleges only a personal loss. (D.I. 13, Ex. A.) The proposed conversion claims against PNC and Bank of America under 6 Del. C. § 3-420 are also legally insufficient for the reasons discussed above. *See supra* note 2. As such, the court will permit amendment with respect to only the 29 U.S.C. § 1132(a)(1)(B) claim against UNUM and the unspecified tort claim against the Taylors. The court notes, however, that, to the extent Brown seeks to bring a conversion claim against the Taylors under 6 Del. C. § 3-420, it will be barred for the reasons previously set forth.