IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

TIARA YACHTS, INC.,

Plaintiff, No. 1:22cv603

vs.

BLUE CROSS BLUE SHIELD OF MICHIGAN,

Defendant.

Before:

THE HONORABLE ROBERT J. JONKER
U.S. District Judge
Grand Rapids, Michigan
Wednesday, September 21, 2022
R16 Proceedings

APPEARANCES:

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On behalf of the Plaintiff;

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On behalf of the Defendant.

REPORTED BY: MR. PAUL G. BRANDELL, CSR-4552, RPR, CRR

09/21/2022

(Proceedings, 3:05 p.m.)

THE CLERK: The United States District Court for the Western District of Michigan is now in session. The Honorable Robert J. Jonker, United States District Judge, presiding.

THE COURT: All right. We're here on the case of Tiara Yachts against Blue Cross Blue Shield of Michigan, 22cv603, and we have a joint status report on file for the Rule 16 today. There's also a motion to dismiss pending but not fully briefed. So let's start with appearances and go from there.

MR. RYNDERS: Good afternoon, Your Honor. Perrin Rynders here on behalf of Tiara Yachts. I am here with my colleagues Aaron Phelps and Chloe Cunningham.

THE COURT: All right. Thank you.

MS. CYLKOWSKI: Good afternoon, Your Honor. Sarah Cylkowski from Bodman PLC on behalf of Blue Cross Blue Shield of Michigan, and I have with me today Sam Van Sumeren with me as well from Bodman, as well as Michelle Heikka, in-house counsel for Blue Cross Blue Shield Michigan.

THE COURT: And it's Cylkowski?

MS. CYLKOWSKI: Yes.

THE COURT: So obviously we are not going to decide any motions since the briefing is still open on it, but I have read the Defense position, which is the only thing on file, to

give me a clearer understanding of what's at issue from the Defense perspective and to see how it should inform if it should inform the scheduling that we have going forward. Let me start with that and just clarify, certainly the moving party, and this is typical, says, let's wait with disclosures and discovery until the motion is decided because we don't think we should be here at all. I think the Defendant agrees with that but I couldn't tell completely. It certainly seemed like they did with respect to disclosures. I couldn't tell for sure on discovery. So let me have your position, Mr. Rynders, on whether you want to delve right in or want to await a decision on the motion to dismiss?

MR. RYNDERS: Well, we have worked together, my firm, and for most of the cases the Bodman firm on upwards of 230 lawsuits involving various ERISA issues. So we have a long history together. We get along and we work hard. I would love to get moving, but I am happy to accommodate counsel for Blue Cross.

So I think where we ended was, at least where I ended, is we can -- we can, you know, put off formal discovery until the motion has been decided. I think we can probably agree amongst ourselves maybe even here today on a few things that ought to happen as soon as that motion is decided. I have made reference to the claims data, which I would submit my client is entitled to anyway. Doesn't need except for this litigation.

And so I think if we can work through some things like that we'll be able to work together and accommodate each other.

THE COURT: All right. Ms. Cylkowski, from your perspective anything you want to --

MS. CYLKOWSKI: Sure. Thank you, Your Honor.

I think that you are correct in that Blue Cross's position is that, you know, we do think it would be most efficient and utilize the resources of both the Court and the parties to hold off on discovery until we have a ruling on the motion to dismiss. But I agree with Mr. Rynders that there are a number of things that we can do in the interim while the motion is pending to make discovery more efficient as soon as we have that ruling. For example, we are in process of negotiating a protective order that would govern confidentiality of any documents and data that would be produced. We are also working on an ESI protocol with Mr. Rynders that would help the parties reach agreement on, you know, what we are disclosing for how we are searching for documents and data, the format of any privilege logs, and I think we also agree with Mr. Rynders that claims data should be one of the first items that is prioritized once discovery commences, and as Mr. Rynders indicated we have had, you know, previous litigation where we have worked together and I think that we can begin discussing, you know, the different data fields, you know, that each side may be interested in so that

we can shortly reach agreement and proceed with productions once we have a ruling on the motion to dismiss.

THE COURT: Okay. Thank you. Let me move to something both sides have already touched on and I just wanted to clarify. Certainly Blue Cross has lots of litigation, and I understand that Mr. Rynders and his firm have been on the other side of a lot of that. What did you say? Two hundred plus cases Bodman has been there for Blue Cross? This seemed different to me, though, at least because when I first read the complaint, started looking, figuring if there is a software program that Plaintiff says is at the root of the wrongdoing, this can't be the only case that comes up in, but I could only find one other case that alluded to this, an Eastern District case, and it didn't allude to it initially. It was in a later -- I think in a Second Amended Complaint. Is there any other litigation like this one as opposed to all the other ways in which people fight Blue Cross Blue Shield for one reason or another?

MR. RYNDERS: Not pending at this time.

THE COURT: Okay.

MR. RYNDERS: Just the Comau case, which has been resolved, and this case now.

THE COURT: Okay. So tell me a little bit about this, is it flip logic? And I know it's early. I know that's not where we are, but I tell you -- and of course, this is informed

by reading the Defense brief and not having had the benefit of your response yet, but when I read through the complaint and then read through the brief I am thinking why isn't this just a matter of contract between the plan sponsor and a service provider? To the extent there is any fiduciary duties it would seem to me to be the plan itself, not necessarily the sponsor or maybe to the plan participants. Why are we doing anymore than contract? And of course, that's not what's pleaded.

MR. RYNDERS: Right.

THE COURT: So that and maybe if I understood more what the theory is on the flip logic that would help, and I know there is a prohibited transaction theory as well, but I am really focused on the first one at this point.

MR. RYNDERS: Sure, Your Honor. Well, I suppose it's perfectly possible that the two parties to the administrative services contract, which we affectionately refer to as the ASC, which would be Blue Cross on the one hand and the employer on the other, if there was an issue about performance under the ASC, they could have their contract dispute and they could litigate that in state court. But this is an ERISA situation, and the sponsor, the employer has a plan, and the plan has certain statutory rights.

THE COURT: Right. But the plan isn't a party.

MR. RYNDERS: The plan can't -- can't be a party.

THE COURT: Right. But I mean, that's the problem,

isn't it? If the duties run -- if the ERISA duties run to the plan or to the beneficiaries and they are not here, why is this an ERISA case?

MR. RYNDERS: Because ERISA says that the only entities or things that can be the Plaintiff are the secretary of labor, a plan beneficiary, the plan sponsor, and the employer is the plan sponsor. So it's the entity that has standing under ERISA to bring the plan's claims on its behalf. The Sixth Circuit based -- the United States Supreme Court have all recognized that these types of claims are brought by somebody with standing under ERISA on behalf of the Plaintiff.

THE COURT: Well, these types of claims. Tell me where there is another analog to this type of claim? I mean, I understand generically what an ERISA claim could be, but I haven't seen a claim that ties into -- I mean, at least as I understand it, everybody is assuming there was a valid claim submitted. It wasn't a claim for some service that wasn't provided. It was simply an overcharge, maybe a gross overcharge, and I haven't seen anything like that in the literature, and maybe there is.

MR. RYNDERS: Two things there I want to say. First of all, I expect that when we get the claims data we will find that there are claims where something got paid twice.

THE COURT: So why doesn't your two-year audit look back enough for that? Doesn't the contract anticipate that?

MR. RYNDERS: Because the plan has its ERISA rights which the contract cannot limit or get rid of.

THE COURT: Okay. And I am sure this will be a preview of coming attractions. I know I am jumping you before I have had a chance to read your position, but those are questions that come out anyway in my mind just on initial view.

MR. RYNDERS: Yeah. I think the analog, Your Honor -- so because you asked that I did want to be responsive to that.

THE COURT: Sure.

MR. RYNDERS: This -- these types of disputes happen very infrequently in the health and welfare benefit side of ERISA, if you will. They happen a lot more on the pension side, and so that's where you are going to find your analogs. Where it could be either a plan beneficiary who feels that a fiduciary to the pension plan gets something that was injurious to the pension plan, but it could also be the employer who has that standing and pursues that claim against, you know, like an investment entity that manages the fund.

THE COURT: I mean, I have had a number of pension cases and the inquiry whether they are analogous or not I guess that's what we'll be fighting about in part. At least my memory of the pension cases that I've had is that they were brought by the plan, not the sponsor.

MR. RYNDERS: Well, if you read ERISA, it says two things that are very clear and also confusing. One is that a

plan has the right to sue and be sued, and it gives standing only to the secretary of labor, the plan sponsor, a plan beneficiary or plan participant or beneficiary, and so what the courts have explained, the Sixth Circuit and the U.S. Supreme Court, is that it's those entities that have standing that bring the plan's claim on behalf of the plan. This comes up -- there are, for example, cases where a plan beneficiary, plan participant, is an employee, signs an employment agreement with an arbitration provision in it, and then that plan participant brings an ERISA claim alleging some breach of fiduciary duty involving ERISA, and the Defendant says, oh, we have to arbitrate this. You, Plaintiff, have signed an arbitration agreement. The courts say no, no, no, that person signed an arbitration agreement in his or her individual capacity, but here they are in a representative capacity. It's like a derivative type of action, and that arbitration agreement doesn't apply because the plan didn't sign the arbitration agreement, and this is a lawsuit advocating or advancing claims that belong to the plan. So that's obviously not our situation here. That's not the issue, but that would be instructive to how we look at this kind of oddity about how ERISA was put together.

THE COURT: Okay. Thanks. And I know both of the lawyers have done a lot more ERISA litigation than I have, so I am sure you'll both educate me as we go forward. Thank you for

that from Mr. Rynders.

Do you want to address anything? Obviously you have been sitting quietly and listening, but you may have your own thoughts or you may want to simply rest on what you have written so far and wait for the response.

MS. CYLKOWSKI: Yes, Your Honor.

I think we are fine to rest on what we've written so far and wait to see what the response is and address anything in reply or any hearings.

THE COURT: Okay. Before we leave the complaint, some of the exhibits are more legible than others. Let's just put it that way. If there is a way that you are able to get us better copies that would be appreciated. So for example, I think it's Exhibit C in particular was very hard to read.

MR. RYNDERS: We will --

THE COURT: Maybe you can print a copy or bring over written courtesy copies or something like that.

MR. RYNDERS: We will do that, and I'll make sure that Ms. Cylkowski knows what we are doing so we'll work on that. My recollection is Exhibit C is 95 percent redaction, but we'll make sure that we get something that you can read.

THE COURT: All right. That would be good. Thank you.

Okay. Are there any other preliminary comments or things that the parties would want me to hear before we go

ahead and do some scheduling?

MR. RYNDERS: This may be premature, Your Honor, so we can take it up later, but something that Ms. Cylkowski and I talked about. Looking ahead to trial, this case, as I imagine it's going to play out, is going to involve many, many individual health care claims that have to be analyzed. We -- nobody wants to try, you know, 100,000 health care claims claim by claim by claim. So I think it's incumbent upon Counsel to try to work through that, and my suggestion at this very early stage, without being presumptuous, of course, is that if the case proceeds we would work together to have a plan for Your Honor, and if it's reasonable to Your Honor that we would, you know, discuss that later. One of the hardest things I had in doing the joint status report was how many days are required for trial, because I think it's really going to depend on how do we effectively manage that large amount of data for the Court?

THE COURT: Okay. Yeah. I mean, it is probably way too early to talk about that since at least from the Defense perspective there shouldn't be a trial at all, and if there is the parties may disagree along the way on how this gets presented, and we'd certainly deal with that at final pretrial or when we have a better idea of what the issues are to be submitted. If it's a bench trial it does make things a little simpler than a jury trial, but there is still usually ways that

the parties can streamline and help. And if you have something concrete we can talk about it, but my general reaction is it's pretty early to tell us what that would look like.

Anything from your perspective?

MS. CYLKOWSKI: No. We agree, Your Honor. You know, if we get to that point down the line we are more than happy to put our heads together with opposing counsel and come up with ways to make it as efficient and streamlined, you know, of a presentation as possible.

THE COURT: All right. Okay. And does either side want to give me a quick tutorial on, what is it called, the flip logic, or is it too early for that, because that certainly features in, at least as I understand it, the mechanism the Plaintiff believes is responsible for some of the wrongs in any event.

MR. RYNDERS: Yeah. At least some of it.

So I have tried to explain this to friends and stuff, too. My client has facilities and employees that from time to time will have claims that are out of network. Now, in the State of Michigan that happens much less frequently because Blue Cross has a very expansive network of physicians and hospitals and various providers. Out of state in a sense everybody -- every claim that comes from out of state is also out of network. Some of those claims get paid at a discounted rate for reasons I don't want to get into, but everyone -- the

Blue Cross has relationships with other affiliates in other states. But there are claims, whether they are out-of-state or in-state, that are deemed out of network. The provider has no contract with Blue Cross Blue Shield of Michigan.

Now, what normally would happen is a claim would get submitted and Blue Cross Blue Shield of Michigan would be obligated under the terms of the ERISA plan to pay at what is reasonable and customary for the service that's provided. For reasons that will have to be explained in discovery, Blue Cross, all the way back in 1997, flipped the logic of what they normally did, and in effect, decided not to scrutinize in anyway any out-of-network claims. So all network -- all out-of-network claims got paid at the amount that was charged, like the list price. And if you can imagine being a provider who prior to 1997, whenever you submit a claim, hears from Blue Cross Blue Shield of Michigan about finding out the amount that's actually reasonable and customary, and then all of a sudden in 1997 never gets questioned about its charges, the claims that it submits, an unscrupulous provider may very logically say, well, I am going to start charging more and more and more because they are clearly not being scrutinized at all. And so what was happening, according to Blue Cross's own internal investigation, is that there were, oh, sleazy or at least less than reputable providers that were submitting really excessively big claims, way more than it was reasonable for the

service provided, and those were getting paid in full without any scrutiny.

And the problem is Blue Cross didn't care because this is a self-funded arrangement. The employer group, the sponsor of the ERISA plan, was the one that had to pay the bills, and yet they didn't know that was happening. In fact, that was contrary to what was told to them. So the flip really refers to a reversal of the normal logic that would have kind of made the system work the way it was supposed to, and they turned that off and they flipped it the other direction.

THE COURT: Okay. So what does it have to do with software? That sounds like a policy decision.

MR. RYNDERS: I don't think it has anything to do with software.

THE COURT: So I must have misread that at some point.

MR. RYNDERS: Yeah.

THE COURT: Okay. Thanks. Do you want to be heard in your position on that?

MS. CYLKOWSKI: Yes. Thank you, Your Honor.

And this may help clarify some of the points, which is, I think, you know, one challenge with the complaint is that it actually is covering a variety of different topics and issues. So it's not only the flip logic issue that we were talking about, but also Blue Cross's shared savings program, which related to a mechanism by which Blue Cross had a team

that would review claims that were processed after they were processed to ensure as kind of a double-check, you know, were the claims processed again according to all of the rules, the policies, procedures that were in place to see if there was any additional money that should be recouped because a claim was processed incorrectly.

As well as then there are challenges to Blue Cross's clinical editing policies and procedures, which are other rules or guidelines that come into play that govern how a particular claim may be processed. In other words, rules that set forth, you know, when a provider submits a claim it needs to do so in a specific way in order to be reimbursed for that claim. So perhaps that means the provider needs to submit two types of services that are related to one another either as separate claims or bundled together.

So there are -- and a lot of it falls under this umbrella, Your Honor, of basically a challenge to the way the mechanisms that Blue Cross processed the health care claims of Tiara Yachts' plan participants. And so some of that does involve, you know, we have claims -- Blue Cross has claims processing systems and they are all these logic -- these rules that apply for all the different scenarios that can come up when a health care claim is submitted by a provider. So some of that could implicate, you know, software. Some of it, as Mr. Rynders said, is more in the bucket of policies and rules

that are set, you know, by both Blue Cross in its relationships with providers or frankly by the plan itself.

And to address -- I won't get into more of the weeds on flip logic other than suffice to say that we disagree with the characterization that Mr. Rynders made of flip logic, and that in short, Your Honor, flip logic is discussing a particular rule that would apply to certain types of nonparticipating provider claims that were submitted for reimbursement. And as Mr. Rynders said, a non-participating provider essentially means a provider that does not already have an existing contract with Blue Cross Blue Shield of Michigan or one of the other Blue Cross Blue Shield plans that would set forth the rate at which it would be reimbursed for a particular service.

But as to what flip logic actually did, you know, could vary from plan to plan depending on what the plan's own, you know, benefit selections were, and it could vary depending on, you know, the specific types of scenarios over time.

THE COURT: Okay. Well, thank you both sides. I'll read it again with the background in mind and it might help me get a clearer picture than I did the first time.

All right. I think, by the way, that some of the exhibits we had trouble with were also part of your motion, not just the complaint, and it may be that the complaint was just a redaction issue. I am not sure, but the courtesy copy approach

might be the best way to do that, too.

Okay. So let's go to the schedule unless there is more from either side. Thank you for that.

Mr. Rynders, anything else? Anything else at this point, Mr. Rynders?

MR. RYNDERS: I'm sorry, Your Honor. No.

MS. CYLKOWSKI: No.

THE COURT: All right. Well, what I think I do plan to do, and I don't always do this, is exhaust the motion practice first. There is a response due fairly soon, I think, and then there will be a reply. So we'll look at that while some of this is still fresh in our heads and set it down for a hearing, and my typical process would be to have an oral argument. And I like that especially with lawyers who are very familiar with the cases generally under ERISA and also the specifics of this. I think that would be helpful. And then depending on the disposition of the motion we can move into actual scheduling.

I am not sure there is a lot more that we can really do. We can certainly, you know, set you up for some kind of facilitative mediation, but I think even that the parties were thinking let's wait and see where the motion is. I am not sure it helps to say, you know, let's put some dates out there now. I think we are better off giving you specific dates at the end of the motion hearing, which if I deny it, you know, we will be

ready. We can go off this. If I grant it then there is a whole different array of issues.

What would be helpful to you, if anything, on scheduling? I mean, maybe nothing. Maybe just get a date for a hearing, have you come back and argue it, and have the two of you as counsel work together on whatever issues you are able to do in advance. I don't want to send you away without anything, but I am not sure there is much more than that, and if I put it on, you know, eight pieces of paper, all of which determine, you know, once you decide the case, Judge, these other things will kick in, I think it might be simpler to put it on one piece of paper and say we'll have a hearing, and then at the end of that we'll put down dates, but you are all here. Happy to hear what you think.

MR. RYNDERS: I think that makes sense, and Ms. Cylkowski and I will do the things we said we were going to do. And I am just -- I am just kind of floating this idea, but I am inclined myself to share with her what I'm going to want to get if the case proceeds forward, and that way she has that ready to go. I wouldn't send a formal discovery request, but just so that everyone kind of knows what might be coming down the pike so that there is no surprises. But that's something that she and I have done in the past and can continue to do in this case.

THE COURT: Yeah. The only thing I would do is say

there isn't going to be any compelled disclosure or discovery pending the disposition of the motion. But that certainly doesn't prevent both sides from doing what they think makes sense with their respective client interests in mind. And you know, the Defense may have things they want to see from your client as well, and there might be a laundry list you both want to put together. But mostly I am looking at, you know, six lawyers. Is there something more concrete that would be helpful, because I don't want to send you away with nothing, but I am thinking hearing the motion after you fully brief it is probably the best thing I can do in fairly reasonably short order.

MR. RYNDERS: Agreed.

MS. CYLKOWSKI: Agree.

THE COURT: Okay.

MS. CYLKOWSKI: Thank you, Your Honor.

THE COURT: All right. Well, thank you. We'll take care of scheduling what -- does anybody know when the briefing schedule is officially over?

MR. RYNDERS: Yes. So our response is due tomorrow, and I think their reply, then, is October 6 if I remember correctly.

MS. CYLKOWSKI: Yes. That's correct.

THE COURT: All right. So hopefully we'd be in a position to put something on -- we have a Marquette docket in

October, but we can do something before Thanksgiving in any event, and hopefully then we won't forget everything we did to prepare for today. You know, things move fast. So we'll give you a specific date.

MR. RYNDERS: Okay.

THE COURT: Okay. Very good. Thank you all.

MR. RYNDERS: Thank you, Your Honor.

THE COURT: One other thing. I did get a note through Ms. Bourque that Mr. Rynders -- and I don't know if you know this or not, Ms. Cylkowski, but he and I were classmates at what's now called Calvin University. It was Calvin College, and I still think of it that way when he and I went, and we were classmates at Michigan law after that, and his office called and indicated he has a high school student shadowing him today who is the daughter of the current CFO at Calvin, and he wondered if it would be okay if he brought her in to meet me afterwards? Obviously wouldn't talk about the case, and if you are uncomfortable with it --

MR. RYNDERS: You are welcome to join.

THE COURT: Exactly what I was going to say. If you'd rather be there or you want to meet an aspiring -- who knows if she's an aspiring lawyer or CPA or what she is. You are more than welcome to come, too, but I didn't want to do it without mentioning and make sure you are comfortable or just want to be a part of it either way.

MS. CYLKOWSKI: Thank you, Your Honor. We are comfortable with that and I'll have no issues at all.

THE COURT: Okay. Fair enough.

MR. RYNDERS: So this is -- I just want to say on the record, this is an amazing day, but it's like every day at Varnum because my shadow got to meet with Judge Beckering this morning. Two of my associates are trying a case just across the hall, and then as soon as we are done here we are going to go back for an event with Justice Zara at our office. So she's going to meet all kinds of wonderful jurists today.

THE COURT: Beautiful. It's a great opportunity. I am glad she is able to do it. I appreciate it when professionals find a way to bring newer students in. You know, we've had more and more situations where it seems like in middle school and high school students don't really know the first thing about government generally and certainly not the judiciary branch, and I think that's a serious problem when you have, as they do across the hall right now, a jury, and if folks don't have a clue what the basic building blocks of government are all about it's just much harder to have confidence in the system to do that job. So both on -- Bodman has been around for a long time and I know people at Bodman that do the same thing and I think it's a great service certainly to the high school student, but more generally I think it's service to the Court system, and that's a good thing

for all our communities.

Okay. Very good. Pack it up and then you can just come around when you are ready and I'll be glad to say hello. Very good. Thank you.

THE CLERK: Court is adjourned.

(Proceeding concluded, 3:36 p.m.)

REPORTER'S CERTIFICATE

I, Paul G. Brandell, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of the proceedings had in the within entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ Paul G. Brandell

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