UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

CIVIL MINUTES -- GENERAL

Case No. **LA CV 18-07389-VBF**-JPRx **Dated: November 1, 2019**

Title: ***Delia Gambino, Plaintiff v. Metropolitan Life Insurance Co., Defendant***

PRESENT: HON. VALERIE BAKER FAIRBANK, U.S. DISTRICT JUDGE

Stephen Montes Kerr	N/A
Courtroom Deputy	Court Reporter

Attorney Present for Plaintiff: n/a Attorney Present for Def.: n/a

Proceedings (in chambers): ORDER Denying Doc #20 (MLIC's Motion to Dismiss); Permitting the Parties to File Dispositive Motions by February 7, 2019, With Responses by March 10, 2020 and Replies by Monday, April 3, 2020

This is an action under the federal Employee Retirement Income Security Act of 1974, as amended ("ERISA"). *See* Doc 1 ¶¶ 16-17. Represented by counsel, plaintiff filed the complaint in 2018, Doc 1 ¶¶ 8-9, seeking to compel Metropolitan Life Insurance Company ("MLIC") to pay her under her late husband's accidental-death insurance policy. Plaintiff has the burden of proving that the death was covered under the policy; if plaintiff carries that burden, then MLIC will have the burden of proving that a valid exclusion applies. *See Smith v. Stonebridge Life Ins. Co.*, 582 F. Supp.2d 1209, 1217 (N.D. Cal. 2008) (citing *Searle v. Allstate Life Ins. Co.*, 696 P.2d 1308 (Cal. 1995)). MLIC filed a Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim (Doc 20). Plaintiff filed opposition (Doc 21), and

MLIC filed a reply (Doc 22). The parties filed supplemental briefs addressing whether ERISA preempts California Insurance Code §§ 10369.1 and 10369.12 (Docs 24 & 25).

MLIC issued group insurance policy 119537-1-G ("the Plan"), which included life insurance coverage for employees who elected it. *See* Doc 1 ¶¶ 3-4; Doc 20-2 at 2 ¶¶ 1, 3, 5. The policy's Situs provision states, "This policy is issued for delivery in and governed by the laws of Massachusetts", Doc 20-2 ¶ 4, and the notice accompanying the operative certificate lists a Massachusetts address for plan administrator UGL Unicco. *See id.* at 3-4 ¶ 7.

Giuseppe chose accidental-death insurance of $518,768, naming plaintiff as primary beneficiary, Doc 1 ¶¶ 22-25. The Gambinos paid all required premiums through July 23, 2015, when Giuseppe died "as a result of an accidental overdose of prescription medication prescribed to him by his physician", Doc 1 ¶¶ 26-27. Dr. Greene's Death Certificate states that the death was an accident caused by "acute hydrocodone-diazepam toxicity", Doc 1 ¶ 36.

MLIC denied plaintiff's claim, Doc 1 ¶ 29, quoting page 74 of the certificate:

> "**ACCIDENTAL DEATH AND DISMEMBERMENT INSURANCE**
> If You or a Dependent sustain an accidental injury that is the Direct and Sole Cause of a covered Loss described in the SCHEDULE OF BENEFITS, Proof of the accidental injury and Covered Loss must be sent to us. When We [sic] receive such Proof We will review the claim and, if we approved it, will pay the insurance in effect on the date of the injury.
> * * *
> **EXCLUSIONS (See notice page for residents of Missouri)**
> *We will not pay benefits under this section for any loss caused or contributed to by:* * * * *8. The voluntary intake or use by any means of:*
> - *any drug, medication or sedative, unless it is:*
> - *taken or used as prescribed by a physician.*"

Doc 20-5 (italics added). **MetLife's March 18, 2016 Denial Letter explained its view:**

> [T]he Certificate of Death issued by the State of California for Giuseppe Gambino indicates that his manner of death [w]as "Acute Hydrocodone - Diazepam Toxicity". The manner is listed as "Accident", but that does not automatically guarantee eligibility for Accidental Death Insurance Benefits.
>
> The Toxicology Reports that we received showed the presence of Diazepam at 230 ng/mL and Hydrocodone at 19 ug/mL. We also received medical records pertaining to Mr. Gambino's prescriptions.

> *We asked an independent physician to review this claim. The physician noted that Mr. Gambino was prescribed Hydrocodone and Diazepam, but the toxic concentrations of Hydrocodone indicate that he was not taking that drug as prescribed. The concentration of Hydrocodone is inconsistent with the drug being taken as 10 mg twice daily, as was prescribed to Mr. Gambino.*
>
> *For the Plan exclusions above, Accidental Death Insurance benefits are not payable if a Loss results from the use of a drug or medi[c]ation that is not taken as prescribed by a physician, as is the case here.*

Doc 20-5 at 3 (italics added). **MetLife denied plaintiff's ensuing appeal as follows**:

> You have appealed the denial of your client's claim on the basis that Mr. Gambino's death was accidental, as it was neither expected nor intentional. You further claim that Mr. Gambino was prescribed all the medications that he was taking at the time of his death and that Mr. Gambino's Hydrocodone level was only slightly above the toxic level.
>
> You further claim that, had Mr. Gambino ingested the 17 Hydrocodone pills that were missing from his prescription bottle, his level of Hydrocodone would have been lethal rather than toxic.
>
> *We note that the Coroner's Report states that, shortly before his death, Mr. Gambino "complained to his wife of indigestion and anxiety and took three (3) tablets instead of the one (1) he normally takes." The Toxicology Report further substantiates that the level of Hydrocodone in Mr. Gambino's system was not consistent with the medication taken as prescribed, which was 10 mg of Hydrocodone twice daily.*
>
> *In addition, Dr. Derr Bailey has noted that Mr. Gambino's Hydrocodone levels were in the same range as at least 25 other individuals who died of Hydrocodone overdose, as reported in medical literature.*
>
> *For the reasons described above and in the initial denial letter, Mr. Gambino's death is excluded under the Plan for Accidental Death Benefits as he died as a result of not taking his medication as prescribed by a physician.*
>
> *Although the medication was prescribed, he was not taking the medications as directed by the physician.*
>
> Therefore, . . . we must uphold the denial of the claim.

Doc 20-4, Oct. 12, 2018 Nguyen Dec Ex. A (Aug. 4, 2016 Letter) (italics and ¶ breaks added).

Plaintiff gave MLIC proof that Giuseppe had prescriptions for all the medications he had taken at the time of his death, and "MLIC did not dispute that", Doc 1 at 5 ¶¶ 34-35. Plaintiff rightly notes that any state law "which regulates insurance" is exempted from ERISA preemption, *see* 29 U.S.C. § 1144(b)(2)(A), and that both the California Insurance Code

sections in question regulate insurance as the Supreme Court has defined the term.

> California law requires all disability policies delivered or issued for delivery to any person in California to contain language equal [to] or more favorable than the language appearing in California *Insurance Code* sections 10369.2 to 10369.12, inclusive (CAL. INS. CODE § 10369.1 (West 2018)).
>
> [CIC] 10369.12 applies to regulating controlled[-]substance exclusions set forth in insurance policies. It provides, in pertinent part, "[t]he insurer shall not be liable for any loss sustained or contracted in consequence of the insured's being intoxicated or under the influence of any controlled substance unless administered on the advice of a physician."
>
> [CIC] 10369.12 only requires that the medications be lawfully prescribed; it does not require that medications be taken in exact dosages as prescribed by a physician as set forth in MetLife's denial letter.
>
> MLIC has inserted an exclusion into the policy issued [by] the Plan that is more restrictive than [CIC] 10369.12. As such, MLIC's policy terms are less favorable than California law to the insured and the beneficiary, specifically, the exclusion applicable to "controlled substance" is contrary to the public policy of the State of California and is consequently null and void.
>
> The statutory language of [CIC]10369.12 controls if the Policy language is less favorable to the insured and the beneficiary.

Doc 1 at 5-6 ¶¶ 37-47. **For reasons set forth below, the Court holds that ERISA does not preempt the application of California Insurance Code sections 10369.1 and 10369.12.**

MetLife contends that Massachusetts law applies because of the Policy Situs choice-of-law provision. *See* Doc 20-1 at 11-16 and Doc 22. A choice-of-law provision in an ERISA plan document generally is enforceable under federal common law if "not unreasonable or fundamentally unfair." *Wang Labs., Inc. v. Kagan*, 990 F.2d 1126, 1129-30 (9th Cir. 1993). MetLife argues that because the choice-of-law provision "is contained in a master group policy that was delivered in Massachusetts to a Massachusetts company", "[t]here is no reason not to enforce the choice of law provision in this case." Doc 20-1 at 2. The Court disagrees.

"The Ninth Circuit identified the standard for determining whether to enforce a choice of law provision in an ERISA plan in" *Wang Labs*. In *Wang*, California was the forum State,

> but the ERISA plan had a choice of law provision which stated that the parties were to be "governed by the law of Massachusetts." *Id.* at 1128.

> [T]he Ninth Circuit rejected the plaintiff's argument that ERISA preempted the contractual choice of law provision, on the ground that "ERISA does not supply a statute of limitations", and thus "cannot preempt the applicable state law statute of limitations." *Id.* The *Kagan* Court then held that the appropriate state statute of limitations was a question of federal law, and under federal law, "[t]he parties' choice of limitations period in an insurance contract is generally enforced . . . unless it is unreasonable or fundamentally unfair." *Id.* . . . .
>
> While nothing that the court "ordinarily borrow[s] the forum state's statute of limitations so long as application of the state statute's time period would not impede effectuation of federal policy," it held that the parties' contractual choice of law provision i.e., the law of Massachusetts applied because it was not unreasonable or fundamentally unfair in the case. *Id.* at 1129. . . .

Logan v. Union Sec. Ins. Co., 2014 WL 12631653, *3 (C.D. Cal. Aug. 4, 2014). It might appear that under *Kagan*, the policy provision choosing Massachusetts law must be applied. "In *Kagan*, however, the Ninth Circuit applied the choice of law provision only after determining that ERISA did not preempt the state law on the relevant issue." *Id.* at *3. As Judge Gee has said, "If ERISA preempts state law with respect to the construction of the [coverage] exclusion, then the choice of law provision of the Policy is irrelevant." *Id.* The Court accordingly turns to the question of preemption.

ERISA has a "savings clause" that "saves from preemption 'any law of any State which regulates insurance, banking, or Securities.'" *Morrison*, 584 F.3d at 841 (quoting 29 U.S.C. § 1144(b)(2)(A)). Although ERISA has broad preemptive force, its savings clause reclaims a substantial amount of ground. *See Standard Ins. Co. v. Morrison*, 584 F.3d 837, 842 (9th Cir. 2009) (citation omitted). **To escape preemption,** "the state law must be specifically directed toward entities engaged in insurance" **a**nd "must substantially affect the risk pooling arrangement between the insurer and the insured." *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 342 (2003). Even where a state law is arguably covered by the savings clause, the state law is still preempted by ERISA if it provides "a separate vehicle to assert a claim for benefits outside of, or in addition to, ERISA's remedial scheme." *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 217-218 (2004) ("*Davila*").

CIC § 10369.12 relates to disability insurance plans covered by ERISA, as the Supreme

Court has broadly construed "relates to" for this purpose. *See* Doc 24 at 24 (citing *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 87 (1983). Thus, **CIC § 10369.12 would be preempted unless it qualifies for the ERISA savings clause. *See Logan*, 2014 WL 12631653 at *4.**

The Court determines that CIC § 10369.12 is "specifically directed toward entities engaged in insurance", so it satisfies prong one of the ERISA savings clause. As MetLife admits, a state law is specifically directed toward entities engaged in insurance simply if it is "grounded in policy concerns specific to the insurance industry." *Unum Life Ins. Co. of America v. Ward*, 526 U.S. 358, 372 (1999). MetLife notes that "where state statutes mandate that certain provisions be included in group insurance policies and/or that certain types of coverage be provided to insureds, such statutes are not usually preempted, ..." Doc 24 at 5 (citing *Met. Life Ins. Co. v. Mass.*, 471 U.S. 724 (1985)). This does not aid MetLife's argument on the first prong, and helps defeat its argument on the second prong. By authorizing insurers to impose only the precisely listed "Intoxication and Controlled Substances" exclusion on a disability policy or a version that is equally or more favorable to the insured, CIC 10369.12(a) necessarily prohibits insurers from imposing any "Intoxication and Controlled Substances" exclusion on a disability policy that has the effect of providing less coverage than that specifically-authorized exclusion would allow.

Accordingly, CIC 10369.12 meets the second prong of the savings clause, because it "substantially affect[s] the risk pooling arrangement", *KAHP*, 538 U.S. at 342. Whenever a provision narrows "[t]he scope of permissible bargains between insurers and insureds", it affects that arrangement. CIC 10369.12 narrows the scope of permissible bargains because it prohibits insurers from imposing a controlled-substance exclusion that excludes coverage that would be provided under the statutorily permitted exclusion. *See Rush*, 536 U.S. at 355 (an Illinois statute narrowed the scope of permissible bargains by prohibiting policies in which the insured waived the right to independent review of an insurer's medical decision); *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 368-71 (1999) (California's notice-prejudice rule

narrowed the scope of permissible bargains); *Morrison*, 584 F.3d at 844-45.

Having determined that CIC § 10369.12 is not preempted, the Court must determine whether it *applies* to this insurance policy. The Court finds that it does.

California Insurance Code § 10369.1, Wording of Policy Provisions, provides:

> Except as provided in section 10323[1], *no disability policy[2] delivered or issued for delivery to any person in this State shall contain provisions respecting the matters set forth in Sections 10369.2 through 10369.12, inclusive, unless such provisions are in the words that appear in such sections;*
>
> *provided, however, that the insurer may, at its option, use in lieu of any such provision a corresponding provision of different wording approved by the commissioner, which is not less favorable in any respect to the insured or the beneficiary.* * * *

Italics added. In turn, CIC § 10369.12(a), Intoxicants and Controlled Substances, provides:

> A disability policy may contain a provision in the form set forth herein.
>
> Intoxicants and controlled substances: The insurer shall not be liable for any

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[1] CIC section 10323, Inapplicable and Inconsistent Provisions, provides in its entirety:

> If any provision set forth in chapter 4a or 5a of this chapter [subsequently renumbered Art. 4 (CIC § 10350 *et seq.*) and Art. 5 (CIC § 10369.1 *et seq.*] is in whole or in part inapplicable to or inconsistent with the coverage provided by a particular form of policy[,] the insurer, with the approval of the commissioner, shall omit from any such policy any inapplicable provision or part of a provision, and shall modify any inconsistent provision or part of the provision in such manner as to make the provision as contained in the policy consistent with the coverage provided by the policy.

See Galanty v. Paul Revere Life Ins. Co., 1 P.3d 658, 671 (Cal. 2000).

[2] "Accidental death policies, such as that at issue here, fall within the definition of 'disability insurance' under the Insurance Code." *Heighley v. J.C. Penney Life Ins. Co.*, 257 F. Supp.2d 1241, 1249 (C.D. Cal. 2003) (citing Croskey et al., Cal. Practice Guide: Ins. Lit. § 6:480 (Rutter Group 2002) (citing Cal. Ins. Code § 106)) and *Williams v. Am. Cas. Co.*, 491 P.2d 398 (Cal. 1971)). Accordingly, "accidental death policies must contain the mandatory provisions required in disability insurance policies." *Heighley*, 257 F. Supp.2d at 1249 (citing Croskey § 6:480).

> loss sustained or contracted in consequence of the insured's being intoxicated or under the influence of any controlled substance unless administered on the advice of a physician.

MLIC contends that "10369.12 does *not* provide for extraterritorial application to an insurance policy that was neither issued for delivery nor delivered . . . in California."

> [T]he subject group insurance policy . . . was issued for delivery and delivered to an entity (Mr. Gambino's employer) in Massachusetts. That Massachusetts employer not Mr. Gambino or his beneficiary (Plaintiff) is the policyholder, and the Policy was not delivered to Mr. Gambino or any other person in California. * * * Plaintiff's claim that Mr. Gambino was in California when his Massachusetts employer provided him with a copy of one of the many certificates of insurance that is an exhibit to the Policy does not constitute delivery of *the Policy* to any person in California.
>
> Under these circumstances, Insurance Code Section 10369.12 a California statute has no bearing on Plaintiff's claim for Plan benefits or this case. To hold otherwise would violate California's well-established presumption against extraterritorial application of its laws . . . . * * *

Doc 24 at 5-6. The Court rejects MLIC's position largely for reasons stated by the plaintiff:

> [T]he plain language of the master group policy states as follows:
>
> > **GENERAL PROVISIONS (Continued)**
> > **Certificates.** MetLife will issue certificates to the Policyholder *for delivery to each Covered Person*, as appropriate. Such certificate will describe the Covered Person's benefits and rights under this Policy. "Certificate" includes any of MetLife's insurance riders, notices or other attachments to the certificate.
>
> Master Group Policy, Exh. A (ECF No. 20-3, at p.10) This provision indisputably required MetLife to issue a certificate "for delivery" to Mr. Gambino who was living and working in California when he obtained the insurance concerning the AD&D [accidental death] coverage.
>
> Just because the certificate first passed through a middleman, Mr. Gambino's employer [which had an office in Massachusetts], does not change the fact that it was ultimately delivered to him in California.
>
> Moreover, the certificate contains a page directed specifically at California residents. * * * MetLife clearly sought the benefit of insuring risks in the State of California so that it could collect premiums from California residents.

Doc 25 at 8. Plaintiff also rebuts MLIC's argument that plaintiff has no authority that delivery of the *certificate* to Gambino constitutes delivery of the *policy* for purposes of CIC

§ 10369.1. MetLife provides no authority to contradict *John Hancock Mut. Life Ins. Co. v. Dorman*, 108 F.2d 220, 221-22 (9th Cir. 1939), where our Circuit stated:

> The contract is embodied in several documents. One, hereafter called the master policy, is issued to the employer. Another is a certificate, issued to the employee whose life and disability are covered." * * * A "certificate required to be issued by the master policy to determine the terms and conditions of the insurer's liability is a part of the policy."

Consistent with *Dorman*, District Judge Alsup recently held as follows:

> The certificate is part of the plan at issue, and it expressly says so. On one of the title pages, the certificate provides, "The terms of the policy which affect an employee's insurance are contained in the following pages. This Certificate of Insurance and the following pages will become Your booklet-certificate. This booklet-certificate is a part of the policy. * * * "

Eppler v. Hartford Life & Acc. Ins. Co., 2008 WL 3266469, *5 (N.D. Cal. Aug. 7, 2008), *aff'd*, 359 F. App'x 826 (9th Cir. 2009). Applying *Dorman*, the Court notes that the group master policy here required issuance of the certificate in question; the group master policy here required the certificate to describe all rights and benefits under the policy; and the certificate here was ninety pages long and did describe all the rights and benefits of the insured/beneficiary, *see* Master Group Policy Ex. A (Doc 20-3) at 10, while the group master policy itself did not state all the terms governing coverage and exclusions

Therefore, the certificate was an integral part of the policy under *Dorman*, and under the circumstances of this case (based on the wording and interplay of the group master policy and the certificate), the delivery of *the certificate* to Giuseppe constituted delivery of "*a policy*" to him. That makes CIC § 10369.1, and therefore § 10369.12, applicable to this policy and coverage dispute. *See* CIC § 10369.1 (stating that it applies to disability insurance policies "*delivered* or issued for delivery *to any person in this State*") (italics added).

Finally, CIC 10369.1 would apply even if delivery of the certificate to Giuseppe in California did not constitute delivery of the *policy* to him in California. This is because plaintiff has shown that the policy was also "issued for delivery" in California, which is the

second way to trigger application of CIC 10369.1. As plaintiff points out, the Group Master Policy's section entitled General Provisions - Certificates, states, "MetLife will issue certificates to the Policyholder *for delivery to each Covered Person*, as appropriate." Master Group Policy Ex. A (Doc 20-3) at 10 (italics added). The Covered Person here, decedent Giuseppe Gambino, was known to the insurer to be living and working in California when he elected its accidental-death coverage. Thus, the group master policy clearly contemplated that the certificates which "will", i.e., must describe all of the Covered Person's "rights and benefits under the Policy" could be delivered to him in California.

The Court intimates no opinion as to the merits, i.e., whether these two California Insurance Code provisions obligate MetLife to pay plaintiff. *See, e.g., Smith v. Stonebridge Life Ins. Co.*, 582 F. Supp.2d 1209 (N.D. Cal. 2008) (applying CIC §§ 10369.1 and 10369.12); *Ciberay v. L-3 Comms. Corp. Master Life & AD&D Ins. Plans*, 2013 WL 2481539 (S.D. Cal. June 10, 2013) (applying CIC §§ 10369.1 and 10369.12), *app. dismissed*, No. 13-56201 (9th Cir. Oct. 25, 2013). **Having denied MLIC's motion to dismiss, the Court will set deadlines for the parties to file summary-judgment motions if they so choose.**

ORDER

No later than Monday, February 7, 2020, parties MAY MOVE for summary judgment.

No later than Fri. March 10, 2020, the non-movant SHALL FILE a response brief.

No later than Mon. April 3, 2020, the movant MAY FILE a reply brief.

If the motion deadline passes without either party filing a summary-judgment motion, the Court will issue an Order scheduling further proceedings including a pretrial conference.

IT IS SO ORDERED.

Valerie Baker Fairbank

VALERIE BAKER FAIRBANK
Senior United States District Judge