IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

RALPH MENOTTI,	)	
	)	
Plaintiff,	)	
	)	**No. 08 C 2767**
v.	)	
	)	**Magistrate Judge Nolan**
THE METROPOLITAN LIFE INSURANCE COMPANY,	)	
	)	
Defendant.	)	

METROPOLITAN LIFE INSURANCE COMPANY'S
MEMORANDUM IN SUPPORT OF ITS
MOTION TO DISMISS COUNT II OF THE SECOND AMENDED COMPLAINT

Defendant, METROPOLITAN LIFE INSURANCE COMPANY ("MetLife"), by its attorneys, Michael J. Smith and Warren von Schleicher, hereby submits its Memorandum in Support of its Motion to Dismiss Count II of the Second Amended Complaint, pursuant to Fed. R. Civ. P. 12(b)(6), and in support thereof, states as follows:

INTRODUCTION

This case involves a straightforward dispute over disability insurance coverage. The plaintiff, Ralph Menotti ("Menotti"), a former commodities pit trader, is an insured under a disability income policy ("Policy") issued by New England Mutual Life Insurance Company (now part of MetLife). In order to qualify for monthly Total Disability benefits under the Policy, the insured must be (i) unable to perform the important duties of his occupation due to a medical condition, (ii) receiving physician's care, and (iii) not engaged in any other gainful occupation. (Sec. Am. Comp., Ex. A, Policy pg. 6). Menotti claimed to be unable to perform the important duties of his occupation as a pit trader due to lumbar back pain. MetLife evaluated Menotti's claim and paid Total Disability benefits to him for approximately 18 months, but declined to pay

benefits after receiving evidence that he no longer satisfied the Policy's three-pronged definition of Total Disability.

In Counts I and III of the Second Amended Complaint, which MetLife has answered, Menotti asserts a claim against MetLife for breach of contract to recover monthly Total Disability benefits allegedly due, as well as a claim for statutory penalties under §155 of the Illinois Insurance Code, 215 ILCS 5/155. In Count II, however, Menotti seeks to recover a lump sum award of future disability benefits through age 65, which is the Policy's maximum benefit period, based on a theory of anticipatory repudiation. Menotti, in short, wants to recover in this suit all benefits potentially payable under the Policy in the future, without having to satisfy his contractual conditions precedent including the Policy's definition of Total Disability.

An action for anticipatory repudiation entails a dispute over the validity of the insurance policy itself. But MetLife has not repudiated the Policy, nor are there any allegations that MetLife repudiated the Policy in the Second Amended Complaint. The parties simply disagree about whether Menotti has satisfied the Policy's definition of Total Disability. A dispute over coverage may create a viable contract dispute to recover benefits *currently* due, but it does not entitle Menotti to circumvent his contractual conditions precedent and recover *future* benefits based on a theory of anticipatory repudiation. Otherwise, every coverage dispute would be transformed into an action for anticipatory repudiation.

Menotti's eligibility for benefits in the future hinges on whether he satisfies the Policy's definition of Total Disability in the future. It would be impossible to foretell Menotti's medical condition, or whether he might obtain gainful employment in another occupation, years into the indefinite future. Yet the occurrence of either of these events would render Menotti ineligible to receive Total Disability benefits. Because an action to recover future insurance benefits

disregards the contractual conditions precedent that the insured must satisfy, Illinois law views an action for anticipatory repudiation in the insurance context as a claim for insurance bad faith. Section 155 of the Illinois Insurance Code was enacted as the exclusive remedy for an insurer's bad faith denial of benefits. Section 155 completely preempts Menotti's claim for anticipatory repudiation. Accordingly, Count II of the Second Amended Complaint should be dismissed due to failure to state a cognizable claim.

ARGUMENT

I. Menotti Fails To State A Cognizable Claim For Anticipatory Breach.

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) challenges the sufficiency of the pleadings for failure to state a cognizable claim. To survive a motion to dismiss, a complaint must set forth sufficient facts establishing a plausible right to relief. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1964 (2007). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1965 (citations omitted). Even under liberal federal notice pleading standards, the factual allegations of the complaint "must be enough to raise a right to relief above the speculative level." *Id.* (citations omitted).

The Illinois Supreme Court has held that a claim for anticipatory repudiation requires a clear repudiation of the validity of the contract itself and not merely a disagreement over coverage:

> Where two contracting parties differ as to the interpretation of the contract or as to its legal effects, an offer to perform in accordance with his own interpretation made by one of the parties is not in itself an anticipatory breach. In order to constitute such a breach, the offer must be accompanied by a clear manifestation of intention not to perform in accordance with any other interpretation.

In re Marriage of Olsen, 124 Ill.2d 19, 24, 528 N.E.2d 684, 686 (1988). The court in *Feliberty v. UnumProvident Corp.*, No. 03 C 7569, 2003 WL 22991859 (N.D.Ill. Dec. 16, 2003) considered a claim for anticipatory repudiation of a disability policy in the context of determining the amount in controversy. Applying the Illinois Supreme Court's holding in *Olsen*, the *Feliberty* court held that the parties' dispute over whether the plaintiff satisfied the policy's definition of Total Disability was not actionable as a claim for future damages based on anticipatory repudiation: "[T]he allegations in the complaint suggest a dispute over the meaning of a contractual provision, not a wholesale rejection of contractual responsibilities." *Id*. at *2-3. *Accord Keck v. Fidelity and Casualty Company of New York*, 359 F.2d 840, 841-842 (7th Cir. 1966).

The Second Amended Complaint reflects a dispute over the meaning and application of the Policy's Total Disability definition and not a repudiation of the validity of the Policy itself. Menotti alleges that after MetLife initially made disability benefit payments under the Policy, MetLife later determined Menotti was no longer disabled "within the meaning of the Plan." (Sec. Am. Comp., ¶¶ 9, 10, 14, 18).[1] Menotti disputes MetLife's determination and maintains that he is disabled "within the meaning of his policy." (Sec. Am. Comp., ¶ 11). Menotti, however, fails to include any allegation that MetLife disputes the validity of the Policy. In fact, the Second Amended Complaint reflects that MetLife acknowledged the Policy's validity when it paid disability benefits to Menotti for approximately 18 months, then later determined that Menotti no longer satisfied the Policy's definition of Total Disability. *See New York Life Ins. Co. v. Viglas*, 297 U.S. 672, 676-77 (1936) (holding there is no repudiation of a disability policy when the insurer "appealed to the[] authority [of the policy provisions] and endeavored to apply

[1] Menotti's reference to the Policy as the "Plan" appears to be a remnant of his initial Complaint, in which he erroneously alleged that the Policy was part of an ERISA plan.

them."). Menotti, therefore, fails to state a plausible claim for anticipatory repudiation that raises a right to relief above the speculative level, as required by *Twombly*.

II. Section 155 Of The Illinois Insurance Code Preempts Menotti's Claim For Anticipatory Breach.

Whether Menotti might be eligible to receive future disability benefits depends on whether he satisfies the Policy's three-pronged definition of Total Disability in the future. It would be impossible for the court to divine the state of Menotti's physical health or his employment status years in the future. Menotti's back injury might resolve with medical treatment, he might obtain gainful employment, or he might not live throughout the Policy's maximum benefit period. The occurrence of any of these events would preclude Menotti from recovering Total Disability benefits through age 65. An insured may not recover future disability benefits when the right to recover those benefits is subject to conditions precedent. *See Shyman v. Unum Life Ins. Co. of America*, No. 01 C 7366, 2002 WL 31133244, at *1 (N.D. Ill. Sept. 20, 2002) ("Whether Shyman will be entitled to disability benefits in the future depends upon certain conditions precedent- *i.e.*, whether he meets the terms and conditions for coverage in the future. And as the Seventh Circuit held in *Morgan*, such conditional payments cannot be enforced until due.") (*citing Morgan v. Aetna Life Ins. Co*., 157 F.2d 527, 530 (7th Cir. 1946)).

An award of future benefits would relieve Menotti of his obligation to satisfy his contractual conditions precedent under the Policy, and therefore constitutes a punitive remedy for MetLife's denial of benefits. Section 155 of the Illinois Insurance Code provides the exclusive remedy for an insurer's bad faith denial of benefits. Under Illinois law a claim for future benefits under a disability insurance policy based on a theory of anticipatory breach is in effect a claim for bad faith denial of benefits. Consequently, Illinois courts have held that §155 preempts claims based on anticipatory repudiation.

For example, in *Busse v. Paul Revere Life Ins. Co.*, 341 Ill.App.3d 589, 793 N.E.2d 779 (1st Dist. 2003), the plaintiff sought a lump sum payment for future disability benefits based on a theory that the insurer's denial of benefits constituted a repudiation of the policy. *Id*. at 592-93. The *Busse* court rejected the plaintiff's attempt to "end run" the remedies available under the Illinois Insurance Code and held that §155 preempts claims for future disability benefits premised on a theory of anticipatory repudiation:

> We agree with the companies that Dr. Busse's claim is in effect one for bad faith denial of benefits, and is therefore preempted by §155, which the legislature has determined to be the remedy for such conduct.
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> ***
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> The court in *Cramer* [*v. Ins. Exchange Agency*, 174 Ill.2d 513, 675 N.E.2d 897 (1996)] cautioned against litigant attempts to make an "end run" around the limits imposed by §155 by creating a common law action "that remedies the same basic evil." [Internal citations and text omitted]. Because we find that Dr. Busse's claim falls within the purview of §155, we hold that the trial court properly held that future damages based upon a theory of anticipatory repudiation are not recoverable.

Busse, 341 Ill.App.3d at 598, 793 N.E.2d at 786. *See also Sieron v. Hanover Fire and Cas. Ins. Co*., 485 F.Supp.2d 954, 961 (S.D. Ill. 2007) ("When a purported tort claim boils down to an insurer's failure to pay, the remedies provided in §155 and for breach of contract cover the claim and are sufficient.") (*citing Cramer*, 174 Ill.2d at 528, 675 N.E.2d at 905).

The Illinois legislature enacted §155 as the exclusive extra-contractual remedy available to "an insured who encounters unnecessary difficulties when an insurer withholds policy benefits." *Golden Rule Ins. Co. v. Schwartz*, 203 Ill.2d 456, 468-469, 786 N.E.2d 1010, 1018 (2003) (*quoting Richardson v. Illinois Power Co.*, 217 Ill.App.3d 708, 711, 577 N.E.2d 823, 826 (5th Dist. 1991)). Illinois courts have refused to supplement that statutory remedy with additional remedies based on the same alleged tortious conduct. *See Cramer*, 174 Ill.2d at 527. In determining whether a plaintiff has alleged a cognizable tort claim independent of the statutory

remedies of §155, courts must "look beyond the legal theory asserted to the conduct forming the basis for the claim." *Id.*

Menotti's claim for anticipatory breach of contract in Count II of the Second Amended Complaint is premised on the same alleged conduct that forms the basis of his breach of contract and §155 claims. Looking beyond the legal theory asserted to the conduct forming the basis of the claim, as *Cramer* instructs, Menotti's anticipatory repudiation and §155 claims are the same. Menotti's anticipatory repudiation claim is subsumed within and preempted by his claims for breach of contract and violation of §155.

CONCLUSION

Menotti fails to allege that MetLife repudiated the validity of the Policy itself. The allegations of the Second Amended Complaint reflect a coverage dispute based on differing interpretations of the Policy. Further, Menotti's claim to recover future Total Disability benefits, without requiring Menotti to fulfill his contractual conditions precedent in the future, is subsumed within and preempted by §155 of the Illinois Insurance Code, which provides the exclusive remedy for an insurer's bad faith denial of benefits. Accordingly, Count II of the Second Amended Complaint should be dismissed with prejudice.

WHEREFORE, defendant, METROPOLITAN LIFE INSURANCE COMPANY, respectfully requests dismissal of Count II of the Second Amended Complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following attorney(s) of record:

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Respectfully submitted,

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