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
REPLY IN FURTHER 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 Reply in Further Support of its Motion to Dismiss Count II of the Second Amended Complaint, pursuant to Fed. R. Civ. P. 12(b)(6):

INTRODUCTION

This case involves a straightforward dispute over disability insurance coverage. In Count II of the Second Amended Complaint, the plaintiff, Ralph Menotti ("Menotti"), seeks to recover a lump sum award of future disability benefits through age 65, the Policy's maximum benefit period, based on a theory of anticipatory repudiation. The Illinois Appellate Court has held that §155 completely preempts claims for anticipatory repudiation of an insurance policy. Menotti, in his Response, acknowledges this Illinois authority, but he fails to proffer any distinguishing or contrary authority. Menotti's claim for anticipatory repudiation clearly is preempted by §155 of the Illinois Insurance Code.

Menotti's claim for anticipatory repudiation seeks to recover speculative future benefits potentially payable under the Policy, while relieving Menotti of his obligation to satisfy his contractual conditions precedent, including 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 allow Menotti to 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 dire predictions of a future "avalanche of litigation" notwithstanding, the court cannot divine Menotti's future medical condition or render an advisory opinion on a hypothetical dispute which is not yet in existence and therefore is not ripe for adjudication. Accordingly, Count II of the Second Amended Complaint should be dismissed due to failure to state a cognizable claim.

ARGUMENT

Where, as here, the court has jurisdiction based on diversity, the court "must apply the state law as declared by the highest state court or otherwise by the intermediate appellate court of the state." *Kutsugeras v. AVCO Corp.*, 973 F.2d 1341, 1344-46 (7th Cir. 1992). Menotti's claims in the Second Amended Complaint are governed by the substantive law of Illinois. The Illinois Appellate Court, in turn, has held that §155 of the Illinois Insurance Code preempts claims for anticipatory repudiation of an insurance contract:

> We agree with the companies that Dr. Busse's claim for anticipatory breach 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.

Busse v. Paul Revere Life Ins. Co., 341 Ill.App.3d 589, 598, 793 N.E.2d 779, 786 (1st Dist. 2003).

In his Response, Menotti acknowledges the holding in *Busse* but fails to submit any contrary authority. (Pl. Resp. at pg. 5). Menotti's only response is to dismiss *Busse* as merely an Illinois Appellate Court decision rather than a decision rendered by the Illinois Supreme Court. Illinois Appellate Court holdings are controlling authority when federal jurisdiction is based on diversity and cannot simply be dismissed. See *Baltzell v. R&R Trucking Co.*, 554 F.3d 1124, 1130 (7th Cir. 2009) ("If there is no prevailing authority from [the Illinois Supreme Court], we give great weight to the holdings of the Illinois appellate courts."); *Kutsugeras*, 973 F.2d at 344-46 (7th Cir. 1992) (describing as "meritless" the plaintiff's argument that state appellate court decisions need not be followed by federal courts sitting in diversity); *Brown & Brown, Inc. v. Ali*, 592 F.Supp.2d 1009, 1043 (N.D. Ill. 2009) (holding that an Illinois appellate court decision directly on point should be applied when the Illinois Supreme Court has not decided the issue). Menotti's claim for anticipatory breach, therefore, is pre-empted by §155 pursuant to the Illinois Appellate Court's decision in *Busse*.

A claim to recover future disability benefits, moreover, is speculative. When "the issue is whether the insured has satisfied the terms and conditions for coverage under the disability insurance policy, the damages available to the insured if he prevails are the amount of insurance benefits in default at the *commencement* of the suit." *Shyman v. Unum Life Ins. Co. of America*, No. 01 C 7366, 2002 WL 31133244, at *1 (N.D. Ill. Sept. 20, 2002) (emphasis in the original) (citing *Morgan v. Aetna Life Ins. Co.*, 157 F.2d 527, 530 (7th Cir. 1946) and *Trainor v. Mutual Life Ins. Co.*, 131 F.2d 895, 897 (7th Cir. 1942)).

It is impossible for the court to adjudicate 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. Menotti's potential eligibility for benefits in the future, therefore, is dependent on conditions precedent that cannot be presently determined or enforced. See *Shyman*, 2002 WL 31133244, at *1 (holding "conditional payments cannot be enforced until due.").

Despite Menotti's threats of a potential "avalanche of litigation" in the future, federal courts cannot render advisory opinions on hypothetical or speculative disputes over future disability benefits. As stated by the Seventh Circuit:

> There is no justiciable controversy with respect to the plaintiff's right to receive the lump-sum [future benefits] payment, because this 'right' may never come into existence. It cannot presently be determined; it can only be determined at the end of the 200-week period.

Keck v. Fidelity and Casualty Company of New York, 359 F.2d 840, 842 (7th Cir. 1966). See also *Hinrichs v. Whitburn*, 975 F.2d 1329, 1333 (7th Cir. 1992) (federal courts "may not render advisory opinions" and cases are unripe for determination "when the parties point only to hypothetical, speculative, or illusory disputes."); *Wisconsin Cent., Ltd. v. Shannon*, 539 F.3d 751, 759 (7th Cir. 2008) ("Ripeness is predicated on the 'central perception ... that courts should not render decisions absent a genuine need to resolve a real dispute,' and '[c]ases are unripe when the parties point only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts.'") (quoting *Lehn v. Holmes*, 364 F.3d 862, 867 (7th Cir. 2004), quoting 13A, Federal Practice & Procedure §3532.1, at 114 (2d ed.1984)).

Finally, Menotti fails to state a plausible claim for anticipatory repudiation that raises a right to relief above the speculative level, as required by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007). Menotti alleges merely a disagreement over whether he is disabled "within the meaning of his policy." (Sec. Am. Comp., ¶ 11). Anticipatory repudiation requires a complete rejection of contractual responsibilities. Menotti fails to allege MetLife has

rejected the Policy. A disagreement over coverage does not give rise to a justiciable claim for anticipatory repudiation. See *Keck*, 359 F.2d at 841 (holding anticipatory repudiation requires that "the validity of the insurance policy itself, and not merely the presence or absence of conditions measuring the insurer's liability thereunder, is the matter in dispute."); *Feliberty v. UnumProvident Corp.*, No. 03 C 7569, 2003 WL 22991859 at *3 (N.D. Ill. Dec. 16, 2003) (holding anticipatory repudiation was not alleged "because the complaint shows the dispute centers on [the insurer's] claim that [the insured] failed to satisfy conditions of coverage, rather than the validity of the underlying insurance policy.").

The case law cited in Menotti's Response reiterates that complete rejection of the policy is a *requirement* for a claim for anticipatory repudiation. See *Coltec Industries, Inc. v. Zurich American Ins. Co.*, No. 99 C 3192, 2000 WL 1231553, at *3 (N.D. Ill. Aug. 28, 2000) (allegations that insurer "refused to acknowledge the existence and terms of the policies" stated a claim for anticipatory repudiation); *Bituminous Casualty Corp. v. Commercial Union Ins. Co.*, 273 Ill.App.3d 923, 926-27, 652 N.E.2d 1192, 1194-95, (1st Dist. 1995) (allegations that insurer stated it "does not have the duty to indemnify" because the policy "contains no defense obligations" stated a claim).

But Menotti fails to allege that MetLife repudiated its Policy. To the contrary, Menotti alleges that MetLife initially approved his disability claim and paid benefits to him for approximately 18 months. (Sec. Am. Comp., ¶¶ 10-11). These allegations reflect that MetLife acknowledged the Policy rather than repudiated it. See *New York Life Ins. Co. v. Viglas*, 297 U.S. 672, 675-76 (1936) (holding there is no repudiation of a disability policy when the insurer made a determination that the insured was no longer disabled within the meaning of the provisions of the policy: "Far from repudiating those provisions, it appealed to their authority

and endeavored to apply them."). See also *McReady v. eBay, Inc.*, 453 F.3d 882, 888 (7th Cir. 2006) ("[I]f a plaintiff pleads facts which show he has no claim, then he has pled himself out of court.").

CONCLUSION

Menotti's claim to recover future Total Disability benefits, without requiring Menotti to fulfill his contractual conditions precedent in the future, is preempted by §155 of the Illinois Insurance Code, which provides the exclusive remedy for an insurer's bad faith denial of benefits. Menotti's hypothetical eligibility for benefits in the future fails to create a justiciable controversy. Accordingly, Count II of the Second Amended Complaint should be dismissed with prejudice.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 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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