276 F.3d 1236
United States Court of Appeals,
Eleventh Circuit.

Norman HOBBS, individually, and on behalf of a class of similarly situated persons, Samuel Irvine, individually, and on behalf of a class of similarly situated persons, Plaintiffs-Appellants,
v.
BLUE CROSS BLUE SHIELD OF ALABAMA, Defendant-Appellee.

No. 01-10019. | Dec. 21, 2001.

Licensed physician assistants brought class action in state court against health insurer alleging failure to reimburse cost of services rendered by physician assistants, in violation of state statute. Insurer removed action based on preemption by the Employee Retirement Income Security Act (**ERISA**). Physician assistants moved to remand. The United States District Court for the Middle District of Alabama, No. 99-01161-CV-S-N, Charles S. Coody, United States Magistrate Judge, 100 F.Supp.2d 1299, denied the motion, dismissed the action on the merits, and denied physician assistants' motion to tax costs and attorney fees. Physician assistants appealed. The Court of Appeals, Alarcon, Circuit Judge, sitting by designation, held that: (1) absent proof that physician assistants obtained an **assignment** of benefits from their patients, insurer failed to establish physician assistants' **derivative standing** to sue under **ERISA** and, thus, failed to show that **ERISA** completely preempted their state law claims, and (2) the Court of Appeals was unable to determine whether the district court properly denied the motion to tax costs and attorney fees.

Reversed in part with instructions, vacated and remanded in part with instructions.

Opinion, 270 F.3d 1324, superseded.

West Headnotes (11)

[1] **Removal of Cases**
Citizenship or Residence of Corporations

State law claim brought by citizens of Alabama against not-for-profit corporation having its principal place of business in Alabama was not removable under the district court's diversity jurisdiction. 28 U.S.C.A. § 1332.

[2] **Federal Courts**
Limited Jurisdiction; Dependent on Constitution or Statutes
Federal Courts
Determination of Question of Jurisdiction

Because federal courts are courts of limited jurisdiction, Court of Appeals must determine in each appeal whether subject matter jurisdiction exists over a pending action, whether or not this issue was raised before.

2 Cases that cite this headnote

[3] **Federal Courts**
Allegations in Pleadings in General
States
Preemption in General

Under the doctrine of complete preemption, plaintiff must have **standing** to sue under a relevant **ERISA** plan before a state law claim can be recharacterized as arising under federal law, subject to federal court jurisdiction. Employee Retirement Income Security Act of 1974, § 502, 29 U.S.C.A. § 1132.

8 Cases that cite this headnote

[4] **Labor and Employment**
Parties in General; **Standing**

Only parties that have **standing** to sue under **ERISA** are those listed in **ERISA's** civil enforcement provision. Employee Retirement Income Security Act of 1974, § 502, 29 U.S.C.A. § 1132.

3 Cases that cite this headnote

producing facts supporting the existence of federal subject matter jurisdiction by a preponderance of the evidence.

11 Cases that cite this headnote

[5] **Labor and Employment**
Parties in General; **Standing**

ERISA's civil enforcement section permits two categories of individuals to sue for benefits under an **ERISA** plan, plan beneficiaries and plan participants. Employee Retirement Income Security Act of 1974, § 502, 29 U.S.C.A. § 1132.

8 Cases that cite this headnote

[6] **Labor and Employment**
Who Is an Employee or Participant

Healthcare **providers** such as physician assistants generally are not considered "beneficiaries" or "participants" under **ERISA**. Employee Retirement Income Security Act of 1974, § 3(7, 8), 29 U.S.C.A. § 1002(7, 8).

10 Cases that cite this headnote

[7] **Labor and Employment**
Parties in General; **Standing**

While the Eleventh Circuit has allowed healthcare **providers** to use **derivative standing** to sue under **ERISA**, it has only done so when the healthcare **provider** had obtained a written **assignment** of claims from a patient who had **standing** to sue under **ERISA** as a "beneficiary" or "participant." Employee Retirement Income Security Act of 1974, § 3(7, 8), 29 U.S.C.A. § 1002(7, 8).

30 Cases that cite this headnote

[8] **Removal of Cases**
Evidence

Party seeking removal has the burden of

[9] **Federal Courts**
Allegations in Pleadings in General
Insurance
Health Care Benefits
States
Pensions and Benefits

Absent proof that plaintiff-physician assistants obtained an **assignment** of benefits from their patients, defendant-insurer failed to establish physician assistants' **derivative standing** to sue under **ERISA** and, thus, failed to show that **ERISA** completely preempted their state law claims against it, as required to recharacterize the claims as arising under federal law, subject to federal court jurisdiction. Employee Retirement Income Security Act of 1974, § 502, 29 U.S.C.A. § 1132.

19 Cases that cite this headnote

[10] **Federal Courts**
Costs, Attorney Fees and Other Allowances

Court of Appeals reviews the district court's denial of a motion to tax costs and attorney fees for abuse of discretion. 28 U.S.C.A. § 1447(c).

7 Cases that cite this headnote

[11] **Removal of Cases**
Review

Where district court did not set forth the basis for its denial of plaintiffs' motion to tax costs and attorney fees, so that Court of Appeals could not tell from the record whether it was premised upon its erroneous determination that removal was proper because plaintiffs' state law claims were completely preempted, it was appropriate

to vacate the order denying the motion to tax costs and attorney fees with instructions that the district court reconsider the question whether the motion should be granted in light of the fact that the matter had to be remanded to state court because the district court lacked federal question subject matter jurisdiction. 28 U.S.C.A. § 1447(c).

10 Cases that cite this headnote

Attorneys and Law Firms

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Appeal from the United States District Court for the Middle District of Alabama.
AMENDED OPINION

Before BIRCH, COX and ALARCÓN,* Circuit Judges.

Opinion

ALARCÓN, Circuit Judge:

Norman Hobbs and Samuel Irvine appeal from the denial of their motion to remand this action to state court. They contend that the district court erred in recharacterizing their state insurance law claim against Blue Cross and Blue Shield of Alabama ("Blue Cross") as "arising under" the Employee Retirement Income Security ***1239** Act of 1974 ("**ERISA**")[1] because they lack **standing** under **ERISA** to bring an action for the payment of their services as physician assistants.

Hobbs and Irvine also argue that the district court erred in dismissing this action on the merits, and in denying their motion to require Blue Cross to pay costs and attorney's fees[2] incurred as the result of the erroneous removal of this action from state court. We reverse the order denying the motion to remand and the dismissal of this action on the merits because we conclude that the district court erred in determining that this action was properly removed from state court as a recharacterized claim under **ERISA**. We also vacate the order denying costs and attorney's fees with instructions.

I

Hobbs and Irvine are licensed physician assistants pursuant to Alabama law. On August 26, 1999, they filed an action in the Circuit Court of Alabama seeking compensatory and punitive damages as well as injunctive relief against Blue Cross for its failure to comply with Alabama Code § 27-51-1. They filed the complaint individually and as representatives of a class of similarly situated Alabama physicians and physician assistants.

Hobbs and Irvine alleged that Blue Cross refused to include a provision in its health insurance policies for the payment of medical or surgical services **provided** by licensed physician assistants in violation of Ala.Code § 27-51-1(a). That statute **provides** in pertinent part:

> An insurance policy or contract **providing** for third-party payment or prepayment of health or medical expenses shall include a provision for the payment to a supervising physician for necessary medical or surgical services that are **provided** by a licensed physician assistant practicing under the supervision of the physician, and pursuant to the rules, regulations, and parameters for physician assistants, if the policy or contract pays for the same care and treatment **provided** by a licensed physician or doctor of osteopathy.

Ala.Code § 27-51-1(a).

[1] Hobbs and Irvine are citizens of Alabama. Blue Cross is a not-for-profit corporation having its principal place of business in Birmingham, Alabama. Thus, Hobbs and Irvine's state law claim is not removable under the district court's diversity jurisdiction. *See* 28 U.S.C. § 1332.

Blue Cross filed a notice of removal in the United States District Court for the Middle District of Alabama in which it alleged that the court had federal question jurisdiction because the state law claim set forth in the complaint was completely preempted under **ERISA**. Hobbs and Irvine filed a motion for remand. They argued that their state law claim is not ***1240** preempted pursuant to 29 U.S.C. § 1144(a) because that statute limits its scope

to "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan," and is not applicable to state laws that apply to all insurance policies and contracts, irrespective of the existence of an **ERISA** plan. Hobbs and Irvine also contended that Ala.Code § 27-51-1 comes within the saving clause contained in 29 U.S.C. § 1144(b)(2)(A) which exempts from preemption "any law of any State which regulates insurance." Hobbs and Irvine did not assert before the district court that it lacked subject matter jurisdiction to consider this matter as involving a recharacterized **ERISA** claim because Blue Cross had failed to demonstrate that Hobbs and Irvine had **standing** to sue under an **ERISA** plan.[3]

The district court denied the motion to remand without discussing whether the state law claim filed by Hobbs and Irvine pursuant to Ala.Code § 27-51-1 could be recharacterized as an artfully pleaded **ERISA** claim if they did not have **standing** to prosecute a cause of action under **ERISA**. *See Hobbs v. Blue Cross & Blue Shield of Ala.*, 100 F.Supp.2d 1299, 1302-09 (M.D.Ala.2000). The district court dismissed the action on the merits on the basis that "the plaintiffs' claims [as] stated in the complaint are not cognizable under **ERISA**."

II

[2] Hobbs and Irvine argue for the first time in this appeal that their state law claims are not completely preempted because they lack **standing** to bring an **ERISA** claim as they are not participants or beneficiaries of an employee health benefit plan. Because federal courts are courts of limited jurisdiction, we must determine in each appeal whether subject matter jurisdiction exists over a pending action whether or not this issue was raised before. *See Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 409-10 (11th Cir.1999) ("[A] federal court is obligated to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking.").

[3] Under the doctrine of complete preemption, a plaintiff must have **standing** to sue under a relevant **ERISA** plan before a state law claim can be recharacterized as arising under federal law, subject to federal court jurisdiction. *Butero v. Royal Maccabees Life Ins. Co.*, 174 F.3d 1207, 1211-12 (11th Cir.1999).

[4] [5] The only parties that have **standing** to sue under **ERISA** are those listed in the civil enforcement provision of **ERISA**, codified at 29 U.S.C. § 1132(a). *See Cagle v. Bruner*, 112 F.3d 1510, 1514 (11th Cir.1997) (per curiam). The civil enforcement provision **provides**, in relevant portion:

> (a) Persons empowered to bring a civil action
>
> A civil action may be brought-
>
> (1) by a participant or beneficiary-
>
> (A) for the relief **provided** for in subsection (c) of this section, or
>
> (B) 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;....

***1241** 29 U.S.C. § 1132(a). Thus, "**ERISA's** civil enforcement section permits two categories of individuals to sue for benefits under an **ERISA** plan-plan beneficiaries and plan participants." *Engelhardt v. Paul Revere Life Ins. Co.*, 139 F.3d 1346, 1351 (11th Cir.1998).

Under **ERISA**, a "participant" is "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit." 29 U.S.C. § 1002(7). A "beneficiary" is "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8); *Engelhardt*, 139 F.3d at 1351.

[6] Healthcare **providers** such as physician assistants generally are not considered "beneficiaries" or "participants" under **ERISA**. *Cf. Cagle*, 112 F.3d at 1514 (stating that healthcare **providers** lack independent **standing** under **ERISA**). Blue Cross contends that Hobbs and Irvine have **standing** under **ERISA** because they "are seeking benefits as purported assignees of their patients' benefits under **ERISA**-governed Blue Cross plans." Blue Cross maintains that pursuant to this court's decision in *Cagle v. Bruner*, 112 F.3d 1510 (11th Cir.1997), Hobbs and Irvine have **derivative** **standing** to sue on behalf of their patients. In *Cagle*, this court held that a healthcare **provider** had **derivative** **standing** to bring an action against an **ERISA** plan insurance fund where the record showed that the minor patient's father signed a form **assigning** his right to payment of medical benefits to the healthcare **provider**. 112 F.3d at 1512-16. This court explained that "if **provider**-assignees can sue for payment of benefits, an **assignment** will transfer the burden of

bringing suit from plan participants and beneficiaries to '**providers**[, who] are better situated and financed to pursue an action for benefits owed for their services.' " *Id.* at 1515 (alteration in original) (internal citation omitted).

More recently, this court held that "neither 1132(a) nor any other **ERISA** provision prevents **derivative** **standing** based upon an **assignment** of rights from an entity listed in that subsection." *HCA Health Servs. of Ga., Inc. v. Employers Health Ins. Co.,* 240 F.3d 982, 991 (11th Cir.2001) (quoting *Cagle,* 112 F.3d at 1515). In *HCA Health Services,* "the patient **assigned** to the medical center his right to recover 80% of the costs of the surgery from the insurance company." *Id.* at 985.

[7] [8] [9] Thus, while this court has allowed healthcare **providers** to use **derivative** **standing** to sue under **ERISA**, it has only done so when the healthcare **provider** had obtained a written **assignment** of claims from a patient who had **standing** to sue under **ERISA** as a "beneficiary" or "participant." *See Cagle,* 112 F.3d at 1512-13 (patient's father signed form **assigning** to hospital right to payment of dependent son's medical benefits under **ERISA**-governed health plan); *see also HCA Health Servs.,* 240 F.3d at 986, 989 (medical center obtained written **assignment** to receive payment from participant's **ERISA**-governed insurance benefits). Here, Blue Cross failed to demonstrate, in response to the motion to remand, that Hobbs and Irvine obtained an **assignment** of benefits from their patients. Indeed, Blue Cross admitted at oral argument that ***1242** it does not know whether Hobbs and Irvine received an **assignment** from an **ERISA** beneficiary or participant. Because Blue Cross failed to present proof of an **assignment**, its reliance on *Cagle* and *HCA Health Services* is misplaced.

As the party seeking removal, Blue Cross had the burden of producing facts supporting the existence of federal subject matter jurisdiction by a preponderance of the evidence. *Pacheco de Perez v. AT&T Co.,* 139 F.3d 1368, 1373 (11th Cir.1998); *Burns v. Windsor Ins. Co.,* 31 F.3d 1092, 1094 (11th Cir.1994). Without proof of an **assignment**, the **derivative** **standing** doctrine does not apply.

Blue Cross argues that the district court had subject matter jurisdiction in this matter because Hobbs and Irvine "plausibly" possess **derivative** **standing** to bring an action under **ERISA** as assignees of their patients. Blue Cross relies on this court's decision in *Blue Cross & Blue Shield of Alabama v. Sanders,* 138 F.3d 1347 (11th Cir.1998). The *Sanders* decision is readily distinguishable and inapposite.

In *Sanders,* participants in an employee health benefits plan filed an action in state court to recover damages resulting from personal injuries suffered by Mrs. Sanders in an automobile accident. The Sanderses did not include a claim for medical expenses. They received a default judgment of $200,000. Blue Cross, as the claims administrator of the plan, requested that the Sanderses reimburse the fund in the amount of $12,678.89. The Sanderses refused. *Id.* at 1350.

Blue Cross filed an action in federal court on behalf of the health benefits plan seeking a declaration that the health benefits plan was entitled to reimbursement of the $12,678.89. *Id.* In their answer to the complaint, the Sanderses admitted that Blue Cross was a **fiduciary** seeking equitable relief under 29 U.S.C. § 1132(a)(3). *Id.*

The district court granted summary judgment to Blue Cross. *Id.* at 1351. On appeal, the Sanderses asserted for the first time that the district court did not have subject matter jurisdiction because Blue Cross was not a **fiduciary** under 29 U.S.C. § 1132(a)(3) and the relief sought in the complaint was not equitable. *Id.*

This court rejected the Sanderses' jurisdictional challenge to the district court's judgment. *Id.* at 1353. Relying on the Supreme Court's decision in *Bell v. Hood,* 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), and its progeny, this court concluded that a federal court has subject matter jurisdiction if the claims are "neither 'immaterial and made solely for the purpose of obtaining jurisdiction' nor 'wholly insubstantial and frivolous.' " *Id.* at 1352-53 (quoting *Bell,* 327 U.S. at 682-83, 66 S.Ct. 773). This court concluded that Blue Cross satisfied its burden of showing that Blue Cross was likely a **fiduciary** under 29 U.S.C. § 1132(a)(3) because the health benefit plan **provided** that "Blue Cross has full authority to determine payment eligibility for submitted claims and to review denied claims." *Id.* at 1352 n. 4. This court also noted that "the Sanderses waived the *particular* failure to state a claim defense that is implicit in their subject matter jurisdiction argument-namely, the defense that Blue Cross is not a '**fiduciary**,' *see* 29 U.S.C. § 1132(a)(3), seeking 'equitable relief,' *see* 29 U.S.C. § 1132(a)(3)(B)." *Id.* at 1354.

Here, unlike the circumstances in *Sanders,* Hobbs and Irvine did not concede that they had **derivative** **standing** as assignees of their patients. In their motion to remand, ***1243** Hobbs and Irvine contended that "Blue Cross' failure to **provide** any factual or legal support for its 'pre-emption' theories renders the Notice of Removal fatally defective and requires remand." They did not expressly argue, however, that the district court lacked

subject matter jurisdiction because Blue Cross failed to meed its burden of demonstrating that Hobbs and Irvine lacked **standing** to file an action under **ERISA**.

In *Sanders*, Blue Cross filed its **ERISA** claim in federal court. This court determined that Blue Cross had met its burden of demonstrating that it plausibly is a **fiduciary** by pointing to the Sanderses' admission in its answer and by reference to the terms of the health benefits plan. In the instant matter, Blue Cross removed the matter to federal court. It failed to set forth facts in the notice of removal demonstrating that Hobbs and Irvine had received **assignments** of their patients' claims under an employee benefit plan. It also failed to present any evidence, or cite to the record, to support its argument that Hobbs and Irvine had received **assignments** from their patients.

Blue Cross has failed to meet its burden of demonstrating that **ERISA** completely preempts Hobbs and Irvine's state law claims. Accordingly, the district court lacked subject matter jurisdiction over this action. It erred in denying the motion to remand.

Because the district court did not have subject matter jurisdiction over Hobbs and Irvine's state law claims, the district court also erred in dismissing this action on the merits. Thus, we also lack the power to determine whether Hobbs and Irvine's state law claims "relate to" an **ERISA** plan or come within **ERISA's** saving clause.

III

[10] Finally, Hobbs and Irvine also seek reversal of the order denying their motion to award them costs and attorney's fees. An order remanding a case to state court "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). We review the district court's denial of Hobbs and Irvine's motion to tax costs and attorney's fees for abuse of discretion. *Fowler v. Safeco Ins. Co. of Am.*, 915 F.2d 616, 617 (11th Cir.1990).

[11] The district court did not set forth the basis for its denial of the motion to tax costs and attorney's fees. Thus, we cannot tell from the record whether it was premised upon its erroneous determination that removal was proper because Hobbs and Irvine's state law claims were completely preempted. Under these circumstances, we deem it appropriate to vacate the order denying the motion to tax costs and attorney's fees with instructions that the district court reconsider the question whether the motion should be granted in light of the fact that this matter must be remanded to state court because the district court lacked federal question subject matter jurisdiction.

Conclusion

Hobbs and Irvine do not have **standing** to present an **ERISA** claim because they are not participants or beneficiaries in an employee health care plan. Blue Cross failed to demonstrate that Hobbs and Irvine had **standing** based on an **assignment** of their patients' claims and benefits. Thus, this matter was improperly removed to federal court because it did not have subject matter jurisdiction. The order denying the motion to remand and the dismissal of this action are REVERSED. Because the district court lacked subject matter jurisdiction, the order dismissing ***1244** this action on the merits is REVERSED. The district court is requested to enter an order remanding this action to state court.

Because we cannot discern from this record whether the district court properly exercised its discretion in denying the motion to tax costs and attorney's fees, we VACATE the order denying that motion and REMAND with instructions to reconsider the motion to tax costs and attorney's fees and set forth the basis for its disposition of this motion in its order.

REVERSED in part with instructions to remand to state court, VACATED in part with instructions to reconsider the motion to tax costs and attorney's fees.

Parallel Citations

15 Fla. L. Weekly Fed. C 163

Footnotes

* Honorable Arthur L. Alarcón, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

1 Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461.

2 There is no consistency among federal statutes, rules, and cases with respect to using the term "attorney fees," "attorneys fees," "attorney's fees," or "attorneys' fees." The removal statute at issue in this case, 28 U.S.C. § 1447(c), uses the term "attorney fees." We note, however, that the Supreme Court Style Manual prefers the use of the phrase "attorney's fees" in all opinions. *See Stallworth v. Greater Cleveland Reg'l Transit Auth.*, 105 F.3d 252, 253 n. 1 (6th Cir.1997). Therefore, we choose to use the term "attorney's fees" in this opinion except when quoting other authorities.

3 After Hobbs and Irvine filed their motion to remand their state law claim to state court, all parties consented to jurisdiction by a United States Magistrate Judge, pursuant to 28 U.S.C. § 636(c)(1).