

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JEFFREY SCHWARTZ and CARI)
SCHWARTZ, Individually and as the)
Parents and Natural Guardians of)
J.S., a Minor,)

Cause No. 1:20-cv-00069 RLM-MPB

Plaintiffs)

v.)

ANTHEM INSURANCE COMPANIES,)
INC., D/B/A ANTHEM BLUE CROSS)
AND BLUE SHIELD, ACCREDO)
HEALTH GROUP, INC., EXPRESS)
SCRIPTS, INC., and KROGER)
SPECIALTY PHARMACY, INC.,)

Defendants)

ORDER

Plaintiffs Jeffrey and Cari Schwartz, individually and as the parents and natural guardians of J.S., a minor, sued defendants Anthem Insurance Companies, Express Scripts, Inc. (the specialty pharmacy of Anthem’s pharmacy network), Accredo Health Group, Inc. (a subsidiary of Express Scripts), Kroger Prescription Plans, and Kroger Specialty Pharmacy over events that led to J.S. contracting respiratory syncytial virus because she didn’t receive a prescribed vaccine. The Schwartzes have since amended their complaint and voluntarily dismissed Kroger Prescription Plans. The Anthem defendants—Anthem, Express Scripts, and Accredo—collectively have filed motions to dismiss the Schwartzes’s complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a

claim upon which relief can be granted. For the following reasons, the court DENIES the Anthem defendants' motions to dismiss [Doc. Nos. 67 and 72].

The amended complaint alleges the following facts. J.S. was born on February 14, 2017, at 23 weeks gestation and weighing only 1.5 pounds. As an extremely preterm baby, J.S. needed several specialty physicians. In August 2017, J.S.'s doctors recommended that she be prescribed Synagis, an antibody used to immunize children against respiratory syncytical virus, because her premature birth had resulted in a compromised immune system. Respiratory syncytical virus season is from November to April, and Synagis is highly effective at preventing sickness if given once a month. Synagis requires prior authorization for use. Prior authorization is a health plan requirement that the health plan (insurer) authorize a particular prescription drug for payment by before the drug is provided to a particular covered individual. Ind. Code § 27-1-37.4-3. A health plan (insurer) must accept and respond to a request for "prior authorization" delivered to the health plan (insurer) by a covered individual's: (1) prescribing health care provider; or (2) dispensing pharmacist..." Ind. Code § 27-1-37.4-4. A single monthly dose of Synagis costs more than \$3,000 without insurance.

Jeff Schwartz is employed by, and has primary health insurance for J.S. through, Kroger Prescription Plans, Inc. ("Kroger Plans"). Kroger Plans uses Kroger Specialty Pharmacy, Inc. ("Kroger Pharmacy") as its specialty pharmacy. The Schwartzes' health insurance through Kroger Plans doesn't start to cover medical expenses until the Schwartzes meet their annual deductible for the

calendar year, and the annual deductible restarts every January. Given J.S.'s needs as an extremely preterm baby, Jeff and Cari acquired secondary health insurance for J.S. through a Medicaid program administered by Anthem to cover J.S.'s medical expenses at the beginning of the year before the Schwartzes met the annual deductible on the Kroger Plans policy. Anthem uses Express Scripts, Inc. as its pharmacy benefit manager, and Express Scripts uses Accredo Health Group, Inc. ("Accredo") as its specialty pharmacy.

In November and December 2017, J.S. received her first two doses of Synagis that were covered by the Kroger Plans policy and fulfilled by Kroger Pharmacy. When January rolled around, Anthem received a prior authorization request for J.S.'s third dose of Synagis from Kroger Pharmacy because the Schwartzes hadn't yet met their annual deductibles on the Kroger Plans policy for 2018. Anthem said it approved the prior authorization request on January 25, 2018, but Kroger Pharmacy called the Schwartzes after it sent Anthem the prior authorization request to inform them that Anthem and Express Scripts wouldn't allow Kroger Pharmacy to fill the prescription because Anthem required the prescription to be filled by their own specialty pharmacy, Accredo.

The Schwartzes called Anthem several times over the next few weeks and were assured that Kroger Pharmacy would be allowed to dispense J.S.'s third dose of Synagis very soon. However, each time Kroger Pharmacy followed up with Anthem, Anthem said that Accredo would have to fill J.S.'s prescription. The administrative confusion persisted through the middle of February. Kroger Pharmacy maintains that Anthem refused to allow it to fill the prescription for

J.S.'s third dose of Synagis because it wanted Accredo to act as the specialty pharmacy to fill and profit from the prescription. Anthem, on the other hand, maintains that Kroger Pharmacy couldn't fill the prescription for J.S.'s third dose of Synagis because it didn't submit the request for prior authorization to Anthem with all the required information. The back-and-forth continued until the effective window for J.S. to take her third dose of Synagis had passed, and J.S. ultimately ended up contracting respiratory syncytial virus and spent 20 days in the hospital, 17 of those on life support.

The Schwartzes sued the defendants alleging that J.S. contracted respiratory syncytial virus and the Schwartzes incurred damages because of the defendants' negligence in failing to exercise reasonable care to properly submit and promptly fill J.S.'s prescription. The Anthem defendants have moved to dismiss the Schwartzes complaint under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

When considering a defendant's motion to dismiss, the court "take[s] as true all well-pleaded facts and allegations in the plaintiff's complaint, . . . and the plaintiff is entitled to all reasonable inferences that can be drawn from the complaint." Bontkowski v. First Nat. Bank of Cicero, 998 F.2d 459, 461 (7th Cir. 1993). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Factual allegations must give the defendant fair notice of the claims being asserted and the grounds upon which they rest and "be enough to raise a right to relief above the speculative

level on the assumption that all of the complaint's allegations are true.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 545 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Ashcroft v. Iqbal, 556 U.S. at 678. In other words, a complaint must give “enough details about the subject-matter of the case to present a story that holds together.” McCauley v. City of Chicago, 671 F.3d 611, 616 (7th Cir. 2011). A pleading that merely offers “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” Ashcroft v. Iqbal, 556 U.S. at 678.

The Anthem defendants argue that the Schwartzes’ complaint should be dismissed for three reasons. First, the Kroger plan is an ERISA plan, and that ERISA’s preemption provision displaces all state law claims that fall within its sphere. The Anthem plan isn’t an ERISA plan by itself, but Anthem says it falls within ERISA’s preemption sphere because it relates to an ERISA plan: coverage under the Anthem plan depends on whether the Schwartzes had coverage under the Kroger ERISA plan. Because the Schwartzes didn’t plead facts which would entitle them to any relief under ERISA and their negligence claim is preempted, their complaint must be dismissed. Second, the Anthem defendants argue that the Schwartzes failed to plead that they exhausted their administrative remedies under either the Kroger ERISA plan or the Anthem Medicaid plan as a condition precedent to filing suit required by law. Finally, the Anthem defendants argue that the complaint should be dismissed because, as a matter of law, they didn’t

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