

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

CAROL DaCOSTA, WAYNE COOPER, M.D.,
DANA DiCOCCO and MELANIE GREEN,
individually and on behalf of all others similarly
situated,

Plaintiffs,

vs.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA,

Defendant.

10-cv-00720-JS (JS) (ARL)

Electronically Filed

**DEFENDANT THE PRUDENTIAL INSURANCE COMPANY OF AMERICA'S REPLY
MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PURSUANT TO
RULES 12(b)(1) AND 12(b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE**

O'MELVENY & MYERS LLP

Gary S. Tell*

Theresa S. Gee*

Micah W.J. Smith*

1625 Eye Street, N.W.

Washington, DC 20006

Telephone: (202) 383-5300

Facsimile: (202) 383-5414

*Admitted *Pro Hac Vice*

O'MELVENY & MYERS LLP

Jeffrey I. Kohn

Times Square Tower

7 Times Square

New York, New York 10036

Telephone: (212) 326-2000

Facsimile: (212) 326-2061

*Attorneys for Defendant The Prudential
Insurance Company of America*

Defendant The Prudential Insurance Company of America (“Prudential”) respectfully submits this reply memorandum of law in support of its motion to dismiss plaintiffs’ two-count Class Action Complaint (“Complaint”).

PRELIMINARY STATEMENT

Plaintiffs fail to explain how the text of the U.S. Department of Labor’s (“DOL”) regulations could possibly be construed to support their view that both mandatory and voluntary appeals must follow the same structure and process. They offer no rebuttal of the published appellate court opinions that solidly foreclose their claims. They say nothing in defense of their interpretation of the DOL’s informal guidance, despite featuring it prominently in the Complaint as support for their allegations. And they do not cite any *relevant* published authority in support of plaintiffs’ view. Instead, plaintiffs rest their case entirely on three judicial opinions that analyze issues not presented in this case, and are simply not germane. In sum, their response is insufficient to overcome the text, structure, and purpose of ERISA and the DOL regulations, all of which undermine plaintiffs’ case.

Furthermore, plaintiffs’ contention that they have Article III standing because they have “special” procedural rights to pursue their claim that Prudential did not provide information about the voluntary appeal process ignores the facts and fundamental legal principles. Each of the named plaintiffs—and every member of the putative class as defined—has already chosen to proceed with and completed the voluntary appeal process. Thus, even if plaintiffs could assert they were injured by Prudential’s alleged failure to inform them of the voluntary appeal process, that injury cannot be redressed because they chose to proceed with the voluntary appeal. For the same reason, the alleged injury cannot be redressed prospectively.

For these reasons, plaintiffs’ Complaint must be dismissed.

ARGUMENT

I. PLAINTIFFS' ATTACK ON THE STRUCTURE OF PRUDENTIAL'S VOLUNTARY APPEALS PROCESS IS MERITLESS AS A MATTER OF LAW

Plaintiffs' principal argument is that ERISA and the DOL's regulations require that voluntary appeals be structured in the same manner as mandatory appeals. This argument is meritless as a matter of law.

A. ERISA and the DOL Regulations Do Not Require the Use of New Claim Examiners and *De Novo* Review During Voluntary Appeals.

While mandatory appeals are subject to the requirement of using a new claim examiner, new medical professionals, and a *de novo* standard of review, voluntary appeals are not. (*See* Prudential Mem. in Supp. of Mot. to Dismiss ("Prudential Mem.") 7-16 (Doc. No. 15).) The text of ERISA § 503(2), as interpreted by the DOL's implementing regulations, can only be read to apply to mandatory appeals. *See* 29 U.S.C. § 1133(2); 29 C.F.R. § 2560.503-1(h)(3)(ii); (*see* Prudential Mem. at 8-9, 13-16). The structure of the DOL regulations treats mandatory appeals in sharp contrast to voluntary appeals. Those regulations require that a claimant receive at least one mandatory appeal that is a *de novo* review, which is appropriate since the claimant must first exhaust the mandatory process before proceeding to federal court. (*See* Prudential Mem. at 9-11.) And this view fulfills ERISA's purpose of balancing the claimant's interests in receiving a meaningful review with granting the claim administrator flexibility in deciding to offer a voluntary appeal process. Thus, the text, structure, and purposes of ERISA and the DOL regulations—as well as published court of appeals decisions and the DOL's own interpretive guidance—make clear that voluntary appeals may be structured differently from mandatory appeals. (*Id.*) Plaintiffs offer no response to any of these arguments. (*Id.* at 13-16.)¹

¹ Plaintiffs also have no response to Prudential's argument that only the initial decision counts as an "adverse benefit determination." (*See* Prudential Mem. 8.) Plaintiffs presumably believe that every decision on appeal counts as an

Plaintiffs nonetheless contend that a claim administrator must either structure its voluntary appeals in the exact manner as mandatory appeals, or it must decline to provide voluntary appeals at all. Thus under plaintiffs' theory, a claim administrator could not invite claimants to telephone the individual who decided their mandatory appeal to discuss the decision; such an invitation, and any other form of voluntary "dispute resolution," would, in their eyes, count as a voluntary appeal, 29 C.F.R. § 2560.503-1(c)(3), and would need to be conducted by a new examiner and new medical professionals, and with a *de novo* review standard—or not conducted at all. (See Prudential Mem. 12 n.7.) Plaintiffs' all-or-nothing view of voluntary appeals is irreconcilable with ERISA's basic purpose of "promot[ing] efficiency by encouraging resolution of benefits disputes through internal administrative proceedings rather than costly litigation." *Conkright v. Frommert*, 130 S.Ct. 1640, 1649 (2010). Furthermore, it is incompatible with the DOL's efforts to "reconcile the need for procedural protections with the purely voluntary nature of the system through which these vital benefits are delivered." 65 Fed. Reg. 70,246 (to be codified at 29 C.F.R. pt. 2560). Plaintiffs offer no response to these points.

B. The Cases Plaintiffs Cite Do Not Support Plaintiffs' Attempt to Ignore the Text, Structure, and Purposes of ERISA and the DOL Regulations.

Plaintiffs' opposition is predicated solely on language in a Seventh Circuit decision and two unpublished district court opinions. (See Pls.' Mem. in Opp. to Prudential's Mot. to Dismiss ("Pls. Mem.") 7-11 (Doc. No. 23).) This reliance is wholly misplaced. All three decisions deal with a completely distinct issue, and do not support plaintiffs' position.

independent "adverse benefit determination," requiring full-dress review even of appellate affirmances. But their interpretation would result in a striking anomaly. Plaintiffs' reading would allow endless mandatory appeals, and thus prevent claimants from ever seeking review in federal court. This anomaly could not have been the DOL's intent when it limited claim administrators to no more than two mandatory appeals "of an adverse benefit determination." 29 C.F.R. § 2560.503-1(c)(2).

The courts in *Love v. National City Corp. Welfare Benefits Plan*, 574 F.3d 392 (7th Cir. 2009), and *Cook v. The New York Times Co. Long-Term Disability Plan*, No. 02 Civ. 9154, 2004 WL 203111 (S.D.N.Y. Jan. 30, 2004), examined purported deficiencies in the mandatory appeal process. In both those cases, the defendant failed to provide “specific and understandable reasons for [the] denial” of benefits, as required by the DOL’s regulations.² *Love*, 574 F.3d at 397; *see Cook*, 2004 WL 203222 at *11, 16. *Love* did not even involve a voluntary appeal. *Love*, 574 F.3d at 395. And while the plaintiff in *Cook* filed multiple appeals in 1997 and 1998, the court made no mention of any of them being voluntary. In *Cook*, the defendant consistently failed to provide the grounds for denial in each decision, including the decision after the first mandatory appeal. *Cook*, 2004 WL 203222. In contrast, plaintiffs here do not challenge the merits of Prudential’s earlier claim decisions, or point to any deficiencies in the earlier appeal process. Accordingly, *Love* and *Cook* have no bearing on the present case.

Plaintiffs rely most heavily upon the unpublished magistrate judge opinion in *Ward v. Life Insurance Co. of North America*, No. 1:08CV675, 2009 WL 2740202 (M.D.N.C. Aug. 26, 2009). But this case is readily distinguishable as well. The issue in *Ward* was similar to the one raised in *Love* and *Cook*: “the letter denying Plaintiff’s second appeal clearly, and admittedly, contains egregious errors and is deficient in providing a basis for denial of the appeal.” *Ward*, 2009 WL 2740202, at *6. Despite promises to do so, the defendant failed to issue a corrected letter. The magistrate judge therefore questioned whether “Plaintiff’s appeal received a meaningful and reasoned consideration, given that the [denial] letter references another claimant

² This notice-of-reasons requirement does not regulate the *structure* of internal appeals, but rather is designed to ensure meaningful review *after* an appeal. And the requirement is not created by 29 U.S.C. § 1133(2) and 29 C.F.R. § 2560.503-1(h), the provisions at issue in this case. Instead, the notice-of-reasons requirement is created by 29 U.S.C. § 1133(1) (requiring “adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied”) and 29 C.F.R. § 2560.503-1(j) (requiring “written or electronic notification of a plan’s benefit determination on review”).

entirely” and misstated plaintiff’s medical condition and impairments. *Id.* at *3, 6. Within this context, the magistrate made broad statements that the plaintiff was entitled to a “full and fair review.” Plaintiffs rely heavily on these remarks, but take them out of context. Nowhere did the magistrate judge suggest that a “full and fair review” at the voluntary appeal stage equates to the requirements imposed on a mandatory appeal, nor did he offer an analysis of the issue. Plainly, the magistrate judge’s comments reflected his concern that the plaintiff did not receive sufficient information about the reasons that his claim was denied, not about the structure of the appeal. Those concerns are in stark contrast to the present case. Here, plaintiffs make no allegation that Prudential’s claim decision letters failed to notify them of the reasons for the claim determination, or contained factual errors as in the letter in *Ward*, or were deficient in any regard. *Ward* therefore provides no support for plaintiffs’ position in this case.

II. PLAINTIFFS’ CLAIM THAT PRUDENTIAL PROVIDED NO INFORMATION ABOUT ITS VOLUNTARY APPEALS PROCESS MUST BE DISMISSED

Plaintiffs’ second claim is that Prudential failed to provide them information about the structure of Prudential’s voluntary appeal process. As explained in the opening memorandum, this claim must be dismissed because (1) plaintiffs lack standing to assert this claim, and (2) Prudential *did* provide plaintiffs with information.

A. Plaintiffs’ Second Claim Must Be Dismissed for Lack of Standing.

To establish Article III standing, plaintiffs must demonstrate “injury in fact,” which requires either actual or threatened injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). They must also establish “a causal connection between the injury and the conduct at issue,” and that the injury it is “likely to be redressed by a favorable decision.” *Kendall v. Employees Ret. Plan of Avon Prods.*, 561 F.3d 112, 118 (2d Cir. 2009). Moreover, a plaintiff “bears the burden of showing that he has standing for each type of relief sought.” *Summers v.*

Earth Island Inst., 129 S. Ct. 1142, 1149 (2009). Plaintiffs cannot satisfy these standards and therefore lack standing to pursue this claim.

As Prudential explained in its opening papers, plaintiffs' Complaint failed to establish that Prudential's alleged conduct *caused* them any actual or threatened injury-in-fact. (*See* Prudential Mem. 17-18.) Plaintiffs now argue—for the first time—that they would not have submitted to the voluntary appeal process if Prudential had provided the requested information. (*See* Pls. Mem. 16-17.) But even this newfound argument does not suffice to establish standing. Plaintiffs are seeking only prospective relief in this lawsuit (*see* Pls. Mem. 15), and that prospective relief could not possibly *redress* any supposed past injuries. An injunction ordering Prudential to provide additional information about its voluntary appeals on a going-forward basis could not possibly alter the allegedly misinformed decision to exhaust the voluntary appeals process or change the outcome of the decision to deny benefits. (*See* Prudential Mem. 17-18.)

As an alternative argument, plaintiffs argue that they “need not demonstrate actual harm in order to have standing to seek injunctive relief requiring that [the plan administrator] satisfy its statutorily-created disclosure or fiduciary responsibilities.” (Pls. Mem. 15 (quoting *Horvath v. Keystone Health Plan East, Inc.*, 333 F.3d 450, 456 (3d Cir. 2003)).) But plaintiffs' argument misses the mark. It is true that plan beneficiaries need not establish *actual* injury in order to obtain an injunction to prevent *threatened* injury to a statutorily-created right. *See, e.g., Gillis v. Hoechst Celanese Corp.*, 4 F.3d 1137, 1148 (3d Cir. 1993) (“ERISA does not require that harm be shown *before* a plan participant is entitled to an injunction ordering the plan administrator to comply with ERISA's reporting and disclosure requirements.” (emphasis added)). But it is also true that if plaintiffs do not establish actual injury, then they *must* establish threatened injury to have Article III standing. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167,

180-181 (2000) (because injury-in-fact must be either “actual or imminent,” plaintiffs failed to demonstrate standing if they do not “show that any of their members had sustained or faced the threat of any ‘injury in fact’”). Plaintiffs do not—and cannot—allege any *threatened* injury. Each of the plaintiffs has submitted to and completed the voluntary appeals process, and therefore none can allege a *threatened* violation of the right to sufficient information to make an informed decision whether to submit to the voluntary appeal process.

B. Prudential Has Substantially Complied with the Regulations.

Even if plaintiffs had standing, their claim fails on the merits. Prudential substantially complied with the requirement of providing information, *upon request*, about the structure of its voluntary appeals process. (Prudential Mem. 4-5, 18-19.)

Plaintiffs contest Prudential’s substantial compliance in two ways. *First*, plaintiffs broadly state that the Second Circuit “has not yet adopted the ‘substantial compliance’ doctrine.” (Pls. Mem. 18.) Yet, the doctrine has been applied by the Second Circuit and certainly has not been rejected. *See Hobson v. Metropolitan Life Ins. Co.*, 574 F.3d 75, 88 (2d Cir. 2009) (concluding that “MetLife substantially complied with ERISA’s notice regulations.”). Indeed, one of the district court cases on which plaintiffs rely expressly adopted the substantial compliance doctrine. *Cook*, 2004 WL 203111, at *6 (“[T]he Second Circuit has indicated that ‘substantial compliance’ with the regulations may suffice to meet § 1133’s mandate.” (citing *Burke v. Kodak Retirement Income Plan*, 336 F.3d 103, 107-09 (2d Cir.2003))).

Second, plaintiffs’ memorandum makes factual assertions that are not alleged in the Complaint. Plaintiffs now assert that they “*specifically* requested, in writing, the appeals claim procedures.” (Pls. Mem. 19 (emphasis added).) But the Complaint alleges only that plaintiffs Cooper, DiCocco, and Green made general requests for “‘sufficient information to make a

decision about filing th[e] [voluntary] appeal,” Compl. ¶ 18, 29, 38.³ Accepting the *Complaint’s* factual allegations as true, the information Prudential provided in the Summary of Material Modifications (“SMM”), which plaintiffs attach as Exhibit D to the Complaint and which describes the voluntary appeal process, substantially complied with their request.⁴

* * *

Plaintiffs have already chosen to avail themselves of Prudential’s voluntary appeal process and have completed that process. They therefore lack standing to seek an injunction ordering Prudential to provide additional information about that the voluntary appeal process on a going-forward basis. In any event, plaintiffs’ claim fails on the merits because Prudential substantially complied with the requirement of providing information, upon request, about the structure of its voluntary appeals.

³ The Complaint nowhere alleges that plaintiff DaCosta made any request for information about the voluntary appeal, *see id.* at ¶¶ 5-13 (alleging only that DaCosta requested “copies of ‘all documents, records and other information relevant to her claim, and a complete copy of her claim file’”).

⁴ The SMM offers a description of both mandatory and voluntary appeals, and outlines the procedural protections included in mandatory appeals that are not provided in voluntary appeal (*see* Prudential Mem. 4-5).

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed in its entirety and with prejudice.

Dated: New York, New York
July 9, 2010

Respectfully submitted:

O'MELVENY & MYERS LLP

/s/ Micah W. J. Smith

Jeffrey I. Kohn
Times Square Tower
7 Times Square
New York, New York 10036
Telephone: (212) 326-2000
Facsimile: (212) 326-2061
jkohn@omm.com

Gary S. Tell*
Theresa S. Gee*
Micah W.J. Smith*
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, D.C. 20006
Telephone: (202) 383-5300
Facsimile: (202) 383-5414
*Admitted *Pro Hac Vice*
gtell@omm.com
tgee@omm.com
micahsmith@omm.com

*Attorneys for Defendant The Prudential Insurance
Company of America*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CAROL DaCOSTA, WAYNE COOPER, M.D.,
DANA DiCOCCO and MELANIE GREEN,
individually and on behalf of all others similarly
situated,

Plaintiffs,

-against-

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA,

Defendant.

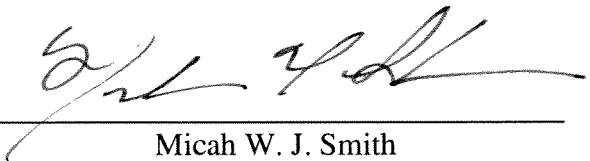
10-cv-00720 (JS) (ARL)

Electronically Filed

CERTIFICATE OF SERVICE

I, Micah W. J. Smith, certify that on the 9th day of July, 2010, I caused to be served true and accurate copies of the attached Reply Memorandum of Law in Support of Defendant's Motion to Dismiss by electronic mail and Federal Express on:

Gregory Michael Dell, Esq.
Dell & Schaefer
381 Park Avenue South, Suite 701
New York, New York 10016
Telephone: (954) 620-8300
Facsimile: (954) 922-6864
E-mail: gdell@diattorney.com



Micah W. J. Smith

Dated: Washington, D.C.
July 9, 2010