662 F.3d 600
(Cite as: 662 F.3d 600)

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United States Court of Appeals,
Second Circuit.
Florence H. METZ, Plaintiff–Appellant,
v.
The UNITED STATES LIFE INSURANCE COMPANY IN the CITY OF NEW YORK, Defendant–Appellee.

No. 10–4305.
Argued: Sept. 28, 2011.
Decided: Dec. 8, 2011.

Background: Insured filed state court action challenging insurer's denial of her claim for benefits under catastrophic medical insurance policy. After removal and transfer of venue, the United States District Court for the Southern District of New York, Barbara S. Jones, J., 2010 WL 3703810, dismissed complaint, and insured appealed.

Holding: The Court of Appeals held that insured did not incur charges that her physicians had agreed to forgo prior to providing treatment.

Affirmed.

West Headnotes

[1] Federal Courts 170B ⚿776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial de novo. Most Cited Cases

Court of Appeals reviews de novo district court's dismissal of complaint. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[2] Health 198H ⚿942

198H Health
198HVII Compensation
198Hk942 k. Contracts for services. Most Cited Cases

Under New York law, patient's liability for charge for medical treatment begins at time of treatment for which charge is imposed, and patient may be considered liable for charge even if he or she does not ultimately pay that charge in full or in part.

[3] Insurance 217 ⚿2523

217 Insurance
217XX Coverage—Health and Accident Insurance
217XX(B) Medical Insurance
217k2520 Amounts Payable
217k2523 k. Deductible amounts and co-payments. Most Cited Cases

Under New York law, for purposes of determining whether insured incurred sufficient charges to satisfy her catastrophic medical insurance policy's deductible, insured who was Medicare beneficiary did not incur charges that her physicians had agreed with Medicare to forgo prior to providing treat- ment.

[4] Federal Civil Procedure 170A ⚿1838

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings
170Ak1837 Effect
170Ak1838 k. Pleading over. Most Cited Cases

District court did not abuse its discretion in insured's action challenging insurer's denial of her claim for benefits when it dismissed her complaint with prejudice, where insured did not advance new factual allegations that she would make if granted leave to amend, but merely claimed in conclusory fashion that had she been permitted to amend, she could have pled allegations sufficient to make out

claim under district court's construction of policy.

***600** Noah H. Kushlefsky, Kreindler & Kreindler LLP, New York, New York (Gretchen M. Nelson, Kreindler & Kreindler, Los Angeles, California; Allan A. Shenoi and Daniel J. **Koes**, Shenoi **Koes**, LLP, Pasadena, California, on the brief) for Plaintiff–Appellant.

***601** Lee E. Bains, Jr., Maynard, Cooper & Gale, P.C. (Michael D. Mulvaney, Edward A. Hosp, and Christopher C. Frost, Maynard, Cooper & Gale; Fred N. Knopf and Michelle M. Arbitrio, Wilson, Elser, Moskowitz, Edelman & Dicker LLP, on the brief) for Defendant–Appellee.

Before: JOHN M. WALKER, JR., STRAUB, and LIVINGSTON, Circuit Judges.

PER CURIAM:

Plaintiff–Appellant Florence Metz ("Metz") sued United States Life Insurance Company ("U.S. Life"), with which she has a catastrophic medical insurance policy, because U.S. Life told her that she had not yet "incurred" sufficient charges to satisfy its deductible. Metz claimed that U.S. Life's refusal to pay benefits rested on a deliberate misinterpretation of "incurred" and breached the insurance contract. She appeals from a September 22, 2010 judgment of the United States District Court for the Southern District of New York (Jones, *J.),* granting U.S. Life's motion to dismiss for failure to state a claim. The district court held that Metz, a Medicare recipient, could not have incurred charges that her physicians had agreed with Medicare to forgo prior to providing treatment. On appeal, Metz argues that the district court incorrectly read "incurred" (as in "incurred charge") in the insurance policy as including only those amounts that the insured paid or was legally obligated to pay. She contends that, properly understood, the amount of an incurred charge for medical treatment is instead the full reasonable and customary charge for that treatment. We hold that the district court correctly interpreted "incurred," and therefore affirm.

BACKGROUND

In 1995, Florence Metz took out a catastrophic care insurance policy from U.S. Life. The policy, as it pertains to Metz, carries a $25,000 deductible. The policy's coverage and benefits go into effect once the insured has satisfied the deductible, which in turn requires the insured to have "incurred" at least $25,000 in "reasonable and customary" charges for certain medical treatments listed in the policy. At issue here is only whether Metz in fact "incurred" those charges.

In September 2007, Metz, under the belief that she had incurred the requisite $25,000 in charges, filed a claim with U.S. Life for medical benefits under the policy. U.S. Life, however, denied her claim. Discussions between Metz and her representatives and U.S. Life failed to resolve the dispute, and in August 2009, Metz brought a putative class action, seeking declaratory and injunctive relief and damages, in California state court.[FN1] U.S. Life removed the matter to federal district court in California, under the court's general diversity jurisdiction, 28 U.S.C. § 1332(a),[FN2] and the Class Action Fairness Act, 28 U.S.C. § 1332(d), then obtained a transfer of venue to the Southern District of New York.

> FN1. The district court granted U.S. Life's motion to dismiss before Metz moved for class certification; certification and any issues raised thereby are not at issue on appeal.
>
> FN2. Metz is a resident of California, and U.S. Life is a New York corporation.

U.S. Life moved to dismiss under Federal Rule of Civil Procedure 12(b)(6); it argued that its denial of Metz's claim was consistent with the accepted definition of "incurred" for insurance purposes under New York law,[FN3] namely "to become liable ***602** or subject to." U.S. Life argued that Metz could not be liable for expenses that her doctors

were legally bound, under their preexisting agreements with Medicare, not to charge her. For her part, Metz argued that "incurred" refers to the full amount representing a reasonable and customary charge for treatment, regardless of whether an insured paid or was legally obligated to pay that full amount.

> FN3. The policy, attached as an exhibit to the complaint, states that it was "issued in and governed by the laws of New York."

The district court concluded that one cannot be liable for or subject to medical treatment charges that a doctor has agreed ahead of time to forgo. Accordingly, the court held that Metz's construction of the contract was unreasonable and without basis in New York law, and thus that the complaint failed to state a claim upon which relief could be granted. This appeal followed.

DISCUSSION

[1] We review *de novo* a district court's dismissal of a complaint under Rule 12(b)(6). *Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc.,* 531 F.3d 190, 194 (2d Cir.2008). We must "accept[ ] all factual allegations as true and draw[ ] all reasonable inferences in favor of the plaintiff." *ECA & Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan Chase Co.,* 553 F.3d 187, 196 (2d Cir.2009). "To survive a motion to dismiss, a complaint must plead enough facts to state a claim to relief that is plausible on its face." *Id.* (internal quotation marks omitted).

I.

[2] The parties do not dispute that this appeal is controlled by New York substantive law, which defines "incurred" for insurance purposes as "to become liable or subject to." New York precedent makes clear that in this context liability for a charge begins at the time of treatment for which the charge is imposed, and that an insured may be considered liable for a charge even if the insured does not ultimately pay that charge in full or in part. *See, e.g., Rubin v. Empire Mut. Ins. Co.,* 25 N.Y.2d 426, 429, 306 N.Y.S.2d 914, 255 N.E.2d 154 (1969). Metz argues that she therefore incurred the full amount of the reasonable and customary charges for certain treatments simply by undergoing treatment.

[3] The question, however, is not whether Metz incurred the dollar amounts of certain charges at the time of treatment, but *which* amounts she in fact incurred. On appeal, Metz does not contest the district court's view that, under the applicable regulatory framework, physicians treating Medicare beneficiaries agree prior to treatment that they will not seek amounts exceeding the Medicare-approved fee. To incur a charge under New York law, an insured must *at some point* be legally liable to pay that charge, even if liability is later extinguished prior to payment by the insured. *Rubin,* 25 N.Y.2d at 429, 306 N.Y.S.2d 914, 255 N.E.2d 154. Metz cannot, as she contends, incur a charge for which she implicitly concedes she was *never* liable. [FN4] We find no error in the district court's conclusion that Metz did not incur more than the amounts that her physicians had agreed ahead of time they would seek from her.

> FN4. Metz does not allege that any of her doctors actually attempted to charge her more than the amounts permitted in their agreements with Medicare, or that she faced liability at any point for more than the Medicare-approved amounts for any other reason. We need not and do not resolve whether such allegations, if present, would produce a different result.

II.

Metz also contends on appeal that the district court erred by dismissing the complaint***603** with prejudice, thus implicitly denying her request for leave to amend in the event of dismissal. We review the denial of leave to amend for abuse of discretion. *Green v. Mattingly,* 585 F.3d 97, 104 (2d Cir.2009).

[4] Here, Metz sought leave to amend only in the final sentence of her opposition to the motion to

dismiss. On appeal, she does not advance new factual allegations that she would make if granted leave to amend, but merely claims in conclusory fashion that had she been permitted to amend, she could have pled allegations sufficient to make out a claim under the district court's construction of the policy. We find no abuse of discretion in these circumstances. *See Pacific Inv. Mgmt. Co. v. Mayer Brown LLP,* 603 F.3d 144, 160–61 (2d Cir.2010).

CONCLUSION

We have reviewed Metz's remaining arguments and find them to be without merit. For the foregoing reasons, the judgment of the district court is AFFIRMED.

C.A.2 (N.Y.),2011.
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