UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CNA INSURANCE COMPANY, as administrator of the DRAW-TITE EMPLOYEE BENEFIT PLAN,

Plaintiff/Counter-Defendant,

v.

ALLSTATE INSURANCE COMPANY,

Defendant/Counter-Plaintiff.
_____/

CIVIL CASE NO. 98-40195

HONORABLE PAUL V. GADOLA
U.S. DISTRICT JUDGE

MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFF/ COUNTER-DEFENDANT CNA INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT/COUNTER-PLAINTIFF ALLSTATE INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT

Presently before the court are the parties' cross motions for summary judgment. On November 12, 1998, plaintiff/counter-defendant CNA Insurance Company (hereinafter "plaintiff CNA"), as administrator of the Draw-Tite Employee Benefit Plan, filed its motion for summary judgment. Defendant/counter-plaintiff Allstate Insurance (hereinafter "defendant Allstate") responded to CNA's motion on November 30, 1998. Also on November 12, 1998, Allstate filed its own motion for summary judgment. Plaintiff CNA responded to Allstate's motion on November 17, 1998, by filing a brief in opposition. The parties, a no-fault insurance carrier and an administrator of an ERISA benefit plan, contest their liability for injuries sustained by their mutual insured in a one-car automobile

Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, *et seq.* The Draw-Tite Employee Benefit Plan is administered by CNA Insurance Company (CNA). The Plan came into existence on June 1, 1990. CNA became a health benefits and claims administrator for the Plan on January 1, 1993. The language of the plan in effect at the time of the accident became effective on January 1, 1993. Chelsea Schwalbe is a "covered person" as defined under the Draw-Tite Plan.

At the time of the accident, Darren Schwalbe also had a policy of personal protection insurance provided by a policy purchased from Allstate. This policy, No. 065-110701, was purchased on January 4, 1990, and was in effect continuously since that date, up until and including the date of loss on September 6, 1996. Chelsea Schwalbe was both a "resident relative" and an "injured person" as defined by the no-fault Allstate insurance policy. Chelsea was thus entitled to coverage pursuant to that policy when the accident occurred. The policy is an "excess" policy for purposes of payment of medical expenses associated with an automobile accident.

Both the Draw-Tite Plan and the Allstate policy contain coordination of benefit (COB) provisions. To date, the Draw-Tite Plan has paid accident-related medical expenses on behalf of Chelsea Schwalbe in the amount of $225,232.79. Allstate has paid in excess of $30,000 for accident-related expenses incurred by

all genuine issues of material fact. See Gregg v. Allen-Bradley Co., 801 F.2d 859, 861 (6th Cir.1986). This burden "may be discharged by showing ... that there is an absence of evidence to support the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party discharges that burden, the burden shifts to the nonmoving party to set forth specific facts showing a genuine triable issue. Fed.R.Civ.Proc. 56(e); Gregg, 801 F.2d at 861. To create a genuine issue of material fact, however, the nonmovant must do more than present some evidence on a disputed issue. As the United States Supreme Court stated in Anderson v. Liberty Lobby, Inc., [t]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the [nonmovant's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted. 477 U.S. 242, 249-50, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *see* Catrett, 477 U.S. at 322-23; Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The evidence itself need not be the sort admissible at trial. Ashbrook v. Block, 917 F.2d 918, 921 (6th Cir. 1990). However, the evidence must be more than the nonmovant's own pleadings and affidavits. *Id.*

III. DISCUSSION

The issue presented for consideration, in light of the

In response, however, defendant Allstate point outs that the Draw-Tite Plan exempts from the definition of "plan," "benefits under a law or plan when, by law, its benefits are excess to those of any private insurance plan." Exh. D to Defendant's Brief in Support of Motion for Summary Judgment, p. 48. Defendant, in its own motion for summary judgment, relies heavily on this excepted definition. Defendant argues that the Allstate contract, although admittedly a no-fault insurance policy, falls within the excepted definition. According to defendant, Michigan law provides that a no-fault insurance policy will be considered "excess" - i.e., secondary - to any other privately sponsored insurance policy held simultaneously by the insured. To fully evaluate this assertion, this Court must enter into a discussion of Mich. Comp. Laws § 500.3109a.

Pursuant to Mich. Comp. Laws § 500.3109a, entitled "Deductibles and exclusions relating to other health and accident coverage,"

> [a]n insurer providing personal protection insurance benefits shall offer, at appropriately reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage on the insured. The deductibles and exclusions required to be offered by this section shall be subject to prior approval by the commissioner and shall apply only to benefits payable to the person named in the policy, the spouse of the insured and any relative of either domiciled in the same household.

M.C.L. § 500.3109a. This Section does not, by its own terms, mandate that a no-fault personal protection insurance policy is to

> automobile no-fault or other insurance to provide benefits. For these reasons, we conclude that M.C.L. § 500.3109a; M.S.A. § 24.13109(1) does not reach an ERISA plan with a COB [contribution of benefits] clause where that clause is unambiguous.

See Frederick & Herrud, 443 Mich. at 388. In a recent Michigan Supreme Court decision, commenting upon Frederick & Herrud, the court reaffirmed that "Federal Kemper was overruled to the extent that it conflicted with the Court's decision in Auto Club Ins. Ass'n v. Frederick & Herrud, Inc. (After Remand) 443 Mich. 358, 387, 505 N.W.2d 820 (1993)." Yerkovich v. A.A.A., 585 N.W.2d 318, 320 n.2 (Mich. 1998).

In light of the Michigan case law discussed above, it is not fair to say that Michigan law provides categorically, in all cases, that a no-fault insurance policy will be considered "excess" - i.e., secondary - to any other privately sponsored insurance policy held simultaneously by the insured. In point of law, the Michigan Supreme Court has carved out an exception for those privately sponsored policies created under federal law, i.e., pursuant to ERISA. Therefore, this Court finds that the Allstate policy does fall within the meaning of "plan," as that term is defined in the Draw-Tite contract. Given this determination, it now becomes necessary to address the respective COB provisions in each plan in order to ascertain whether a direct conflict truly exists.

The Allstate policy contains its own coordination of benefits provision, stating that

false, then the default rule would apply, placing the Draw-Tite ERISA plan in direct conflict with Allstate's no-fault policy. It is clear that statement one has been satisfied: the other plan - i.e., the Allstate policy - does indeed contain a coordination of benefits provision. The second statement requires more in-depth analysis. As that statement provides, both the Allstate policy's rules and the Draw-Tite Plan must require that the Draw-Tite Plan's benefits be determined before those of the other plan. The discussion below will show that this second requirement is not satisfied, thus triggering the default rule of secondary liability with respect to the Draw-Tite Plan.

The Allstate plan does provide that the Draw-Tite Plan's benefits must be determined before those of Allstate's. The crucial issue is whether the Draw-Tite Plan itself requires the Plan to be primarily liable given the particular factual conditions found in the case at bar. The Draw-Tite Plan contains six order of benefits rules, concerning the following topics:

(1) Non-dependent/Dependent

(2) Dependent Child/Parents not Separated or Divorced

(3) Dependent Child/Separated or Divorced Parents

(4) Active/Inactive Employee

(5) Continuation Coverage; and

(6) Longer/Shorter Length of Coverage

See Exh. D to Defendant's Brief in Support of Motion for Summary

the default rule applies, to wit: "[w]hen there is a basis for a claim under [the Draw-Tite] Plan and another Plan, this Plan is a Secondary Plan which has its benefits determined after those of the other plan. . . ." Exh. A to Plaintiff's Brief in Support of Motion for Summary Judgment, p. 49. This explicit language serves to create a direct conflict between the two plans. On the one hand, Draw-Tite's COB provision seeks to hold Allstate primarily liable; on other hand, the no-fault insurance policy attempts to hold itself out as an "excess" policy, secondarily liable to the ERISA plan.

B. Since a direct conflict does exist between the parties' respective contribution of benefits provisions, the question thus becomes which plan should prevail.

Both parties agree that Auto Owners Ins. Co. v. Thorn Apple Valley, 31 F.3d 371 (6th Cir. 1994), provides the definitive rule with respect to determining disputes between self-funded ERISA benefit plans and no-fault carriers. In that case, the Sixth Circuit concluded that "when a traditional insurance policy and a qualified ERISA plan contain conflicting coordination of benefits clauses, the terms of the ERISA plan, including its COB clause, must be given full effect." *Id.* at 374. However, the Thorn Apple Valley court warned that "this consideration does not necessarily mean that the ERISA plan must prevail." *Id.* Instead, the Court held that a conflict between two COB provisions should be resolved pursuant to federal common law:

may be defined as a statement wherein the benefit plan specifically subordinates itself to other coverages. *See* Dayton-Hudson Dept. Store Co. v. Auto-Owners Ins., 953 F. Supp. 177, 179 (W.D. Mich. 1995). As discussed, the Draw-Tite Plan explicitly states that where there is a basis for claims under two different "plans," the Draw-Tite Plan is "a Secondary Plan which has its benefits determined after the those of the other plan. . . ." *See* Exh. A to plaintiff's Brief in Support of Motion for Summary Judgment, p. 49. Defendant Allstate attacks plaintiff's assertion that the ERISA plan contains such an express disavowal of other plans.

In Travelers Ins. Co. v. Auto-Owners Ins. Co., 971 F. Supp. 298 (6th Cir. 1997), the court found that the ERISA plan in that case contained an express disavowal of other plans. The court relied upon the following factors in making this determination:

> [t]he plan COB clause, in relevant part: (1) provides that it "will coordinate the health benefits payable under this Plan with similar benefits payable under other plans;" (2) defines "other plans" as including coverage provided pursuant to a no-fault automobile insurance law; (3) purports to eliminate duplicate coverage; (4) purports to coordinate available coverages, setting forth rules for determining which coverage is primary (paying benefits first) and which is secondary; and (5) providing, among such rules, that if no other rule applies, that coverage is primary "which has covered the person for the longest time."

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29 U.S.C. § 1144; *see also* FMC Corp. v. Holliday, 498 U.S. 52, 61 (1990)(interpreting the deemer clause "to exempt self-funded ERISA plans from state laws that 'regulat[e] insurance'"). In the instant case, the Draw-Tite Plan is self-funded, and therefore meets this requirement. *See* Plaintiff's Brief in Support of Motion for Summary Judgment, p. 4.

considered "excess" to any private insurance plans. *See* Auto Club Ins. Co. Ass'n v. Frederick & Herrud, 443 Mich. 358, 388 (1993). In light of this fact, the Allstate policy clearly may be considered an "other plan" for purposes of the Draw-Tite Plan.

Defendant further attempts to equate the Draw-Tite ERISA plan to the one found in Dayton-Hudson, wherein the court ultimately held that that plan contained no express disavowal. 953 F. Supp. at 180. The Court is not persuaded by defendant's comparison. In Dayton-Hudson, the ERISA plan under consideration was similar to the Draw-Tite Plan insofar as it included no-fault automobile coverage as "another plan" within its coordination of benefits provision. *Id.* However, the Dayton-Hudson plan proceeded to provide for an "order of benefit determination," which stated that

> [i]f a person is covered under this plan and another plan at the same time, the plans will pay benefits in [an order to be determined by four rules]. . . .

Id. (emphasis on the plural added). Therefore, in stark contrast to the instant case, the Dayton-Hudson plan did not explicitly provide that it would be secondary to any other plan if certain conditions existed. The Dayton Hudson plan did not contain language comparable to that found in the Draw-Tite Plan, to the effect that "[w]hen there is a basis for a claim under This Plan and another Plan, This Plan is a Secondary Plan which has its benefits determined after those of the other Plan, ..." Exh. A to Plaintiff's Brief in Support of Motion For Summary Judgment, p.

Draw-Tite ERISA benefit plan must be given priority over the Allstate no-fault personal protection policy. Where a direct conflict between COB provisions and an express disavowal of other plans is found, the Court must give full effect to the ERISA plan in order "to safeguard the financial integrity of qualified plans by shielding them from unanticipated claims." Thorn Apple Valley, 31 F.3d at 375. The Court will accordingly grant plaintiff CNA's motion for summary judgment and deny defendant Allstate's motion for summary judgment. Plaintiff has overcome its burden of showing that no genuine issue of material fact exists, and is entitled to judgment as a matter of law.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that plaintiff/counter-defendant CNA Insurance Company's motion for summary judgment is **GRANTED;**

IT IS FURTHER ORDERED that defendant/counter-plaintiff Allstate Insurance Company's motion for summary judgment is **DENIED;**

IT IS FURTHER ORDERED that defendant/counter-plaintiff Allstate Insurance Company shall be primarily liable for the medical expenses of Chelsea Schwalbe; a judgment in accordance with this order shall be entered forthwith.

SO ORDERED.

Dated: 1/13/99

HON. PAUL V. GADOLA
UNITED STATES DISTRICT JUDGE