STATE OF MICHIGAN

COURT OF APPEALS

AMERICAN MEDICAL SECURITY, INC., as Subrogee of JOHN PERRI,

Plaintiff-Appellee,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant.

FOR PUBLICATION
April 20, 1999
9:00 a.m.

No. 206239
Oakland Circuit Court
LC No. 95-506446 CZ

Before: Hood, P.J., and Holbrook, Jr. and Whitbeck, JJ.

PER CURIAM.

The trial court denied defendant's motion for summary disposition and granted plaintiff's cross-motion for summary disposition. Defendant appeals as of right, and we reverse.

John Perri was injured in an automobile accident and incurred medical expenses. At the time of the accident, he had medical coverage through his mother's employer. The employer's benefit plan was administered by plaintiff and the medical coverage was provided under a Certificate of Insurance issued by the United Wisconsin Life Insurance Company. At the time of the accident, Perri was also covered by a no-fault insurance policy issued by defendant to Perri's mother. Both policies contained coordination of benefits clauses, which clauses conflicted. Medical benefits were paid to Perri by plaintiff under the policy issued by United Wisconsin. Plaintiff thereafter sought reimbursement from defendant, claiming that defendant was first in priority to pay the medical expenses pursuant to the coordination of benefits clause found in United Wisconsin's Certificate of Group Insurance.

Defendant moved for summary disposition citing MCL 500.3109a; MSA 24.13109(1) and *Federal Kemper Ins Co, Inc v Health Ins Administration, Inc*, 424 Mich 537; 383 NW2d 590 (1986). Plaintiff responded by claiming that § 3109 was preempted by the Employee Retirement Income Security Act (ERISA), 29 USC 1001 *et seq.* It also moved for summary disposition. The trial court ruled in favor of plaintiff. We disagree with the trial court's ruling on the issue of preemption.

We review decisions on motions for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In addition, statutory interpretation

is a question of law that this Court reviews de novo. *VandenBerg v VandenBerg*, 231 Mich App 497, 499; 586 NW2d 570 (1998).

MCL 500.3109a; MSA 24.13109(1) requires no-fault insurers to offer, at a reduced premium, personal injury protection benefits which are coordinated with benefits available from other health and accident coverage[1]. *Yerkovich v AAA*, 231 Mich App 54, 59-60; 585 NW2d 318 (1998), lv pending. The coordination of benefits clause serves to contain automobile insurance and health insurance costs while eliminating duplicative recovery. *Major v ACIA*, 185 Mich App 437, 441; 462 NW2d 771 (1990) (citation omitted). Under Michigan law, where no-fault coverage and health coverage are coordinated, the health insurer is primarily liable for plaintiff's medical expenses. *Federal Kemper, supra.* See also *Tousignant v Allstate Ins Co*, 444 Mich 301, 307; 506 NW2d 844 (1993). In *ACIA v Frederick & Herrud*, 443 Mich 358, 388-389; 505 NW2d 820 (1993), and its companion case, the plans at issue were self-funded plans created pursuant to ERISA, and the Court carved an exception to the rule of law set out in *Federal Kemper*. It held that the unambiguous coordination of benefits clause found in the ERISA plans[2] must be given their plain meaning despite the clause in the no-fault policy. *Id.* at 389-390.

In this case, the parties agree that plaintiff's group plan qualifies as an employee welfare benefit plan under ERISA. The plan, however, is clearly not self-funded[3], but rather has purchased insurance through United Wisconsin. The issue is whether § 3109a is preempted in a situation where the ERISA plan is not self-funded but has purchased insurance coverage. We hold that it is not.

When determining whether federal law preempts a state statute, this Court must look to congressional intent. "Preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *FMC Corp v Holliday*, 498 US 52, 56-57; 111 S Ct 403, 112 L Ed 2d 356 (1990) (citations omitted). ERISA contains three provisions that address the question of preemption. The preemption clause itself, 29 USC 1144(a), is extremely broad and provides that the provisions of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." *Id.* at 57-58. That clause is tempered by 29 USC 1144(b)(2)(A), commonly known as the "savings clause", which "returns to the States the power to enforce those state laws that 'regulate insurance'". *Id.* Further, 29 USC 1144(b)(2)(B) sets out the "deemer" clause under which employee benefit plans themselves may not be deemed insurance companies for purposes of state laws "purporting to regulate" insurance companies or insurance contracts. *Id.*

In *FMC*, the Court stated:

> We read the deemer clause to exempt self-funded ERISA plans from state laws that "regulat[e] insurance" within the meaning of the saving clause. By forbidding States to deem employee benefit plans "to be an insurance company or other insurer . . . or to be engaged in the business of insurance," the deemer clause relieves plans from state laws "purporting to regulate insurance." As a result, self-funded ERISA plans are exempt from state regulation insofar as that regulation "relate[s] to" the plans. . . . State laws that directly regulate insurance are "saved"

but do not reach self-funded employee benefit plans because the plans may not be deemed to be insurance companies, other insurers, or engaged in the business of insurance for purposes of such state laws. On the other hand, *employee benefit plans that are insured are subject to indirect state insurance regulation. An insurance company that insures a plan remains an insurer for purposes of state laws "purporting to regulate insurance" after application of the deemer clause. The insurance company is therefore not relieved from state insurance regulation. The ERISA plan is consequently bound by state insurance regulations insofar as they apply to the plan's insurer.* [*Id.* at 61 (emphasis added).]

The Supreme Court distinguished between insured and uninsured plans, "leaving the former open to indirect regulation while the latter are not." *Id.* at 62, citing to *Metropolitan Life Ins Co v Massachusetts*, 471 US 724, 747; 105 S Ct 2380, 85 L Ed 2d 728 (1985). It emphasized that "if a plan is insured, a State may regulate it indirectly through regulation of its insurer and its insurer's insurance contracts." *Id.* at 64. See also *Lincoln Mutual Casualty Co v Lectron Products, Inc*, 970 F2d 206, 210 (CA 6, 1992)[4].

Section 3109a is not preempted under the circumstances of this case. The employee benefit plan at issue was not a self-funded plan, and plaintiff's insurer, United Wisconsin, was subject to Michigan insurance law and regulation, specifically § 3109a, even where that statute indirectly effects the plan. Our ruling does not allow our state law to control an ERISA plan, but simply recognizes that state law can regulate the insurer of an ERISA plan even if that regulation may indirectly effect the plan, which is the case here.

Having determined that § 3109a is not preempted, we remand for entry of a judgment of no cause of action in favor of defendant.

Reversed and remanded. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ William C. Whitbeck

[1] MCL 500.3109a; MSA 24.13109(1) provides:

> An 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. [*Id.*]

[2] It is important to note that the coordination of benefits clauses were terms in the self-funded plans themselves, and not in any insurance policies paid for by the plans. *Id.* at 362, 365.

[3] The trial court did not render an opinion or enter into a discussion on the issue of whether plaintiff's plan was insured or self-funded, finding that defendant did not provide proof as to its allegations on the issue. We disagree. Defendant provided adequate documentary support in the trial court to determine that the plan was not self-funded, but was insured, and plaintiff does not contest that it was insured with a group policy through United Wisconsin.

[4] In *Lincoln Mutual,* the plan was self-funded, but also had stop-loss insurance for catastrophic claims. The Court found that ERISA preempted state law in the case notwithstanding the stop-loss coverage. *Id.* The plan was self-funded outside of the catastrophic coverage and thus, § 3109a would directly effect the plan. Note that stop-loss policies do not affect an ERISA plan's status as self-insured. See *Wolverine Mutual Ins Co v Rospatch Corp Employee Benefit Plan,* 195 Mich App 302, 308; 489 NW2d 204 (1992). The *Lincoln Mutual* Court acknowledged, however, that *FMC* holds that states may regulate companies that insure ERISA plans even if those state regulations may indirectly effect those ERISA plans. *Id.*