UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ALLSTATE INSURANCE COMPANY,

Plaintiff,

v.

THE SHERWIN-WILLIAMS COMPANY GROUP COMPREHENSIVE HEALTH CARE COVERAGE PLAN,

Defendant.
/

Case No. 5:98-CV-118

Hon. Richard Alan Enslen

**OPINION**

This matter is before the Court on the parties' competing motions for summary judgment. For the reasons which follow, the Court grants summary judgment in favor of Plaintiff. A declaratory judgment shall enter declaring that Plaintiff has a federal common law right of reimbursement from the Defendant for medical benefits paid under the no-fault policy to the extent that those benefits otherwise qualify for reimbursement under the Defendant's Plan.

**BACKGROUND**

On September 27, 1996, James Symons drove his automobile after consuming alcohol and with a blood alcohol level in excess of .20. His automobile crossed the centerline of Bluestar Highway in Allegan County and collided with a vehicle, carrying two passengers and traveling in the opposite direction. (Defendant's Exhibit C.) The two passengers Symons struck died and he suffered a severe and disabling closed head injury. Due to the accident, Symons incurred large medical expenses (in the hundreds of thousands of dollars) and continues to incur such medical expenses for continuing treatment.

At the time of the accident, Symons was an employee of the Sherwin Williams Company, which sponsors the Sherwin Williams Company Group Comprehensive Health Care Coverage Plan ("the Plan") to benefit its employees. Symons participated in the Plan and his health care coverage under the Plan commenced on June 1, 1991. (Defendant's Exhibit B.) The terms of the Plan are stated in Defendant's Exhibit A, which contains headings for coordination of benefits, claim procedures and the Plan's right of recovery. The term "coordination of benefits" is defined under the Plan to mean "that if the covered person is covered under more than one plan, and it is determined that this Plan will not pay its benefits first, the total amount payable under this Plan will be reduced by the amount or value of the benefits or services provided by all other plans." (Exhibit A at 59.) The terms "other plans" are defined to include medical and dental coverage under no-fault automobile insurance. (*Id.*)

The following "coordination of benefit" rules under the Plan determine which plan pays first:

> (1) A plan which does not provide for Coordination of Benefits will pay its benefits first.
>
> (2) A plan which covers a person other than as a Dependent will pay its benefit before the plan which covers the person as a Dependent.
>
> (3) [Laid-off worker rule--inapplicable.]
>
> (4) [Child rule--inapplicable.]
>
> (5) [Divorced parent rule--inapplicable.]
>
> (6) When the rules above do not apply, the plan which has covered the person for the longer period of time will pay its benefits first. A new plan is not established when coverage by one carrier is replaced within one day by that of another.

(*Id.* at 60-61.)

Additionally, the Plan contains a section titled "Plan's Rights of Recovery," which provides in pertinent part:

> In addition to the other rights provided in the Plan, the Plan shall have the right to reduce benefit payments otherwise properly payable to the covered persons (including covered Dependents) to the extent of any and all of the following:
> . . . .
>
> (2) Automobile Insurance medical or dental payments coverage benefits to which the covered person is entitled.
> . . . .

(*Id.* at 57.) This section also requires covered persons to execute documents and assist the Plan in recovering payments. Other sections of the Plan require covered persons or their assignees to file claims to recover for medical and dental charges and provide an administrative system for appealing adverse claim determinations. (*Id.* at 56-57.)

Symons insured his automobile by purchasing no-fault Auto Insurance Policy No. 065 189446 ("the Policy") through Allstate Insurance Company ("Allstate"). Symons coverage under the Policy commenced on July 31, 1994. (Plaintiff's Exhibit E.) The terms of the Policy in effect at the time of the accident are contained in Plaintiff's Exhibit D. The terms of the Policy provide for personal injury protection medical coverage. (Plaintiff's Exhibit D at 13.) The Policy also includes a coordination of benefits clause and a right to reduce payment clause. (*Id.* at 18-19.)

On May 7, 1997, an employee named Diane Bilicki of Subro Audit, Inc., the agent for the Plan, wrote to Allstate to request reimbursement of the medical costs paid on behalf of Symons. (Defendant's Exhibit E.) On August 7, 1997, Robert Goldenbogen, an attorney for Allstate, wrote to Diane Bilicki to indicate Allstate's position that the Plan provided the primary medical insurance for Symons and requested reimbursement of $40,814.53 of health care expenses of Symons.

(Defendant's Exhibit F.) On February 23, 1998, Goldenbogen again wrote Bilicki to indicate that Allstate had paid in excess of $400,000 for the medical care of Symons and that Symons was continuing to receive ongoing care. In such letter, Goldenbogen requested that the Plan reimburse Allstate for said medical expenses and pay future medical expenses as the primary insurer of Symons. (Defendant's Exhibit G.) The Plan has not agreed to any reimbursement and, as of June 25, 1999, Allstate has paid $656,523.63 in medical expenses for Symons for which it seeks reimbursement. (Plaintiff's Exhibit F.) The Plan also asserts that, even if its coverage is determined to have priority, at least some of the billed expenses for psychological treatment, rehabilitation and alcohol dependency treatment are not covered under the Plan. (Defendant's Brief in Support of Defendant's Motion for Summary Judgment at n. 2.) The Plan has also challenged in its Reply Brief whether Plaintiff has provided complete answers in discovery to its question of whether Allstate previously insured Symons under policies prior to the 1994 policy which might have the effect of making the Allstate policy "prior in time" under the Plan's coordination of benefit rules. (Defendant's Reply Brief at 9-10.) However, Defendant has neglected to file any motions to compel discovery and such motions were required to be filed under the Case Management Order by May 22, 1999.

Plaintiff Allstate filed its civil action seeking a declaration that the Plan had primary coverage of Symons' medical expenses on or about July 23, 1998 in the Circuit Court for the County of Allegan, Michigan. Defendant was served on August 12, 1998 and Defendant removed this suit to this Court by Notice of Removal filed on August 24, 1998. After a period of discovery, the parties filed their competing motions for summary judgment, which have now been fully briefed.

## STANDARD FOR SUMMARY JUDGMENT

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 320-22 (1986). The initial burden is on the movant to specify the basis upon which summary judgment should be granted and to identify portions of the record which demonstrate the absence of a genuine issue of material fact. *Id.* The burden then shifts to the non-movant to come forward with specific facts, supported by the evidence in the record, upon which a reasonable jury could find for non-moving party. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). If, after adequate time for discovery on material matters at issue, the non-movant fails to make a showing sufficient to establish the existence of a material disputed fact, summary judgment is appropriate. *Celotex Corp.*, 477 U.S. at 323, 326 n.6.

## LEGAL ANALYSIS

It is apparent from the parties' motions and other documents filed that there are few, if any, factual disputes pending and that the parties' dispute is essentially legal in nature. The Plaintiff takes the position that the coordination of benefits language in the Plan preempts the coordination of benefits language in the Policy under the holding of *Auto-Owners Ins. Co. v. Thorn Apple Valley, Inc.*, 31 F.3d 371, 375 (6th Cir. 1994). Plaintiff then reads the Plan provisions as giving priority to the Plan coverage over the Policy coverage because the Plan coverage was first in time under the catch-all provision (rule 6) of the coordination of benefits clause. (The catch-all is the operative provision in that the preceding rules do not establish any basis for priority.)

Defendant contends that summary judgment should be granted to it for several reasons. First, because neither Symons nor Plaintiff exhausted the administrative claims procedures contained in the Plan, citing *Weiner v. Klais & Co.*, 108 F.3d 86 (6th Cir. 1997). Second, Defendant contends that it has expressly disavowed coverage under the "right to reduce" provision in the Plan (because the medical expenses were related to the automobile accident) and that such action was not arbitrary and capricious within the meaning of *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). Defendant also argues in its response and reply that summary judgment is premature because Plaintiff has not fully answered its discovery requests pertaining to the insurance policy and that full reimbursement would be inappropriate because some of the medical costs compensated by Allstate are not covered under the Plan.

Almost identical legal disputes were raised in the recent Sixth Circuit unpublished decision in *Prudential Property & Cas. Ins. v. Delfield Co. Group Health Plan*, 187 F.3d 637, 1999 WL 617992, *1-3 (6th Cir. Aug. 6, 1999). The analysis in that decision is worthy of review at length:

> Section 502(a)(1) of ERISA permits participants or beneficiaries of employer health care plans to bring civil suits to recover benefits. See §29 U.S.C. 1132(a)(1)(B). However, it is well established that a participant or beneficiary must exhaust his or her administrative remedies prior to commencing suit in federal court. *See Baxter v. C.A. Muer Corp.*, 941 F.2d 451, 453-54 (6th Cir. 1991). The district court, relying on *Weiner v. Klais and Co.*, Inc., 108 F.3d 86 (6th Cir. 1997), found that Prudential had no standing to sue the Plan except under § 502(a)(1) as a subrogee/assignee asserting Ms. Schafer's rights under the plan, so Prudential was required to exhaust administrative remedies just as Ms. Schafer would have been required to do if she had pursued an action against the Plan. *Weiner* involved a podiatrist who rendered medical services to numerous employee/participants of various group health plans, who in turn validly assigned their rights to benefits under their respective plans to the doctor. He then submitted to the plan administrator his claims for payment relating to the services rendered. The administrator denied the claims. The doctor, without having further administratively pursued the claims, filed suit against the administrator, seeking to recover benefits pursuant to §29 U.S.C. 1132(a)(1)(B). *See id.* at 87-88. Although the district court in *Weiner* did not consider the issue of

exhaustion of administrative remedies, though it was raised by the defendant's motion to dismiss, this court held that "plaintiff should have exhausted the administrative remedies under the plans and, because he did not, dismissal of his action for recovery of benefits is proper." *Id.* at 91 Thus, Weiner extended ERISA's administrative exhaustion requirement to assignees of participants or beneficiaries.

In the case at bar, the district court characterized Prudential as analogous to the assignee/plaintiff doctor in *Weiner* in holding that Prudential's only avenue for proceeding against the Plan was § 502(a)(1)(B). *Weiner*, however, is not applicable as it is readily distinguishable from the facts of the present case. The plaintiff doctor in *Weiner*, as a true assignee, stepped into the shoes of the participants and attempted to assert their rights for the recovery of benefits under § 502(a)(1)(B). Conversely, Prudential is not stepping into the shoes of Ms. Schafer in the classic sense of an assignee or subrogee. Rather, Prudential, having paid benefits to the participant/beneficiary, is asserting its own rights under federal common law in seeking a declaration of liability under the respective COB clauses. *See Thorn Apple Valley*, 31 F.3d at 374.

In *Thorn Apple Valley*, this court, faced with a nearly identical factual scenario as in the case at bar, held that "[b]ecause no federal statute addresses the resolution of the conflict between the COB clauses, application of federal common law is appropriate." Furthermore, this court stated that "[§ 502(a)(1)(B) ] empowers a select group of persons--participants or beneficiaries--to bring civil actions. Auto Owners [the plaintiff automobile insurer] falls into neither of these categories and the company concedes that ERISA contains no provision specifically according it the right to bring a cause of action." *Id.* Thus, a plaintiff such as Prudential proceeds under the federal common law, not as a participant or beneficiary under § 502(a)(1)(B). Although this court did not specifically address the administrative exhaustion requirement, the district court in *Thorn Apple Valley* confronted the issue and rejected it, stating that "the exhaustion requirement is applicable when a participant or a beneficiary of ERISA plan is challenging the Plan's denial of a benefit claim. *See Baxter v. C.A. Muer Corp.*, 941 F.2d 451, 453-54 (6th Cir. 1991). It is not applicable where, as here, a declaratory judgment and recoupment action-not a claim for benefits under ERISA- is brought by a nonparticipant or a nonbeneficiary of an ERISA plan." *Auto-Owners Ins. Co. v. Thorn Apple Valley, Inc.*, 818 F.Supp. 1078, 1083 (W.D. Mich. 1993), *rev'd on other grounds*, 31 F.3d 371 (6th Cir. 1994). This analysis is persuasive and comports with this court's later analysis in *Thorn Apple Valley*. Thus, *Weiner* is inapposite, and ERISA's administrative exhaustion is inapplicable.

In light of the foregoing, we REVERSE the judgment of the district court and REMAND the case to the district court for a determination of primary/secondary liability under the respective COB clauses.

SUHRHEINRICH, J., concurring.

SUHRHEINRICH, J.
I concur in the result because *Auto Owners Ins. Co. v. Thorn Apple Valley*, Inc., 31 F.3d 371 (6th Cir. 1994) is indistinguishable from the present case. However, I think this case is indistinguishable from *Weiner*. In my mind, it makes no difference whether one is an assignee or subrogee (both are usually contractually-created rights) or an insurance company seeking declaratory relief under its contract with the direct beneficiary. Therefore, I believe *Auto Owners* and *Weiner* are in direct conflict and cannot be reconciled. Although I view *Weiner v. Klais & Co.*, 108 F.3d 86 (6th Cir. 1997), as providing the better reasoning, I recognize that, as a subsequent decision, it must yield to the authority of *Thorn Apple Valley*. *See United States v. Washington*, 127 F.3d 510, 517 (6th Cir. 1997) (holding that one panel cannot overrule a prior panel's published opinion).

*Prudential Property & Cas. Ins. v. Delfield Co. Group Health Plan*, 187 F.3d 637, 1999 WL 617992, at *1-3.

Given the holding in *Prudential* and the other case law cited by the parties, the Court makes the following rulings: (1) that the terms of the Plan's coordination of benefits clause govern priority of coverage; (2) that the Plaintiff was not required to exhaust the Plan's administrative claim procedures because it is an insurance company seeking a common law right of reimbursement; (3) that Defendant's interpretation of its right to reduce clause is "arbitrary and capricious" because it would render meaningless its own coordination of benefits clause (*see Moench v. Robertson*, 62 F.3d 553, 566 (3rd Cir. 1995); *Farm Bureau Gen. Ins. Co. v. Morton Buildings, Inc*, No. 5:97-CV-191 (W.D. Mich. Aug. 28, 1998) (unpublished opinion)); (4) that under the Plan's coordination of benefits clause the Plan assumes primary coverage of medical expenses deriving from the automobile accident and the Policy coverage is secondary; (5) that Defendant had ample opportunities for discovery prior to the resolution of these summary judgment motions and the Defendant did not seek to compel discovery in a timely manner in this suit; and (6) Plaintiff's

Motion for Summary Judgment should be granted and the Defendant's Motion for Summary Judgment denied. Declaratory relief should enter declaring: that the Plan medical coverage relating to the automobile accident is primary; that the Policy coverage is secondary; and that the Plan should reimburse Allstate for past and future medical expenses paid by Allstate (arising from the automobile accident) to the extent that the medical expenses are covered medical expenses under the Plan (*see Farm Bureau Gen. Ins. Co. v. Morton Buildings, Inc*, No. 5:97-CV-191 (W.D. Mich. Aug. 28, 1998) (unpublished opinion)).

**CONCLUSION**

For the reasons stated, Plaintiff's motion shall be granted, Defendant's motion denied and judgment shall enter declaring the rights of coverage as stated herein.

DATED in Kalamazoo, MI:

Oct 20, 1999

RICHARD ALAN ENSLEN
Chief Judge

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Rec/Rec

ALLSTATE INSURANCE COMPANY,

Plaintiff,

v.

THE SHERWIN-WILLIAMS COMPANY GROUP COMPREHENSIVE HEALTH CARE COVERAGE PLAN,

Defendant.
/

Case No. 5:98-CV-118

Hon. Richard Alan Enslen

**JUDGMENT**

In accordance with the Court's Opinion of this date;

**IT IS HEREBY ORDERED** that Plaintiff's Motion for Summary Judgment (Dkt. No. 18) is **GRANTED** and Defendant's Motion for Summary Judgment (Dkt. No. 17) is **DENIED**.

**IT IS FURTHER ORDERED** that declaratory relief issues in favor of the Plaintiff and against Defendant, pursuant to 28 U.S.C. § 2201, declaring the rights of the parties as follows: Defendant Sherwin-Williams Company Group Comprehensive Health Care Coverage Plan under its Plan has primary coverage for the medical expenses arising from the automobile accident of James Symons on September 27, 1996; Plaintiff Allstate Insurance Company under its Policy has secondary coverage for said medical expenses; Defendant shall reimburse Plaintiff for past and future medical expenses paid by Plaintiff (arising from the automobile accident) to the extent that the medical expenses are covered medical expenses under the Plan.

DATED in Kalamazoo, MI:
Oct 20, 1999

RICHARD ALAN ENSLEN
Chief Judge