UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

LAKES STATES INSURANCE COMPANY,

Plaintiff(s),

v.

SIMPLIFIED EMPLOYMENT SERVICES EMPLOYEE BENEFIT PLAN,

Defendant(s).
_____/

Case No. 98-74639

Hon. Nancy G. Edmunds

OPINION & ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on the parties' cross motions for summary judgment. Plaintiff, an auto insurer, and Defendant, an ERISA insurer, each claim the other is liable to pay the medical expenses resulting from a mutually insured individual's auto accident. Under federal common law, an ERISA plan prevails over a no-fault policy where the terms of the plan "expressly disavow" coverage. Where a plan does not expressly disavow coverage, and the language of the no-fault policy subordinates its coverage, the no-fault policy prevails. For the reasons set forth below, the no-fault policy prevails in this case. Accordingly, Defendant's motion for summary judgment is DENIED, and Plaintiff's motion for summary judgment is GRANTED.

I. Facts

Plaintiff, Lake States Insurance Company ("Lake States"), is a no-fault auto insurer under Michigan law. Defendant, Simplified Employment Services Employee Benefit Plan ("SES Plan"), is the administrator of an employee welfare benefit plan governed by the Employment Retirement Income

Security Act (ERISA), 29 U.S.C. § 1001, et. seq. Lawrence R. May is the mutually insured. He and his dependants are entitled to insurance benefits under the policy and the SES Plan.

On September 22, 1997, Fallon Harvey (Lawrence May's dependant) was injured in an automobile accident. Lake States provided coverage for the expenses incurred as a result of the accident. However, Lake States now seeks to recover from Defendant monies it expended for Fallon Harvey's medical expenses.[1] Lake States filed a complaint seeking a declaratory judgment.

The Lake States no-fault policy contains a coordination of benefits clause under the Michigan No Fault Insurance Act, Mich. Comp. Laws Ann. § 500.3109(a). The coordination of benefits clause provides:

> B. We do not provide Personal Injury Protection Coverage for:
>
> 1. Medical expenses for you or any 'family member':
>
> a. To the extent that similar benefits are paid or payable under any other insurance, service, benefits or reimbursement plan (excluding Medicare benefits provided by the Federal Government); and
>
> b. If Coordination of Benefits for medical expenses is indicated in the Declarations.

See Pl's Motion for Summary Judgment at Exb. C, Amendment of Policy Provisions at 6.

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[1] Lake States has paid $151,938.19 in medical benefits on behalf of Fallon Harvey. *See* Pl's Motion for Summary Judgment at Exb. E. During oral argument it was disclosed that the SES Plan has also paid benefits to the insured.

Lawrence May elected coordinated coverage. See id. at Exb. C, Declaration. Lake States claims that under this clause, the ERISA plan is primarily liable for the insured's medical expenses, and Lake States is secondarily liable.

SES counters that under the terms of the ERISA plan, it is not at all liable for the insured's medical expenses. Alternatively, if it is liable to some extent, SES contends its responsibility is secondary, i.e. excess, to Lake States' primary responsibility to pay. The SES Plan similarly contains a coordination of benefits clause. It provides:

> COORDINATION OF BENEFITS
>
> Individuals might be covered under two or more plans; and in the event of an accident or illness, could possibly submit claims to each of the different companies underwriting their plans of coverage. The end result might be that the total claim payments from the companies exceed the individual's total medical expenses. Therefore, the following Coordination of Benefits provision applies to this coverage.
>
> This provision is not to deny you benefits but to ensure that duplicate payments are not made when you are covered by this and any other contract. Under this plan of group coverage all benefits will be coordinated with all other plans you or your Dependent might have coverage through, so that the total amount payable under all plans will not exceed 100% of your total medical expense incurred during a calendar year. However, if your Dependents have coverage under any other plan and said plan is considered primary payor and the Dependent spouse fails to comply with the requirements of the other plan or fails to utilize a Health Maintenance Organization (HMO) which has been selected by said Dependent spouse under the other plan and the other plan would have been primary for the Dependent's actions, this plan will not pay any portion of the allowable expenses incurred by the Dependent spouse.
>
> For a Dependent child who fails to utilize the services of the HMO, which would otherwise be considered as a primary payor for the Dependent, this Plan will pay its pro-rata share, up to one-half of the allowable benefits determined by this Plan.

See Pl's Motion for Summary Judgment, Exb B at 24-5 (emphasis added).

The definition of "Other Plan" includes "Automobile 'no fault' and 'fault' insurance, including individual insurance. See id. at 25. The Plan provides that the order of benefit will be handled as follows:

1. The primary plan for husbands or wives is that which covers the person as an employee or as the certificate holder.

2. For children's expenses the primary plan is the plan of the parent whose birthday falls earlier in the calendar year.

3. For children's expenses when the parents are separated or divorced. [Certain rules apply].

Id.

The parties agree that none of these three priority rules apply in this case.

Although the SES Plan includes no-fault insurance within its definition of "Other Plan" with which it purportedly coordinates benefits, the SES Plan's coordination of benefits section does not expressly subordinate plan coverage to no-fault coverage. In addition, another section of the SES Plan contains an exclusion. The language provides:

The following are not covered by your benefit plan:

. . . .

* To the extent that those expenses are in any way reimbursable through 'No Fault' automobile insurance.

Pl's Motion for Summary Judgment Exb. B at 16-17.

Therefore the SES Plan language purports to coordinate benefits with no-fault carriers and at the same time to entirely exclude coverage when medical expenses are reimbursable by a no-fault carrier. The parties have filed cross motions for summary judgment, each arguing that as a matter of law, the other is liable to the insured for medical benefits.

II. Summary Judgment Standard

Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R. Civ. P. 56(c). The central inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). After adequate time for discovery and upon motion, Rule 56(c) mandates summary judgment against a party who fails to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The movant has an initial burden of showing "the absence of a genuine issue of material fact." Celotex, 477 U.S. 317, 323. Once the movant meets this burden, the non-movant must come forward with specific facts showing that there is a genuine issue for trial. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). To demonstrate a genuine issue, the non-movant must present sufficient evidence upon which a jury could reasonably find for the non-movant; a "scintilla of evidence" is insufficient. Liberty Lobby, 477 U.S. at 252.

The court must believe the non-movant's evidence and draw "all justifiable inferences" in the non-movant's favor. Liberty Lobby, 477 U.S. at 255. The inquiry is whether the evidence presented is such that a jury applying the relevant evidentiary standard could "reasonably find for either the plaintiff or the defendant." Liberty Lobby, 477 U.S. at 255.

III. Analysis

The Sixth Circuit addressed the issue of conflicting insurance policies in Auto Owners Ins. Co. v. Thorn Apple Valley, Inc., 31 F.3d 371 (6th Cir. 1994), holding that where an ERISA policy directly conflicts with an auto policy, the terms of the ERISA policy govern. In that case, the insured was

injured in a car accident. The insured was covered by auto insurance and an ERISA plan. Each insurer claimed that the other was liable for medical benefits. The no-fault auto insurance policy contained a coordination of benefits provision providing that the insurer was only liable for personal injury benefits to the extent that such benefits were not covered by any health insurance plan. The ERISA plan also contained a coordination of benefits provision which provided as follows:

> In addition to the benefits payable under this Plan, sometimes an employee or dependent is entitled to benefits for the same hospital or medical expenses under Group Fault or No-Fault Auto Insurance . . . or another group plan. Should this type of duplication occur, the insurance does not apply to any liability for losses covered by a primary contributory, excess, secondary or any other coverage of any other basis by any other insurance company, under any other types of circumstances, particularly such benefits as may be payable under any type of coordinating policy with an automobile insurance carrier for first party benefits under MCLA 500.3109 et. seq.

In sum, the auto policy and the ERISA plan were in direct conflict because each purported to make the other primarily liable for medical payments.

The Sixth Circuit first noted that ERISA preempts Mich. Comp. Laws Ann. § 500.3109, the Michigan No-Fault Act provision regarding coordination of benefits. Further, because ERISA does not contain any provisions governing this type of conflict between insurance policies, federal common law applies. Id. at 374. The court noted that ERISA plans should be uniformly interpreted. Further, the underlying purpose of ERISA is to protect employee benefits plans and their participants. The court explained, "In our view, this directive means that Congress sought to guard qualified benefit plans from claims, such as that advanced by Auto Owners, which have been expressly disavowed by the plans." Id. at 375 (emphasis added). Accordingly, the Sixth Circuit held that the terms of the ERISA plan, which expressly disavowed coverage under the circumstances, should be given full effect and the auto insurer should be primarily liable.

> Accordingly, we conclude that the terms of the [ERISA] plan, including its coordination of benefits clause, must be given full effect in order to comply with the

> primary goal of ERISA, which is to safeguard the financial integrity of qualified plans by shielding them from unanticipated claims.

Id. Accord Great West Life & Annuity Ins. Co. v. Titan Index. Co., No. 95-72351 (E.D. Mich. Feb. 18, 1997) (Cohn, J.) (following Thorn Apple and holding that where coordination of benefits provisions conflict, ERISA plan governs).

Where an ERISA plan does not expressly subordinate its coverage to other coverage and an auto insurance policy does subordinate its coverage, there is no direct conflict between the policies. In these circumstances, the ERISA plan is the primary insurer and the auto policy is the secondary insurer. In Dayton Hudson Dept. Store Co. v. Auto-Owners Ins. Co., 953 F. Supp. 177 (W.D. Mich. 1995), the auto insurance policy expressly subordinated coverage to any health care plan. The auto policy provided, "It is agreed that the limits of liability provision . . . which provides that benefits payable under this policy shall be reduced by certain benefits from other sources . . . [including] any health care plan." Id. at 180. In contrast, the ERISA plan at issue did not expressly disavow coverage or subordinate its coverage. The ERISA plan provided for coordination of benefits as follows:

> If you or your dependants incur medical expenses for which benefits are payable under this Plan and another plan, such as . . . no-fault auto coverage, the Coordination of Benefits provision will be applied.
>
> If a person is covered under this plan and another plan at the same time, the plans will pay benefits in this order:
>
> 1. The plan that covers the person as an employee pays first. The plan that covers the person as a dependant pays second.
>
> 2. For children's expenses, the primary plan is the plan of the male parent and the secondary plan is the plan of the female parent.
>
> 3. If the above rules don't establish an order, the plan which has covered the person as an employee or as that employee's dependant for the longer period of time will pay first with the following exception: The plan covering an active employee would pay before the plan of a laid-off or retired employee.

> 4. Any plan that does not contain a Coordination of Benefits provision automatically pays first.

Id. The court in Dayton Hudson reasoned that because the ERISA plan did not "expressly disavow" coverage, the case was distinguishable from Thorn Apple and it was not necessary that the terms of the ERISA plan prevail. As a result, the court held that the ERISA plan provided primary coverage and the no-fault policy provided secondary coverage. Accord Campbell Soup Co. v. Allstate Ins. Co., 4:95-CV-38 (W.D. Mich. Jan. 9, 1996) (Bell, J.) (where ERISA plan did not expressly subordinate its coverage and auto policy did subordinate, there is no direct conflict between the policies; ERISA plan must provide primary coverage).

This case is more closely analogous to Dayton Hudson that it is to Thorn Apple. The SES Plan language here does not expressly disavow coverage when there is coverage by a no-fault carrier. Rather, the Plan's language is internally inconsistent. On the one hand it purports to coordinate benefits with no-fault insurance carriers, and on the other hand it purports to exclude coverage when the insured has no-fault coverage. The language reads:

> COORDINATION OF BENEFITS
>
> Individuals might be covered under two or more plans; and in the event of an accident or illness, could possibly submit claims to each of the different companies underwriting their plans of coverage. The end result might be that the total claim payments from the companies exceed the individual's total medical expenses. Therefore, the following Coordination of Benefits provision applies to this coverage.
>
> This provision is not to deny you benefit but to ensure that duplicate payments are not made when you are covered by this and any other contract. Under this plan of group coverage all benefits will be coordinated with all other plans you or your Dependent might have coverage through, so that the total amount payable under all plans will not exceed 100% of your total medical expense incurred during a calendar year. However, if your Dependents have coverage under any other plan and said plan is considered primary payor and the Dependent spouse fails to comply with the requirements of the other plan or fails to utilize a Health Maintenance Organization (HMO) which has been selected by said Dependent spouse under the other plan and the other plan would have been primary for the Dependent's actions, this plan will not pay any portion of the allowable expenses incurred by the Dependent spouse.

> For a Dependent child who fails to utilize the services of the HMO, which would otherwise be considered as a primary payor for the Dependent, this Plan will pay its pro-rata share, up to one-half of the allowable benefits determined by this Plan.

See Pl's Motion for Summary Judgment, Exb. B at 24-5 (emphasis added).

The Plan specifically defines "other plan" to include no-fault insurance carriers. *Id.* at 25. This language does not expressly disavow coverage, but purports to coordinate coverage with no-fault carriers. In another section of the Plan entitled "EXCLUSIONS UNDER ALL PHASES OF COVERAGE" the Plan states, "The following are not covered by your benefit plan: . . . . To the extent those expenses are in any way reimbursable through 'No Fault' automobile insurance." Id. at Exb. B. 16-17.

The rules of construction for insurance contracts are the same as those for any other written contract. Comerica Bank v. Lexington Ins. Co., 3 F.3d 939, 942 (6th Cir. 1993). First, the Court must determine whether the contract language at issue is ambiguous or unambiguous. Then, the court must construe the contract. The question of whether a contract is ambiguous is a question of law for the court. Steinmetz Elec. Contractors v. Local Union No. 58, 517 F. Supp. 428, 432 (E.D. Mich. 1981); Mayer v. Auto-Owners Ins. Co., 127 Mich. App. 23, 27, 338 N.W.2d 407, 409 (1983). Construction of a contract, whether it is ambiguous or unambiguous, also is a question of law for the court. Petovello v. Murray, 139 Mich. App. 639, 642, 362 N.W.2d 857, 858 (1984); Fragner v. American Community Mut. Ins. Co., 199 Mich. App. 537, 540, 502 N.W.2d 350, 352 (1993). A contract which admits of but one interpretation is unambiguous. Fragner, 199 Mich. App. at 540, 502 N.W.2d at 352. In contrast, a contract provision is ambiguous if it is capable of two or more constructions, both of which are reasonable. Petovello, 139 Mich. App. at 642, 362 N.W.2d at 858.

In addition, certain rules of construction apply. Ambiguous terms in an insurance policy are construed in favor of the insured. Arco Indus. Corp. v. Am. Motorists Ins., 448 Mich. 395, 402-03, 531

N.W.2d 168, 172 (1995). Moreover, it is the insurer's responsibility to clearly express limits on coverage. Auto Club Ins. Ass'n v. DeLaGarza, 433 Mich. 208, 214, 444 N.W.2d 803, 806 (1989). Thus, insurance exclusion clauses are construed strictly and narrowly. Auto-Owners v. Churchman, 440 Mich. at 567, 489 N.W.2d at 435; Farm Bureau Mut. Ins. Co. v. Stark, 437 Mich. 175, 181, 468 N.W.2d 498, 501 (1991).

In the context of an ERISA case, the Sixth Circuit has noted that the federal common law and Michigan law are "essentially the same" when it comes to the issue of general contractual rules that apply to the interpretation of insurance contracts. Regents of the University of Michigan v. Employees of Agency Rent-A-Car Hospital Assoc., 122 F.3d 336, 339-40 (6th Cir. 1997). The court of appeals noted the following:

> Under Michigan law, insurance policies are to be construed in a manner consistent with the ordinary and popular sense of the language used therein. A technical construction of a policy's language which would defeat a reasonable expectation of coverage is not favored . . . . Accordingly, an insurer has a duty to express clearly the limitations in its policy; any ambiguity will be construed liberally in favor of the insured and strictly against the insurer.

Id. at 339, quoting Ford Motor Credit Co. v. Aetna Casualty and Surety Co., 717 F.2d 959, 961 (6th Cir. 1983).

The Sixth Circuit also noted that the federal common law, similar to Michigan law, "requires that the terms of an ERISA plan be interpreted in an ordinary and popular sense, and that any ambiguities in the language of the plan be construed strictly against the drafter of the plan." Id. at 339-40, citing Phillips v. Lincoln Nat'l Life Ins. Co., 978 F.2d 302, 307-308 (7th Cir. 1992).

The Coordination of Benefits Clause and the Exclusion Clause of the SES Plan cannot be reasonably reconciled with each other. The SES Plan language is ambiguous, and internally inconsistent. The Plan cannot be said to have "expressly disavowed" coverage as in Thorn Apple. Rather, as in Dayton Hudson, the Plan's language is unclear and is not automatically entitled to priority

over the no-fault policy. As the court in Thorn Apple reminded us, the fact that ERISA preempts state law "does not necessarily mean that the ERISA plan must prevail." Thorn Apple Valley, 31 F.3d at 374.

The Court must apply federal common law, which provides that the ERISA plan prevails where its language "expressly disavows" coverage in the face of other policies. Id. at 375 ("Congress sought to guard qualified benefit plans from claims . . . which have been expressly disavowed by the plans." Id.) The application of federal common law to the SES Plan does not lead to the conclusion that it "expressly disavowed" coverage when an insured also has no-fault insurance. Accordingly, the SES Plan is not entitled to priority.

SES would have the Court ignore the coordination of benefits provision altogether, apparently because none of the priority rules accompanying that section apply under the circumstances of this case. The Plan's coordination of benefits clause is implicated in this case. Although the language triggering the clause's application could be clearer, the first paragraph of the clause reads:

> Individuals might be covered under two or more plans; and in the event of an accident or illness, could possibly submit claims to each of the different companies underwriting their plans of coverage. The end result might be that the total claim payments from the companies exceed the individual's total medical expenses. Therefore, the following Coordination of Benefits provision applies to this coverage.

See Pl's Motion for Summary Judgment Exb. B at 24 (emphasis added).

Furthermore, simply because the drafters of the Plan language did not foresee the situation that has arisen here does not mean that the coordination of benefits section is inapplicable, especially when it specifically purports to coordinate benefits with no-fault carriers. See id. at 25. Ignoring the provision does nothing to shed light on its inconsistency with the exclusion clause.

SES also relies upon Allstate Insurance Company v. American Medical Security, Inc., 975 F.Supp. 1005 (E.D. Mich. 1997)(Edmunds, J.) in which this Court held that an ERISA plan had priority over a no-fault insurance plan. However, the decision in that case turned on policy language that

distinguishes it from this case. In Allstate, the no-fault carrier argued that there was a conflict between the Plan's coordination of benefits clause and the excess insurance clause which resulted in the Plan not having "expressly disavowed" coverage. However, the Court found that the coordination of benefits clause only applied to competing group coverage, and not to individual coverage. "Here, . . . [the] ERISA plan expressly disavows coverage when there is coverage by another non-group policy." Id. at 1008 (emphasis in original). Thus, the coordination of benefits clause was not implicated and the Court applied the excess insurance clause which rendered the no-fault policy subordinate. Id.

As discussed above, the coordination of benefits clause is implicated in this case. Its application is not limited to situations involving only other group insurers as was the case in Allstate. By its terms, the coordination of benefits clause in the Plan here expressly applies when a no-fault carrier also provides coverage.

The language of the Lake States no-fault policy at issue here is clear. It provides:

> B. We do not provide Personal Injury Protection Coverage for:
>
> 1. Medical expenses for you or any 'family member':
>
> a. To the extent that similar benefits are paid or payable under any other insurance, service, benefits or reimbursement plan (excluding Medicare benefits provided by the Federal Government); and
>
> b. If Coordination of Benefits for medical expenses is indicated in the Declarations.

Pl's Motion for Summary Judgment Exb. C, Amendment of Policy Provisions at 6.

Given that both "a" and "b" above are satisfied under the circumstances of this case, that the SES Plan language is internally inconsistent, and that it does not "expressly disavow" coverage as required to render it secondarily liable under federal common law, the SES Plan is primary and the

Lake States plan is secondary, or excess. Accordingly, the Plaintiff's motion for summary judgment is GRANTED and the Defendant's motion for summary judgment is DENIED.

IV. Conclusion

Being fully advised in the premises, having read the pleadings, and for the reasons set forth above, the Court hereby orders as follows: Plaintiff Lake States Insurance Company's motion for summary judgment is GRANTED. Defendant Simplified Employment Services Employee Benefit Plan's motion for summary judgment is DENIED.

SO ORDERED.

Nancy G. Edmunds
U. S. District Judge

Dated: 12/10/99