STATE OF MICHIGAN

COURT OF APPEALS

AUTO-OWNERS INSURANCE COMPANY,

JAN 14 1988

Plaintiff-Appellee,

v

No. 97740

AMERICAN COMMUNITY MUTUAL INSURANCE COMPANY,

Defendant-Appellee.

/

BEFORE: MacKenzie, P.J., M.M. Doctoroff and J.C. Kingsley,* JJ.

PER CURIAM

Defendant appeals as of right from an order granting plaintiff's motion for summary disposition, MCR 2.116(C)(9) and (10). We affirm.

Plaintiff no-fault insurer and defendant health insurer issued policies to the same insured. Plaintiff's no-fault insurance policy includes a coordination of benefits provision which provides:

"It is agreed that the limits of liability provision of Section IV of the Michigan No-Fault Insurance Endorsement attached to and forming a part of this policy, which provides that benefits payable under this policy shall be reduced by certain benefits from other sources, is amended by addition of the following:

"6. (c) any health, disability or automobile medical expenses insurance policy: any health care plan; or any salary or wage continuation plan, including sick pay benefits; but this provision (c) shall apply only with respect to the named insured and any relative.

"It is further agreed that where a deductible applies to the Personal Protection insurance afforded by this policy, the deductible amount shall be reduced by any benefits paid or payable under any of the policies over which this insurance is stated to be excess."

Defendant's group disability insurance policy contains the following provision:

"The following 'Excluded Charges' are specifically excluded from coverage:

"All Charges which are not specifically included in the definition of eligible charges for personal insurance and in addition any charges:

* * *

*Circuit judge, sitting on the Court of Appeals by assignment.

"(12) for any loss caused by accidental bodily injury which arises out of or results from an automobile accident when benefits are provided under the Michigan No-Fault Insurance Act (Act No. 294 of the Public Acts of 1972) including any amendments thereto, exceeding three hundred dollars ($300) for any one insured person as a result of any Automobile Accident."

When the insured was involved in an automobile accident, defendant health insurer paid $300 toward medical expenses and disclaimed further liability.

Plaintiff then brought this action and filed a motion for summary disposition, claiming that defendant had primary liability for payment of medical expenses and that its own liability was secondary thereto. In granting plaintiff's motion, the trial court concluded that Federal Kemper Insurance Co v Health Insurance Administration, Inc, 424 Mich 537; 383 NW2d 590 (1986), applied to this case such that defendant was primarily liable for the insured's medical expenses.

Defendant now argues that the trial court erred by applying Federal Kemper to this case. It first asserts that Federal Kemper is inapposite because the clauses at issue in this case are not conflicting "other insurance" clauses. It further asserts that it does not deny primary liability, but only seeks to limit the amount of benefits it must pay as the primary insurer. We find Federal Kemper dispositive of this case. See Michigan Mutual Ins Co, et al v American Community Mutual Ins Co, (Docket Nos. 92599; 94188, rel'd 12/21/87).

In Federal Kemper, both plaintiff no-fault insurer and defendant health insurer disclaimed primary liability for their insured's medical bills following an auto accident. The Michigan Supreme Court examined the policies' conflicting "other insurance" clauses in light of the legislative history of §3109a of the no-fault act.[1] This provision mandates that no-fault carriers offer coordination of benefits at reduced premiums when an insured has other health and accident coverage. MCL 500.3109a; MSA 24.13109(1). The Court concluded that defendant's "other insurance" provision was to be given no effect and found the health care insurer primarily liable for payment of medical

expenses. Giving effect to plaintiff no-fault insurer's coordinated benefits provision furthered the purposes of §3109a to contain both auto insurance costs and health care costs while eliminating duplicative recovery. 424 Mich 551.

Defendant argues that it does not deny "primary" liability because it pays $300 toward medical expenses before the no-fault insurer becomes liable for payment of the bills. However, defendant misperceives the meaning of the word "primary". As used in Federal Kemper, "primary" does not mean "first in time" and has nothing to do with priority of payment. It means instead "principal" or "main". As used in this context, defendant denies primary liability through the use of an "other insurance" provision--in this case, a modified "escape" clause that enables it to restrict or escape liability after payment of a de minimis sum to its insured.

We are persuaded that defendant health insurer is primarily liable for payment of its insured's medical bills pursuant to Federal Kemper.

Defendant next attempts to distinguish Federal Kemper by arguing that the policy embodied in §3109(3)[2] instructs that savings achieved through a $300 reduction on liability "does not run afoul" of §3109a,[3] and that its benefit limitation is reasonably related to the goal of reducing premium costs, therefore consistent with the intent of the no-fault act.

Section 3109(3) enables no-fault insurers who provide personal protection insurance benefits to offer, at appropriately reduced premium rates, a deductible not exceeding $300 per accident which may be applicable to all or some personal protection benefits. It is permissive in nature.

Section 3109a, however, requires an insurer providing personal protection insurance benefits to offer deductibles and exclusions reasonably related to other health insurance at appropriately reduced premium rates. It mandates the availability of coordination of benefits provisions, and requires the insurance commissioner's prior approval of the deductions and exclusions.

From these provisions, defendant concludes that a reduction in potential liability of the insurer is capable of being passed on to the consumer, and that its limitation furthers the goal of reducing premium costs.

Defendant's attempt to distinguish its clause from that found in Federal Kemper by analogizing §3109a to §3109(3) is unpersuasive. See Michigan Mutual Ins Co, et al, supra.

Our disposition of this case renders it unnecessary to address defendant's policy-based arguments. See Parsonson v Construction Equipment Co, 18 Mich App 87, 90; 170 NW2d 479 (1969), aff'd 386 Mich 61; 191 NW2d 465 (1971).

Defendant's argument that procedural infirmities occurred when plaintiff moved for summary disposition was never raised in the trial court and is not now properly before us. Community National Bank of Pontiac v Michigan Basic Property Insurance Assn, 159 Mich App 510, 520-521; ___ NW2d ___ (1987).

Defendant's last argument is that the trial court failed to address an affidavit that has a bearing on the policy consideration, left open by Federal Kemper, relative to the effect on the outcome of the issue of premium reduction on the part of the health insurer. Defendant asserts that remand is necessary so that the trial court can consider the affidavit.

Pursuant to MCR 2.116(G)(5), the trial court must consider affidavits, among other things, when deciding a motion under MCR 2.116(C)(10). Although the trial court is obligated to consider the affidavits, it need not "address" them in its opinion, for findings of fact and conclusions of law are unnecessary in decisions on motions unless specifically required by a particular rule. MCR 2.517)(A)(4). Such findings were not required in this case. The fact that the trial court did not address the affidavit in its opinion, then, does not require remand.

Accordingly, the trial court's order granting plaintiff's motion for summary disposition is affirmed.

s/Barbara B. MacKenzie
s/Martin M. Doctoroff
s/James C. Kingsley

FOOTNOTES

[1] As set forth in Federal Kemper:

"Many insurance policies contain language intended to restrict or escape liability for a particular risk in the event that there is other insurance. Such 'other insurance' provisions are of three basic types; 'pro rata,' 'escape,' and 'excess.' A 'pro rata' clause purports to limit the insurer's liability to a proportionate percentage of all insurance covering the insured event, while an 'escape' or 'no liability' clause provides that there shall be no liability if the risk is covered by other insurance, and an 'excess' clause limits liability to the amount of loss in excess of the coverage provided by other insurance." (Footnotes omitted.) 424 Mich 542.

[2] MCL 500.3109(3); MSA 24.13109(3) provides:

"An insurer providing personal protection insurance benefits may offer, at appropriately reduced premium rates, a deductible of a specified dollar amount which does not exceed $300.00 per accident. This deductible may be applicable to all or any specified types of personal protection insurance benefits but shall apply only to benefits payable to the person named in the policy, his spouse and any relative of either domiciled in the same household. Any other deductible provisions require the prior approval of the commissioner."

[3] 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."