STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN MILLERS MUTUAL
INSURANCE COMPANY,

Plaintiff-Appellee,

v No. 100716

INDEPENDENT INSURANCE AGENTS OF
MICHIGAN - INSURANCE RESERVE TRUST,

Defendant-Appellant,

and

WEST MICHIGAN HEALTH CARE NETWORK,

Defendant.

Before: Maher, P.J., Murphy and R.B. Burns,* JJ.

PER CURIAM

Defendant Independent Insurance Agents of Michigan, Insurance Reserve Trust, appeals the trial court's grant of plaintiff's motion for summary disposition. The parties have stipulated to the facts of this case.

On November 12, 1985, David and Barbara White received injuries as a result of being involved in an automobile accident. On August 21, 1985, their son Timothy also sustained injuries from an automobile accident. At the time of both accidents, the Whites were covered under an insurance policy issued by plaintiff no-fault insurer. The Whites were also covered by a medical plan issued by defendant employee benefit plan. Plaintiff paid the medical expenses incurred by the Whites. Plaintiff now seeks reimbursement for the medical expenses from defendant.

Both parties' policies contain coordination of benefits clauses which state that if an insured possesses other insurance which will cover medical expenses incurred, then that insurance will be the primary provider.

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*Former Court of Appeals Judge, sitting on the Court of Appeals by assignment.

Plaintiff brought a motion for summary disposition on stipulated facts under MCR 2.116(A) based upon the fact that federal law mandates the unenforceability of defendant's "other insurance" provision. In bringing the motion, plaintiff admitted that federal law should apply as defendant is an uninsured employee benefit plan under the Employee Retirement Income Security Act (ERISA). The trial court granted plaintiff's motion on the basis of federal law and judgment was entered on July 15, 1987.

Defendant raises two issues:

I. Whether ERISA preempts the application of state law in the present case?

II. Whether the trial court correctly found defendant's "other insurance" provision to be unenforceable under ERISA?

Plaintiff in its supplemental brief on appeal raises the issue that federal law does not preempt the application of state law to its claim. Plaintiff did not raise this issue below and both parties assumed that federal ERISA law preempted state law. The trial court did not address the preemption issue. Normally, a party's failure to raise an issue below will preclude appellate review. MCR 7.203.

However, the issue may be considered by an appellate court when it is a question of law concerning which the necessary facts have been presented. Citizens Insurance Co v Lowery, 159 Mich App 611, 614; 407 NW2d 55 (1987). In the present case, all of the facts necessary to resolve this dispute were presented below.

I. Whether ERISA preempts the application of state law in the present case.

The parties' insurance policies contained conflicting coordination of benefits clauses. Plaintiff's policy states:

> "A. This insurance does not apply to the extent that any amounts are paid or payable for allowable expenses to or on behalf of such named insured or relative under the provisions of any other insurance, service, benefit or reimbursement plan providing similar direct benefits, without regard to fault, for bodily injury sustained as a result of the operation,

maintenance or use, including the loading or unloading, of a motor vehicle."

Defendant's policy states:

"General Exclusions

"No benefits under the Plan shall be payable with respect to:

* * *

"Charges in connection with any loss caused by accidental bodily injury which arises out of or results from an automobile accident when benefits are provided or would be provided in the absence of this Plan under the Michigan No-Fault Insurance Act (Act No. 294 of the Public Acts of 1972) including any amendments thereto exceeding the deductible amount, or $300, whichever is less, for any one covered person as a result of any one automobile accident."

It is undisputed that defendant is a self-insured employee benefit plan and thus is within the scope of the Employee Retirement Income Security Act (ERISA). As such, any claim against defendant is subject to the preemption language of Section 514(a) of this act:

"Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under 4(b) [2d USCS §1003(b)]. This section shall take effect on January 1, 1975." 29 USC 1144(a).

However, certain types of state laws are "saved" from preemption by the statute. Section 514(b)(2)(a) states:

"Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." 19 USC 1144(2) (emphasis added.)

There is no dispute that the Michigan no fault insurance act and Michigan case law interpreting it are laws which regulate insurance and thus are not preempted by ERISA under Section 514(b)(2)(a). Northern Group Services v Auto Owners Ins Co, 833 Fed 85 (CA 6, 1987). The precise issue in this case is whether the Section 514(b)(2)(b) exception to the savings clause, the so-called "deemer" clause, acts to preempt application of Michigan's no-fault laws to this particular defendant. Section 514(b)(2)(b) states that:

> "Neither an employee benefit plan * * * nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies." 29 USC 1144(b)(2).

One panel of this Court held that the "deemer clause" acts to preempt application of Michigan's no-fault laws when an uninsured ERISA plan is involved. State Farm Mutual Automobile Ins Co v C.A. Muer Corp, 154 Mich App 330; 397 NW2d 311 (1986). However, the Sixth Circuit was later faced with the identical question of whether Michigan's coordination-of-benefits law was preempted by ERISA when applied to an insurance plan. In Northern Group Services, supra, the Court held that Michigan's coordination-of-benefit law was not preempted by ERISA. We are persuaded by the analysis from the Court in Northern Group Services, decided after State Farm, and agree that Michigan's coordination-of-benefits law is not preempted by ERISA when an uninsured ERISA plan is involved.

Under Michigan law, where a no-fault policy and a health insurance policy contain conflicting coordination-of-benefits clauses, the health insurance policy will be primarily liable. Federal Kemper Insurance Co v Health Insurance Administration, Inc, 424 Mich 537, 551; 383 NW2d 590 (1986). Therefore, under Michigan law defendant is liable for the medical expenses which plaintiff paid.

> II Whether the trial court correctly found defendant's "other insurance" provision to be unenforceable under ERISA?

Defendant's clause allows defendant to restrict its liability altogether after paying the $300 deductible. The provision contains no avenue by which an employee may return to the plan for benefits which are not paid by their non-fault insurance. This Court in Michigan Mutual v American Community, 165 Mich App 269; 418 NW2d 455 (1987), held that a provision

virtually identical to the one in the present case was an escape clause. Therefore, the trial court's findings that the provision in the present case was an escape clause and unenforceable under federal law is correct.

Affirmed.

/s/ Richard M. Maher
/s/ William B. Murphy
/s/ Robert B. Burns