UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

TRANSAMERICA INSURANCE COMPANY OF NORTH AMERICA,

Plaintiff,

v File No. G88-98 CA1

IRON WORKERS LOCAL 340 HEALTH CARE FUND,

Defendant.
_____/

ORDER

In accordance with the opinion dated August 4, 1988;

IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment is DENIED;

IT IS FURTHER ORDERED that Defendant's Cross Motion for Summary Judgment is DENIED.

DATED in Kalamazoo, MI:

8/4/88

RICHARD A. ENSLEN
U.S. District Judge

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Plaintiff,

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OPINION

In this action, Transamerica Insurance Company of North America ("Transamerica") seeks to recover personal protection insurance benefits paid under a no-fault automobile insurance policy to its insured, Charles Graybeal, from the Iron Workers Local 340 Health Care Fund ("the Fund"). Mr. Graybeal is a member of the Fund. In 1983, Mr. Graybeal was involved in a one-car automobile accident. Transamerica, his no-fault automobile insurance carrier, paid various medical hospital and other expenses pursuant to its policy. The policy contains a valid coordination of benefits endorsement which provides that Transamerica is not liable "to the extent that any Personal Protection Insurance allowable expenses benefits are paid, payable or required to be provided to or on behalf of the person named in the policy...under the provisions of any valid and collectible...medical or surgical reimbursement plan...." Plaintiff's Brief in Support of Motion for Summary Judgment at 2. Because Mr. Graybeal is a member of the Fund, a medical reimbursement plan, Transamerica contends that the Fund ought to reimburse it for benefits it paid to Mr. Graybeal.

On May 24, 1988, Transamerica filed its motion for summary judgment, contending that it was entitled to judgment as a matter of law since, under

Michigan law, the Fund was the primary insurer and since the fund's purported exclusion of coverage for injuries incurred in automobile accidents was void as a matter of law under the Employee Retirement Income Security Act, 29 U.S.C. 1001 et seq. On June 9, 1988, the Fund filed a cross-motion for summary judgment arguing that the majority of Transamerica's claim was barred by the applicable statute of limitations. In its motion, the Fund took the somewhat risky position that Transamerica could only recover for payments made within the last year. It suggested that the Court enter judgment against it in the amount of those payments. The Fund chose not to respond to the arguments made in Transamerica's motion for summary judgment.

Standard

The standard for granting a motion for summary judgment brought pursuant to Federal Rule of Civil Procedure 56(c) is familiar and needs no extended discussion here. The Court may only grant such a motion if there are no material issues of fact to be decided and if the moving party is entitled to judgment as a matter of law. F.R.Civ.P. 56(c); Windsor v. The Tennessean, 719 F.2d 155, 158 (6th Cir. 1982). In this case, the dispute is solely one of law which involves two questions: (1) what is the applicable statute of limitations? and (2) assuming the claims are not time-barred, is the Fund the primary insurer and thus liable to reimburse Transamerica for the benefits it paid to Mr. Graybeal?

Discussion

1. Statute of Limitations. The Fund argues that the one-year statute of limitations contained in Michigan's no-fault insurance statute should apply to bar the majority of Transamerica's claim. M.C.L.A. 500.3145(1), M.S.A. 24.13145(1) provides that "An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be

commenced later than 1 year after the date of the accident causing the injury...." Under certain circumstances, the limitation period contained in section 3145(1) will begin to run from the date notice of the injury is given to the insurer. The Fund argues that, since ERISA contains no statute of limitations applicable to this sort of claim, the Court must apply the most closely analogous state limitations period. Board of Regents v. Tomanio, 446 U.S. 478, 483-84 (1984). Transamerica agrees that a Michigan statute of limitations applies to this case, but argues that the proper limitation period is the six-year period contained in M.C.L.A. 600.5807; M.S.A. 27A.5807, for breach of contract or for recovery in quasi-contract. The Court believes that Transamerica is correct, and therefore, the Fund's motion for summary judgment will be denied.

In support of its argument that section 3145 applies to this case, the Fund cites a number of cases holding that subrogation actions brought by insurance carriers to secure payment of benefits under a no-fault insurance policy are covered by the limitation period contained in section 3145. See, Badger State Insurance Co. v. Auto Owners Insurance Co., 128 Mich. App. 120 (1983); Michigan Mutual Insurance Co. v. Home Mutual Insurance Co., 108 Mich. App. 274 (1981); Federal Kemper Insurance Co. v. The Western Insurance Companies, 97 Mich. App. 204 (1980). See also, Keller v. Losinski, 92 Mich. App. 468 (1979); Home Insurance Co. v. Rosquin, 90 Mich. App. 682 (1979), lv den., 408 Mich. 855 (1980).

In Federal Kemper, for example, one no-fault insurer sued another no-fault insurer claiming that the latter was the primary insurer and was, therefore, liable to reimburse it for benefits it paid to the insured. The court of appeals characterized the action as one for subrogation, id. at 208, and held that § 3145 applied to the insurer's action for subrogation. "A

subrogee acquires no greater rights than those possessed by his subrogor and the subrogated insurer is merely substituted for his insured." Id. at 210 (quoting, Northwestern Mutual Insurance Co. v. Jackson Vibrators, 402 F.2d 37, 40 (6th Cir. 1968). Since the insured's action to recover no-fault benefits from the defendant would have been barred by the one-year limitation period in § 3145, the plaintiff-insurer's action was also barred. Id. at 211. The court further found that it would be "inequitable to afford plaintiffs the benefit of the more liberal statute of limitations for an action in quasi-contract. Doing so would thwart the legislative intent of the no-fault act to give quick notice and to provide prompt payment." Id.

Michigan Mutual involved a similar fact situation. In that case, the accident victim was covered by two no-fault policies. Michigan Mutual paid the insured's claim and discovered the second insurer two years later. It promptly brought suit to recover the amounts paid under its policy. The court tersely concluded that "Because the action is one for subrogation, the one-year statute of limitations is the proper provision to apply...." Michigan Mutual, 108 Mich. App. at 280.

Badger State involved a slightly different set of facts. In that case, the no-fault insurer, Badger State, paid benefits to its insured and then sought reimbursement from the insured's workers compensation carrier. Badger State argued that the one-year statute of limitations should not apply to its action since it was not suing to recover from a no-fault insurer, but rather from a workers compensation carrier. The court rejected this argument:

> [The Federal Kemper line of cases] reasoned that since those actions were properly characterized as subrogation actions, the plaintiff insurer could not pursue an action for reimbursement of no-fault benefits paid if a suit by the insured against the defendants for such benefits would be barred by § 3145(1). In the present case, however, a suit by the insured...against defendant [a workers compensation carrier] would not be barred by § 3145(1) because [the insured's]

> claim against defendant was for compensation benefits. Thus, § 3145(1) would be clearly in applicable to such a claim.

Id. at 128. Although the court found this argument appealing, it rejected it in favor of the trial court's reasoning:

> [T]he statutory language of M.C.L. 500.3145 and 500.3146 makes mandatory the one-year statute of limitations where an action is commenced for recovery of personal protection benefits...[t]he legislature intended by this section to make the subject matter of the action determinative of the limitation rather than the position of the defendant.

Id. at 118-29. Thus, the court concluded that § 3145 applied to bar the action, despite the fact that the action was not brought to recover benefits due under a no-fault insurance policy, but to recover benefits due under another type of insurance policy.

Two more recent cases call this conclusion into question. In Adams v. Auto Club Insurance Association, 158 Mich. App. 186 (1986), another panel of the court of appeals rejected the Badger State reasoning. In that case, an insured sued his no-fault insurer for resumption of certain work-loss benefit payments allegedly due him under his policy. The insurer counter-claimed for overpayments it argued had been made due to a mistake in calculating the insured's income. The court held that the insurer's action for reimbursement was not covered by § 3145(1):

> [W]e believe that because defendant's action seeking recovery for amounts overpaid involves a common-law right of action, the limitation found in § 3145(1) is not applicable. Since there is no other statute of limitations directly applicable, the general six-year limitation period argued by defendant must be applied. Although we recognize that a strong argument to the contrary could be made, see Badger State Mutual Casualty Insurance Co. v. Auto Owners Insurance Co., 128 Mich. App. 120, 128-29 (1983), we believe that plaintiff's argument tortures the language of § 3145 and the legislative intent in enacting that section in attempting to extend the limitation period found in that section to the facts of this case involving a common-law right of action. Therefore, defendant's claim against the plaintiff is not

barred by the one-year period of limitation provision of § 3145(1).

Id. at 196.

Employing a somewhat different tactic, Madden v. Trucks, No. 96143 (Mich. App. April 18, 1988), distinguished Badger State by arguing that the case before it did not involve an action for subrogation. In Madden, Wausau Insurance Company sued Lake States Insurance Company to recover for benefits paid to an individual insured by both firms. Wausau contended that it paid the claim only because it believed that the insured had no other applicable coverage. The existence of another insurer came to light more than two years after the accident at issue. Lake States argued that the claim was barred by § 3145. The court of appeals reasoned that the issue presented was, "whether [§ 3145] applies when an insurer is suing another insurer on the basis that it paid benefits by mistake for which the defendant-insurer is liable." Slip op. at 3. The court then concluded that Wausau's action was not barred by § 3145:

> Section 3145 applies only to actions to recover personal injury protection benefits and does not apply to an action for recovery of money paid by mistake. The recovery of money paid by mistake is a common law cause of action that was not abrogated by the no-fault act. Adams v. Auto Club Insurance Assoc., 154 Mich. App. 186, 195 (1986). Therefore, a suit to recover money paid by mistake is not governed by the one-year statute of limitations contained in § 3145.

Id. at 6.

Thus, both Adams and Madden found § 3145 inapplicable where the action was not one to enforce the terms of a no-fault policy. This Court finds the reasoning in Adams and Madden to be more persuasive than that in Badger State, and more consistent with the intent of the no-fault act as well as with the reasoning of the Federal Kemper line of cases. As the court noted in Federal Kemper, the purpose of the no-fault act is to insure prompt notice of claims and quick payments to insured persons who are injured in automobile accidents. The

statute requires that a no-fault carrier pay the insured's claim promptly and iron out the details of liability with other insurers later. Federal Kemper, 97 Mich. App. at 209, 211. The legislative intent behind the no-fault act is fully served where, as here, the no-fault carrier promptly pays the insured's claim. It cannot be adversely affected by later actions between insurers seeking to iron out the details of liability among themselves. Second, the act, by its terms, applies only to no-fault insurance policies. Where, as here, the insurance policy sought to be enforced is some other sort of policy, the no-fault act has no application.

Finally, it is important to remember that this is an action for subrogation. The plaintiff has no fewer, and no more rights than would its subrogated insured. Northwestern Mutual, 402 F.2d at 40. If Mr. Graybeal sued the Fund to recover insurance benefits wrongfully withheld, he would not be suing to enforce a no-fault insurance policy. Therefore, as the court in Badger State recognized, section 3145 would not apply to an action between Graybeal and the Fund. Why then should § 3145 apply here, where Transamerica seeks only to enforce Mr. Graybeal's rights as a member of the Fund? Under the reasoning in Federal Kemper and Michigan Mutual, section 3145 would not apply, since Graybeal's suit would not be an action for personal protection insurance benefits provided by a no-fault insurance policy. Badger State's conclusion to the contrary is, I believe, an anomoly and a misreading of the statute and earlier cases.

Section 3145 does not apply to bar Transamerica's claim because Transamerica does not seek to recover benefits due under a no-fault insurance policy. Rather, Transamerica seeks to enforce the provisions of an employee benefit plan of which its insured is a member. Since the action is not governed by Michigan's no-fault insurance act, the applicable statute of limitations is

M.C.L.A. 600.5813; M.S.A. 27A.5813, the general statute of limitations. See, Madden, slip op. at 6. Since Transamerica brought this action within the applicable six-year limitation period, the suit is not time-barred. The Fund's cross motion for summary judgment will, therefore, be denied.

2. Liability. The next question to consider is whether the Fund must reimburse Transamerica for the medical benefits Transamerica paid to Mr. Graybeal. In its motion, Transamerica seeks judgment only on the issue of liability. The Fund appears almost to have conceded this issue, since in its cross motion for summary judgment it admitted liability for one years' worth of Mr. Graybeal's medical expenses. The Fund chose not to respond to the arguments advanced in Transamerica's motion. The Fund's only argument against liability appears to be the statute of limitations argument I have already rejected. On this record, the Court believes it would be justified in entering judgment against the Fund. However, because I believe that Transamerica's argument in support of its motion is incorrect as a matter of law, I will deny its motion for summary judgment.

Because Transamerica seeks to enforce the Fund's obligation to pay benefits to Mr. Graybeal, the Court will apply the same standard to Transamerica's claim as it would to a claim brought by Mr. Graybeal. Thus, in order to prevail, Transamerica must show that the Fund's decision to deny payment of Graybeal's claim was arbitrary and capricious. Norman v. United Mine Workers of America Health and Retirement Fund, 755 F.2d 509 (6th Cir. 1985). Transamerica argues that, under Michigan law, a health insurance carrier is primarily liable for its insured's health care expenses, while no-fault carriers are secondarily liable for those expenses. M.C.L.A. 500.3109a; M.S.A. 24.13109(1); Federal Kemper Insurance Co. v. Health Insurance Administration, Inc., 424 Mich. 537 (1986). Transamerica then correctly points out that the Sixth Circuit has held

that this provision of Michigan law is not pre-empted by ERISA. Northern Group Services v. Auto Owners Insurance Co., 833 F.2d 85 (6th Cir. 1987). Finally, Transamerica seeks to avoid the effect of the Fund's "escape clause," which denies coverage for charges incurred in connection with automobile accidents, by arguing that this clause is void as against public policy. See, Northeast Department ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund, 764 F.2d 147 (3d Cir. 1985). Since the escape clause is invalid as a matter of federal law, Transamerica argues that the Fund must be considered the primary insurer in this case.

The Court agrees with two-thirds of Transamerica's argument. Federal Kemper held that, where two insurance policies contain conflicting coordination of benefits clauses, the no-fault insurer's clause takes precedence, leaving the health insurer primarily liable for the insured's health-related expenses. 424 Mich. at 551. Similarly, Transamerica correctly reads the Sixth Circuit's decision in Northern Group Services. In that case, the court held expressly that "The Michigan no-fault coordination of benefits rule is the type of insurance regulation of an ERISA plan that is not preempted...." Id. at 95. See also, Employers Association v. New Jersey, 601 F. Supp. 232 (D.N.J.), aff'd sub nom, 774 F.2d 1151 (3d Cir. 1985). Thus, the rule announced in Federal Kemper is enforceable against the Fund, even though the Fund is an employee benefit plan within the meaning of ERISA.

The flaw in Transamerica's argument is its conclusion that the Fund's health benefits plan contains an escape clause which is void under ERISA. An escape clause is a clause in an insurance policy which provides that there shall be no liability if the risk is covered by other insurance. See, Northeast Department, 764 F.2d at 160 ("An escape clause...provides for an outright exception to coverage if the insured is covered by another insurance policy");

Federal Kemper, 424 Mich. at 542 ("an 'escape'...clause provides that there shall be no liability if the risk is covered by other insurance"). In Northeast Department, the court considered a case where competing insurance policies contained incompatible "other insurance" provisions, one of which was an escape clause. Id. at 161. The court held that the incorporation of an escape clause in an ERISA benefit plan was arbitrary and capricious conduct by the plan's board of trustees, and that the clause was unenforceable for that reason. Id. at 163. In so holding, the court reasoned as follows:

> [O]ne very important policy underlying ERISA is that employees enrolled in a benefit plan should not be deprived of compensation that they reasonably anticipate under the plan's purported coverage. Escape clauses, however, risk just such a result. An escape clause...does not contain any requirement that the coverage provided by the other plan be comparable to the coverage provided by the escaping plan before the latter plan will defer liability. In addition, unlike plans with excess clauses, a plan with an escape clause does not provide participants who receive less in benefits from the other plan with the opportunity to return to the first plan for the difference. As a result, a participant of a plan with an escape clause, who thinks that he is covered by that plan and who expects to recover medical expenses in accordance with the terms of that plan, automatically loses this coverage in the presence of another insurance plan, even if the benefits he is entitled to receive under the other plan are much less favorable than those of his own. In our view, trustees who incorporate in a plan a provision that has the potential to harm participants in this way have indeed acted in an arbitrary and capricious manner.
>
> Accordingly, we hold that the escape clauses in ERISA covered employee benefit plans are unenforceable as a matter of law.

Northeast Department, 764 F.2d at 163-64.

This appears to be the only published decision considering this particular issue. Plaintiff cites, and the Court's research has revealed, no other applicable law. Thus, if this case involved two competing "other insurance" clauses, I would be compelled to agree with the Third Circuit's decision in Northeast Department and hold in favor of Transamerica.

The problem with this conclusion is that we are not presented with competing "other insurance" clauses. Transamerica's coordination of benefits clause is clearly an "other insurance" clause, since it purports to deny coverage where other health insurance exists. But the Fund's exclusionary clause does not depend upon the existence of other insurance. Rather, that clause, as quoted in Transamerica's brief, states that the Fund "does not provide benefits for charges incurred in connection with:...(6) any accidental bodily injury which arises out of an automobile accident, whether or not the eligible member...is entitled to benefits under No-Fault Laws or similar legislation." The exclusion provided by this clause is total; it does not depend for its operation upon the existence of another insurance policy.

The court in Northeast Department found escape clauses arbitrary and capricious, in part, because they denied coverage to plan members in situations where the member might reasonably have anticipated that coverage existed. Here, no such result could have occurred. Mr. Graybeal, faced with the exclusion quoted above, could never have reasonably concluded that the Fund would provide coverage for medical expenses incurred as a result of an automobile accident. Northeast Department also found escape clauses unenforceable because they denied coverage without regard to the level of benefits provided by the other insurance policy. Again, no such unfairness exists in this case, because the Fund's clause denies coverage under all circumstances, regardless of whether the plan member has another insurance policy or whether the benefits provided by that policy are comparable to those provided under the Fund's plan.

Transamerica has not, to date, demonstrated that this decision to completely exclude coverage for automobile accidents was an arbitrary and capricious one. Northeast Department does not mandate that conclusion, because that case dealt with an "other insurance" clause, not a total exclusion of

coverage. Further, under ERISA, the parties creating an employee benefit plan have discretion to define the content of benefits available under that plan. Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981). Therefore, the fact that the plan excludes coverage for certain types of injury does not, in and of itself, indicate an arbitrary and capricious judgment by the plan's creators. Thus, because I find that Transamerica has failed to establish that the Fund acted arbitrarily and capriciously in denying payment of this claim, I must deny Transamerica's motion for summary judgment. Since the parties have yet addressed whether the Fund's total exclusion of liability is arbitrary and capricious, I am prevented from entering reverse summary judgment in favor of the Fund.

DATED in Kalamazoo, MI:

August 4, 1988

RICHARD A. ENSLEN
U.S. District Judge