STATE OF MICHIGAN

COURT OF APPEALS

FRANKENMUTH MUTUAL INSURANCE COMPANY, Individually and/or as Subrogee of JOHN GOLEMBIEWSKI,

Plaintiff-Appellee,

v No. 102284

MEIJER, INC. and MEIJER, INC. EMPLOYEE BENEFIT PLAN,

Defendants-Appellants.

Before: MacKenzie, P.J., and McDonald and R.E. Robinson,* JJ.

PER CURIAM.

Defendants' appeal from a bench trial resulting in a declaratory judgment in favor of plaintiff requires us to decide whether plaintiff no-fault insurance carrier or defendant health insurance carrier is liable for payment of John Golembiewski's (claimant) medical expenses resulting from injuries suffered in an automobile accident. Both policies contain coordinated benefits clauses, and each party claims that its coverage is secondary to the other.

At the time of the accident, claimant was insured under a no-fault insurance policy issued by plaintiff. The policy granted claimant personal injury protection at a reduced premium rate in exchange for his election to coordinate such benefits with his health insurance. Plaintiff's coordination of benefits clause mandated by MCL 500.3109a; MSA 24.13109(1), provided that plaintiff was not liable for payment of expenses or losses paid or payable under the provisions of any other health and/or accident insurance coverage available to the insured.

Also, at the time of the accident, claimant as an employee of Meijer, Inc., was a participant in the Meijer Employee Benefit Plan, which among other benefits, provided him

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

with protection for medical expenses resulting from accidental injuries. This portion of the Employee Benefit Plan was funded by Meijer from its own monies. To protect the plan from catastrophic loss, Meijer purchased stop-loss coverage from Blue Cross/Blue Shield. The plan's coordination of benefits clause provided that a participant was not eligible for benefits arising out of an accident involving a motor vehicle for which there was in effect a policy of no-fault automobile insurance.

In Federal Kemper Insurance Company, Inc v Health Insurance Administration, Inc, 424 Mich 537; 383 NW2d 590 (1986), our Supreme Court established the principal that furthering the purpose of Michigan's no-fault act, which is to contain auto and health insurance costs while eliminating duplicate recovery, required that the no-fault insurer's coordination of benefit clause take precedence over similar provisions in health insurance policies.

However, defendants assert that since their benefit plan is uninsured, §3109a and Kemper do not control this case, because §3109a is preempted by the Federal Employee Retirement Income Security Act (ERISA), 29 USC 1001 et seq. The preemption provision is contained in 29 USC 1144(a) which provides in part:

> "Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . ."

In support of their argument, defendants refer us to Metropolitan Life Insurance v Massachusetts, 471 US 724; 105 S Ct 2380; 85 L Ed 2d 728 (1985), which held that ERISA benefit plans are subject to state regulation if these plans purchase insurance.

In reaching its conclusion, the Metropolitan Court considered 29 USC 1144(a), along with ERISA "savings clause," 29 USC 1144(b)(2)(A):

> "Except as provided in (B), nothing in this subchapter shall be construed to exempt or relieve any

person from any law of any State which regulates insurance . . ."

Subparagraph (B) referred to above is the so-called "deemer" clause, 29 USC 1144(b)(2)(B):

> "Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies [or] insurance contracts . . ."

Although the Supreme Court did not have to address the possible restrictive effect of the "deemer clause" or the "savings clause," it did, by way of dicta, suggest that an uninsured employee benefit plan is not subject to state regulation because the plan is not an insurance company and may not be "deemed" to be such under 29 USC 1144(b)(2)(B).

Defendants refer us to State Farm Auto Insurance Company v CA Muer Corp, 154 Mich App 330; 397 NW2d 299 (1986), where another panel of this Court, relying in part on the dicta in Metropolitan, reached the conclusion that an uninsured benefit plan is indeed protected from state regulation by 29 USC 1144(b)(2)(B).

However, this argument assumes that defendant's plan is not insured. We disagree. A similar argument was made in Northern Group Services v Auto Owners Ins Co, 833 F2d 85 (CA 6, 1987), where the court responded to the following effect:

> "Appellee plans argue that the Highland Plan is 'uninsured' because (1) the actual insured is the employer, Highland Appliance Company, and not the Plan; and (2) the insurer's liability comes into effect only when specified benefit ceilings are exceeded. Both arguments are without merit. Whether the actual insured is the employer or the ERISA plan, the stop loss insurance is purchased to 'provide benefits for plans subject to ERISA.' Metropolitan Life, 471 US at 738, n 15, 105 S Ct at 2388, n 15. That the Plan pays a deductible does not alter the fact that benefits payable above specified levels, either on an individual beneficiary or in the aggregate, are nonetheless insured. See Baerwaldt, 676 F2d at 313." 833 F2d 91.

In like manner is defendants' plan, with its stop-loss coverage, an insured plan which under ERISA's "savings clause" is

not protected from the effect of §3109a of the Michigan No-Fault Insurance Law.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Gary R. McDonald
/s/ Richard E. Robinson