STATE OF MICHIGAN

COURT OF APPEALS

---

AUTO-OWNERS INSURANCE COMPANY, Subrogee of RANDAL L. VANDERWAL and GINNY VANDERWAL,

Plaintiff-Appellant,

v

CORDUROY RUBBER COMPANY, CADILLAC MOLDER RUBBER CO., CORDUROY RUBBER COMPANY EMPLOYEE BENEFIT PLAN & CORDUROY RUBBER COMPANY EMPLOYEE BENEFIT TRUST & VOLUNTARY EMPLOYEE BENEFIT ASSOCIATION,

Defendants-Appellees.

APR 21 1989

ON REMAND
114550

---

BEFORE: Hood, P.J., and Maher and Beasley, JJ.

PER CURIAM.

The Michigan Supreme Court has vacated our earlier opinion in this case and remanded for reconsideration in light of Teper v Park West Galleries, Inc., 431 Mich 202; 427 NW2d 535 (1988).

This case concerns whether the federal Employee Retirement Income Security Act (ERISA) precludes application of our no-fault coordination-of-benefits law. Specifically at issue is whether the Vanderwals' no-fault insurer can look to Mr. Vanderwal's health benefit insurer, a self-insured plan of his employer governed by ERISA, to assume primary responsibility for medical expenses incurred by the Vanderwals in a car accident. The employer's health plan specifically excludes benefits for injuries received in accidents involving a car for which a no-fault insurance policy was in effect. The health plan indicates that the benefits involved here were self-funded by the employer.

In our earlier opinion, (Docket No. 90026, unpublished per curiam 6/22/87), we affirmed the trial court's

dismissal of plaintiff's claim by finding that the claim was precluded under ERISA, relying on State Fund Mutual Automobile Ins Co v C A Muer Corp, 154 Mich App 330; 397 NW2d 299 (1986).

As set forth in State Farm, id., pp 334-336, two questions need be addressed to resolve the issue before us: 1) Since our no-fault law would require the health plan to take primary responsibility for paying for the medical expenses, does that law "relate to" the plan so that ERISA would preempt its application; and 2) Does our answer change because the health plan is a self-insured plan? The Teper opinion concerns only the first question.

ERISA expressly preempts the application of a state law which "relates to" an employee benefit plan. 29 USC 1144(a). In Teper, our Supreme Court reviewed the various United States Supreme Court decisions regarding ERISA preemption and the meaning of the term "relates to." Our Court found that a state law is preempted if it "relates to" an employee benefit plan by:

> "1) altering the level of benefits which would be paid out under a given plan from state to state, 2) altering the terms of the plan such as requirements for eligibility, or 3) subjecting the fiduciaries of a plan to claims other than those provided in the ERISA itself." Supra, p 221.

The Michigan no-fault coordination-of-benefits law would require the health plan to assume primary responsibility for the Vanderwals' medical expenses despite the plan's exclusion clause. Federal Kemper Ins Co, Inc v Health Ins Administration, Inc, 424 Mich 537; 383 NW2d 590 (1980); Auto-Owners Ins Co v Lacks Industries, 156 Mich App 837; 402 NW2d 102 (1986) lv den 428 Mich 902 (1987). By doing so, our no-fault law comes under the second example set forth in Teper, because it alters the terms of the plan by requiring a benefit that the employer otherwise was under no obligation to provide. Teper, supra, p 214; Shaw v Delta Air Lines, Inc, 463 US 85, 103 S Ct 2890, 77 LE2d 490, 500-503 (1983). Therefore, if Teper were our only consideration, the no-fault law would be preempted.

However, ERISA also includes a provision which allows for the application of insurance laws even if they "relate to" the plan. We therefore turn to consideration of our second question: Does our answer change because the health plan is a self-insured plan?

As noted in State Farm, supra, p 335, there is a saving clause in ERISA which would allow enforcement of the no-fault policy as a state law regulating insurance. 29 USC 1144(b)(2)(A). This saving clause is, however, limited by the "deemer clause" which provides that an employee benefit plan shall not be deemed an insurance company for purposes of a state law regulating insurance companies or contracts. 29 USC 1144(b)(2)(B). State Farm held that because the health plan there was self-funded and not insured by a commercial insurance company it was not deemed to be subject to the insurance laws of Michigan. Under State Farm, the no fault law would continue to be preempted.

Since State Farm, however, the Sixth Circuit has considered the identical question raised here of whether Michigan's no-fault coordination-of-benefits law was preempted when applied to self-insured health plans. In Northern Group Services Inc v Auto Owners Ins Co, 833 F2d 85 (CA 6, 1987), cert den US , 108 S Ct 1754 (1988), the Court held that Michigan's coordination-of-benefits law was not preempted by ERISA. The Northern Group Services analysis has recently been adopted by this Court in Michigan Millers Mutual Ins Co v Independent Ins Agents of Michigan, 174 Mich App ; NW2d (rel'd for publication 12/13/88) and in Auto Club Insurance Association v Frederick and Herrud, Inc, No. 96693, rel'd March 6, 1989. The interpretation of a federal statute is a question of federal law. Cook v City of Detroit, 125 Mich App 724,730; 337 NW2d 277 (1983). We are persuaded that Northern Group Services, decided after State Farm and our earlier opinion in

this case, is the better analysis of the federal preemption question. We therefore agree that Michigan's no-fault coordination-of-benefits law is not preempted by ERISA simply because an uninsured ERISA plan is involved. The fact that on its face the health plan excludes rather than provides for coordination of benefits does not change our conclusion. Auto Owners, supra.

Defendants' final issue, challenging plaintiff's standing, was not addressed in our earlier opinion. We also need not address it now since they did not properly raise this issue by filing a cross appeal. MCR 7.207; Michigan Ass'n of Admin Law Judges v Michigan Personnel Director, 156 Mich App 388, 395; 402 NW2d 19 (1986). Nor is it clear that this issue was ever actually addressed by the trial court. Michigan Mutual Ins Co v American Community Mutual Ins Co, 165 Mich App 269, 277; 418 NW2d 455 (1987). In any event, it appears from the record that plaintiff insurance company is proceeding as subrogee of the Vanderwals and that the second review provided for in the health plan policy is not mandatory. Defendants' standing arguments appear to be without merit.

In summary, we find that our no-fault coordination-of-benefits law would be preempted under Teper as a law which "relates to" an ERISA benefit plan. However, because the no-fault law is the type of state insurance regulation not barred by ERISA, the coordination-of-benefits law is saved from preemption. We therefore reverse the order granting summary disposition for defendants and remand this matter to the trial court. Jurisdiction is not retained.

Reversed.

/s/ Harold Hood
/s/ Richard M. Maher
/s/ William R. Beasley