UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WOLVERINE MUTUAL INSURANCE COMPANY, as Assignee of SANDRA AND HAROLD MOON,

Plaintiff,

vs.

ROSPATCH CORPORATION EMPLOYEE BENEFIT PLAN,

Defendant.

File NO. 1:90-CV-30

HON. ROBERT HOLMES BELL

MEMORANDUM OPINION

This case presents an action by a no-fault automobile insurer for reimbursement of certain medical expenses which it paid on behalf of its insured, for which defendant employee benefit plan is alleged to be primarily liable under Michigan's coordination of benefits law. The action was commenced in the Circuit Court for the County of Kent. Defendant removed it to this Court on the ground that a claim to recover benefits under an employee benefit plan presents a federal question under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 et seq. Plaintiff now moves the Court to remand.

Plaintiff's motion is based on the argument that it's complaint merely alleges a state common law action. Any federal question is said to arise purely as a function of defendant's defense, constituting an insufficient basis for federal jurisdiction.

The argument is in accord with the general rule:

> [S]ince 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case.

Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 14, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). As noted by defendants, however, the Supreme Court has also observed that "Congress may so completely pre-empt a particular area, that any civil complaint raising this select group of claims is necessarily federal in character." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63, 106 S.Ct. 1542, 95 L.Ed.2d 55 (1987). Further, the court went on to hold in Metropolitan Life that Congress had, in § 502(a) of ERISA, 29 U.S.C. § 1132(a), clearly intended that all suits brought by employee benefit plan participants or beneficiaries to enforce plan benefit rights in federal or state courts are to be regarded as arising under federal law. Id. 481 U.S. at 65-66.

It does not appear that Congress has so completely pre-empted the law of employee benefit plan regulation as to compel the conclusion that the present complaint presents a federal question. The Court recalls that:

> "whether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute, ... must be determined from what necessarily appears in the plaintiff's

> statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." Taylor v. Anderson, 234 U.S. 74, 75-76, 34 S.Ct. 724, 58 L.Ed.1218 (1914).

Franchise Tax Board, supra, 463 U.S. at 10. The present complaint alleges essentially that Sandra Moon is a beneficiary of an employee benefit plan, who sustained injuries covered under the plan. Based on this premise, plaintiff's claim is for reimbursement of benefits paid on her behalf, for which defendant plan is primarily liable under Michigan's coordination of benefits law. See Federal Kemper Ins. Co., Inc. v. Health Ins. Administration, Inc., 424 Mich. 537, 383 N.W.2d 590 (1986). Michigan's coordination of benefits rule is a state law which regulates insurance, expressly saved from pre-emption under ERISA, 29 U.S.C. § 1144 (b)(2)(A). Northern Group Services v. Auto Owners Ins. Co., 833 F.2d 85 (6th Cir. 1987) cert. denied 486 U.S. 1017, 108 S.Ct. 1754, 100 L.Ed.2d 216 (1988).

Thus, plaintiff's claim, unaided by any anticipated defense, simply seeks enforcement of a rule of state law which is exempt from ERISA preemption. That Sandra Moon's injuries are covered under the defendant plan is assumed by the complaint. The correctness of this assumption is apparently a focus of defendant's defense, constituting a question arising under federal law. Yet, since the question is first raised as a defense, and since the claim is not one by a plan participant or beneficiary and is one

not subject to ERISA pre-emption, this case presents no basis for removal jurisdiction.

Defendant objects, observing that plaintiff brings the action nominally as assignee of a plan beneficiary and contending the Court's holding exalts plaintiff's artful pleading over substance. The argument is not without merit, but it is not persuasive. The Court recognizes that remand may very well require the Kent County Circuit Court to determine Sandra Moon's entitlement to benefits under ERISA,

> [b]ut the presence of a federal question, even a [LMRA] § 301 [which closely parallels ERISA & § 502(a), Metropolitan Life, 481 U.S. at 65-66] question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule - that the plaintiff is master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court . . . [A] defendant cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated. If a defendant could do so, the plaintiff would be master of nothing. Congress has long since decided that federal defenses do not provide a basis for removal.

Caterpillar, Inc. v. Williams, 482 U.S. 386, 398-99, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987) (emphasis supplied; footnotes, citations omitted).

Accordingly, the Court concludes it lacks subject matter

jurisdiction over plaintiff's claim.[1] The complaint must be remanded to the Kent County Circuit Court. An order consistent with this opinion shall issue forthwith.

Date: March 14, 1990

ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

[1]As noted by the parties, this result is in accord with several recent unpublished opinions. Transamerica Ins. Co. v. Detroit Carpenters Health & Welfare Fund, (6th Cir. Dk.Nos. 88-1853 et al., Aug. 14, 1989) (U.S. App. LEXIS 12089); State Farm Mutual Automobile Ins. Co. v. Employee Benefit Administrators Inc., (W.D. Mich. File No. G87-284 CA, dated October 20, 1988); Transamerica Ins. Co. v. Michigan Laborers' Health Care Fund, (W.D. Mich. File No. L88-259 CA, dated Nov. 9, 1988). But cf. Nationwide Ins. Co. v. J.T. Batts, Inc., (W.D. Mich. File No. G88-557 CA6, dated January 19, 1989).

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Defendant.

ORDER OF REMAND

In accordance with the Court's written opinion issued on March 14, 1990,

IT IS HEREBY ORDERED that plaintiff's motion to remand is GRANTED;

IT IS FURTHER ORDERED that this action is REMANDED to the Circuit Court for the County of Kent for further proceedings.

Dated: March 14, 1990

ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE