STATE OF MICHIGAN

COURT OF APPEALS

GAIL PROFIT, as Guardian and Conservator of the Estate of GEORGE YANCEY, JR.,

Plaintiff-Appellee,

v

CITIZENS INSURANCE COMPANY OF AMERICA,

Defendant-Appellant.

January 22, 1991
9:00 a.m.

No. 120094

Before: Griffin, P.J., and Sawyer and Brennan, JJ.

GRIFFIN, P.J.

In this first-party no-fault case, defendant appeals as on leave granted from an order of partial summary disposition in favor of plaintiff. The issue presented is whether the defendant insurer may subtract from the plaintiff's work loss personal protection insurance benefits, social security disability benefits, which the plaintiff is receiving for the same disability when the policy between the parties is labeled "noncoordinated" as to wage loss, but specifically authorizes a set-off of governmental benefits. On the basis of Tatum v GEICO, 431 Mich 663; 431 NW2d 391 (1988), we are compelled to hold that despite the contract and the plain language of MCL 500.3109(1); MSA 24.13109(1), such a set-off is not permissible for the reason that the defendant insurer failed to offer to the plaintiff a policy of no-fault insurance which would not coordinate this governmental benefit.

I

We begin our analysis with the no-fault statutory provision which the defendant argues not only allows such a set-off but requires it:

> Benefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the personal protection insurance benefits otherwise payable for the injury. [MCL 500.3109(1); MSA 24.13109(1).]

In O'Donnell v State Farm Mutual Automobile Ins Co, 404 Mich 524; 273 NW2d 829; app dis 444 US 803; 100 S Ct 22; 62 L Ed 2d 16 (1979), the Supreme Court held this governmental benefit set-off provision to be constitutional. The Court specifically found a rational basis for treating governmental benefits differently from private benefits:

> The Legislature's judgment that the recipients of private benefits should be treated differently from the recipients of government benefits is supported by a rational basis and should therefore be sustained. [Id., p 537.]

In Thompson v DAIIE, 418 Mich 610; 344 NW2d 764 (1984), the Supreme Court held that social security disability benefits serve the same purpose as PIP work loss benefits and therefore are to be subtracted from no-fault benefits otherwise payable for an injury. Thompson would be dispositive as to the instant issue were it not for the Supreme Court's subsequent decisions in LeBlanc v State Farm Mutual Automobile Ins Co, 410 Mich 173; 301 NW2d 775 (1981), and Tatum v GEICO, supra, which hold that a 1974 amendment to the No-Fault Act, MCL 500.3109a; MSA 24.13109a, modifies by implication the governmental set-off provision of § 3109(1).[1]

The legislative history to the 1974 no-fault amendment clearly indicates that the Legislature intended to create greater coordination not less. Further, the legislative history of the bill reveals that the additional coordination which the Legislature sought to achieve as to "other health and accident coverage" was directed to private, not governmental, coverages:

> The Apparent Problem to Which the Bill Addresses Itself:
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> Since the advent of compulsory no-fault automobile insurance last October, auto insurance premiums have not been reduced as some persons had anticipated. Many believe the average driver is overbuying in regards to accident and medical insurance since no-fault coverage overlaps with portions of the medical coverage offered by the private accident and health insurers and the group plans of Blue Cross and Blue Shield. Some persons claim Michigan residents should not be required to pay for this duplicate coverage and that automobile insurers should offer deductions and exclusions at reduced premiums to those who pay for similar coverage under other health and accident plans. Further, many contend this elimination of duplicate coverage by the no-fault insurers would result in a substantial savings to Michigan drivers. [Analysis of 1974 H.B. 5724 (as passed by the House) Analysis Section House of Representatives Committee: Insurance 2-22-74.] [Emphasis added.]

There is no legislative history which indicates that House Bill 5724 (§ 3109a) was intended to effect the mandatory set-off of governmental benefits. Additionally, until the LeBlanc decision in 1981, it was assumed by the industry and by the courts that § 3109a had no effect on § 3109(1). Five years in fact after its enactment, the Supreme Court in O'Donnell, supra at 550-551, viewed § 3109a as limited to private insurance coverages:

> Section 3109(1) did not attempt to address the problem of overlapping no-fault and private health or accident insurance benefits. Soon after the No-fault Act was passed by the Legislature, however, an attempt was made to fine-tune the set-off provisions so that this kind of duplication could be reduced while still permitting persons with needs exceeding the benefits provided by no-fault insurance to obtain the extra coverage they required. The Legislature enacted § 3109a which states:
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> "An insurer providing personal protection insurance benefits shall offer, at appropriate reduced premium rates, deductibles and exclusions reasonably related to other health and accident coverage on the insured. The deductibles and exclusions required to be offered by this section shall be subject to prior approval by the commissioner and shall apply only to benefits payable to the person named in the policy, the spouse of the insured and any relative of either domiciled in the same household."
>
> Although the Legislature did not choose to make this set-off mandatory, as it had done with § 3109(1)'s government benefit set-off, this distinction is justified by the perceived necessity of making it possible for persons with greater needs to obtain the coverage they require and pay reduced rates on the no-fault insurance through deductibles and exclusions approved by the Commissioner. That some persons can still slip through the colander of § 3109a and receive additional benefits does not mean the statute is unconstitutional. Mathematical precision is neither possible nor required.
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> Section 3109a promotes the valid legislative objective of reducing duplicative benefits; the means chosen is rationally related to that end; and the distinctions drawn are supported by a rational basis. This statute is also constitutional. [Emphasis added.]

Also see Nyquist v Aetna Ins Co, 84 Mich App 589; 269 NW2d 687 (1978), aff'd 404 Mich 817 (1979).

Shortly after the enactment of § 3109a, the Commissioner of Insurance issued Bulletin AD 74-2 which provided the following guidelines for the implementation of the new law:

> Attached are guidelines to be followed when filing your company's coordination of benefits program.
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> * * *
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> Basically, the act [1974 PA 72] requires that automobile insurers must offer excess no-fault benefits to allow individuals who have health coverage which duplicates coverage under no-fault to eliminate the duplication.
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> * * *
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> The act applies to commercial and personal automobile insurance, but to the extent commercial rates have already been reduced to take account of workmen's compensation benefits or other statutorily required benefits, no further deductions would be required. * * * Note that coordination with statutory programs is defined by statute. For your information Medicare is a primary health program. [Insurance Department Bulletin AD 74-2 (issued as ED-1), April 15, 1974, quoted in LeBlanc, supra at 219, (Levin, J., dissenting).]

The clear import of the insurance bureau memorandum was that the statutorily mandated governmental set-off provision of § 3109(1) was unaffected by the enactment of § 3109a. This construction by the Commissioner of Insurance is particularly significant in view of the fact that under § 3109a "deductibles and exclusions reasonably related to other health and accident coverage on the insured . . . shall be subject to the prior approval by the commissioner." [Emphasis added.] Since the commissioner was taking the position that the mandatory coordination of governmental benefits under § 3109(1) continued despite § 3109a, an insurance carrier such as Citizens was neither compelled nor authorized to offer a noncoordinated policy which permitted duplication of governmental benefits.

II

This Court finds the above arguments to be strong and persuasive. Nevertheless, the defendant's position was rejected by the majority of the Supreme Court in LeBlanc, supra, and by a unanimous Supreme Court in Tatum, supra. We are unable to rationally distinguish the social security disability benefits at issue from the federal military medical benefits addressed in Tatum. The rationale of Tatum appears applicable and is therefore applied.

"Were we writing on a clean slate,"[2] we would decide in defendant's favor. Duplication of governmental benefits is repugnant to the purposes and objectives of the No-fault Act and to the plain language of § 3109(1). The Legislature in enacting the 1974 amendment, § 3109a, intended to encourage and promote greater coordination not greater duplication.

We reluctantly follow Tatum and hold that despite the plain language of § 3109(1) defendant may not set-off plaintiff's social security disability payments from plaintiff's PIP work loss benefits because defendant failed to offer to the plaintiff a policy of no-fault insurance which would not coordinate this governmental benefit.

Affirmed.

/s/ Richard Allen Griffin
/s/ David H. Sawyer
/s/ Thomas J. Brennan

[1] As a general rule of statutory construction, repeals by implication are not favored. See People v Buckley, 302 Mich 12, 22; 4 NW2d 448 (1942). If by a reasonable construction two statutes can be reconciled and a purpose found to be served by each, both must stand and there is no repeal by implication. See Valentine v Redford Twp, 371 Mich 138; 123 NW2d 227 (1963).

[2] The Supreme Court in Tatum included the following intriguing footnote reflecting upon the stare decisis effect of LeBlanc:

> Were we writing on a clean slate, we might well conclude that only those benefits that are health and accident benefits directly financed by the insured are within the coverage of § 3109a. See separate opinion of Ryan, J., in LeBlanc. We are not. Moreover, although we are not bound to follow prior precedent if convinced it is incorrect, we are not convinced that LeBlanc was wrongly decided. [Tatum v GEICO, supra at 670, n 5.]

The use of the double negative by the Supreme Court ("not convinced that LeBlanc was wrongly decided") casts doubt on the positive proposition of whether the court is convinced that LeBlanc was correctly decided.