STATE OF MICHIGAN

COURT OF APPEALS

AUTO CLUB INSURANCE ASSOCIATION,
formerly known as DAIIE, Subrogee of:
ALI CHEHAB, FAYSAL, MASLOUM,
HOUHAD JAMIL BAZZI, HUSSEIN E. HABAB,
NASRI JOMAA, ALI K. HASHEN and
SAMI M. ALAOUIE,

Plaintiff-Appellee,

v

FREDERICK & HERRUD, INCORPORATED,
a corporation,

Defendant-Appellant.

October 8, 1991
9:35 a.m.
FOR PUBLICATION

No. 135974
ON REMAND

Before: Gribbs, P.J., and Doctoroff and Reilly, JJ.

PER CURIAM.

This case has been remanded to us by the United States Supreme Court for our reconsideration in light of FMC Corp v Holliday, 498 US ___, ___ S Ct ___; 112 L Ed 2d 356 (1990). We reverse.

This matter is before us for the third time. This litigation involved a dispute between plaintiff and defendant as to which of them should bear primary responsibility for medical and related expenses incurred by several employees of defendant. These employees were covered by no-fault insurance policies issued by plaintiff and by a self-funded health and accident benefit plan operated by defendant. In our initial decision, we reversed the lower court's order holding each party responsible for payment of one-half the benefits owed to the insured and concluded that the Legislature intended the health and accident coverage to be primary and the no-fault coverage to be secondary. We remanded this case for entry of judgment and determination of liability consistent with our opinion. Auto Club Ins Assn v Frederick & Herrud, Inc, 145 Mich App 722; 377 NW2d 902 (1985).

Following remand to the circuit court, defendant moved for leave to amend its answer to add the affirmative defense that plaintiff's state claim was preempted by the Employee Retirement Income Security Act (ERISA), 29 USC 1144(a). The circuit court denied the motion to amend, finding no newly discovered facts and undue delay in bringing the motion. Defendant then moved for summary disposition, asserting that ERISA deprived the state court of subject matter jurisdiction over the dispute. The circuit court denied defendant's motion for summary disposition and entered judgment for plaintiff. Defendant appealed the circuit court decision to this Court.

This Court issued a published opinion noting that the issue whether MCL 500.3109a; MSA 24.13109(1) was preempted by ERISA had been resolved in Northern Group Services, Inc v Auto Owners Ins Co, 833 F 2d 85 (CA 6, 1987), cert den 486 US 1017; 108 S Ct 1754; 100 L Ed 2d 216 (1988):

> We believe the Sixth Circuit's construction of the pertinent ERISA provisions is persuasive and, as a federal court construing federal law, its decision is controlling precedent [Auto Club v Herrud, 175 Mich App at 418-419].

Defendant's application for leave was denied by our Supreme Court, 433 Mich 900 (1989). However, in November 1990, the United States Supreme Court released FMC v Holliday, 498 US ___; 111 S Ct ___; 112

L Ed 2d 356 (1990). Shortly following its decision in FMC v Holliday, Id, the United States Supreme Court granted certiorari in this case, vacated our decision and remanded this matter to us for reconsideration in light of FMC.

In FMC, the Court ruled that ERISA preempted a Pennsylvania law precluding self-funded employee benefit plans from exercising subjugation rights on a claimant's tort recovery:

> [I]f a plan is insured, a State may regulate it indirectly through regulation of its insurer and its insurer's insurance contracts; if the plan is uninsured, the State may not regulate it. [FMC , 498 US at ___; 112 L Ed 2d at 368.].

Since the plan in this case is self-insured, it now appears to us that contrary to the decision in Northern Group Services, supra, state regulation is precluded under ERISA. We note, too, that other courts have concluded that Northern Group Services was effectively overruled by the United States Supreme Court decision in FMC. See Allstate Ins Co v Carpenters, 760 F Supp 665 (WD Mich 1991); Lincoln Mutual Casualty Co, v Lectron Products, Inc, 1991 W L 33558 (ED Mich).

We need not consider plaintiff's newly discovered claim that the ERISA plan in this case is not self-funded since this issue was not raised before the trial court. Peisner v Detroit Free Press, 421 Mich 125, 129 n 5; 364 NW2d 600 (1984). In any case, we are convinced that purchase of stop loss insurance coverage does not transform a benefit plan into an insured plan for purposes of ERISA. See FMC, 112 L Ed 2d at 366.

Reversed.

/s/ Roman S. Gribbs
/s/ Martin M. Doctoroff
/s/ Maureen Pulte Reilly