STATE OF MICHIGAN

COURT OF APPEALS

ALLSTATE INSURANCE COMPANY,

Plaintiff-Appellant,

v

LUFTHANSA GERMAN AIRLINES,

Defendant-Appellee,

and

STEPHAN ROESCH,

Defendant.

December 27, 1993

No. 146004
LC No. 90-395445-CZ

Before: Brennan, P.J., and Reilly and Danhof,* JJ.

PER CURIAM.

Plaintiff appeals as of right a circuit court order granting summary disposition pursuant to MCL 2.116(C)(8) and (10) in favor of defendant on plaintiff's complaint for declaratory relief. We affirm.

Stephan Roesch, voluntarily dismissed from this suit, was injured in an automobile accident and incurred $67,000 in medical expenses, which plaintiff Allstate, Roesch's no-fault insurer, paid in full. Roesch was also eligible to receive benefits under defendant Lufthansa's employee medical-benefit plan, established pursuant to the Employee Retirement Insurance Security Act (ERISA), 29 USC §1001 et seq. Both plaintiff's policy and defendant's benefit plan contained a coordination-of-benefits (COB) provision, purporting to assume only excess or secondary liability for expenses resulting from an automobile accident. According to the parties' later stipulation of facts, the COB provisions thus conflicted with each other.

Acting on its own COB provision, plaintiff sought recoupment from defendant, and declaratory relief in court. Plaintiff's theory was that since defendant was insured by an excess risk policy issued by Lloyd's of London, defendant's plan was an insured plan, and plaintiff's COB provision was entitled to primacy under Federal Kemper Ins Co v Health Ins Administration, Inc, 424 Mich 537; 383 NW2d 590 (1986) (interpreting MCL 500.3109a; 24.13109(1)). In response, defendant moved for summary disposition, arguing that since the excess-risk policy insured defendant itself but not its medical benefit plan, and did not govern the plan's benefits in any way, defendant's plan was self-funded within the meaning of the ERISA, which preempted MCL 500.3109a; 24.13109(1), and thus entitled the plan's COB provision to primacy under FMC Corporation v Holliday, 498 US ___, 112 L Ed 2d 356; 111 S Ct 403 (1990). The circuit court agreed with defendant.

On appeal, plaintiff first argues that the trial court erred in finding defendant's coverage secondary to plaintiff's coordinated no-fault coverage because Lufthansa's purchase of "stop-loss" coverage rendered its medical benefit plan an insured plan which was not protected by the ERISA's "savings clause" from the effect of MCL 500.3109a; 24.13109(1). Plaintiff secondly argues that even if the ERISA insulates defendant's plan from the application of state insurance law, plaintiff is nonetheless entitled to full or partial reimbursement by virtue of either the plan's own language or the application of federal common law.

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

When reviewing a grant of summary disposition, we review the record to determine de novo whether the moving party was entitled to judgment as a matter of law. Adkins v Thomas Solvent Co, 440 Mich 293, 302; 487 NW2d 715 (1992). We conclude that the trial court properly granted defendant's motion.

Plaintiff's first argument relies on holdings in Northern Group Services, Inc v Auto Owners Ins Co, 833 F2d 85, 91 (CA 6, 1987) (an employer's purchase of stop-loss insurance renders its benefit plan an insured plan), and Frankenmuth Mutual Ins Co v Meijer, Inc, 176 Mich App 675, 678; 440 NW2d 7 (1989) (following Northern Group Services, supra). However, to whatever extent the Northern Group Services holding survived the generally contrary holding of FMC Corp, supra, it has not survived subsequent cases. In Lincoln Mutual Casualty Co v Lectron Products, Inc, Employee Health Benefit Plan, 970 F2d 206 (CA 6, 1992), the Sixth Circuit held that an employer's purchase of stop-loss insurance did not affect the preempted status of its benefit plan under the ERISA because to hold otherwise would be to permit the states to directly regulate a benefit plan, in contravention of the ERISA. Id. at 210. The Michigan Supreme Court followed that holding in ACIA v Frederick & Herrud, Inc, 443 Mich 358, 361, 386, 389-390; ___ NW2d ___ (1993), affirming this Court's 1991 decision in the same case, 191 Mich App 471; 479 NW2d 18 (1991), and overruling Federal Kemper to the extent of any conflict. 443 Mich at 390. It is thus now settled law that the "purchase of stop loss insurance coverage does not transform a benefit plan into an insured plan for purposes of the ERISA." 191 Mich App at 475.

The first prong of plaintiff's second issue appeals to terms in defendant's COB provision suggesting its deference to state law notwithstanding ERISA preemption. Plaintiff thus argues in effect that a closer look at the terms reveals that the provision does not actually purport to assume only secondary liability for expenses resulting from an automobile accident. We decline to address this argument. Having stipulated to conflicting COB clauses, plaintiff may not now argue that the trial court erred in failing to examine terms which arguably lend themselves to a less conflicting interpretation. Bloesma v ACIA (After Remand), 190 Mich App 686, 691, 692; 476 NW2d 487 (1991).

Finally, although the trial court did not address the federal common-law question, plaintiff preserved it by raising it in its responsive brief to defendant's motion. The Supreme Court resolved that question as well in Frederick & Herrud, supra, holding that the COB clause in an ERISA plan must be given its plain meaning despite the existence of a similar clause in a no-fault insurance policy as a matter of federal common law. 443 Mich at 361, 389. In so deciding, the Court did not adopt the pro-rata apportionment espoused in Winstead v Indiana Ins Co, 855 F2d 430 (CA 7, 1988) and applied in Auto Owners Ins Co v Thorn Apple Valley, 818 F Supp 1078 (WD Mich, 1993). Rather, guided by the federal district court's decision on remand in Lincoln Mutual v Lectron, 823 F Supp 1385 (ED Mich 1993), the Court held that where an ERISA plan provides that no-fault insurance is primary where the potential for duplication of benefits occurs, the plan's terms control, and the no-fault insurer is primarily liable for the benefits at issue. Id. at 387.

Defendant was entitled to judgment as a matter of law.

Affirmed.

/s/ Thomas J. Brennan
/s/ Maureen P. Reilly
/s/ Robert J. Danhof