STATE OF MICHIGAN

COURT OF APPEALS

AETNA CASUALTY AND SURETY COMPANY,

Plaintiff-Appellant,

v

MANUFACTURER'S INDUSTRIAL EMPLOYEES ASSOCIATION, LTD.,

Defendant-Appellee.

Before: Weaver, P.J., and Shepherd and D.A. Johnston, III,* JJ.

PER CURIAM.

Plaintiff appeals as of right from a June 26, 1991, order of the trial court granting defendant's motion for summary disposition. We affirm.

Plaintiff, Aetna Casualty and Surety Company, subrogated to the rights of its insureds, Deborah, Jeremy and Justin Grandy, brought suit for reimbursement of payments made for medical expenses incurred as a result of a motor vehicle accident. The Grandy's were covered as resident relatives of David Grandy by a policy of no-fault automobile insurance issued by plaintiff. Plaintiff's no-fault insurance policy included the following provision:

> In consideration for a reduction in the premium payable for Personal Injury Protection insurance, it is agreed that personal protection benefits for allowable expenses and work loss afforded under the Michigan Personal Injury Protection Endorsement do not apply to bodily injuries sustained by the named insured or any relative to the extent that similar benefits are available to such named insured or relative under any health and accident coverage.
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> For purposes of this endorsement, the term "health and accident coverage" means insurance covering hospital, surgical and medical expenses and providing wage continuation or disability benefits, with a waiting period for accidental injury of not more than 24 hours, under a policy issued by an insurance carrier duly authorized to provide such coverages in Michigan. [Emphasis deleted.]

David Grandy's employer participated in an employee benefit plan which offered health and accident benefits. The employers which participated in the plan are all owned by the same family. Defendant's plan is self-funded, and procures stop-loss insurance. The parties agree that defendant's plan is an employee welfare benefit plan (EWBP) under the Employee Retirement Income Security Act of 1974 (ERISA), 29 USC 1001 et seq. Defendant's plan included the following provision:

> No benefits are available under this Plan: ... for charges in connection with an Injury or Illness resulting from a motor vehicle accident in excess of a $300 maximum benefit. (applicable only in states where No-Fault regulations are in force.) [sic]

Plaintiff originally filed a complaint for reimbursement from defendant in the United States District Court for the Eastern District of Michigan. In July, 1988, the federal court dismissed the complaint sua sponte, finding that the dispute arose under state law and did not involve the ERISA.

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

In August, 1988, plaintiff refiled its complaint for reimbursement in Oakland County Circuit Court. Plaintiff's complaint in circuit court sought reimbursement from defendant under § 3109a of the no-fault insurance act, MCL 500.3109a; MSA 24.13109(1), on the theory that no-fault coverage is secondary where an insured has "other health and accident coverage." Plaintiff sought reimbursement from defendant for payments made to the Grandys in excess of $200,000.

In November, 1989, on cross-motions for summary disposition, the trial court initially ruled in favor of plaintiff. Defendant promptly filed a claim of appeal with this Court. However, since there was no decision as to the amount of damages, the claim of appeal was rejected for lack of a final order. The parties then entered into negotiations to determine the appropriate amount of damages.

In the interim, the United States Supreme Court released its decision in the case of FMC Corp v Holliday, 498 US 52; 111 S Ct 403; 112 L Ed 2d 356 (1990), which held that the ERISA preempts the application of state law which relates to a self-funded employee benefit plan. In response to that decision, defendant filed a renewed motion for summary disposition. Following a hearing on the matter, the circuit court reversed its prior decision and found that the ERISA preempted the application of state law. However, the court temporarily stayed entry of judgment to permit the parties to brief the issue of how to coordinate payments between the no-fault insurance policy and the employee benefits plan under federal law. Subsequently, the circuit court found that it did not have jurisdiction to apply federal law under these circumstances, and entered summary disposition in favor of defendant. Herein plaintiff appeals by right.

On appeal from a trial court's grant of summary disposition, we must review the record de novo to determine whether the prevailing party was entitled to judgment as a matter of law. Adkins v Thomas Solvent Co, 440 Mich 293, 302; 487 NW2d 715 (1992).

The primary issue in this case is whether state or federal law should be applied. Plaintiff acknowledges that FMC Corp, supra, provides general authority for the proposition that § 3109a of Michigan's no-fault insurance act, MCL 500.3109a; MSA 24.13109(1), is preempted by the ERISA. However, plaintiff raises a number of arguments against the general rule of ERISA preemption.

First, plaintiff argues that defendant's procurement of stop-loss insurance takes this case out of the realm of ERISA preemption. However, plaintiff's argument must fail in light of the recent decision of our Supreme Court in ACIA v Frederick & Herrud, Inc, 443 Mich 358; 505 NW2d 820 (1993). Therein our Supreme Court held that the procurement of stop-loss insurance for a self-funded EWBP is irrelevant to the issue of preemption because "any regulation of it would have a significant effect on the administration of the ERISA plans involved." ACIA, supra at 389. Further, our Supreme Court in ACIA reiterated the holding of FMC Corp, supra, that state insurance laws - such as § 3109a of the no-fault act - are preempted by the ERISA. Accordingly, this argument is without merit.

Next, plaintiff argues that § 3109a of Michigan's no-fault insurance act should be applied in this case because the ERISA permits state regulation of multiple employer welfare arrangements (MEWAs). Defendant acknowledges that its plan is a MEWA under the definition set forth at 29 USC 1002(40)(A).[1] We recognize that 29 USC 1144(b)(6)(A) permits some state regulation of EWBP-MEWAs, as follows:

> (6)(A) Notwithstanding any other provision of this section--
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> (i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides--
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> (I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

However, under 29 USC 1144(b)(6)(A)(ii), state regulation of EWBP-MEWAs which are not fully insured (as here) is only permissible "to the extent not inconsistent with the preceding sections of this subchapter."[2] The relevant inquiry, then, is whether § 3109a of the no-fault act is "inconsistent with" the ERISA.

In light of our Supreme Court's recent decision in ACIA, we must conclude that § 3109a of the no-fault act is inconsistent with the ERISA's purpose of protecting employee benefit plans. ACIA, supra at 373. Although our Supreme Court in ACIA was not faced with an EWBP which was also a MEWA, its analysis of the impact of § 3109a of the no-fault act upon ERISA plans is nevertheless instructive:

> Although the Michigan statute purports to regulate insurance and not ERISA plans, we conclude that it has a direct effect on the administration of the plans in these cases because it would virtually write a primacy of coverage clause into the plans. This is the type of state regulation that would lead to administrative burdens that the historical progression of federal cases recounted earlier forbids. [ACIA, supra at 387.]

In keeping with our Supreme Court's analysis in ACIA, if the limited preemption contemplated by 29 USC 1144(b)(6)(A)(ii) is to have any effect at all, a pervasive state law such as § 3109a of the no-fault act must be held "inconsistent" with the ERISA. To hold otherwise would undermine the stability of self-funded EWBPs, and the very purpose of the ERISA. As such, we will not enforce the primacy of coverage provision of § 3109a of the no-fault act against defendant's EWBP-MEWA. Accordingly, this issue is without merit.

Next, plaintiff argues that even if the ERISA is found to preempt the application of § 3109a of the no-fault act, then defendant would still be liable for at least partial reimbursement under either state or federal common law. However, our Supreme Court in ACIA, supra at 387, also addressed this question concerning conflicting coordination of benefits (COB) clauses. Taking guidance from the Sixth Circuit in Lincoln Mutual Casualty Co v Lectron Products, Inc, Employee Health Benefit Plan, 970 F2d 206, 211 (CA 6, 1992), our Supreme Court recently stated as follows:

> We take our guidance from the Eastern District's decision in Lincoln Mutual on remand because we believe that it best reconciles the tension between state and federal policy. We agree with that court's conclusion that the COB clause in an ERISA policy must be given its clear meaning without the creation of any artificial conflict based upon MCL 500.3109a; MSA 24.13109(1). Therefore, because both plans provide that no-fault insurance is primary where the potential for duplication of benefits occurs, we hold that the ERISA plans' terms control. The no-fault insurer, ACIA, is primarily liable for the benefits at issue. [ACIA, supra at 387.]

In the present case, there is no greater conflict between the COB provisions in the no-fault policy and defendant's EWBP than was the case in ACIA, supra. Arguably, the COB clauses here conflict less than in ACIA. Accordingly, under ACIA, supra at 387, we must give the clause in defendant's plan its clear meaning. As such, defendant is liable to the extent of $300 in benefits as a result of the accident.[3] Plaintiff is liable for the remainder of the personal injury benefits.

After reviewing plaintiff's remaining public policy argument, we are not persuaded that it justifies a deviation from our Supreme Court's recent holding in ACIA, supra, as discussed herein.

The trial court properly granted summary disposition for defendant – albeit, in part, for the wrong reason.[4]

Affirmed.

/s/ Elizabeth A. Weaver
/s/ John H. Shepherd
/s/ Donald A. Johnston III

[1] 29 USC 1002(40)(A) defines a MEWA as follows:

> (40)(A) The term "multiple employer welfare arrangement" means an employee welfare benefit plan, or any other arrangement (other than an employee welfare benefit plan), which is established or maintained for the purpose of offering or providing any benefit described in paragraph (1) to the employees of two or more employers (including one or more self-employed individuals), or to their beneficiaries, except that such term does not include any such plan or other arrangement which is established or maintained--
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> (i) under or pursuant to one or more agreements which the Secretary finds to be collective bargaining agreements,
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> (ii) by a rural electric cooperative, or
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> (iii) by a rural telephone cooperative association.

[2] Notably, not all MEWAs are EWBPs subject to ERISA preemption. MD Physicians & Associates, Inc v State Board of Ins, 957 F2d 178, 181 (CA 5, 1992). In those cases where the MEWA is not an EWBP, the ERISA does not preempt the application of state law. Id. In the case of a fully-insured EWBP-MEWA, state regulation is expressly limited to matters involving reserves and contribution requirements. 29 USC 1144(b)(6)(A)(i). In this case, plaintiff acknowledges that defendant's plan is an EWBP-MEWA. And, there is no question that defendant's plan is not fully-insured. Accordingly, the limited preemption provision of 29 USC 1144(b)(6)(A)(ii) applies in this case.

[3] It appears that defendant has already paid the $300 maximum benefit as provided under its plan.

[4] As a court of general jurisdiction, the circuit court could have entertained plaintiff's arguments concerning the application of federal common law. However, defendant was entitled to summary disposition in any event because the application of federal common law does not change the outcome of this case. The trial court was correct in the first part of its ruling that the ERISA preempted the application of § 3109a of Michigan's no-fault act.