UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, as subrogee of Diana Swick,

Plaintiff,

v.

ALCHEM ALUMINUM, INC., COMMONWEALTH LIFE INSURANCE COMPANY, and ACCELERATION LIFE INSURANCE COMPANY,

Defendants.
_____/

File No. 4:93-CV-35

Hon. Benjamin F. Gibson

OPINION

This is a dispute between a no-fault automobile insurance carrier and an employer and the insurers of its employee benefit plan over liability for medical coverage of injuries sustained in an automobile accident by an alleged beneficiary of the employee benefit plan. Before the Court are the no-fault insurer's motion for summary judgment against the employer and the plan insurers and the motion for summary judgment of the plan insurers against the no-fault insurer.

I.

The parties have stipulated to the following facts: Lyle and Diana Swick were married on April 11, 1987, and had five children. Alchem Aluminum, Inc., employed Lyle Swick at all relevant times. Diana Swick was not employed. Alchem also provided an employee health care benefit plan ("the Plan") pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461. Defendants Alchem

Commonwealth Life Insurance Company ("Commonwealth") and Acceleration Life Insurance Company ("Acceleration") funded the Plan. Lyle Swick was a covered employee under the Plan at all relevant times. The Plan provided coverage for a covered employee's dependents, including a spouse. However, the Plan excluded from the definition of a dependent, and thus from coverage, a spouse who was "legally separated or divorced from the Covered Employee." The phrase "legally separated or divorced" is not defined in the Plan. Lyle and Diana Swick received a copy of the health care benefit plan and their rights and obligations under it prior to September 10, 1991.

On September 20, 1991, Diana Swick moved out of the Swick's marital home. On September 30, 1991, Diana Swick filed a complaint for divorce in the Branch County Circuit Court. On September 30, 1991, Diana Swick also filed a motion for temporary custody, support, and attorney fees. On October 11, 1991, the court put an oral settlement as to custody and support on the record and on December 5, 1991, entered a written order of the settlement.

On January 15, 1992, Diana Swick was seriously injured in a car accident and hospitalized for a period of time. State Farm Mutual Automobile Insurance Company ("State Farm") insured Diana Swick at all relevant times. Lyle and Diana Swick lived apart continuously from September 20, 1991, until after January 15, 1992, the date of the accident. Diana Swick returned to the marital home after she left the hospital and resided with Lyle

Swick during April 1992. On April 17, 1992, Diana and Lyle Swick stipulated to dismiss the complaint for divorce because they had reconciled. The complaint was dismissed on April 30, 1992. However, on May 20, 1992, Diana and Lyle Swick stipulated that they were not reconciled and the court rescinded the dismissal. The court entered a judgment of divorce on August 21, 1992.

During December 1991, Lyle Swick remembers that he informed Carolyn Coonce, an insurance clerk for Alchem, and Patricia Bunting, an accounting clerk for Alchem, that he and his wife were divorcing and that she should be removed from the insurance. Coonce remembers that Lyle Swick was not definite as to whether he and his wife were separated or reconciled. Coonce also remembers that she advised him to bring in any court documents, but that she is unsure whether Lyle Swick ever did so. Bunting remembers that she overheard Lyle Swick asking Coonce to remove Diana Swick from the insurance because Diana Swick had again left him. Bunting also believes that Coonce gave Lyle Swick a "change card" to change Diana Swick's status and that Lyle Swick signed it. A review of Alchem's file reflects no change card. At the time of the accident, no paperwork had been processed to remove Diana Swick as a covered dependant and the Plan administrator, Automated Group Administration, had not been notified. On July 29, 1992, Acceleration denied State Farm's request for reimbursement of Diana Swick's medical expenses because of Lyle and Diana Swick's legal separation.

State Farm then sued Automated Group Administration and Alchem in state court for reimbursement of its coverage of Diana Swick's medical expenses based on its coordinated policy of no-fault insurance, Alchem's employee benefit plan, and Michigan's no fault insurance law. The action was removed to this Court. Automated Group Administration was replaced as a party by Commonwealth and Accelerated, the Plan's insurance providers.

II.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc., 862 F.2d 597, 601 (6th Cir. 1988). In ruling on a motion for summary judgment, the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether the evidence is so one-sided that one party must prevail as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989).

III.

The parties dispute several issues. They contest the effect of the coordination of benefits provisions ("COB") in the no-fault insurance policy and the Plan, whether Diana Swick was "legally separated" from Lyle Swick for purposes of the Plan

because of their pending divorce at the time of the accident and, therefore, not covered under the Plan, and the effect of Lyle and Diana Swick's compliance or noncompliance with the notification provisions of the Plan and the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA").

The Court will consider the effect of the COB provisions of the Plan and the no-fault insurance policy first to determine which coverage is primary. Plaintiff argues that its COB provision unambiguously subordinates its no-fault coverage as secondary to that of the Plan but that the Plan's COB provision failed to subordinate its coverage as secondary to other applicable insurance. Defendants argue that its COB provision unambiguously coordinates its coverage as secondary to other coverage and that the Michigan State Supreme Court recently reversed its position that a no-fault insurer is secondarily liable to any other health care insurance and held that an unambiguous COB provision in an ERISA plan must be given its plain meaning despite any similar COB provision in a no-fault policy.

A.

The law applicable to this issue is in flux. In Lincoln Mutual Casualty Co. v. Lectron Products, Inc., Employee Health Ben. Plan, 970 F.2d 206, 209-210 (6th Cir. 1992) and Auto Club Ins. Ass'n v. Health and Welfare Plans, Inc., 961 F.2d 588, 592-93 (6th Cir. 1992), relying on FMC Corp. v. Holliday, 498 U.S. 52, 111 S. Ct. 403, 112 L. Ed. 2d 356 (1990), the Sixth

Circuit held that the federal law of ERISA preempts state law, such as the Michigan No-Fault Insurance Act, Mich. Comp. Laws §§ 500.3100 et seq., that relates to an ERISA plan. ERISA preemption, however, does not resolve the coverage dispute between two conflicting COB provisions. It merely requires application of federal law instead of state law to resolve the conflict. ERISA itself does not specifically address the issue of conflicting COB provisions in ERISA plans and no-fault automobile insurance policies. Lincoln Mutual, 970 F.2d at 211; see also PM Group Life Ins. Co. v. Western Growers Assurance Trust, 953 F.2d 543, 546 (9th Cir. 1992). Congress recognized such limitations and intended that federal courts would develop a federal common law of ERISA. See 120 Cong. Rec. 29,942 (1974) (remarks of Sen. Javits); Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110, 103 L. Ed. 2d 80, 109 S. Ct. 948 (1989) (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987)). In Lincoln Mutual, 970 F.2d 206, 211 and Auto Club, 961 F.2d 588, 594-95, the Sixth Circuit recognized that a federal common law of ERISA must be decided to determine coverage priority among conflicting COB provisions. Lincoln Mutual, 970 F.2d 206, 211 (6th Cir. 1992). The Lincoln Mutual court stated:

> Because no federal statutory law addresses the issue of how to resolve the conflict between the clauses, this case must be resolved by applying federal common law. See [Auto Club Ins. Assoc. v. Health and Welfare Plans, Inc., 961 F.2d 588 (6th Cir. 1992)]; see Winstead v. Indiana Ins. Co., 855 F.2d 430, 433-34 (7th Cir. 1988) cert. denied, 488 U.S. 1030, 109 S. Ct. 839, 102 L. Ed. 2d 971 (1989)."

Id., 970 F.2d at 211.

Two cases in the Sixth Circuit have provided conflicting federal common law on this issue. Auto-Owners Ins. Co. v. Thorn Apple Valley, 818 F. Supp. 1078 (W.D. Mich. 1993), adopted the Seventh Circuit's pro rata apportionment rule presented in Winstead v. Indiana Ins. Co., 855 F.2d 430 (7th Cir. 1988), which decided an issue of priority coverage between the COB provisions of an ERISA plan and a Michigan no-fault automobile insurance policy under Michigan Compiled Laws Annotated Section 3109. Although the Sixth Circuit did not announce a federal common law rule in Lincoln Mutual and Auto Club, it did appear to approve the Winstead decision. However, Winstead was a pre-FMC Corp. v. Holliday decision (which mandated ERISA preemption of "other insurance" provisions in non-ERISA policies) and acknowledged that the district court had actually fashioned its "federal common law" from state common law.

In Lincoln Mutual Casualty Co. v. Lectron Products, Inc. Employee Health Benefit Plan, 823 F. Supp. 1385, 1394 (E.D. Mich. 1993) (on remand), the court determined that Michigan Compiled Laws Annotated Section 500.3109a; Michigan Statutes Annotated Section 24.3109(1), as construed by the Michigan Supreme Court in Federal Kemper Ins. Co. v. Health Ins. Admin. Ins., 424 Mich. 537, 383 N.W.2d 590 (1986), would impermissibly subject ERISA plans to variable state regulation. Based on several unpublished cases dealing with ERISA issues, other than conflict of COB provisions, the court held that "Thus, under federal common law,

the plain language, strictly construed, of the ERISA plan, not the intent of the state legislature in statutorily regulating insurance, must prevail." 823 F. Supp. 1393.[1]

In developing a federal common law rule for insurance coverage priority, a federal court may properly consult state law because of the experience and expertise it represents. Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077, 1084 (1st Cir.), cert. denied, 498 U.S. 1013, 112 L. Ed. 2d 586, 111 S. Ct. 581 (1990). But a federal court may adopt it only if it is consistent with the policies underlying the federal law at issue. Phillips v. Lincoln Nat'l Life Ins. Co., 978 F.2d 302, 311 (7th Cir. 1992). The emerging federal common law of ERISA must attempt to effect the intent of Congress in passing ERISA, not the intent of a state legislature in passing a no-fault automobile legislation. In Winstead, the Seventh Circuit acknowledged that the purported federal common law of the district court was in fact "a solomonic apportionment of liability . . . in keeping with generally accepted notions derived from state common law." 855 F.2d at 433-34. Although the result may have been fair, equitable, and even solomonic, the Supreme Court's decision in FMC both clarifies that ERISA plans

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[1]The unpublished cases are Lingerfelt v. Nuclear Fuel Services Inc., 1991 U.S. App. Lexis 1822 (6th Cir. Feb. 5, 1991) and Criss v. Hartford Accident & Indem. Co., 1992 U.S. App. Lexis 13288 (6th Cir. May 28, 1992). In Lingerfelt, the court stated:

> "We believe that under the emerging federal common law, we should adhere to the literal language of accident insurance policies [ERISA plans] except where public policy considerations dictate a different course."

are not insurance companies under state law and also renders application of state insurance law inappropriate. Therefore, this Court adopts that common law ruling of the court in Lincoln Mutual and also determines that "under federal common law, the plain language, strictly construed, of the ERISA plan, not the intent of the state legislature in statutorily regulating insurance, must prevail."

The Court notes that in Auto Club Ins. v. Frederick & Herrud, 443 Mich. 358, 505 N.W.2d 820 (1993), the Michigan Supreme Court has recently addressed this issue based upon its determination of what "the federal common law should be." In so doing, it overruled its decision in Federal Kemper, 424 Mich. 537, 383 N.W.2d 590, which made a health insurance provider primarily responsible without considering ERISA preemption. The Frederick & Herrud court held:

> [A]n unambiguous COB clause in an ERISA health and welfare benefit plan must be given its plain meaning despite the existence of a similar clause in a no-fault policy because any conflict created by the requirements of M.C.L. § 500.3109A; M.S.A. § 24.13109(1) and this Court's interpretation of the statute would have the direct effect of dictating the terms of the ERISA plans. To the extent that our decision in Federal Kemper is inconsistent with our holding today, it is overruled. We emphasize, however, that the primacy of health care coverage over that in a no-fault policy continues in Michigan jurisprudence in all cases not within the purview of this narrow holding.

443 Mich. at 389-90.

B.

The no-fault automobile insurance policy for Diana Swick provided coordinated benefits for such allowable expenses as

medical, surgical, x-ray, dental, ambulance, hospital, professional nursing, and rehabilitative service. The plaintiff's COB provision states:

> Benefits shown as coordinated will be reduced by any amount paid or payable to you or any relative under any:
>
> 1. Vehicle or premises insurance;
> 2. Individual, blanket or group accident or disability insurance; and
> 3. Medical or surgical reimbursement plan.

State Farm Car Policy at 13. The Court finds that this language in plaintiff's no-fault policy unambiguously coordinates its coverage as secondary to any medical plan.

The Plan Document contains a section entitled "Coordination of Benefits" and provides in part:

> This Coordination of Benefits provision applies when the Covered Person entitled to medical benefits under the Plan is also covered by another plan or plans of health care benefits. The purpose of this provision is to prevent the payment of benefits under the Plan which, when added to the benefits payable by other plans, will exceed 100% of Allowable Expenses. This provision applies whether or not a claim is filed under the other plan or plans.

Plan Document at 32. An "Allowable Expense" is a "charge for a medical treatment, service or supply, at least a portion of which is covered under at least one of the plans covering the person for whom claim is made." A "Plan" includes a no-fault automobile insurance policy that provides benefits for medical services. The Plan Document in a section entitled "Coordination Procedures" further states:

> Notwithstanding other provisions of the Plan, benefits that would otherwise be payable under the Plan will be reduced so that the sum of the benefits payable under

all plans will not exceed the total of Allowable Expenses incurred during any Claim determination Period with respect to the Covered Person.

The Plan Document in a section entitled "Payments" states:

> Each plan will makes its benefit payment according to where it falls in the following order.
>
> A. A plan which contains no provision for coordination of benefits pays before all other plans.
>
> B. A plan which provides coverage to the claimant by virtue of current employment pays before a plan which provides coverage to the claimant by virtue of past or inactive employment.

Subsection B then enumerates several rules for determining priority of payment among plans that provide benefits based on current employment and among plans that provide benefits based upon past or inactive employment. The Court determines that the Plan Document also unambiguously, although not as concisely as the no-fault policy, coordinates its coverage as secondary to benefits payable under other plans, which includes no-fault automobile insurance.

Plaintiff argues that the Plan Document actually makes the Plan primary because the Plan Document does not explicitly state that a no-fault carrier is primary and that the priority of coverage rules in the "Payments" section does not apply to no-fault policies but only to plans without a COB provision or to plans that provide coverage based on employment. The Court is not persuaded. The scope of the priority of payment rules in the "Payments" section is narrow and simply does not apply to no-fault automobile insurance policies. This does not mean that

the Plan Document does not subordinate the Plan's coverage of medical expenses to that of other plans. Further, as noted above, the Plan Document unambiguously subordinates its coverage as secondary to that of other coverage under other plans, although not as concisely as the no-fault policy.

C.

Therefore, this Court determines that the plain language of the Plan subordinating its coverage to that of the no-fault insurer controls and that, based on the materials submitted to the Court, defendants' coverage for Diana Swick's medical benefits is secondary to plaintiff's coverage.

IV.

The Court considers its determination of the primacy of coverage between the Plan and the no-fault policy dispositive and will not further consider the other issues of whether Diana and Lyle Swick were "legally separated" for purposes of the Plan and whether Diana and Lyle Swick complied with the notice requirements of the Plan. Even if Diana Swick were a covered dependent under the Plan, the no-fault policy would be primary. Accordingly, the Court will grant the motion for summary judgment of defendants Commonwealth Life Insurance Company and Acceleration Life Insurance Company and deny plaintiff's motion for summary judgment.

It further appears, in light of this analysis, that the cross-claims of Acceleration and Commonwealth against Alchem for indemnification, contribution, and breach of implied contract and

Alchem's counter cross-claim for indemnification are moot. Accordingly, the Court will dismiss those claims.

BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE

DATED: July 5, 1994

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, as subrogee of Diana Swick,

Plaintiff,

v.

ALCHEM ALUMINUM, INC., COMMONWEALTH LIFE INSURANCE COMPANY, and ACCELERATION LIFE INSURANCE COMPANY,

Defendants.
_____/

File No. 4:93-CV-35

Hon. Benjamin F. Gibson

JUDGMENT

At a session of the Court held in and for said District and Division, in the City of Grand Rapids, Michigan, this 5th day of July, 1994.

PRESENT: HON. BENJAMIN F. GIBSON, U.S. DISTRICT JUDGE

In accordance with the Opinion entered this day, IT IS HEREBY ORDERED that the motion for summary judgment of defendants Commonwealth Life Insurance Company and Acceleration Life Insurance Company (pleading no. 27) is GRANTED and the motion for summary judgment of plaintiff State Farm Mutual Automobile Insurance Company (pleading no. 28) is DENIED.

IT IS FURTHER ORDERED that judgment is entered in favor of defendants Alchem Aluminum, Inc., Commonwealth Life Insurance Company, and Acceleration Life Insurance Company and against State Farm Mutual Automobile Insurance Company.

IT IS FURTHER ORDERED that the cross-claim of Commonwealth Life Insurance Company and Acceleration Life Insurance Company

(pleading no. 23) and the counter cross-claim of Alchem Aluminum, Inc. (pleading no. 25) are dismissed as MOOT.

IT IS SO ORDERED.

Benjamin F. Gibson

BENJAMIN F. GIBSON
U.S. DISTRICT JUDGE