UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AUTO-OWNERS INSURANCE COMPANY, a Michigan Insurance corporation,

Plaintiff,

v.

FAIRVIEW MEDICAL CARE FACILITY EMPLOYEE BENEFIT PLAN,

Defendant.

File No. 1:94-CV-102

HON. ROBERT HOLMES BELL

O P I N I O N

Plaintiff Auto-Owners Insurance Company filed this complaint for declaratory relief against Defendant Fairview Medical Care Facility Employee Benefit Plan. Jurisdiction of this Court was premised upon federal question jurisdiction pursuant to the preemption provisions of the Employment Retirement Income Security Act, 29 U.S.C. § 1144(a).

This matter is currently before the Court on Defendant Fairview's motion to dismiss and for summary judgment and on Plaintiff Auto-Owner's cross-motion for summary judgment.

I.

The relevant facts are not disputed. Chris Jaegger was injured in an automobile accident on July 20, 1993. At the time of the accident Jaegger was insured for no-fault benefits through Plaintiff Auto-Owners Insurance Co., and for health care coverage through Defendant Fairview Medical Care Facility Employee Benefit Plan.

Plaintiff Auto-Owners has paid $103,000 in benefits to date on behalf of its insured, and anticipates continuing medical bills. Plaintiff contends this is a case of competing coordination of benefits (COB) provisions, and that Defendant should be responsible for payment of the bills on a 50/50 pro rata basis.

Defendant contends that it falls within the governmental plan exemption from ERISA, and that this Court accordingly does not have jurisdiction over this case.[1] In the alternative, Defendant contends the recent Sixth Circuit opinion in Auto Owners Ins. Co. v. Thorn Apple Valley, Inc., 31 F.3d 371 (6th Cir. 1994)(suggestion for rehearing en banc denied 9/26/94) precludes the pro rata relief Plaintiff is requesting.

II.

Because Plaintiff has premised jurisdiction on the existence of a federal question, specifically, the federal preemption doctrine of ERISA, 29 U.S.C. § 1144(a), the threshold issue for this Court is whether the Plan is governed by ERISA.

29 U.S.C. § 1003(b)(1) provides that ERISA "shall not" apply to any employee benefit plan if such plan is a "governmental plan." Section 1002(32) defines "governmental plan" as

> a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

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[1]Although Defendant originally acknowledged it was an ERISA Plan, it has recently amended its answer and now contends that it is exempt from ERISA under the governmental plan exemption, 29 U.S.C. § 1003(b)(1).

Because ERISA is a federal statute, the term "political subdivision" is interpreted by reference to federal law. Shannon v. Shannon, 965 F.2d 542, 546 (7th Cir. 1992), cert. denied, 113 S. Ct. 677 (U.S. 1992). In determining what qualifies as a governmental plan the Seventh Circuit stated that the relevant test is the one applied under the NLRA and the LMRA:

> The entity is a political subdivision if it is "either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate."

Id. at 548 (quoting NLRB v. Natural Gas Utility District, 402 U.S. 600, 604-05 (1971)). In Shannon the Seventh Circuit held that the local hospitals' Plan was not a "governmental plan," because even though the City owned the hospital facility, it was run by a private non-profit board.

In Michigan, the county department of social services is an entity created by law. M.C.L.A. § 400.45; M.S.A. § 16.445. The director is employed by the county board and is responsible to the board. M.C.L.A. § 400.49; M.S.A. § 16.449. The county social services board is made up of 3 members, 2 appointed by the county board of commissioners and 1 appointed by the director of social services. M.C.L.A. § 400.46; M.S.A. § 16.446.

Michigan statute authorizes county social welfare boards, with the approval of the board of supervisors, to supervise and be responsible for the operation of a county medical care facility. M.C.L.A. § 400.58; M.S.A. § 16.458. The county social welfare board must apply in writing to the state for a license. Id. Once

it has a license the social welfare department "shall thereafter represent such facility to the public as the county medical care facility." Id.

Fairview Medical Care Facility is a state-licensed intermediate care facility operated by St. Joseph County. Employees of Fairview Medical Care Facility are county employees. M.C.L.A. § 400.58; M.S.A. § 16.458. The Fairview Medical Care Facility Employee Benefit Plan was established by the St. Joseph County Board of Social Services for the benefit of the medical care facility's employees.

Because the social welfare board is responsible to public officials (the county board of commissioners), the social welfare board is properly considered a political subdivision. Accordingly, because the Fairview Plan was established by the social welfare board, it is a governmental plan and falls within the government plan exemption to ERISA.

Plaintiff notes, however, that the Plan itself contains a "Statement of ERISA Rights" on page 43, which states in relevant part:

> As a participant in this plan you are entitled to certain rights and protection under the Employee Retirement Income Security Act of 1974 (ERISA).

Additionally, on page 45, under "ERISA Requirement," the Plan Sponsor is identified as Fairview Medical Care Facility, and the Plan Administrator is identified as First Benefits of the Midwest, Inc. Thus, according to Plaintiff, the Plan has, by its own terms, opted to come within the provisions of ERISA.

The issue of whether a governmental plan can waive its exemption from ERISA was considered in Krystyniak v. Lake Zurich Community Unit Dist. No. 95, 783 F.Supp. 354 (N.D. Ill. 1991). In Krystyniak the plaintiff argued that the governmental plan at issue had waived its exemption from ERISA by virtue of the provision in the Plan designating the fiduciary for the purposes of ERISA. The court rejected the waiver argument. The court noted that nothing in the legislative history of ERISA suggests that Congress intended to permit governmental employers to "opt in" to ERISA. Id. at 356.

ERISA was enacted primarily to curb abuses in the administration of "private" employee welfare and pension plans. Feinstein v. Lewis, 477 F.Supp. 1256, 1260 (S.D.N.Y. 1979), aff'd without op., 622 F.2d 573 (2d Cir. 1980). Plans established by state and local governments are generally excluded from coverage under ERISA because of concerns of federalism. Id. at 1261.

In light of the federalism concern, even in cases where the plans themselves have sought to avoid the governmental plan exemption, courts have routinely held that ERISA did not govern the plans. See Shirley v. Maxicare Texas, Inc., 921 F.2d 565 (5th Cir. 1991)(no subject matter jurisdiction to order arbitration of suit against governmental plan even though plan removed case to federal court on basis of ERISA preemption); Silvera v. Mutual Life Ins. Co., 884 F.2d 423 (9th Cir. 1989)(no subject matter jurisdiction over governmental plan even though Plan removed case to federal court); Feinstein, 477 F.Supp. at 1260-61 (government plans established through collective bargaining could not choose to be covered by ERISA).

The Court concludes as a matter of law that the Plan is a governmental plan and that it has not waived its ERISA exemption merely because its plan documentation refers to ERISA. Accordingly, because the ERISA governmental plan exemption applies, this case presents nothing more than a state law insurance issue. No federal question under ERISA having been presented, and Plaintiff having failed to allege any alternative bases for this Court's jurisdiction, this case must be dismissed for lack of subject matter jurisdiction.

III.

In the alternative, even if the Plan were construed as an ERISA plan, the Court would nevertheless find that the recent Sixth Circuit decision in Thorn Apple bars the relief Plaintiff seeks. In Thorn Apple the Sixth Circuit was presented with the precise question of what to do when a traditional insurance policy and an ERISA plan have conflicting COB clauses:

> [W]e conclude that when a traditional insurance policy and a qualified ERISA plan contain conflicting coordination of benefits clauses, the terms of the ERISA plan, including its COB clause, must be given full effect.

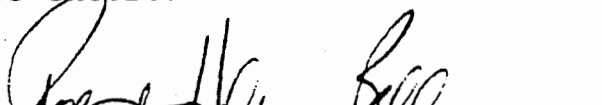
31 F.3d at 374.

In this case, the relevant provision in Defendant's Plan states that expenses that are in any way reimbursable through "no fault" automobile insurance are excluded from the benefit plan. (Plan, p. 22). Giving that clause full effect, as this Court is required to do under Thorn Apple, it is clear that Plaintiff's request for pro rata contribution from Defendant must fail.

IV.

For the reasons stated, Plaintiff's motion for summary judgment is denied, Defendant's motion to dismiss and for summary judgment is granted, and Plaintiff's action is dismissed. An order consistent with this opinion will be entered.

Date: October 18, 1994



ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

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ORDER AND JUDGMENT

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that Plaintiff's motion for summary judgment (Docket # 17) is **DENIED.**

IT IS FURTHER ORDERED that Defendant's motion to dismiss and for summary judgment (Docket # 16) is **GRANTED** and this case is **DISMISSED** in its entirety.

Date: October 18, 1994

ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE