STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MUSKEGON

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THOMAS J. LINCK, Personal
Rep. of ESTATE OF MAUREEN LINCK,
DEC'D.; S. J. LINCK, JR.; and
JEANETTE LINCK,

Plaintiffs,

vs. File No. 85-20399-CK

HAWKEYE-SECURITY INSURANCE
COMPANY, HARTFORD ACCIDENT &
INDEMNITY CO., and AMERICAN HEALTH
& LIFE INSURANCE COMPANY,

Defendants.
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Plaintiff files suit against Defendants Hawkeye-Security Insurance Company and American Health and Life Insurance Company seeking recovery from both defendants for medical benefits and hospital payments. On March 11, 1986, subsequent to the trial but prior to the issuance of an opinion in the case, Linck and Hawkeye submitted a "Settlement Agreement" in which Linck agreed to withdraw his claims for additional payments for additional PIP benefits arising out of the injuries suffered by Maureen Linck in a motor vehicle collision on January 14, 1985. However, Linck continues his claim against American Health for full payment of benefits under the policy. The Court adopts and incorporates by reference the "Stipulated Statement of Facts" dated December 16, 1985. In addition, the Court makes the following findings of fact:

When Sylvester Linck, President of Linck Insurance Agency, first applied for no-fault insurance coverage with Hawkeye, he did not request coordination of benefits which

would result in a lowered premium. As a long-time insurance agent and executive, Mr. Linck was well aware of the existence of coordination of benefits clauses and their consequences. Indeed, when plaintiff writes no-fault insurance for his customers, he asks his clients if they have health and accident insurance so they can coordinate benefits and get lower premiums. Mr. Linck was also aware that an application for insurance is sent to the company where an underwriter must review and approve the application. The underwriter has discretion to amend coverage or change endorsements.

At the time Mr. Linck changed no-fault insurance coverage from Hartford to Hawkeye, Hartford had informally advised him that they were not likely to renew the policy. However, Hartford had not formally refused a renewal. Thus, plaintiff started looking for other insurance, and to the question on the Hawkeye application form "During the past 3 years has any company cancelled, refused to renew, or declined to provide you with automobile insurance?", Linck answered "No". Hawkeye subsequently stated that it would not have insured Linck Agency vehicles if Hawkeye perceived that Hartford would not renew its auto policies for Linck Agency. At all times prior to and during the time Linck Insurance Agency's vehicles were insured by Hawkeye, the agency maintained workers' compensation coverage on its employees.

Linck then sent his application for insurance to the Hawkeye underwriting office. Prior to the time that Linck submitted his application for insurance, Hawkeye had adopted a rule that coordination of benefits provisions were to be written only in individual auto policies, not commerical auto policies. In spite of this company-wide rule, Hawkeye's Grand Rapids underwriting office had always engaged in the practice of including

a coordination of benefits clause in commerical auto policies, whether requested or not, if it appeared that the non-employee family members not covered by workers' compensation might use the commercial vehicles. Indeed, Hawkeye's Grand Rapids underwriting office would not even have issued auto insurance to Linck Agency if Linck had refused to accept the coordination of benefits clause. In July, 1985, Hawkeye advised its Grand Rapids underwriting office to refrain from this practice which was contrary to company rules. However, Hawkeye had followed its local office practice of putting coordination of medical benefits endorsements in commerical auto policies when it issued the original and January, 1985 renewal commercial policies to Linck Agency.

Hawkeye provided a premium discount for policies which contained coordinated benefits clauses. Thus, when Hawkeye issued its renewal policy to Linck Agency in January, 1985, the PIP premium was reduced by fifteen per cent. Hawkeye did not take into account when issuing the original policy or the January, 1985 renewal policy that Linck Agency maintained workers' compensation coverage on its employees. Linck never advised Hawkeye in his application or otherwise that the corporation carried workers' compensation on its employees. In July, 1985, Hawkeye renewed the Linck Agency coverage by excluding the coordination of benefits endorsement and factoring in the workers' compensation coverage which Linck Agency maintained, and the premium Linck Agency was charged for PIP coverage decreased compared to what had been paid on the previous Hawkeye policies. If Hawkeye had rated Linck Agency according to the workers' compensation coverage Linck carried when the January, 1985 renewal was issued, Linck Agency would have paid a reduced

premium and would not have had a coordination of benefits endorsement in the policy, because the Grand Rapids office never included a coordination of benefits clause in a commercial policy if the insured was rated for workers' compensation coverage.

Linck never examined the original policy or renewal policy sent to him by Hawkeye. He filed them without inspection and did not observe the coordination of benefits language which had been inserted in the insurance contract. Thus, Linck never wrote Hawkeye asking for removal of the coordination of benefits endorsement.

Defendant American Health argues that Hawkeye should be adjudicated the primary insurer which is solely responsible for payment of all damges to plaintiff. As a secondary alternative, American Health argues that plaintiff's loss should be prorated pursuant to the respective American Health and Hawkeye policy limits. Defendant Hawkeye argues that American Health is exclusively responsible for payments and that plaintiff may not obtain a double recovery from both insurers.

American Health abandoned at trial its earlier contention that its health and accident policy contained a coordination of benefits clause effective as to Hawkeye's no-fault policy. The Court agrees with American Health's abandonment of this contention. The clear language of American Health's contract indicates that it provides for coordination only with other group plans. Such language is consistent with the requirements of MCL 550.253(2), MSA 24.13673(2) and MCL 500.3400(1) and MSA 24.13400(1). The Hawkeye policy is not part of a group plan. As to the other paragraphs in the American Health policy referred to in American Health's supplemental brief dated January 20, 1986, those paragraphs are simply amplifications of the

coordination of benefits provisions which, regardless of the contractual language, cannot be applied to another non-group policy pursuant to the provisions of the aforementioned MCL 550.253(2), MSA 24.13673(2).

American Health argues that it is protected from primary liability or pro-rata liability due to the provisions of Section 11 of the American Health contract, which reads as follows:

> "No benefits will be paid for benefits incurred... For care and treatment of an injury or sickness for which you are entitled to or eligible for benefits under any Workman's Compensation Act or similar law."

American Health contends that the Michigan No-Fault Act is "a similar law" to the Michigan Workman's Compensation Act, and that American Health has thus excluded coverage for injuries incurred in an accident covered by a No-Fault Policy. The Court respectfully disagrees. There are no Michigan cases on point, and the national reporters do not reveal any cases where a Court has adjudicated the issue of whether a no-fault law constitutes "a similar law" to a worker's compensation law for purposes of interpreting an exclusionary provision of an insurance contract. However, the Court has reviewed the cases cited by plaintiff which either directly or indirectly hold certain classes of benefits as being similar to workers' compensation, including Ezell v. Hayes Oilfield Construction Co., 693 F2d 489, 494 (CA 5, 1982); Hartford Accident and Indemnity Co. v. Motor Vehicle Casualty Co., 576 F Supp. 604, 607 (WD Pa 1984); Craft v.Government Employees Ins. Co., 432 So 2d 1343, 1344 (Fla App 1983); and Britton v. Safeco Insurance Co., 707 P2d 125, 130 (Wash 1985). The Court has also reviewed those cases in which Courts have either directly or indirectly held that certain classes of benefits are not similar to workers' compensation, including Royal Globe

Insurance Co. v. Graf, 453 A2d 1262, 1264 (NH 1982); United States v. Government Employees' Insurance Co., 612 F2d 704, 707 (CA 2, 1980); Reliance Insurance Co. v. Robertson, 390 NE 2d 739, 741 (Mass, 1979); United States v. Automobile Club Insurance Co., 522 F2d 1, 4 (CA 5, La, 1975); and Atkins v. Allstate Insurance Co., 382 So 2d 1276, 1279 (Fla App 1980).

The Court holds that in order for a law to be "similar" to the Michigan Workers' Compensation Act the law must provide benefits for injuries arising out of one's employment or occupation. The Massachusetts appellate court so reasoned in Reliance, supra, when it stated at page 741: "The phrase 'similar law' refers to plans for the compensation of injured workers (emphasis added), without regard to fault". The Court further finds that the phrase "or similar law" is ambiguous, and the Court construes that ambiguity in a manner so as to uphold coverage. Vigilant Ins. Co. v. Kambly, 114 Mich App 683, 687 (1982). Thus, the Court holds that Section 11 of the American Health policy does not constitute an exclusionary clause applicable to the facts of this case.

American Health joins plaintiff in arguing that Hawkeye's coordination of benefits and exclusionary clauses are invalid for a variety of reasons. Plaintiff submits that the coordination of benefits clause is unenforceable because it was inserted without the insured's request or knowledge. The Court rejects this contention. MCL 500.3109(a), MSA 24.13109(1) does not specify any particular method an insurer must use in offering coordination of benefits. Mr. Linck stated that he was aware that underwriters could amend or alter coverages after their review of the application for insurance. The offer of coordination of benefits was made by inserting this endorsement on the declaration

page and in the policy itself. Although the insertion of a coordination of benefits clause in a commercial contract was contrary to company policy, this fact is irrelevant as to the contract between Hawkeye and Linck. The fact remains that a coordination of benefits clause was included in the contract sent to Linck. His failure to read the policy does not absolve him from responsibility for its contents. "The law is well-settled that an insured must be held to a knowledge of the terms and conditions contained in his policy of insurance, even though he may not have read it." Russell v. State Farm Mutual Ins., 47 Mich App 677 (1973). Hawkeye offered Linck Agency a no-fault automobile policy with a coordination of benefits endorsement by sending such a document to Linck Agency. By keeping the contract and paying for it, Linck Agency accepted Hawkeye's offer of a contract containing a coordination of benefits clause. Thus, the Court holds that the rule summarized in Russell, supra, is controlling in the case at bar, notwithstanding the language in Industro Motive v. Morris, 76 Mich App 390 (1977) and Gristock v. The Royal Insurance Co., 87 Mich 428 (1891).

Plaintiff also argues that the Hawkeye coordination of benefits clause fails because of lack of consideration. The Court disagrees. While plaintiff paid a smaller premium for more coverage when his Hawkeye policy was renewed in July, 1985, because the coordination of benefits clause was eliminated and his workers' compensation coverage was factored in, such a reduction in premium in no way necessitates a finding that the previous Hawkeye coordination of benefits clause fails because of a lack of consideration. Plaintiff has cited no authority for its implied proposition that Hawkeye had a duty

to advise plaintiff that he would receive a lower rate if he carried workers' compensation coverage. Hawkeye did not ask him if he carried workers' compensation, and plaintiff, an experienced insurance executive and salesperson, did not volunteer the fact. Plaintiff knew, or should have known, the contents of his policy. He accepted the policy, paid for it, renewed it, and never protested its contents. He paid for a coordination of benefits endorsement, and that is what he received. The mere fact that plaintiff could have received a better bargain had the coordination of benefits clause been omitted and his workers' compensation been factored in the rate structure does not mean that the original policy with its coordination of benefits clause fails for lack of consideration.

Plaintiff also argues that the coordination of benefits clause by its own terms and definitions does not apply to the deceased, Maureen Linck. The Court agrees. The named insured in the policy is "Linck Insurance Agency, Inc.". The coordination of benefits clause reads as follows:

> "Medical Expenses
>
> PERSONAL INJURY PROTECTION INSURANCE (MICHIGAN)
>
> for <u>you</u> or any <u>family member</u> is changed as follows:
>
> The insurance does not apply to the extent that any benefits paid or payable under medical expenses (except expenses provided by Medicare) are paid or payable under any other insurance, service, benefit, or reimbursement plan providing similar benefits."

The definitions section of the policy states the following in Paragraph A: "'You' and 'your' mean the person or organization shown as the named insured in Item One of the declarations". "Family Member" is defined as "a person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child". Thus, the coordination of benefits

clause applies only to Linck Insurance Agency, Inc. and anyone who is related to and a resident of the household of Linck Insurance Agency, Inc. Decedent Maureen Linck was related to and a resident of the household of Sylvester Linck, but she was not related to and a resident of the household of Linck Insurance Agency, Inc. Thus, the coordination of benefits clause does not apply to Maureen Linck.

Such a construction might at first glance seem strained and hypertechnical. However, the Court finds this construction to be appropriate for the following two reasons: (a) In Allstate Ins. v. Citizens Ins., 118 Mich App 594 (1982), the Court of Appeals refused to broadly interpret the language of MCL 500.3114(1), MSA 24.13114(1) so as to extend PIP coverage to the son of the sole shareholder of a close corporation who insured his vehicles in the name of the corporation. The appellate court further refused to pierce the corporate veil, and the Court in the case at bar finds this holding to be especially controlling when Hawkeye impliedly asks the Court to disregard the plain meaning of language which Hawkeye drafted and inserted into the contract. (b) Insurance contract exclusion provisions are to be strictly construed against the insurer. Kal Aviation v. Royal Globe Ins., 70 Mich App 267, 270 (1976), and Reurink Bros. v. Maryland Cas, 131 Mich App 139, 146-147 (1983). The Court submits that the aforementioned rules are especially applicable to the facts of the instant case which establish that Linck Insurance Agency did not ask for coordination of benefits, Hawkeye's Grand Rapids office violated company policy by attaching a coordination of benefits clause to a commercially-insured vehicle, Hawkeye attached a coordination of benefits form written for individually-insured vehicles to a commercially-

insured vehicle policy, and Hawkeye drafted the language in the coordination of benefits endorsement. Thus, the Court holds that by the terms of the Hawkeye policy itself, the coordination of benefits provision is inapplicable to Maureen Linck. The Court further holds that the paragraphs in Section 4 entitled "Two or More Policies; Non-Duplication of Benefits" merely provide that a person may not recover double PIP benefits from two or more no-fault insurance policies. It does not apply to a no-fault policy and a medical and hospitalization policy.

However, the Hawkeye policy does contain a valid "primary insurance" clause as well as a valid "other insurance" pro-rata clause. The pertinent language of paragraphs B (1) and B (2) on page 4 of the Hawkeye policy, captioned "Other Insurance", reads as follows:

> "B. Other Insurance
>
> (1) For any covered auto you own this policy provides primary insurance. . .
>
> (2) When two or more policies cover on the same basis, either as excess or primary, we will pay only our share. Our share is the proportion that the limit of our policy bears to the total of the limits of all the policies covering on the same basis."

The aforementioned contractual language constitutes a valid primary insurance clause and pro-rata clause which by its terms would apply to the accident which led to the untimely and tragic death of Maureen Linck. Plaintiff argues that there are possible situations in which such language might be in conflict with certain provisions of the Michigan No-Fault Statute. Nevertheless, merely because the policy language might be in conflict with the No-Fault Act in certain hypothetical situations does not preclude the Court from enforcing that language in the case at bar where application of the "other insurance"

provision to the facts before the Court is not in conflict with any sections of the Michigan No-Fault Act.

Defendant Hawkeye relies upon the holdings in Auto Club v. Frederick and Herrud, 145 Mich App 722 (1985) in support of its position that defendant American Health should have primary liability. However, Auto Club is readily distinguishable because the no-fault policy in that case did not specifically provide that the no-fault insurer was the primary insurer. In the instant case, Hawkeye has specifically contracted to be the primary insurer, and this contractual agreement to be the primary insurer is binding on Hawkeye. See Doss v. Citizens Insurance Company of America, 146 Mich App 510 (1986).

However, the Hawkeye policy does contain a pro-rata clause which this Court finds to be valid and enforceable. The Court has reviewed the state and national reporters and encyclopedias as well as Couch on Insurance 2d and can find no holding, or reason for a holding, which would preclude an "other insurance pro-rata clause" from being enforced in a no-fault case. Thus, the Court holds that (a) as between Hawkeye and American Health, Hawkeye has contracted to have primary liability, but (b) Hawkeye has legally limited its liability to a pro-rata liability when other insurance, such as the American Health coverage, applies to the same injuries.

Although Hawkeye is only liable for its pro-rata share pursuant to the terms of its contract, does American Health benefit from this provision of the Hawkeye policy, or is American Health liable to pay its total contractual obligation on behalf of plaintiff just as if the Hawkeye policy was non-existent? The Court has searched the authorities in vain for a clear-cut, unambiguous rule regarding a plaintiff's right of recovery

when one policy (in this case, Hawkeye) has an "other insurance" pro-rata clause and another policy (in this case, American Health) has no applicable coordination of benefits or "other insurance" clause.

None of the cases cited by American Health substantiate its contention that Hawkeye should have sole liability for all the medical payments. Neither do the cases suggest support for American Health's secondary position that a health insurance carrier not directly subject to the provisions of the No-Fault Act should somehow benefit by an "other insurance" clause in a No-Fault insurance contract when the health insurance policy, issued completely independent of the provisions of the No-Fault Act, contains no applicable coordination of benefits clause or "other insurance" clause. <u>Doss, supra</u>, merely held that a no-fault insurance carrier can contract to be the primary insurer, but <u>Doss</u> did not hold that the contractual provision establishing primary coverage somehow nullifies a valid "other insurance" pro-rata clause in the same contract. In the case at bar, the Hawkeye policy contains both a "primary coverage" clause and an "other insurance" <u>pro-rata</u> clause. <u>Beaver v. Auto-Owners</u>, 93 Mich App 399 (1979), and <u>O'Hannesian v. DAIEE</u>, 110 Mich App 280 (1981) only hold that MCL 500.3115(3), MSA 24.13115(3) establishes a limit of a single recovery for no-fault benefits regardless of the number of multiple policies <u>issued under the No-Fault Statute</u>. In the case at bar, the American Health policy was issued independent of the provisions of the No-Fault Act and is not covered by either the burdens or benefits of that act. <u>Dean v. Auto Club Ins. Assn.</u>, 139 Mich App 266 (1984) and <u>Wiltzius v. Prudential Co.</u>, 139 Mich App 306 (1984) both illustrate that a no-fault insurer may

enjoy the benefit of a coordination of benefits clause which appears in its own contract. The American Health policy has no such applicable clause. Farm Bureau Ins. v. H. Mann Ins., 131 Mich App 98 (1983) and Kemper Ins. v. Health Ins., Inc., 135 Mich App 76 (1984) adjudicate controversies in which both overlapping policies had "other insurance" clauses. In the instant case, only the Hawkeye policy has a valid "other insurance" clause; the American Health policy does not.

In Stanley v. Hinchcliffe, 395 Mich 645 (1976), the Michigan Supreme Court stated that a double recovery of workers' compensation benefits was contrary to the principles of the Workers' Compensation Act. However, the Court was there negating the possibility of two separate recoveries arising out of a single statutory remedy. Nothing in the language of the case suggests that the Court was holding as a general principle that double recoveries are never allowed for any kind of loss in the State of Michigan. In the case at bar, the Court once again notes that the issuance of the general health insurance contract was not within the ambit of the No-Fault Automobile Insurance Act. In Brewer v. Payless Stations, Inc., 412 Mich 617 (1982), the Court implied that double recovery in a single, general tort action was impermissible. Nevertheless, this ruling has little applicability to a situation where two insurers both accept premiums and contract to provide coverage for a common loss.

Thus, the Court must rely not only upon the no-fault statute, but also upon the clear and unequivocal language of the contracts and the common law principles of contract. In so doing, the Court holds as follows:

(1) Hawkeye's insurance contract contains a valid "primary liability" clause and a valid "other insurance" pro-rata clause. Thus, Hawkeye has primary liability to pay the expenses, but because of the existence of the American Health policy, Hawkeye need only pay the proportion that the limit of the Hawkeye policy bears to the total of the limits of the Hawkeye policy and the American Health policy. Because the American Health policy contains a $5,000.00 deductible provision, Hawkeye, as primary insurer, must pay the first $5,000.00. As to expenses above $5,000.00, Hawkeye need only pay a pro-rata share according to its aforementioned pro-rata formula.

(2) The Court holds that American Health must pay to plaintiff <u>all</u> of the expenses covered by its policy just as if the Hawkeye policy did not exist. That is, after excluding the first $5,000.00 in expenses pursuant to the American Health deductible, American Health must pay to plaintiff all expenses covered by the terms of the American Health contract without credit for those sums paid by Hawkeye. The Court believes that such a partial double recovery by plaintiff is mandated for the following reasons:

(a) The issuance of the American Health policy is not mandated or controlled by the No-Fault Act. Therefore, the general policy of the No-Fault Act against double recovery does not inure to the benefit of a general health and medical policy. Indeed, the No-Fault Act itself does not act as an absolute bar to double recovery in every situation. MCL 500.3109a, MSA 24.13109(1) merely requires a no-fault insurer to <u>offer</u> coordination of benefits at reduced rates to avoid duplicate recovery; it does not mandate the insured

to purchase this option. Indeed, in the summary of the arguments in favor of the adoption of the No-Fault Act appearing in Dean, supra, p. 273, the Court noted this language: "The bill does not make it mandatory for an insurance buyer to select these deductibles and exclusions so many could still opt for overlapping coverage". Thus, even under the No-Fault Act, an insured may opt for overlapping coverage and dual benefits if the insured is willing to pay the higher premiums. If this is a permitted practice under the No-Fault Act, it is certainly permitted in regard to medical insurance contracts issued outside the ambit of the No-Fault Act.

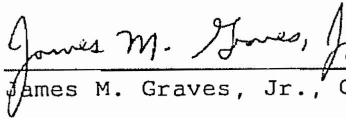
(b) MCL 550.253(2), MSA 24.13673(2) specifically precludes the American Health group policy from coordinating benefits with an individual No-Fault policy. Thus, it appears to be legislative policy not only to permit but to mandate that American Health pay full benefits regardless of the existence of other overlapping non-group policies. Dual recovery of benefits, then, can hardly be said to be contrary to public policy in this instance.

(c) There has been no common law principle cited which could suggest that the "other insurance" clause in the Hawkeye contract should inure to the legal benefit of American Health. The Hawkeye "other insurance" pro-rata clause benefits Hawkeye, not American Health. American Health must look to its own contract for its advantages and liabilities, and its contract has no valid enforceable pro-rata or coordination of benefits

clause which applies to the no-fault policy issued in this case. Thus, American Health contracted to pay certain medical expenses, regardless of the existence of other no-fault insurance coverage. As American Health was barred by law from coordinating benefits with an individual no-fault policy, it could not have charged a lower premium because of the existence of the Hawkeye no-fault policy. Thus, it would be inequitable to permit American Health to accept higher premiums for coverage which did not coordinate benefits with a no-fault policy and then claim a right to reduce benefits because of the overlapping coverage of a no-fault policy.

A judgment may be submitted which incorporates the relevant holdings of this opinion.

Dated this 26 day of March, 1986.



James M. Graves, Jr., Circuit Judge

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