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# FEHBA Preemption: When No-Fault Is, And Is Not, Primary For Federal Employees

By Drew Broaddus

In *Battle v State Farm*, Wayne County Circuit Court No. 11-008767-NI, a first-party action under the No-Fault Act, Secrest Wardle's attorneys recently succeeded in dismissing a $160,000 Health Alliance Plan ("HAP") lien. State Farm argued that the HAP policy was primary to no-fault coverage, based upon coordination of benefits language in State Farm's policy. Plaintiff, a federal employee, claimed that the Federal Employees Health Benefits Act ("FEHBA"), U.S.C. § 8902(m)(1), trumped State Farm's policy language and therefore made the no-fault policy primary. The Circuit Court disagreed, finding that the HAP policy was primary, and therefore dismissed the lien.

**SECREST WARDLE NOTES:**

**Even when a health insurance plan is governed by FEHBA, it does not mean that a no-fault policy is automatically primary. The specific plan language is critical, as is the specific language of the no-fault policy.**

**This is a unique area of law and there are very few published cases. Indeed, this author's research uncovered less than ten cases *nationally* that addressed the interplay between FEHBA and no-fault automobile insurance.**

MCL 500.3109a generally "requires a finding that a no-fault insurer is secondarily liable for insurance coverage where there is any other form of health care coverage and where the insurers both sought to escape liability through the use of competing coordination-of-benefits clauses…." *Auto Club Ins Ass'n v Frederick & Herrud*, 443 Mich 358, 383-384 (1993). However, MCL 500.3109a must yield to federal law if the two conflict. *Sibley v DAIIE,* 431 Mich 164 (1988).

The federal statute relied upon by Plaintiff in *Battle,* FEHBA, states in relevant part that "[t]he provisions of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supercede and preempt any State or local law, or any regulation thereunder, which relates to health insurance or plans." 5 U.S.C. § 8902(m)(1). In *Shields v Gov't Employees Hosp Ass'n,* 450 F3d 643, 647 (6th Cir 2006), the U.S. Court of Appeals for the Sixth Circuit construed this language to hold a no-fault carrier primary. The Plaintiff in *Battle* relied upon *Shields* in opposing State Farm's motion. However, the Wayne Circuit Judge in *Battle* found *Shields* to be distinguishable, based upon the language of the policy in *Shields* in comparison to the HAP policy at issue in *Battle.* In short, the Circuit Court Judge in *Battle* found that in order for

a FEHBA-governed plan to pre-empt the No-Fault Act, there must actually be *conflicting* coordination of benefits clauses.[1] Such a conflict existed in *Shields,* but not in *Battle*; in *Battle,* the HAP policy simply did not have a coordination of benefits clause. Without a conflict, there was no preemption. See *Empire HealthChoice Assur, Inc v McVeigh*, 547 U.S. 677, 698 (2006) ("Section 8902(m)(1)'s text does not purport to render inoperative any and all state laws that in some way bear on federal employee-benefit plans.").

Absent precedential guidance, no-fault attorneys might look to ERISA preemption cases. "FEHBA and ERISA are different federal statutes, but their preemption provisions are analytically similar." *Marin Gen Hosp v Modesto & Empire Traction Co,* 581 F3d 941, 950 (9th Cir 2009). Under ERISA, the no-fault policy's coordination of benefits provision is not preempted unless the ERISA plan is both self-funded and contains a valid no-fault exclusion. *Citizens Ins of America v Mid Michigan Health Connect,* 449 F3d 688 (6th Cir 2006).

If you have any questions about FEHBA please contact the author or Nathan J. Edmonds at nedmonds@secrestwardle.com, (248) 851-9500 ext. 2116.

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[1] In this respect, the FEHBA analysis is very similar to ERISA preemption analysis. See *Shields v Gov't Employees Hosp Ass'n,* 2004 U.S. Dist. LEXIS 31431 (W.D. Mich. Dec. 10, 2004).

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