

IN THE SUPREME COURT OF OHIO

TIMOTHY METCALFE, <i>et al.</i> ,)	Case No.: 14-0738
)	
<i>Appellants,</i>)	On Appeal from the Franklin County
)	Court of Appeals, Tenth Appellate
vs.)	District
)	
THE CITY OF AKRON, <i>et al.</i> ,)	Court of Appeals Case Nos.
)	13-AP-473, 13-AP-484, 13-AP-496
<i>Appellees.</i>)	

MERIT BRIEF OF APPELLEE MEDICAL MUTUAL OF OHIO

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STATEMENT OF THE CASE AND FACTS

To avoid unnecessary repetition, Appellee Medical Mutual of Ohio ("Medical Mutual") joins in the Statement of Facts proffered by Appellee City of Akron ("Akron") in its Merit Brief.

While Appellants present five separate propositions of law, their fundamental contention is that Akron's and Appellee Ohio Police & Fire Pension Fund's ("OP&F") self-funded retiree health plans are subject to Ohio's Coordination of Benefits ("COB") statute. The Tenth District Court of Appeals undertook not one, but two, comprehensive evaluations of all aspects of the relevant provisions of Chapter 39 of the Ohio Revised Code. (See Appendix to Appellants' Merit Brief). In doing so, the Court of Appeals soundly and comprehensively dissected, and rejected, Appellants' strained efforts to manufacture statutory application where none exists. Indeed, Appellants' frustration in regard to the COB statute's non-application is more appropriately directed at the Ohio General Assembly, which certainly could have applied the COB statute to self-funded government plans had it desired to do so.

LEGAL ARGUMENT

Medical Mutual joins in the legal arguments made by Akron in response to each proposition of law advanced by Appellants. In addition, Medical Mutual submits the following additional comments as to each proposition.

Appellants' Proposition of Law No. I:

A complaint falls within the Ohio Department of Insurance's exclusive jurisdiction if that agency is vested by the legislature with the sole authority to resolve the issue.

Appellants' initial proposition of law is antithetical to the other positions they advance in their merit brief. Appellants invoke Chapter 39 of the Ohio Revised Code, contending that the Superintendent of the Ohio Department of Insurance ("ODI") has jurisdiction over Appellants' claims because the Superintendent has jurisdiction over all claims "relating to insurance." (Appellants' Merit Brief at 6, citing R.C. §3901.04). However, Appellants readily concede that "this case is not about insurance or the business of insurance." (Appellants' Merit Brief at 4). Indeed, they also concede that "Appellants do not disagree with the fact that the self-insured/self-funded governmental plans of Akron and OP&F **are not insurance.**" (Appellants' Merit Brief at 9; emphasis added). Given that concession, Appellants' general reliance on ODI's authority over all matters "relating to insurance" is *non sequitur*.

Second, Appellants' reliance on O.A.C. 3901-08-01 to support its general proposition is equally baseless. O.A.C. 3901-08-01 is a COB rule derived from the Superintendent's authority given by the legislature. It is axiomatic that "an administrative rule may not add to or subtract from a legislative enactment." *Hoffman v. State Medical Board*, 113 Ohio St. 3d 376, 378, 2007-Ohio-2201 (2007). Thus, the rule can only give the Superintendent authority over matters "relating to insurance" and nothing more. Accordingly, even if the rule could be construed as Appellants maintain (a proposition exhaustively considered and rejected by the Court of Appeals), such an

interpretation would constitute an invalid extension of the Superintendent's authority.

Id.

Finally, and perhaps most significantly, ODI itself has repeatedly and persistently maintained that it has no jurisdiction over issues relating to self-funded government plans. For example, in 2007, a participant in the OP&F pension fund filed a consumer complaint against Medical Mutual. ODI declined to address the complaint, stating:

We have reviewed your complaint, which involves a self-funded public employee retirement plan. Self-funded plans providing retirement health coverage are not regulated by state law.

In this case, Medical Mutual is acting as the administrator of your plan with Ohio Police and Fire Pension Fund. Therefore, we have no jurisdiction in this matter.

ODI consistently took this position on several occasions and over several years. (See discussion in Akron Merit Brief at p. 5-6). Accordingly, Appellants' initial proposition of law provides no valid support for the result Appellants seek from the Court.

Appellants' Proposition of Law No. II:

The City of Akron's and OP&F's group health plans are uninsured agreements and/or group type contracts subject to the jurisdiction of the superintendent of insurance pursuant to O.A.C. 3901-8-01 and its predecessor O.A.C. 3901-1-56.

Appellants advance a series of disjointed arguments, none of which actually addresses Proposition of Law No. 2. First, the proposition of law itself relates to the Superintendent's authority under the Ohio Administrative Code, which Appellants raised in Proposition of Law No. 1. As discussed above, reliance on those administrative code provisions lacks reasonable justification given ODI's limited authority over matters relating to insurance – which the self-funded government plans are not – and ODI's

consistent, historical position that it has no jurisdiction over self-insured governmental health plans. Further, contrary to Appellants' suggestion that the Court of Appeals ignored their arguments concerning O.A.C. 3901-8-01, the Tenth District indeed addressed that provision and Appellants' arguments as to the applicability of that provision. The court devoted 4 ½ pages of its Reconsideration explaining why Appellants' reliance on O.A.C. 3901-8-01 is not justified. (Appellants' Appx., pp.33-37).

Second, Appellants needlessly spend several pages discussing ERISA and its non-applicability to the plans at issue, apparently in an effort to justify a "public policy" need to impermissibly expand ODI's authority so as to force the statutory COB rules for insurance on these plans. However, "public policy" is not a basis for empowering a court to undertake an impermissibly broad statutory interpretation. Again, this effort should be directed to the Ohio legislature, which certainly knows how to make certain insurance related provisions applicable to self-insured governmental plans. As this Court has recognized, "it is not the province of the court, under the guise of construction, to ignore the plain terms of a statute or to insert a provision not incorporated therein by the Legislature." *Garfield Heights City School District v. State Board of Education*, 71 Ohio St. 3d 590, 593, 646 N.E.2d 163, 166 (1995), quoting *State ex rel. Defiance Spark Plug Corp. v. Brown*, 121 Ohio St. 329, 331-332, 168 N.E. 842, 843 (1929).

Moreover, Appellants' claim -- that, without ODI's involvement in enforcing the statutory COB rules on these plans, chaos will ensue and they will be left is without a remedy -- is simply not correct. Ohio courts have very clearly stated that COB provisions in insurance policies are subject to normal contract interpretation, just like

any other contract term. See e.g., *Qualchoice, Inc. v. Nationwide Insurance Co.* 11 Dist. Lake No. 2007-L172, 2008-Ohio-6979, *PP36-37 (court applied standard rules of contract construction in evaluating import of coordination of benefits provision); *Grant Medical Center v. Krickenbarger*, 10th Dist. Franklin No. 92AP-419, 1992 Ohio App. LEXIS 4581, *4-5 (Sept. 3, 1992) (coordination of benefits provision subject to Ohio's rules of contract construction). Appellants offer no explanation why the COB contract provisions here are any different.

In fact, they are not. These COB provisions were part of litigation and a labor arbitration prior to the institution of the lawsuit that was the genesis of the current dispute. (See Akron Brief at p.p. 2-4). As such, it is clear that the contractual COB provisions can be dealt with without having to transmogrify an Ohio statute so as to empower ODI to go where it is not otherwise authorized to go.

Finally, Appellants claim that Appellees surely agreed that ODI has jurisdiction over these claims by virtue of their motions to dismiss the lawsuit in the Summit County Court of Common Pleas. Otherwise, Appellees have engaged in unethical conduct.

As to Medical Mutual, Appellants conveniently omit Medical Mutual's motion to dismiss, which Medical Mutual submits as a Supplement to its Merit Brief. (Medical Mutual Suppl. at 1). In its motion, Medical Mutual only argued that no private right of action exists for alleged deceptive insurance practices, such as purported violations of the statutory COB rules. In other words, Appellants could not advance a legal claim in court for such statutory violations. Medical Mutual made no argument about ODI's jurisdiction. As such, its position is not inconsistent with the jurisdictional arguments advanced by either Medical Mutual or Akron.

Appellants' Proposition of Law No. III:

For the purposes of Title 39, a person is defined as any individual, corporation, association, partnership, reciprocal exchange, inter-insurer, fraternal benefit society, title guarantee and trust company, health insuring corporation, and *any other legal entity* as stated in R. C. 3901.04(A)(2) and/or R.C. 3901.19.

The Court of Appeals twice very carefully considered Appellants' contention that an expansive definition of "person" should apply so as to make the statutory COB rules apply to Akron and OP&F. The court's reasoning is clear and consistent with traditional concepts of statutory construction. (Appellants' Appx., pp. 20-21; 37).

Two additional points demonstrate the fallacy of Appellants reliance on R.C. §3901.04(A)(2) and/or R.C. §3901.19 for the definition of "person." First, "person" was not used by the legislature in the COB statute, most significantly not in R.C. §3902.13(K), which discusses who is prohibited from violating the COB rules. "Third-party payer" is the term used by the legislature. Common sense dictates that, had the legislature wanted to use the expansive definition of "person" as advocated by Appellants, the legislature obviously could and would have used it. By not doing so, the legislature clearly intended a more restrictive meaning – specifically, the definition of "third-party payer" in R.C. §3901.38(F). Accordingly, adopting Appellants' expansive application of "person" would clearly frustrate the legislature's intent.

Second, even assuming the more expansive definition of "person" applies, Appellants conveniently ignore that the Superintendent's powers are still confined by the general statutes they rely on to matters "**relating to insurance.**" R.C. §3901.19(B). As such, if the situation does not involve insurance, it does not matter how expansive the definition of "person" may be.

As discussed above, Appellants have repeatedly conceded that Akron's and OP&F's retiree health plans are **not** insurance. As such, any activity undertaken by Akron and OP&F in administering their plans cannot relate to insurance. Accordingly, it does not matter how expansive a definition of "person" is applied when that "person" is not engaged in conduct relating to insurance. Thus, Appellants' reliance on this definition is without merit.

Appellants' Proposition of Law No. IV:

Akron, OP&F, and Medical Mutual of Ohio are all third-party payers as defined in R.C. 3902.11 and R.C. 3901.38(F) and subject to Ohio's Coordination of Benefits Laws as Relating to Unfair and Deceptive Acts as Specifically Defined In R.C. 3902.13(K).

Appellants maintain that Medical Mutual is a "third-party payer" (a) under R.C. §3901.38(F)(1) because it is an insurance company; and (b) under R.C. §3901.38(F)(8) because it is "any other person that is obligated pursuant to a benefits contract to reimburse for covered health care services rendered to beneficiaries under such contract." Appellants' contentions fail for several reasons.

First, while Medical Mutual is certainly an insurance company, it did not issue insurance in this case and is not acting as an insurance company in providing third party administrative services for health plans that Appellants acknowledge are not insurance. Accordingly, if Akron's and OP&F's plans are not subject to the COB statutory rules, Medical Mutual, as an entity assisting in the administration of those plans, certainly cannot be subject to those COB rules merely because of the happenstance that it is an insurance company and acts as such in other contexts. The Court of Appeals recognized this logic in its denial of Appellants' Motion for Reconsideration. (Appellants' Appx., p. 38).

Second, ODI historically recognized that there are circumstances when it lacks jurisdiction to address a complaint where the health plan at issue is administered by Medical Mutual, even though Medical Mutual is an insurance company. (*supra*, p. 3). As such, the fact that Medical Mutual may, in other situations, act in its capacity as an insurance company (and, indeed may be subject to the COB statute in those situations) does not and cannot create jurisdiction where the self-funded government plan itself is not subject to ODI jurisdiction under Chapter 39.

Third, Appellants' contention in this regard is belied by their own arguments. They spend considerable time in their brief discussing the distinction between the self-funded government plans that are not subject to ERISA and those private self-funded plans that are subject to ERISA regulation. Appellants readily concede the latter clearly fall outside the purview of ODI's jurisdiction. (Appellants' Brief at 9). If Medical Mutual is providing third-party administrative services to a private self-funded plan that falls outside of ODI's jurisdiction, can ODI nevertheless advance a claim against Medical Mutual for violation of the COB statutory rules because Medical Mutual is an insurance company? The obvious answer is no.

Indeed, the logical, albeit inappropriate, conclusion of such a contention is that, because Medical Mutual is an insurer, ODI can exercise jurisdiction over Medical Mutual for anything that Medical Mutual does, regardless of whether Medical Mutual's conduct in any particular circumstance is subject to Chapter 39 regulation. So, if Medical Mutual engages in insurance-related transactions outside of Ohio, can ODI attempt to regulate that conduct because Medical Mutual is sometimes an insurer or third-party administrator for purposes of Chapter 39? If Medical Mutual engages in non-insurance-

related transactions in Ohio, can ODI regulate that conduct because Medical Mutual is sometimes an insurer or third-party administrator for purposes of Chapter 39? Again, the answer is obviously no.

Finally, even assuming possible application of R.C. §3901.38(F)(8), Medical Mutual does not meet the definition. Medical Mutual, as a third party administrator, has no obligation “under a benefits contract to reimburse for covered health care services.” Medical Mutual’s contractual obligations are dictated by a separate third party administrative services contract with Akron, not a benefits contract with Appellants. In addition, while Medical Mutual processes the reimbursements, the actual reimbursement obligation lies with Akron, not Medical Mutual. Accordingly, Medical Mutual does not satisfy the definition advanced by Appellants.

Appellants’ Proposition of Law No. V:

The appellate court decision has created an issue of denial of due process and either intentionally or inadvertently created a private cause of action contrary to Ohio law.

Appellants’ final proposition of law is illogical and unsupported by any component of the Court of Appeals’ decision. First, there certainly has not been any denial of due process. As discussed above and at length in Akron’s brief, Appellants have had the opportunity to challenge Akron’s COB position in the context of prior lawsuits and a labor arbitration proceeding. Further, as noted above, COB provisions are often treated as contract provisions subject to typical contract litigation. Accordingly, the fact that Akron’s COB provisions are not subject to Ohio’s insurance statutes does not deprive Appellants of other ways to seek redress and due process is not implicated by the Court of Appeals’ decision.

Finally, there is absolutely nothing in the Court of Appeals' opinion that "created" a private cause of action under Ohio's insurance statutes regulating alleged deceptive trade practices. In fact, the Court of Appeals repeatedly stated that there could be no action of any kind for alleged violations of the COB statute because the COB statute did not apply to the Akron and OP&F retiree plans since those plans were not insurance under Ohio law. If there is a claim, it is based on contract principles under Ohio's common law. Nothing in the Court of Appeals' decision alters this basic tenet.

CONCLUSION

The foregoing analysis, and the analysis provided by the City of Akron, demonstrates that Appellants have not advanced legitimate propositions of law or legal arguments that warrant reversal of the well-reasoned decisions of the Court of Appeals. Accordingly, Appellee Medical Mutual of Ohio respectfully requests that this Court affirm the decision of the Tenth District Court of Appeals.

Respectfully submitted,

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