COURT OF APPEALS
DECISION
DATED AND RELEASED

April 18, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 95-0246

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

KEVIN MARTIN
AND SHEILA MARTIN,
PEKIN INSURANCE COMPANIES,

Plaintiffs-Respondents,

v.

NORTH AMERICAN INSURANCE COMPANY
AND STEENBERG HOMES, INC.,

Plaintiffs-Intervenors-Appellants,

INTEGRITY MUTUAL INSURANCE COMPANY,

Defendant,

MEDDAUGH RANCH, INC.,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Clark County: MICHAEL W. BRENNAN, Judge. *Affirmed.*

Before Eich, C.J., Gartzke, P.J., and Dykman, J.

GARTZKE, P.J. Steenberg Homes, Inc. and its reinsurer, North American Insurance Company, appeal from a summary judgment dismissing their subrogation claims against Kevin and Sheila Martin and Meddaugh Ranch, Inc. We affirm.

The relevant facts are undisputed. Kevin, Steenberg's employee, was injured in an automobile accident involving a Meddaugh employee. Pursuant to its Group Health Plan covering its employees, Steenberg paid $75,327.98 to or for Kevin, to cover his medical expenses.

Kevin and Sheila, his wife, brought an action against Meddaugh for damages arising out of the accident. Meddaugh's liability insurer successfully interposed a coverage defense. Before the matter was tried, the Martins entered a settlement agreement with Meddaugh, the terms of which are not pertinent to our decision except that Meddaugh will pay a total of $12,000 and convey forty acres of cropland as consideration for the Martins' releases. Kevin's damages far exceed his share of the settlement. Steenberg and its reinsurer were permitted to intervene in the action against Meddaugh because they claim that Steenberg's subrogation rights under its Group Health Plan entitle them to the settlement proceeds. The trial court held otherwise, and Steenberg and North American appeal.

Steenberg relies on the following subrogation provisions in its Group Health Plan Document:

> A third party may have to pay benefits to you or your covered **Dependents**. If the **Covered Person** has received benefits under this **Plan** for an **Illness** or injury caused by the third party, then the **Company** may at its sole option:
>
> - take over the **Covered Person's** right to receive payment for benefits from the third party. In this case, the **Covered Person** will also transfer to the **Company**

> any rights he may have to take legal action against the third party;
>
> - recover from the **Covered Person** any payment for the benefits the **Covered Person** receives from the third party; ....

Steenberg's plan is self-insured and governed by the Employee Retirement Income and Security Act (ERISA), 29 U.S.C. §§ 1001, *et seq.* ERISA preempts state law related to unfunded employee benefits plans. ***FMC Corp. v. Holliday***, 498 U.S. 52, 61 (1990). Federal courts are authorized to create common law for use in ERISA cases. ***Pilot Life Ins. Co. v. Dedeaux***, 481 U.S. 41, 56 (1987).

We had a comparable subrogation issue in ***Schultz v. Nepco Employees Mut. Benefit***, 190 Wis.2d 742, 528 N.W.2d 441 (Ct. App. 1994). In ***Schultz***, we relied on ***Sanders v. Scheidler,*** 816 F. Supp. 1338 (W.D. Wis. 1993), *aff'd by unpublished order*, 25 F.3d 1053 (7th Cir. 1994), as having established "federal common law make-whole doctrine" to resolve a subrogation dispute between the administrator of an employee benefit plan subject to ERISA and the beneficiaries of the plan. In ***Sanders***, the employee and his family were injured in an automobile accident, and the adverse driver's liability insurer was willing to pay its policy limits, $50,000. The plan had paid over $156,000 in medical benefits to the employee and his family. Both the plan administrator and the employee claimed the right to the entire $50,000. The plan contained a subrogation clause that did not address which of the conflicting claims had priority.

As we said in ***Schultz***, 190 Wis.2d at 751, 528 N.W.2d at 445:

> [B]ecause the plan's subrogation clause did not address the priority of [the plan's] rights with respect to "competing claim[s] ... to the undesignated proceeds of a limited insurance settlement," the ***Sanders*** court faced the problem of attempting to ascertain such a priority.... After discussing several alternatives, the court looked to the common-law rule in Wisconsin—the "make-whole doctrine" of ***Rimes v. State Farm Mut. Auto. Ins. Co.***, 106 Wis.2d 263, 271-72, 316

> N.W.2d 348, 353 (1982), that states that an insurer cannot assert a subrogation right until the insured is fully compensated for his or her injuries—and adopted the rule as "federal common law," which would apply in cases where a plan fails to designate priority rules or provide its fiduciaries the discretion necessary to construe the plan accordingly. ***Sanders***, 816 F. Supp. at 1346-47. (Footnote omitted.)

On appeal, Steenberg asserts that its Group Benefit Plan unequivocally gives the plan administrator discretion and "final decision" over issues involving claims and benefits. We disagree. Nothing in the plan gives the administrator the discretion necessary to establish priority rules. The plan prescribes the procedure for presenting benefit claims. The claimant who disagrees with the reasons for a denial may obtain review by giving notice to the administrator, and "notice of the final decision will be given sixty days after receipt of a request for review." "Final decision" in this context means nothing more than a decision terminating the dispute.

Steenberg cites ***Cutting v. Jerome Foods, Inc.***, 993 F.2d 1293 (7th Cir. 1993), as having refused to apply a federal version of the make-whole doctrine because of an unequivocal subrogation provision. The ***Cutting*** court said, "[B]ecause, as the Cuttings concede, the make-whole rule is just a principle of interpretation, it can be overridden by clear language in the plan." 993 F.2d at 1298-99. The court said, "[W]e cannot say that the company was *unreasonable* in interpreting this plan as disclaiming the make-whole principle...." ***Id.*** at 1299. The language of the subrogation provision in ***Cutting*** and the language of Steenberg's own subrogation provision are identical, and Steenberg concludes that its administrator was no less reasonable in its interpretation of its plan than was the interpretation of the administrator in ***Cutting***.

Steenberg misreads ***Cutting v. Jerome Foods***. The plan before the ***Cutting*** court provided that "all decisions concerning the interpretation or application of this Plan shall be vested in the sole discretion of the plan administrator." 993 F.2d at 1295. The court therefore applied a deferential standard of review to the administrator's decision.

> If the plan itself vests discretion in the administrator—if as here it gave the administrator a long leash—the courts pull back and defer broadly although not totally to the administration's determination, upending it only if persuaded that the administrator acted unreasonably.

Id. at 1296. Having sustained the administrator's claim to the priority of the plan subrogation on that ground, the ***Cutting*** court found it unnecessary to "decide ... whether the merits of the [make-whole] rule are sufficient on balance to warrant its use as a principle of interpretations of ERISA plans." ***Id.*** at 1298.

Unlike the plan before the ***Cutting*** court, Steenberg's plan does not provide that decisions concerning its interpretation or application are "vested in the sole discretion of the plan administrator." For that reason, we do not apply the reasonableness standard of review to the administrator's claim that its subrogation claim has priority over Kevin Martin's claim against Meddaugh.[1] And because the Steenberg plan does not designate priority rules or provide its administrator with discretion necessary to construe the plan to grant the administrator priority, the "federal common law make-whole doctrine" recognized by the ***Sanders*** court means that Kevin's claim to the settlement proceeds prevails over Steenberg's subrogation claim.

Nor do we believe that the ***Cutting*** decision overrules ***Sanders's*** recognition of a "federal common law make-whole doctrine." The ***Cutting*** opinion (which was released just two months after ***Sanders***) leaves ***Sanders*** untouched and, indeed, does not cite ***Sanders***. And as we noted, the Seventh Circuit affirmed ***Sanders*** by an unpublished order, 25 F.3d 1053 (7th Cir. 1994).

Having concluded that the trial court properly dismissed Steenberg's subrogation claim, we do not reach the other issues Steenberg raises in this appeal.

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[1] When an ERISA plan vests discretion as to its interpretation with an administrator, and the administrator interprets the plan to enforce a subrogation even if the covered person has not been made whole, we have deferred to that interpretation if it is reasonable. ***Newport News Shipbuilding Co. v. T.H.E. Ins. Co.***, 187 Wis.2d 365, 371-72, 523 N.W.2d 270, 272-73 (Ct. App. 1994).

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.