

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN**

RICHARD GEROUX,)	
)	
Plaintiff,)	
)	Case No. 2:08-cv-00184-RAED
vs.)	
)	
ASSURANT, INC., and)	
UNION SECURITY INSURANCE)	
COMPANY,)	
)	
Defendants.)	

**SEPARATE ANSWER AND COUNTERCLAIM OF
DEFENDANT UNION SECURITY INSURANCE COMPANY**

COMES NOW Defendant UNION SECURITY INSURANCE COMPANY (hereinafter, “this Defendant”) and for its Answer to Plaintiff’s Tribal Court Complaint, now a Complaint by virtue of removal, and STATES, ADMITS and DENIES as follows:

1. As to the allegations contained in Paragraph 1 of Plaintiff’s Complaint, this Defendant: upon information and belief, ADMITS the allegations contained in subparts a and b of Paragraph 1 of Plaintiff’s Complaint, and DENIES the allegations contained in subparts c and d of Paragraph 1 of Plaintiff’s Complaint.

2. As to the allegations contained in Paragraph 2 of Plaintiff’s Complaint, this Defendant: upon information and belief, ADMITS the allegation that Plaintiff is a former employee of the Keweenaw Bay Indian Community to the extent that his employment was at the Keewenaw Bay Travel Center, lacks sufficient information to form a belief as to the allegations that Plaintiff is a Native American and a member of the Keweenaw Bay Indian Community and therefore, DENIES same, DENIES the remaining allegations contained in Paragraph 2 of Plaintiff’s Complaint, and STATES that Mutual Benefit Life Insurance Company issued a group

insurance policy bearing policy number G 25,012-5 (hereinafter the “Group Insurance Policy”) to the Inter-Tribal Council of Michigan, Inc., and that Keweenaw Bay Indian Community is a named employer under the foregoing Group Insurance Policy and Plaintiff was a certificate holder under the foregoing group insurance policy, and STATES that Defendant Union Security Insurance Company has succeeded to any interest and responsibility of Mutual Benefit Life Insurance Policy under the foregoing Group Insurance Policy.

3. For answer to Paragraph 3 of Plaintiff’s Complaint, this Defendant: ADMITS that the group insurance division of Mutual Benefit Life Insurance Company was acquired by AMEV Holdings, Inc. in 1991, and that AMEV Holdings, Inc. changed its name to Fortis, Inc. in that same year. This Defendant DENIES that Fortis, Inc. was sold via an initial public offering in 2004. This Defendant STATES that Fortis, Inc. was merged into Assurant, Inc., which is a publicly traded company. This Defendant ADMITS the remaining allegations contained in Paragraph 3 of Plaintiff’s Complaint.

4. For answer to Paragraph 4 of Plaintiff’s Complaint, this Defendant: DENIES that partial payments have been made, STATES that Union Security Insurance Company and previously, Fortis Benefits Insurance Company and Mutual Benefit Insurance Company paid all benefits due and owing to Plaintiff and no benefits are due and owing to Plaintiff, and to the extent the remaining allegations contained in Paragraph 4 of Plaintiff’s Complaint are not inconsistent with the statements and denials contained in this Paragraph, they are ADMITTED.

5. For answer to Paragraph 5 of Plaintiff’s Complaint, this Defendant incorporates by reference the statements, admissions and denials to Paragraphs 1 through 4 of Plaintiff’s Complaint as if they were set out at length herein.

6. Upon information and belief, ADMITS the allegations contained in Paragraph 6 of Plaintiff's Complaint.

7. DENIES the allegations contained in Paragraph 7 of Plaintiff's Complaint.

8. As to the allegations contained in Paragraphs 8 and 9 of Plaintiff's Complaint, this Defendant: STATES that the Certificate of Group Insurance speaks for itself, STATES that Plaintiff's paraphrase of the group insurance certificate is incomplete and therefore, DENIES the allegations contained in Paragraphs 8 and 9 of Plaintiff's Complaint.

9. As to the allegations contained in Paragraph 10 of Plaintiff's Complaint, this Defendant: STATES that Plaintiff was employed by Keweenaw Bay Travel Center and, upon information and belief, that employment was employment by an entity covered under the Group Insurance Policy, STATES that Plaintiff became eligible for benefits under the Group Insurance Policy, and DENIES the remaining allegations contained in Paragraph 10 of Plaintiff's Complaint.

10. DENIES the allegations contained in Paragraphs 11 and 12 of Plaintiff's Complaint and for further answer STATES that all claims purported to be made by Plaintiff are preempted by ERISA, 29 U.S.C. § 1001 in that Plaintiff seeks recovery of benefits paid under a welfare benefit plan and all such claims derive from an employee welfare benefit plan and therefore, are preempted.

11. ADMITS the allegations contained in Paragraph 13 of Plaintiff's Complaint.

12. DENIES the allegations contained in Paragraphs 14 and 15 of Plaintiff's Complaint.

13. As to the allegations contained in Paragraph 16 of Plaintiff's Complaint, this Defendant: lacks sufficient information to form a belief as to the truthfulness of the allegations

contained in Paragraph 16 of Plaintiff's complaint and therefore, DENIES same, STATES that any of the alleged losses identified were not caused by any actions or inactions of either this Defendant or Defendant Assurant, Inc., and, in any event, are preempted by the effect of ERISA in that Plaintiff is entitled to recover only any benefit that a tribunal may determine is due and owing and such other relief as afforded under 29 U.S.C. § 1001, *et seq.*

14. DENIES the allegations contained in Paragraphs 17, 18 and 19 of Plaintiff's Complaint.

SEPARATE ANSWER TO FIRST PRAYER FOR RELIEF

15. For answer to Paragraph 20 of Plaintiff's Complaint, this Defendant incorporates its statements, admissions and denials to Paragraphs 1 through 19 of Plaintiff's Complaint as if they were set out at length herein.

16. DENIES the allegations contained in Paragraphs 21 and 22 of Plaintiff's Complaint.

17. STATES that Plaintiff's First Prayer for Relief of the Complaint fails to state a claim against this Defendant.

18. Except as otherwise admitted herein, DENIES each and every other allegation, averment, statement, fact and conclusion plead or averred in Plaintiff's First Prayer for Relief of the Complaint.

AFFIRMATIVE DEFENSES

19. For further answer, this Defendant STATES that Plaintiff's claims are barred by the doctrines of laches, estoppel, and waiver.

20. For further answer, this Defendant STATES that Plaintiff's claims, any and all of them, are barred by the applicable statutes of limitation or repose under any tribal, state and/or federal law found to be applicable to any and all of Plaintiff's claims.

21. For further answer, this Defendant DENIES that Plaintiff has any cognizable claims or causes of action, but this Defendant STATES that to the extent the Court deems Plaintiff to have any claims or causes of action against this Defendant, such claims or causes of action are governed or controlled by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* as amended, known commonly as ERISA. ERISA preempts all of Plaintiff's alleged claims, damages and causes of action. To the extent Plaintiff asserts any claim other than a claim under ERISA, or seeks damages other than those recoverable under ERISA, such claim, damage, or cause of action is preempted and barred by ERISA.

22. In the alternative, this Defendant STATES that Plaintiff has failed to exhaust administrative remedies as required by ERISA, in that all of Plaintiff's claims herein are to be construed pursuant to and according to the terms, conditions and provisions of the Group Insurance Policy at issue by the Group Insurance Policy's claim review designee. This Defendant STATES that to the extent: a) Plaintiff has made allegations that were not before the claim review designees and the Court concludes that it will entertain such allegations, b) Plaintiff intends to rely on evidence or present to this Court evidence that was not before such claim review designees at the time the claim was last reviewed and the Court concludes that it will entertain such evidence, or c) an award of benefits is ordered to be rendered and, due to the initial claim decision in this matter, the calculation of such benefit has not been determined in the administrative process, then Plaintiff has failed to exhaust administrative remedies and this matter is in the primary jurisdiction of this Defendant and is not ripe for judicial determination. Further, Plaintiff has not submitted the claim to this Defendant for consideration prior to filing suit. Accordingly, Plaintiff's claim is barred.

23. For further answer, this Defendant STATES that any denial or review of Plaintiff's claims was not an abuse of discretion or arbitrary and capricious and any judicial review of this matter should be conducted under the deferential, arbitrary and capricious standard of review.

24. STATES that all benefits due and owing to Plaintiff have been paid pursuant to the Group Insurance Policy and ERISA, and that no such benefits, including interest, are due and owing, and STATES that to the extent that Plaintiff has been overpaid benefits, then this Defendant is entitled to recover for such overpayment.

25. STATES that Plaintiff's remedies against this Defendant, if any, are limited solely to those afforded by the Group Insurance Policy and ERISA.

26. DENIES that pursuant to the terms, conditions and provisions of the Group Insurance Policy at issue, Plaintiff is entitled to benefits, and for further answer STATES that Plaintiff has failed to comply with all of the terms, provisions and conditions of the Group Insurance Policy in that Plaintiff has failed to pursue or exhaust administrative remedies, and failed to timely bring suit as required under the Group Insurance Policy and ERISA.

27. STATES that Plaintiff's claims for estoppel and breach of contract are barred and preempted by ERISA.

28. This Defendant has incurred and will incur expenses, costs and attorney's fees in defending against Plaintiff's claims and this Defendant is entitled to recover from Plaintiff its expenses of litigation, costs and reasonable attorney's fees pursuant to ERISA, 29 U.S.C. § 1132(g).

29. This Defendant reserves the right to amend its Answer to assert such other, further and additional defenses as are warranted under any law found to be applicable to any or all of

Plaintiff's claims, the Plan, Plan documents and the administrative record, if any, and otherwise discovered during the pendency of this lawsuit.

30. To the extent Plaintiff has made, or will make, a demand for a jury trial, this Defendant STATES that pursuant to ERISA and case law interpreting same, Plaintiff is not entitled to a trial by jury.

SEPARATE ANSWER TO SECOND PRAYER FOR RELIEF

31. For answer to Paragraph 23 of Plaintiff's Complaint, this Defendant incorporates its statements, admissions and denials to Paragraphs 1 through 22 of Plaintiff's Complaint as if they were set out at length herein.

32. DENIES the allegations contained in Paragraph 24 of Plaintiff's Complaint.

33. STATES that Plaintiff's Second Prayer for Relief of the Complaint fails to state a claim against this Defendant.

34. Except as otherwise admitted herein, DENIES each and every other allegation, averment, statement, fact and conclusion plead or averred in Plaintiff's Second Prayer for Relief of the Complaint.

AFFIRMATIVE DEFENSES

35. Incorporates by this reference Paragraphs 19 through 30 of its Affirmative Defenses as if the same were set out at length herein.

SEPARATE ANSWER TO THIRD PRAYER FOR RELIEF

36. For answer to Paragraph 25 of Plaintiff's Complaint, this Defendant incorporates its statements, admissions and denials to Paragraphs 1 through 24 of Plaintiff's Complaint as if they were set out at length herein.

37. DENIES the allegations contained in Paragraph 26 of Plaintiff's Complaint.

38. STATES that Plaintiff's Third Prayer for Relief of the Complaint fails to state a claim against this Defendant.

39. Except as otherwise admitted herein, DENIES each and every other allegation, averment, statement, fact and conclusion plead or averred in Plaintiff's Third Prayer for Relief of the Complaint.

AFFIRMATIVE DEFENSES

40. Incorporates by this reference Paragraphs 19 through 30 of its Affirmative Defenses as if the same were set out at length herein.

SEPARATE ANSWER TO FOURTH PRAYER FOR RELIEF

41. For answer to Paragraph 27 of Plaintiff's Complaint, this Defendant incorporates its statements, admissions and denials to Paragraphs 1 through 26 of Plaintiff's Complaint as if they were set out at length herein.

42. DENIES the allegations contained in Paragraph 28 of Plaintiff's Complaint.

43. STATES that Plaintiff's Third Prayer for Relief of the Complaint fails to state a claim against this Defendant.

44. Except as otherwise admitted herein, DENIES each and every other allegation, averment, statement, fact and conclusion plead or averred in Plaintiff's Fourth Prayer for Relief of the Complaint.

AFFIRMATIVE DEFENSES

45. Incorporates by this reference Paragraphs 19 through 30 of its Affirmative Defenses as if the same were set out at length herein.

SEPARATE ANSWER TO FIFTH PRAYER FOR RELIEF

46. For answer to Paragraph 29 of Plaintiff's Complaint, this Defendant incorporates its statements, admissions and denials to Paragraphs 1 through 28 of Plaintiff's Complaint as if they were set out at length herein.

47. DENIES the allegations contained in paragraph 30 of Plaintiff's Complaint.

48. STATES that Plaintiff's Fifth Prayer for Relief of the Complaint fails to state a claim against this Defendant.

49. Except as otherwise admitted herein, DENIES each and every other allegation, averment, statement, fact and conclusion plead or averred in Plaintiff's Fifth Prayer for Relief of the Complaint.

AFFIRMATIVE DEFENSES

50. Incorporates by this reference Paragraphs 19 through 30 of its Affirmative Defenses as if the same were set out at length herein.

WHEREFORE, Defendant Union Security Insurance Company denies liability to Plaintiff and prays that the Court enter judgment in its favor, ordering that Plaintiff go hence *sine die*, and that this Defendant recover its costs incurred herein from Plaintiff, that the Court grant to this Defendant an award of expenses and attorney's fees pursuant to 29 U.S.C. § 1132(g), and that the Court grant this Defendant such other and further relief as the Court deems is just and proper in the premises.

COUNTERCLAIM

COMES NOW Defendant UNION SECURITY INSURANCE COMPANY (hereinafter, "this Defendant") and for its Counterclaim for Declaratory Judgment, states and alleges as follows:

1. This is an action for declaratory judgment pursuant to 28 U.S.C § 2201 for the purpose of determining a question of actual controversy between the parties, as more fully set forth below.

2. Jurisdiction and venue of this action are proper under and pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e), and in the alternative, 28 U.S.C. § 1332. Under 28 U.S.C. § 1331 and 29 U.S.C. § 1132(e) this case presents a federal question, to-wit: the scope and applicability to Plaintiff's claim for long-term disability benefits to 29 U.S.C. § 1001, *et seq.*, commonly known as ERISA. In the alternative, this Court has jurisdiction pursuant to 28 U.S.C. § 1331 because Plaintiff and Defendants are citizens of different states and the amount in controversy exceeds \$75,000.00. Plaintiff is a citizen of Michigan. This Defendant is an Iowa Corporation with its principal place of business in Missouri. The amount in controversy is in excess of \$75,000.00.

3. Plaintiff Richard Geroux has filed a Complaint in the Keweenaw Bay Tribal Court seeking long-term disability benefits under a plan for which claims are administered by this Defendant under a group insurance policy issued to Plaintiff's prior employer. Plaintiff's claims are governed by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, *et seq.*

4. ERISA, and federal common law interpreting same, provide the exclusive cause of action and relief for Plaintiff. ERISA preempts all of Plaintiff's asserted common law claims seeking remedies that conflict with ERISA exclusive remedial scheme. Federal preemption is complete. 29 U.S.C. § 1144.

5. Congress did not vest tribal courts with jurisdiction over ERISA claims. 29 U.S.C. § 1132(e).

6. The Keweenaw Bay Tribal Court has no jurisdiction over Plaintiff's ERISA claims and cannot proceed to adjudicate them.

7. Allowing any of Plaintiff's claims to proceed in the Keweenaw Bay Tribal Court will unnecessarily impose undue burden and expense on this Defendant because this Defendant will be required to defend claims in a forum that lacks jurisdiction.

8. This Defendant is not required to exhaust its jurisdictional claims before the Tribal Court, which has no jurisdiction over ERISA claims, because it would serve no purpose other than delay.

9. In the alternative, Plaintiff's claims are breach of contract claims (which are denied), and this Defendant is entitled to an adjudication of these claims in federal court pursuant to 28 U.S.C. § 1332, as set forth above.

WHEREFORE, Counterclaimant Union Security Insurance Company prays that this Court enter an order determining that this Court is the exclusive forum for resolution of Plaintiff's claims, deny Plaintiff's claims, and grant to Union Security Insurance Company such other and further relief as the Court deems is just and proper in the premises.

Respectfully submitted,

LATHROP & GAGE L.C.

By: s/ Richard N. Bien

Richard N. Bien, Admitted 8/15/2008
Benjamin Hassebrock, Admitted 8/15/2008
2345 Grand Boulevard, Suite 2800
Kansas City, Missouri 64108-2684
Telephone: (816) 292-2000
Telecopier: (816) 292-2001

And

Roger W. Zappa, Michigan Bar #P36610
Bensinger, Contant & Menkes, P.C.
122 W. Bluff
Marquette, MI 49855
Telephone: (906) 225-1000
Telecopier: (906) 225-0818

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that, on August 21, 2008, I filed the foregoing electronically with the Clerk of Court, to be served by operation of the Court's electronic-filing system upon the following counsel of record:

Joseph P. O'Leary
P.O. Box 659
Baraga, MI 49908
Tel: (906) 524-5440
Fax: (906) 524-5832
joleary@up.net

s/ Richard N. Bien
Attorney for Defendant