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From the Chair

Nicole E. Wilinski
Collins Einhorn Farrell

What an unprecedented year! When my term as Chair began last October, I didn't expect to be preparing to pass the gavel in a Zoom meeting this fall. But, where there's Zoom there's a way! This section has not let the Covid-19 pandemic slow it down. Over the past year, Zoom has allowed us to hold regular meetings and host three very well attended educational Webinars.

Scholarship

We have selected the topic for our annual essay contest. Submissions of up to 2,500 words are due by February 28, 2020. Students are asked to address the following current issue:

> Ransomware attacks are becoming more widespread as high-profile incidents have made the news recently due to ever increasing multi-million dollar payoffs in order to recover stolen data. Any discussion concerning ransomware requires an analysis of whether ransom should be paid as a public policy matter. Many insurance carriers providing cyber insurance would rather pay the ransom that pay their insureds to restore their systems and resultant business income.
>
> Discuss the effect of public policy on insurance coverage, the pros and cons of paying ransom, and propose possible solutions.

Election of Officers and Council – Annual meeting October 7, 2021.

On October 7, 2021, the section held its annual meeting and election. I'd like to congratulate our incoming chair, **Lauretta Pominville** and wish her the best in 2022. Lauretta's great ideas and enduring energy are a gift to this section. I'd also like to congratulate the rest of the incoming 2022 officers: **Rabih Hamawi** – Chair Elect; **Patrick Crandell** – Secretary and **Renee VanderHagen** – Treasurer. This great group of attorneys, along with our hard working council and our amazing Editor in Chief – **Hal Carrol**l are the backbone of this section.

Next meeting, Suggestions and Section Involvement

Please continue to follow our Facebook Page for information on upcoming meetings and other educational events.

If you have suggestions for topics or speakers for programs, please share!

This section is made up of a diverse group of policyholder and insurer sided attorneys. If you have any interest in getting more involved with the council, a great way to start is by attending a meeting or writing an article for the *Journal*. ■

Editor's Notes

By Hal O. Carroll, *www.HalOCarrollEsq.com*

The *Journal* is a forum for the exchange of information, analysis and opinions concerning insurance and indemnity law and practice from all perspectives. All opinions expressed in contributions to the *Journal* are those of the author. The *Journal* – like the Section itself – takes no position on any dispute between insurers and insureds. We welcome all articles of analysis, opinion, or advocacy for any position.

Copies of the *Journal* are mailed to all state circuit court and appellate court judges, all federal district court judges, and the judges of the Sixth Circuit who are from Michigan. Copies are also sent to those legislators who are attorneys.

The *Journal* is published quarterly in January, April, July and October. Copy for each issue is due on the first of the preceding month (December 1, March 1, June 1 and September 1). Copy should be sent in editable format to the editor at HOC@ *HalOCarrollEsq.com*.. ■

The No-Fault Amendments: How Do the Priority Provisions Work with Dissimilar PIP Limits?

(Part I)

By Christian C. Huffman, *Garan Lucow Miller, PC*

Introduction

When it assessed the constitutionality of Michigan's no-fault automobile insurance act[1] shortly after its inception on October 1, 1973, the Michigan Supreme Court explained that the no-fault act:

> [W]as offered [by the Michigan Legislature] as an innovative social and legal response to the long payment delays, inequitable payment structure, and high legal costs inherent in the tort (or "fault") liability system. The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses. The Legislature believed this goal could be most effectively achieved through a system of compulsory insurance, whereby every Michigan motorist would be required to purchase no-fault insurance or be unable to operate a motor vehicle legally in this state. Under this system, victims of motor vehicle accidents would receive insurance benefits for their injuries as a substitute for their common-law remedy in tort.[2]

Not discussed, however, were the equally innovative "priority rules" set forth by the legislature in the no-fault act. These priority rules delineate the insurer from which no-fault insurance benefits are to be claimed.[3] In part, the priority rules ensure that a person injured in a motor vehicle accident who is not the owner or registrant of a motor vehicle required to be registered in Michigan[4] (i.e., not a "Michigan motorist") and, thus, not mandated by the no-fault act to purchase a policy no-fault insurance, is nevertheless able to receive no-fault benefits under a policy maintained by another.

But another aspect of these priority rules truly is innovative – the legislature mandated that even if the injured person is a "Michigan motorist," and therefore maintains his or her own policy of no-fault insurance, the injured person nonetheless under certain circumstances is required to claim no-fault benefits under a no-fault policy maintained by someone else.[5]

Until recently, this was not problematic for the injured person because the policy under which he or she was mandated to claim no-fault benefits, like his or her own policy, was required by the no-fault act to provide exactly the same coverage as would be available under the injured person's own policy – unlimited lifetime medical benefits.

But the Legislature recently amended the no-fault act to enable persons to purchase policies providing varying levels of coverage. The conundrum created by this becomes evident when one considers that the injured person may have purchased a policy of no-fault insurance providing for a higher coverage limit than the other policy from which the injured person is compelled to claim benefits by virtue of the no-fault act's priority rules.

This raises an issue that never previously needed to be addressed by Michigan's appellate courts - whether the no-fault act's priority rules limit the injured person to recovering no-fault benefits *solely* under the policy to which they are directed, or whether the injured person may claim "excess" benefits under their own policy of insurance once the limits of the policy required by the priority rules are exhausted.

It is that issue which this article will explore.

Analytical Standard – Legislative Intent

There being no appellate decisions to serve as a guide, analysis of the issue presented requires first-hand interpretation of the pertinent provisions of the amended no-fault act. When interpreting statutes, the Michigan Supreme Court has explained that the goal is to ascertain the intent of the Legislature.[6] In doing so, the court has instructed that the focus must be on the intent that can reasonably be inferred from the statute's text itself because the statutory text "'offers the most reliable evidence of the legislature's intent.'"[7] If the statutory text is clear and unambiguous, then the text is conclusive of the legislature's intention and the statute must be applied as written.[8] Where, however, the statutory text is not clear and unambiguous, the Michigan Supreme Court has sought clarification from "the purposes of the no-fault statute," and noted that "the overall [legislative] goal of the no-fault insurance system . . . is . . . to provide victims with assured, adequate, and prompt reparations at the lowest cost to both the individuals and the no-fault system,"[9] while simultaneously reducing the need for motor vehicle accident victims to resort to litigation to procure such reparation.[10]

Analysis

The no-fault act renders a no-fault insurer "liable to pay [personal protection insurance] benefits for accidental injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, *subject to* the provisions of" the no-fault act.[11] One category of these personal protection insurance benefits (commonly referred to as "PIP" benefits[12]) are those known as "allowable expense" PIP benefits.[13] These allowable expense PIP benefits consist of payment for "reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation"[14] (i.e., such things as medical care, prescriptions, etc.).

This raises an issue that never previously needed to be addressed by Michigan's appellate courts - whether the no-fault act's priority rules limit the injured person to recovering no-fault benefits solely under the policy to which they are directed, or whether the injured person may claim "excess" benefits under their own policy of insurance once the limits of the policy required by the priority rules are exhausted.

PIP Benefits Before the Amendment

Before the Legislature's recent amendments to the no-fault act,[15] the primary statutory provisions that an insurer's liability to pay allowable expense PIP benefits was "subject to" consisted of MCL 500.3107(1)(a) and the so-called "priority" provisions, MCL 500.3114 and MCL 500.3115.

Section 3107(1)(a) provides for the payment of allowable expense benefits, but sets no express temporal or monetary limits thereon. Rather, under the pre-amendment version of the no-fault act, in all cases an insurer's liability to pay allowable expense PIP benefits was potentially unlimited. That is, liability continued so long as the products, services, or accommodations for which reasonable charges were incurred were "reasonably necessary" for the injured person's care, recovery, or rehabilitation from an injury sustained in a motor vehicle accident.[16]

Which insurer bore responsibility for paying those allowable expenses was, in turn, determined by section 3114 and section 3115.[17] And, because the insurer that section 3114 or section 3115 placed "first in priority" to pay allowable expense PIP benefits bore effectively unlimited liability pursuant to section 3107(1)(a), a person injured in a motor vehicle accident was always entitled to unlimited allowable expense PIP benefits from the "first in priority" insurer. Thus, whether another insurer that was "second in priority" could be held liable to pay "excess" allowable expense PIP benefits was never an issue.

After the Amendment – Differing Coverage Levels

However, as part of its recent overhaul of the no-fault act, the legislature enacted MCL 500.3107c to work in conjunction with section 3107(1)(a). Section 3107c provides that for policies "issued or renewed after July 1, 2020, the applicant or named insured shall . . . select 1 of the following coverage levels"[18] in exchange for a corresponding reduction in policy premiums:[19] (1) "[n]o limit for" allowable expense PIP benefits,[20] (2) an allowable expense PIP benefit limit of $500,000 per individual per loss occurrence,[21] (3) an allowable expense PIP benefit limit of $250,000 per individual per loss occurrence,[22] (4) an allowable expense PIP benefit limit of $50,000 per individual per loss occurrence,[23] or (5) no coverage for allowable expense PIP benefits.[24]

Thus, under section 3107c, a person can now be limited regarding the amount of allowable expense PIP benefits they are entitled to recover if that person opts to purchase a policy providing less than unlimited coverage. And, significantly, section 3107c(5) states that "[t]he coverage level selected [by the applicant or named insured] applies to the named insured, the named insured's spouse, and a relative of either domiciled in the same household, *and any other person with a right to claim personal protection insurance benefits under the policy*."[25]

Therefore, the coverage level selected by the named insured applies not only to the named insured, but also to his or her spouse or any resident relative. However, this only occurs if the spouse or resident relative does not maintain their own policy of no-fault insurance because, if they do, then section 3114(1) provides that the spouse or resident relative must collect under their own policy up to the allowable expense coverage limit the spouse or resident relative has selected under section 3107c.[26]

More significant, however, is that to the extent that "any other person" has a right to claim PIP benefits under a policy to which an allowable expense PIP benefit limit applies, *the coverage level selected by the named insured applies to that "other person."*

The issue thus becomes whether that other person *only* has the right to claim PIP benefits under that policy, or if the injured claimant also retains the right to claim PIP benefits under another policy that they purchased themselves, or that was purchased by their spouse or a resident relative, if that policy has an allowable expense PIP benefit limit higher than the primary policy.

That issue, in turn, requires consideration of section 3114 and section 3115 because, as has been explained by the Michigan Supreme Court:

> [section] 3114 and [section] 3115 constitute both entitlement provisions and priority provisions in certain respects. They are entitlement provisions in the sense that they are the only sections where persons are given the right to claim personal protection insurance benefits from a specific insurer. They are priority provisions in that they define the circumstances in which a particular insurance source is liable to provide personal protection insurance benefits.[27]

Section 3115 contains entitlement and priority rules pertaining to "a person who suffers accidental bodily injury while not an occupant of a motor vehicle"[28] (i.e., pedestrians, bicyclists, etc.). Under the amended version of section 3115,[29] the legislature has stated that such a person "shall claim personal protection insurance benefits under [Michigan's] assigned claims plan[30] under [MCL 500.3171 et seq.]."[31] The amended version of the no-fault act limits the assigned claims plan's potential liability to pay allowable expense PIP benefits to such persons at $250,000.[32] However, section 3115 *only* applies where a person does not maintain their own policy of no-fault insurance, is not married to someone who does, and is not a resident relative entitled to claim under that person's policy. Accordingly, whether someone who is directed by section 3115 to claim PIP benefits from the assigned claims plan may recover additional PIP benefits under their own policy, or the policy of their spouse or a resident relative, is not an issue.

But, the issue can arise under section 3114, which sets forth entitlement and priority rules pertaining to persons injured while occupying motor vehicles and motorcycles. The amended version of section 3114 states, in pertinent part:

> (1) Except as provided in subsections (2), (3), and (5), a personal protection insurance policy described in section 3101(1) applies to accidental bodily injury to the person named in the policy[33], the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident. . . .
>
> (2) A person who suffers accidental bodily injury while an operator or a passenger of a motor vehicle operated in the business of transporting passengers shall receive the personal protection insurance benefits to which the person is entitled from the insurer of the motor vehicle. This subsection does not apply to a passenger in any of the following, unless the passenger is not entitled to personal protection insurance benefits under any other policy:
>
> (a) A school bus . . . .
>
> (b) A bus operated by a common carrier of passengers. . . .
>
> (c) A bus operating under a government sponsored transportation program.
>
> (d) A bus operated by or providing service to a nonprofit organization.
>
> (e) A taxicab . . . .
>
> (f) A bus operated by a canoe or other watercraft, bicycle, or horse livery used only to transport passengers to or from a destination point.
>
> (g) A transportation network company vehicle.
>
> (h) A motor vehicle insured under a policy for which the person named in the policy has elected to not maintain coverage for personal protection insurance benefits under section 3107d or as to which an exclusion under section 3109a(2) applies.
>
> (3) An employee, his or her spouse, or a relative of either domiciled in the same household, who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle.
>
> * * *
>
> (5) Subject to subsections (6) and (7), a person who suffers accidental bodily injury arising from a motor vehicle accident that shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of the motor vehicle involved in the accident.
>
> (b) The insurer of the operator of the motor vehicle involved in the accident.
>
> (c) The motor vehicle insurer of the operator of the motorcycle involved in the accident.
>
> (d) The motor vehicle insurer of the owner or registrant of the motorcycle involved in the accident.

Under section 3114, "[t]he default rule for [entitlement and] priority is found in MCL 500.3114(1), which states, in part, that 'a personal protection insurance policy . . . applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household . . . .'"[34] (For sake of brevity, the named insured's

spouse and resident-relatives of the named insured will hereafter be referred to collectively as the named insured's "household"). Where this "default rule" applies, the named insured and his or her household claim PIP benefits under the policy purchased by the named insured, up to whatever allowable expense PIP benefit coverage level was selected by the named insured. Accordingly, if the named insured has purchased a policy providing for unlimited allowable expense PIP benefits, then the named insured and his or her household will receive unlimited allowable expense PIP benefits under that policy if they are injured in a motor vehicle accident.

What if the person or entity that is in the business of transporting passengers opted to purchase less than unlimited allowable expense PIP benefits, but the injured person is covered by a policy providing for a higher level of allowable expense PIP benefit coverage?

Occupants of Certain Vehicles with Lower PIP Limits

But what if the "[e]xcept as provided in subsections (2), (3), and (5)" is triggered because the named insured or a member of his or her household is injured in a motor vehicle accident while occupying a motor vehicle operated in the business of transporting passengers, while a specified occupant of an employer-provided motor vehicle, or while occupying a motorcycle? In such instances, the legislature has mandated that the person claim PIP benefits from another policy of insurance, and simultaneously mandated[35] that such other insurer is "first in priority" to pay their PIP benefits. What if the person or entity that is in the business of transporting passengers opted to purchase less than unlimited allowable expense PIP benefits, but the injured person is covered by a policy providing for a higher level of allowable expense PIP benefit coverage? Once the allowable expense PIP benefit limits of the policy to which they are directed by sections 3114(2), (3), or (5) are exhausted, are they precluded from claiming "excess" allowable expenses under *the* other policy?

The question becomes whether the legislature intended for sections 3114(2), (3), or (5) to be the exclusive source of benefits. In other words, whether the legislature meant that a person injured while occupying a motor vehicle operated in the business of transporting passengers "shall receive the [PIP] benefits to which the person is entitled [*only*] from the insurer of the motor vehicle" *and not* any other insurer; that a specified occupant of an employer-provided vehicle "shall receive [PIP] benefits [*only*] from the insurer of the furnished vehicle" *and not* from another insurer; and that a person injured while occupying a motorcycle "shall claim [PIP] benefits from [the] insurer[]" that the Legislature has placed first in priority, *and not* from any other insurer.

If so, this would mean that the Legislature intended for sections 3114(2), (3), and (5) to not only entitle the person to recover PIP benefits from the insurer placed "first in priority" by sections 3114(2), (3), and (5), but to simultaneously *preclude* the person from recovering PIP benefits under his or her own policy or that of a household member – a policy that was purchased at an increased premium to ensure that the named insured and his or her household members would receive a higher level of allowable expense PIP benefits than is available under the policy made "first in priority" by sections 3114(2), (3), and (5).

Sections 3114(2), (3), and (5), of course, do not expressly provide that a person shall *only* receive PIP benefits from the insurer that sections 3114(2), (3), or (5) places "first in priority" and *shall not* receive PIP benefits under any other policy which they or a household member may have purchased. Nor, on the other hand, do sections 3114(2), (3), or (5) expressly state that a person *may*[36] claim "excess" PIP benefits under any "second in priority" policy which they or a household member may have purchased. The Legislature obviously could have easily said either explicitly - but did not - and the Michigan Supreme Court has often cautioned that when interpreting a statute that courts "'may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.'"[37]

However, while sections 3114(2), (3), and (5) do not expressly state that a person "shall receive [PIP] benefits . . . [*only*] from" the insurer rendered "first in priority" *and not from* any other insurer - and also do not expressly state that a person "shall receive [PIP] benefits . . . from" the insurer rendered "first in priority" *and may* claim any excess PIP benefits from another insurer - sections 3114(2), (3), and (5) cannot be interpreted in isolation and disassociated from the "default" rule set forth in sections 3114(1).[38]

In that regard, of primary importance here is discerning what the legislature intended by the modifying clause "*[e]xcept as provided in subsections (2), (3), and (5)*, a [PIP] policy . . . applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household . . . ."

Significantly, this modifying clause can be interpreted in two different ways. Those divergent interpretations will be explored in Part II of this article. ■

About the Author

Christian C. ("Chris") Huffman *is a member of the Appellate Department of Garan Lucow Miller, PC, where he serves as the Editor* Pro Tempore *of The Garan Report, a firm publication devoted to advising its readers of significant legal developments concerning personal injury litigation and insurance*

issues. Before joining the firm Chris served as a Prehearing Attorney for the Michigan Court of Appeals, and thereafter served as a Judicial Clerk for former Justice Clifford W. Taylor of the Michigan Supreme Court. He graduated magna cum laude *from the Michigan State University College of Law in 2003. Chris can be contacted at chuffman@garanlucow.com.*

The author would like to thank Tamara York Cook ("Tammy") and Cloie Chidiac ("Cloie") for their assistance in preparing this article. Tammy graduated summa cum laude *and first in her class from the Michigan State University College of Law in 1997. She previously served as a Judicial Clerk for former Michigan Supreme Court Justices Patricia J. Boyle, Maura D. Corrigan, Robert P. Young, and Kurtis T. Wilder. Tammy currently practices as an appellate specialist at Hewson & Van Hellemont, PC. Cloie is a third-year law student at Wayne State University Law School, where she is the Managing Editor of External Affairs for the* Journal of Business Law. *She also serves as a legal intern for Garan Lucow Miller, PC.*

Endnotes

1 MCL 500.3101 *et seq*.

2 *Shavers v. Kelley,* 402 Mich. 554, 578-79; 267 N.W.2d (1978).

3 MCL 500.3114; MCL 500.3115.

4 MCL 500.3101(1)("[T]he owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance and property protection insurance as required under this chapter, and residual liability insurance.").

5 MCL 500.3114(2); MCL 500.3114(3); Mich. Comp. Laws § 500.3114(5).

6 *Covenant Med. Ctr., Inc. v. State Farm Mut. Auto. Ins. Co.,* 500 Mich. 191, 199; 895 N.W.2d 490 (2017).

7 *Id.* (quoting *Badeen v. PAR, Inc.*, 496 Mich. 75, 81; 853 N.W.2d 303 (2014)).

8 *Id.* (quoting *People v. Gardner,* 482 Mich. 41, 50; 753 N.W.2d 78 (2008)).

9 *Celina Mut. Ins. Co. v. Lake State Ins. Co.,* 452 Mich. 84, 89; 549 N.W.2d 834 (1996)(In *Celina*, the Michigan Supreme Court applied this rule in determining the Legislature's intention regarding the scope of one of the provisions at issue here, MCL 500.3114(3). More specifically, the court considered "whether § 3114(3) of the no-fault act applies when the injured person is operating an insured vehicle in the course of self-employment." *Id.* at 85. In determining that it does, the court stated "[w]e believe that it is most consistent with the purposes of the no-fault statute to apply § 3114(3) in the case of injuries to a self-employed person" because doing so would "allocate the cost of injuries resulting from use of business vehicles to the business involved through the premiums it pays for insurance." *Id.* at 89.)

10 *Shavers v. Kelley,* 402 Mich. 554, 578-80; 267 N.W.2d (1978); *See also U.S. Fid. & Guar. Co. v. Mich. Catastrophic Claims Ass'n,* 484 Mich. 1, 25; 795 N.W.2d 101 (2009) (quoting *Miller v. State Farm Mut. Auto. Ins. Co.*, 410 Mich. 538, 568; 302 N.W.2d 537 (1981)) ("Additionally, this Court has stated that '[t]he act is designed to minimize administrative delays and factual disputes that would interfere with achievement of the goal of expeditious compensation of damages suffered in motor vehicle accidents.'").

11 MCL500.3105(1) (emphasis added).

12 *Grange Ins Co of Mich v Lawrence,* 494 Mich. 475, 490; 835 N.W.2d 363 (2013) ("[I]nsurance companies are required to provide first party insurance benefits for accidental bodily injury arising out of the use of a motor vehicle, which are commonly referred to as personal protection insurance (PIP) benefits.").

13 *See also Johnson v. Recca,* 492 Mich. 169, 173; 821 N.W.2d 520 (2012) (providing that there are three other categories of PIP benefits, which include work loss PIP benefits under section 3107(1)(b), replacement services PIP benefits under section 3107(1)(c), or survivor's loss PIP benefits under MCL 500.3108).

14 MCL 500.3107(1)(a).

15 2019 Mich. Pub. Acts 21 and 2019 Mich. Pub. Acts 22 became effective on June 11, 2019.

16 *Johnson*, 492 Mich. at 189 ("[T]here are no 'daily, monthly or 3-year limitations' on allowable expenses pursuant to [Mich. Comp. Laws §] 500.3107(1)(a).").

17 *Covenant Med. Ctr., Inc. v. State Farm Mut. Auto. Ins. Co.*, 500 Mich. 191, 215; 895 N.W.2d 490 (2017).

18 Note that the new "coverage levels" that can be selected apply *only* to "personal protection insurance benefits under section 3107(1)(a)"; i.e., "allowable expense" PIP benefits. Thus, the limits have no application to the three other categories of PIP benefits (each of which have their own daily, monthly, or 3 year limitations). Rather, a no-fault insurer's liability to pay work loss PIP benefits, replacement service PIP benefits, or survivor's loss PIP benefits is *in addition to*, and not part of, the "coverage level" selected by the insured with respect to "allowable expense" PIP benefits.

19 Simultaneous to its enactment of section 3107c, the legislature enacted MCL 500.2111f, which in pertinent part states:

> (1) Before July 1, 2020, an insurer that offers automobile insurance in this state shall file premium rates for personal protection insurance coverage for automobile insurance policies effective after July 1, 2020.
>
> (2) Subject to subsections (6) and (7), the premium rates filed as required by subsection (1), and any subsequent premium rates filed by the insurer for personal protection insurance coverage under automobile insurance policies effective before July 2, 2028, must result, as nearly as practicable, in an average reduction per vehicle from the premium rates for personal protection insurance coverage that were in effect for the insurer on May 1, 2019 as follows:
>
> (a) For policies subject to the coverage limits under section 3107c(1)(a), an average 45% or greater reduction per vehicle.
>
> (b) For policies subject to the coverage limits under section 3107c(1)(b), an average 35% or greater reduction per vehicle.

(c) For policies subject to the coverage limits under section 3107c(1)(c), an average 20% or greater reduction per vehicle.

(d) For policies not subject to any coverage limit under section 3107c(1)(d), an average 10% or greater reduction per vehicle.

(3) For a policy under which an election under section 3107d has been made to not maintain coverage for personal protection insurance benefits payable under section 3107(1)(a) . . . the premium rates filed under subsection (1), and any subsequent premium rates filed by the insurer for personal protection insurance coverage, must result in no premium charge for coverage for personal protection insurance benefits payable under section 3107(1)(a).

20 MCL 500.3107c(1)(d).

21 MCL 500.3107c(1)(c).

22 MCL 500.3107c(1)(b).

23 MCL 500.3107c(1)(a).

24 MCL 500.3107d(1).

25 MCL 500.3107c(5).

26 MCL 500.3114(1) provides, in pertinent part, that:

. . . . If [PIP] benefits . . . are payable to or for the benefit of an injured person under his or her own policy and would also be payable under the policy of his or her spouse, relative, or relative's spouse, the injured person's insurer shall pay all of the benefits up to the coverage level applicable under section 3107c to the injured person's policy, and is not entitled to recoupment from the other insurer.

27 *Belcher v. Aetna Cas. & Sur. Co.*, 409 Mich. 231, 251-52; 293 N.W.2d 594 (1980); *See also Covenant Med. Ctr., Inc. v. State Farm Mut. Auto. Ins. Co.*, 500 Mich. 191, 215; 895 N.W.2d 490 (2017) ("The priority statutes, MCL 500.3114 and MCL 500.3115, define against whom an individual may make a claim for benefits."). This conclusion flows not only from the plain language of MCL 500.3114, but also from the title ascribed to it by the Legislature, which prior to the recent amendments was "[p]ayment of personal protection insurance benefits; order of priority among insurers", and after the amendments, in pertinent part, is "[p]ersons entitled to personal protection insurance benefits or personal injury benefits; order of priority for claim of motor vehicle occupant or motorcycle operator or passenger".

28 As of June 11, 2019, MCL 500.3115 provides that "[e]xcept as provided in section 3114(1), a person who suffers accidental bodily injury while *not an occupant of a motor vehicle* shall claim personal protection insurance benefits under the assigned claims plan under [MCL 3171] to [MCL] 500.3175."

29 The pre-amendment version of section 3115 provided, in pertinent part:

(1) Except as provided in subsection (1) of section 3114, a person suffering accidental bodily injury while not an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:

(a) Insurers of owners or registrants of motor vehicles involved in the accident.

(b) Insurers of operators of motor vehicles involved in the accident.

30 Michigan's assigned claims plan was created and is maintained by Michigan's Automobile Insurance Placement Facility ("MAIPF"), which is a program that every insurer which is authorized to write insurance in Michigan is statutorily required to participate in. MCL 500.3171(2); MCL 500.3301(1). Basically, the claims of persons entitled to recover PIP benefits under the assigned claims plan are assigned by the MAIPF to a participating insurer. That insurer then adjusts the claim and pays any PIP benefits that the injured person is entitled to recover. The assigned insurer is then reimbursed by the MAIPF out of monies that Michigan's insurers collect from persons who purchase no-fault policies from them and, in turn, pay to the MAIPF in the form of assessments. *See* MCL 500.3175(1); MCL 500.3301 to 500.3390.

31 MCL 500.3115.

32 MCL 500.3172(7)(a); MCL 500.3107(1)(b).

33 For the purposes of section 3114(1), "the phrase 'the person named in the policy' is synonymous with the term 'named insured.'" *State Farm Fire & Cas. Co. v. Old Republic Ins. Co.*, 234 Mich. App. 465, 469; 595 N.W.2d 149 (1999); *Cvengros v. Farm Bureau Ins.*, 216 Mich. App. 261, 264; 548 N.W.2d 698 (1996); *Transamerica Ins. Corp. of Am. v. Hastings Mut. Ins. Co.*, 185 Mich. App. 249, 252-255; 460 N.W.2d 291 (1990); *Dairyland Ins. Co. v. Auto Owners Ins. Co.*, 123 Mich. App. 675, 686; 333 N.W.2d 322 (1983).

34 *Johnson v. Recca*, 492 Mich. 169, 215; 821 N.W.2d 520 (2012).

35 The legislature's use of the word "shall" in sections 500.3114(2), (3), and (5) denotes that it is mandatory that the person claim PIP benefits from the insurer specified in those sections. *People v. Lockridge*, 498 Mich. 358, 387; 870 N.W.2d 502 (2015) ("As we have stated many times, 'shall' indicates a mandatory directive.").

36 Whereas the Legislature's use of the word "shall" typically indicates mandatory action, *Lockridge,* 498 Mich. at 387, its use of the word "may" typically denotes permissive action, *People v. Watkins*, 491 Mich. 450, 483-84; 818 N.W.2d 296 (2012).

37 *Covenant Med. Ctr., Inc. v. State Farm Mut. Auto. Ins. Co.*, 500 Mich. 191, 199; 895 N.W.2d 490 (2017) (quoting *Roberts v. Mecosta Cty. Gen. Hosp.*, 466 Mich. 57, 63; 642 N.W.2d 663 (2002)).

38 *People v. Vanderpool*, 505 Mich. 391, 398; 952 N.W.2d 414 (2020) (quoting *People v. Cunningham*, 495 Mich. 145, 154; 852 N.W.2d 118 (2014)) (Statutory provisions 'cannot be read in isolation, but instead must be read reasonably and in context.'"); *Cunningham*, 495 Mich at 153-54 (quoting *City of Grand Rapids v. Crocker*, 219 Mich. 178, 182-83; 189 N.W. 221 (1922)) (One must "examine the provision within the overall context of the statute 'so as to produce, if possible, a harmonious and consistent enactment as a whole.'").

An Insurance Agent is not Just the Agent of the Insured

By Adam Kutinsky, *Kutinsky PLLC*

The Common Law Rule

In the context of insurance agent errors and omissions the common law holds that an independent insurance agent is considered an agent of the insured rather than an agent of the insurer:

> ". . . the independent insurance agent or broker is considered an agent of the insured rather than an agent of the insurer." [1]

An independent agent is one who represents multiple insurance companies as opposed to a captive or exclusive agent who sells policies for one insurer. Conversely, when a case involves an insurance agent but is not limited to errors and omissions claims, involves other parties or entirely different claims, the independent agent common law rule becomes less relevant and in some contexts irrelevant. This is because independent insurance agents are not exclusively the agent of the insured and because an agent does not only owe duties to its principal but also has authority to act on its behalf. Put another way, an independent insurance agent is a dual agent with duties and authority for the insured and the insurer.

The Agent's Contractual Obligation

The common law rule that an independent agent is the agent of the insured is an incomplete statement because it does not consider an agent's contractual and statutory duties and authority. By way of example, in most circumstances an independent agent maintains a "producer agreement" with each insurance company for whom he sells policies. A producer agreement grants the agent the necessary authority to bind the insurer to coverage at least temporarily. Absent public policy or statutory exceptions, the aforementioned common law rule does not affect a contract that creates a principal-agent relationship and defines the scope of that relationship.

Statutory Law

Additionally, the Michigan Insurance Code was amended in 2018 to add definitions of "agent of the insurer" and "agent of the insured."[2] These definitions conflict with the common law rule:

> (b) "Agent of the insured" means an insurance producer who is not an appointed insurance producer of the insurer with which the insurance policy is placed. An agent of the insured is treated

Continued on next page

as representing the insured or the insured's beneficiary and not the insurer.

(c) "Agent of the insurer" means an insurance producer who sells, solicits, or negotiates an application for insurance as a representative of the insurer and not the insured or the insured's beneficiary.

In Michigan an insurance company must appoint an independent insurance agent who maintains authority to bind the insurer to coverage. Once that appointment is made the insurance code considers the insurance agent the agent of the insurer, not the insured. Whether a statute abrogates common law is subject to further analysis and the conflict between the two should be raised when an agent's duties and authority is at issue. And the application of the contractual, statutory and common law governing insurance agents requires a case-by-case analysis. Take for example the situation of an insurance company issuing a policy with different coverage from what an insured requested and was promised by an independent insurance agent. The common law would be relevant to an errors and omissions claim against the agent but not relevant to a reformation claim against the insurance carrier. It is the insurer/agent producer agreement that determines whether an agent bound the insurance company to the promised coverage or exceeded that authority.

The bottom line is that insurance agents are governed by three sources of authority - contract, statute and common law. All three should be reviewed to determine what duties and authority an insurance agent held towards the insured and the insurer in each particular case. ■

About the Author

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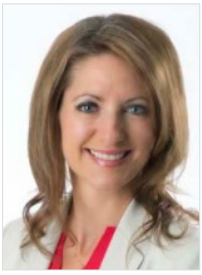
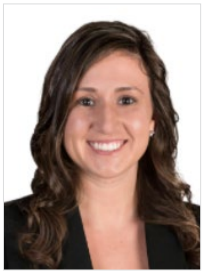
Endnotes

1 *West American Ins. Co. v. Meridian Mut. Ins. Co.,* 230 Mich. App. 305, 310, 583 N.W.2d 548 (1998).

2 MCL 500.1201.





What's Your (App) Status? PIP Coverage And Priority In The Ridesharing World

By Elizabeth A. Favaro and Nina M. Jankowski, *Giarmarco, Mullins & Horton, PC*

Uber, Lyft, and other ridesharing companies are hardly novel concepts at this point, and Michigan was among the first states to regulate them. However, nearly five years after Michigan's Limousine, Taxicab, and Transportation Network Company Act[1] took effect, the question of which insurer must provide personal injury protection coverage for accident victims arising out of ridesharing situations continues to confound both No-Fault practitioners and Michigan courts. And although the pandemic nearly crushed the ridesharing industry in 2020, signs of recovery are afoot,[2] so now is the time to understand where to look for PIP coverage when an accident involving a ridesharing company occurs.

The Statutory Scheme

For many years, the starting point for determining which insurer is liable to provide PIP coverage has been Michigan's priority statute, MCL 500.3114. This remains a good place to start, since in Michigan, Uber and Lyft drivers are generally considered independent contractors. So, if they drive their personal vehicles, they must (of course) maintain their own personal coverage.

But what about when an accident happens and an Uber or Lyft driver is on his or her way to pick up a passenger, or has a passenger in the vehicle? Where does the driver look for PIP coverage? What if the driver is not using his or her personal vehicle when the accident happens? Does it matter whether the driver has a passenger in the vehicle or not? Does the law treat the driver as an employee, or as someone operating in a commercial context, where the vehicle owner's insurer provides coverage? And where should passengers look for coverage?

These types of questions are answered by reading the priority statute in harmony with the Limousine, Taxicab,

and Transportation Network Company Act ("TNC Act").[3] Among other things, the TNC Act, which went into effective on March 21, 2017, regulates Uber, Lyft, and other ridesharing companies, which the TNC Act defines as "transportation network companies."[4] While the TNC Act includes several important safety and policy measures such as mandating drivers' criminal background checks,[5] annual vehicle inspections,[6] and accommodations for disabled passengers,[7] it also regulates insurance coverage for accidents involving transportation network companies.

The TNC Act's coverage and priority rules focus on how a vehicle is being used at the time of the accident.

Coverage And Priority – "App Status"

Uber and Lyft drivers use their vehicles – whether owned or leased by them or rented on a short-term basis – for dual purposes. Sometimes, the vehicles they drive are used for personal purposes, but other times, the vehicles are used to transport passengers. The TNC Act acknowledges this reality by focusing its coverage and priority rules not on the driver or vehicle's generalized involvement with a transportation network company. Rather, the TNC Act's coverage and priority rules focus on how a vehicle is being used at the time of the accident.

The first inquiry is whether, at the time of the accident, the driver is logged into a "transportation network company digital network" or is engaged in a "prearranged ride." A "transportation network company digital network" is defined by the TNC Act as "an online-enabled application, website, or system offered or utilized by a transportation network company that enables the prearrangement of rides with transportation network company drivers."[8] In simple terms, this is the app that allows transportation network company drivers and passengers to connect with each other via their smartphones to schedule "prearranged rides."

Under the TNC Act, a "prearranged ride" is "the provision of transportation by a transportation network company driver to a transportation network company rider, beginning when a transportation network company driver accepts a ride requested by a transportation network company rider through a digital network controlled by a transportation network company, continuing while the transportation network company driver transports the requesting transportation network company rider, and ending when the last requesting transportation network company rider departs from the personal vehicle."[9]

The trigger for determining coverage is based entirely on "app status." When a driver is logged into a transportation network company's app or is engaged in a prearranged ride, the transportation network company must either directly, or on the driver's behalf, provide PIP coverage.[10] As such, individuals injured in accidents that occur when the driver is logged into the transportation network company's app – whether the individual is the driver or a passenger – should look to the transportation network company's insurer for coverage. While this article is limited to the issue of priority, No-Fault practitioners should also pay attention to the coverage levels available for accidents involving Uber or Lyft drivers or rides, as the levels of coverage for third-party claims varies depending on whether the driver is simply logged into the transportation network company's app or has a passenger in the vehicle during a prearranged ride.[11]

A transportation network company's obligation to provide such coverage in this situation does not depend upon a personal carrier first denying the claim, and if there is a lapse in coverage or the transportation network company's policy does not provide the level of PIP coverage required by the statute, the transportation network company must *still* cover the claim pursuant to the statutory requirements.[12] In short, individuals involved in accidents in a ridesharing situation, even if they are not certain that the driver was logged into the transportation network company's app, would do well to put the transportation network company's carrier on notice of the claim as soon as possible. The failure to do may be a missed opportunity and, perhaps, a loss in benefits.

Don't Forget About Personal Policies

A common mistake when evaluating coverage and priority in the ridesharing context is failing to consider the role of personal no-fault insurance policies. Because vehicles used by transportation network company drivers can serve as *both* personal vehicles and transportation network company vehicles, depending on the driver's app status at the time of the accident, it is important to consider all possible sources for coverage until the driver's app status is confirmed. Whether a driver is logged into a transportation network company's app at the time of an accident is not always easy to determine. And if the driver's memory is wrong or the smartphone wasn't actually logged into the app, even when the driver thought it was, the transportation network company will likely not be required to provide coverage.

One possible source of coverage is the driver's personal policy, or that of a resident domiciled in the same household as the driver, since if the driver is not logged into a transportation network company's app at the time of the accident, the driver is using the vehicle for personal purposes. In such circumstances, the order of priority set forth in MCL 500.3114 applies and a personal policy will be first in line.

For some reason, personal policies are sometimes not considered in ridesharing situations, and the focus tends to be on finding coverage from the vehicle owner's carrier. Perhaps

this is due to reliance upon longstanding exceptions to MCL 500.3114(1)'s general rule that places personal policies first in priority. No-Fault practitioners are of course familiar with the "in the business of transporting passengers" exception,[13] which in this commercial context places the vehicle owners' carrier in priority for PIP coverage. But when the Michigan Legislature passed the TNC Act, it also amended the priority statute to provide that this exception does not apply to drivers or passengers in a "transportation network company vehicle," which is defined as "a personal vehicle while the driver is logged onto the transportation network company digital network or while the driver is engaged in a transportation network company prearranged ride."[14]

There is also the "employment" exception,[15] which does not apply when a driver is logged into a transportation network company's app, since the TNC Act proscribes coverage in that situation through the driver's carrier or that of the transportation network company. And it does not apply when the driver is using the vehicle for personal use because he or she is not engaged in employment activities at the time of the accident.[16]

In the ridesharing context, the No-Fault Act requires the vehicle owner's carrier to provide PIP coverage only when the driver is not logged into the transportation network company's app and has no personal coverage.[17] For this reason, if an individual is involved in an accident in a ridesharing situation and has a personal policy, a claim should be made with the personal carrier, even if the individual firmly believes the driver was logged into a transportation network company's app at the time of the accident or otherwise believes coverage under the vehicle owner's policy is available.

Whether a driver is logged into a transportation network company's app at the time of an accident is not always easy to determine. And if the driver's memory is wrong or the smartphone wasn't actually logged into the app, even when the driver thought it was, the transportation network company will likely not be required to provide coverage.

Questions Answered

Once the legal framework for PIP coverage in ridesharing situations is understood, the questions posed previously are easily answered:

Q. *If a driver is on his or her way to pick up a passenger, and a motor vehicle accident occurs before the driver gets there, or the driver has a passenger in his or her car during a prearranged ride, where should the driver look for PIP coverage?*

A. The driver should confirm app status at the time of the accident.

If the driver was logged into the transportation network company's app, then the transportation network company should provide coverage. If not, a personal policy of the driver or the driver's relative domiciled in the same household should provide coverage (provided such a policy exists). But the driver should really be sure of app status, and if there is any doubt, he or she should make a claim with *both* the carrier for the transportation network company and with his or her personal carrier.

Q. *What if the driver is not using his or her personal vehicle when the accident happens?*

A. Again, app status is the key.

If the driver was logged into the transportation network company's app at the time of the accident, the transportation network company should provide coverage. If not, the driver should *still* look to his or her personal carrier or the personal carrier of a relative domiciled in the driver's household. The vehicle owner's policy typically provides coverage only if no personal coverage is available.

Q. *Does it matter whether the driver has a passenger in the vehicle or not?*

A. Not for PIP coverage.

Q. *Does the law treat a transportation network company driver as an employee, or as someone operating in a commercial context, where the vehicle owner's insurer provides coverage?*

A. Generally, no.

The TNC Act's insurance coverage framework will govern when the driver is logged into a transportation network company's app at the time of the accident. The order of priority set forth in MCL 500.3114 will govern if the driver is not logged into an app, with the vehicle owner's policy in priority only when there is no personal policy available.

Q. *Where should passengers look for coverage when involved in an accident during a prearranged ride with a transportation network company?*

A. Passengers should look to the transportation network company for coverage, bearing in mind that their personal insurer, if they have one, should also be notified of the claim. ■

About the Authors

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Endnotes

1 MCL § 257.2101, et seq.

2 According to one source, Uber and Lyft have regained 52% of the business they lost in March 2020. *See* "Uber and Lyft expect ride-hailing to make a sharp recovery, but there are some potential roadblocks," MarketWatch, April 28, 2021.

3 MCL § 257.2101, et seq.

4 MCL § 257.2102(l).

5 MCL § 257.2107(1)(a).

6 MCL § 257.2109(1).

7 MCL § 257.2145(4).

8 MCL § 257.2102(m).

9 MCL § 257.2102(o). "Transportation network company prearranged ride" does not include shared-expense carpooling or vanpooling arrangements, nor does it include transportation provided using a taxicab, limousine, or other vehicle. *Id.*

10 MCL § 257.2123(1)-(4).

11 MCL § 257.2123(2)-(3).

12 MCL § 257.2123(5)-(6).

13 MCL § 500.3114(2).

14 MCL § 500.3114(2)(g); MCL § 500.3114(9)(b).

15 MCL § 500.3114(3).

16 *See, e.g., id*. at 85-86; *Besic v Citizens Ins Co of the Midwest*, 290 Mich App 19, 21-22 (2010); *Dulic v Progressive Michigan Ins Co*, Michigan Court of Appeals No. 271275, 2007 WL 490984 at *2 (Feb. 15, 2007); *Maroky v Encompass Indem Co*, Michigan Court of Appeals No. 333489, 2017 WL 4700030, at *2 (Oct. 19, 2017), *appeal denied*, 914 NW2d 925 (Mich 2018)); *Truck Insurance Exchange v Farm Bureau Ins Co of MI*, Michigan Court of Appeals No. 332318, 2017 WL 1967488 (May 11, 2017).

17 Indeed, No-Fault insurers may exclude coverage for PIP benefits while a driver is logged into a digital transportation network. *See* MCL § 500.3101(6). MCL § 500.3017(1) eliminates the insurance requirement when a driver is logged into a transportation network company's network: insurers of a personal vehicle "may exclude all coverage afforded under the policy for any loss or injury that occurs while a transportation network company driver is logged into a transportation network company digital network or while a transportation network company is providing a prearranged ride." Insurers may exclude PIP coverage under MCL § 500.3017, including "personal protection and property protection insurance required under section 3101." *Id.*

Covid-Related Case Results
Through September 23, 2021

The Michigan cases summarized below are taken from a national summary prepared by KennedysCMK, Basking Ridge, New Jersey

Michigan 30th Cir. Ct. (Ingham County)

Gavrilides Management Co. v. Michigan Ins. Co.
Case No. 20-258-CB
7/1/2020

Favorability: Insurer
Motion: MTD
Business Type: Restaurant

Ruling:
(1) Michigan Executive Orders did not cause direct physical loss of or damage to property;

(2) Virus exclusion not ambiguous and applied to preclude coverage;

(3) Acts or decisions exclusion applied to preclude coverage.

Virus Exclusion: Yes (CP 01 40 07 06)

Federal District Court – Northern District of Michigan

Turek Enterprises, Inc., d/b/a Alcona Chiropractic v. State Farm Mut. Auto. Ins. Co. et al.
Case No. 20-11655
9/3/2020

Favorability: Insurer
Motion: MTD
Business Type: Chiropractic office

Ruling:
(1) Executive Orders did not cause accidental direct physical loss; and

(2) Virus exclusion precluded coverage.

Note: Court observed argument for "loss of use" would be stronger had language been direct physical loss of property.

Virus Exclusion: Yes (not CP 01 40 07 06)

Federal District Court – Eastern District of Michigan

Richard Kirsch, DDS v. Aspen Am. Ins. Co.
Case No. 20-11930
12/14/2020

Favorability: Insurer
Motion: MTD
Business Type: Dental Office

Ruling:
(1) Executive Orders did not cause direct physical loss of or damage to property;

(2) Not entitled to ordinance or law coverage; and

(3) Not entitled to civil authority coverage.

Virus Exclusion: None
Appeal: Appealed

Federal District Court – Eastern District of Michigan

Salon XL Color & Design Group, LLC v. West Bend Mut. Ins. Co.
Case No. 20-11719
2/4/2021

Favorability: Mixed
Motion: MTD
Business Type: Hair salon

Ruling:
(1) Allegations that COVID-19 contaminated property and persons at the premises was sufficient to allege direct physical loss of or damage to property (terms "damage" and "loss" are ambiguous);

(2) Allegations that Executive Orders issued in response to spread of COVID-19 throughout the state, including at the premises, sufficient for Civil Authority coverage and Communicable Disease coverage; and

(3) Virus exclusion and Loss of Use exclusion applied to preclude all coverage except for Communicable Disease coverage.

Virus Exclusion: Yes (CP 01 40 07 06)

Federal District Court – Eastern District of Michigan

Dye Salon, LLC v. Chubb Indemnity Ins. Co.
Case No. 4:20-cv-11801
2/10/2021

Favorability: Insurer
Motion: MTD
Business Type: Hair salon

Ruling:
(1) No standing to sue entities not party to the insurance policy (claim administrators);

(2) Virus exclusion applied to preclude coverage, relying in part on the exclusion's anti-concurrent causation language;

(3) Virus exclusion not limited to instances of contamination; and

(4) Regulatory estoppel did not apply.

Virus Exclusion: Yes (not CP 01 40 07 06)

Federal District Court – Eastern District of Michigan

Stanford Dental, PLLC v. The Hanover Ins. Group, Inc.
Case No. 20-cv-11384
2/10/2021

Favorability: Insurer
Motion: MTD
Business Type: Dental Practice

Ruling:
(1) No standing to sue entities not party to the insurance policy (claim administrators);

(2) Virus exclusion applied to preclude coverage, relying in part on the exclusion's anti-concurrent causation language;

(3) Virus exclusion not limited to instances of contamination; and

(4) Regulatory estoppel did not apply.

Virus Exclusion: Yes (not CP 01 40 07 06)

Federal District Court – Western District of Michigan

St. Julian Wine Co., Inc. v. The Cincinnati Ins. Co.
Case No. 1:20-cv-374
3/19/2021

Favorability: Insurer
Motion: MTD
Business Type: Winery

Ruling:
(1) Executive Orders did not cause accidental direct physical loss or accidental direct physical damage to property; and

(2) Not entitled to Civil Authority coverage.

Virus Exclusion: None

Federal District Court – Western District of Michigan

Gro Holdco, LLC v. Hartford Fire Ins. Co.
Case No. 1:20-cv-1093
5/7/2021

Favorability: Insurer
Motion: MTD
Business Type: Eye care provider

Ruling: Virus exclusion applied to preclude coverage.
Virus Exclusion: Yes (not CP 01 40 07 06)

Federal District Court – Eastern District of Michigan

The Brown Jug, Inc. v. The Cincinnati Ins. Co.
Case No. 20-CV-13003
5/26/2021

Favorability: Insurer
Motion: MTD
Business Type: Restaurant

Ruling:
(1) Executive Orders did not cause accidental physical loss or damage to property; and

(2) Not entitled to Civil Authority coverage.

Virus Exclusion: None

Federal District Court – Eastern District of Michigan

Dino Drop, Inc. v. The Cincinnati Ins. Co
Case No. 2:20-cv-12549
6/21/2021

Favorability: Insurer
Motion: MTD
Business Type: Restaurant

Ruling:
(1) Executive Orders and COVID-19 did not cause direct physical loss or damage to property; and

(2) Not entitled to Contamination or Civil Authority coverage.

Virus Exclusion: None

Federal District Court – Eastern District of Michigan

Chelsea Ventures, LLC v. Cincinnati Ins. Co.
Case No. 5:20-cv-13002
6/21/2021

Favorability: Insurer
Motion: MTD
Business Type: Restaurant

Ruling:
(1) Executive Orders and COVID-19 did not cause direct physical loss or damage to property; and

(2) Not entitled to Contamination or Civil Authority coverage.

Virus Exclusion: None

Federal District Court – Eastern District of Michigan

Captain Skrip's Office LLC v. Conifer Holdings, Inc.
Case No. 20-11291
6/28/2021

Favorability: Insurer
Motion: MTD
Business Type: Restaurant

Ruling: Virus exclusion precluded coverage.
Virus Exclusion: Yes (CP 01 04 07 06) ■

Legislative Update: Back From Summer Recess

By Patrick D. Crandell, *Collins, Einhorn, Farrell PC*

The Legislature is back in session after a two-month summer recess. Neither committee met since the last update. And the Legislature didn't take action on any insurance-related bills.

So it's a short update for this *Journal*, as the only things to note are a few referrals to the House and Senate insurance committees:

- **No-Fault Fee Schedule –** HB 5125 amends the No Fault Act to delay implementation of the fee schedule that was part of the No Fault Act changes passed in 2019.
- **No-Fault Pre-Authorization –** HB 5168 amends the No Fault Act to define the procedures for any required preauthorization for PIP benefits.
- **No-Fault Tort Liens –** HB 5169 amends the No Fault Act to prohibit medical treaters that provide PIP benefits from claiming a lien on third-party tort claims.
- **Oversight for IMEs –** HB 5170 amends the insurance code to create an oversight board for independent medical examinations, and details the composition and board member appointments.
- **IME Procedures –** HB 5171 amends the insurance code to provide procedures for independent medical examinations.
- **Coverage for Living Organ Donors –** SB 584 amends the insurance code to prohibit health insurers from denying or limiting coverage to living organ donors.
- **Non-Forfeiture Amounts for Annuities –** SB 624 amends the insurance code to modify the determination for non-forfeiture amounts related to annuities.

Mission Statement of the Insurance and Indemnity Law Section

Issues arising out of insurance contracts and indemnity agreements affect a broad range of practice areas. In addition, insurance is a regulated industry, and state and federal regulations present specialized questions. The membership of the Insurance and Indemnity Law Section of the State Bar of Michigan consists of those who have expertise in this area of practice, as well as those whose expertise lies in other practice areas that are affected by insurance and indemnity issues. The mission of the Section is to provide a forum for an exchange of information, views and expertise from all perspectives on both insurance coverage issues and indemnity issues, and to provide information and assistance to other persons or organizations on matters relating to insurance and indemnity. Membership is open to all members of the State Bar of Michigan.

Selected Insurance Decisions

By Deborah A. Hebert, *Collins, Einhorn, Farrell PC*

Michigan Court of Appeals – Unpublished Decisions

Replacement cost requirements enforced

J & J Castor Group, Inc v Home-Owners Ins Co
Docket No. 354832
August 19, 2021

When a portion of plaintiff's commercial building collapsed under the weight of snow and ice in 2014, plaintiff submitted a claim to Home-Owners under its commercial property policy. Coverage was limited to actual cash value, with an option for replacement cost for both the building and business personal property, but only if the insured notified Home-Owners within 180 days of its intent to repair or replace the damaged property. And even then, replacement cost would only be available after the repair or replacement was completed, and only if completed as soon as reasonably possible after the loss.

Plaintiff ran into issues with building code requirements and financing options, which delayed plans to replace the building. Home-Owners finally notified plaintiff in June of 2016 that the deadline for replacement or repair was March 30, 2017. When that deadline passed, Home-Owners formally denied any further coverage. The Court of Appeals affirmed the denial. "Because plaintiff never rebuilt or replaced the building, defendant is not obligated under the policy to pay the replacement cost value." The insured's difficulties with building codes and financing did not alter the terms of coverage.

Federal District Court – Eastern District of Michigan

No coverage for losses caused by COVID-19 business shut-downs

Dino Drop, Inc v Cincinnati Ins Co
(5 Plaintiffs)
Case No. 20-12549
June 21, 2021
Appeal pending

Chelsea Ventures, LLC v Cincinnati Ins Co
Case No. 20-13002
June 21, 2021
Appeal pending

In these two cases, the court ruled, consistent with other decisions of the Eastern District Court and consistent with the majority of decisions from around the country, that the financial losses suffered as a result of business interruptions due to the COVID-19 pandemic are not covered losses under an insuring agreement that affords coverage for "direct loss" to property, where "loss" is defined as "accidental physical loss or accidental physical damage." There must be a physical loss of the property, or physical damage to the property making it either uninhabitable or in need of repair or replacement to trigger coverage under these types of insuring agreements. Temporary loss of use for reasons other than physical loss or damage does not involve the kind of tangible harm required.

In *Dino Drop*, the court further held that even though the virus may have contaminated the property, that contamination did not impact the functionality of the property, which could still be used (e.g., in the case of restaurants, the ability to continue a carry-out business). And the "civil authority" coverage in Cincinnati's policy only applied where a civil authority has impeded access to the insured's property through actions taken on other property.

Virus exclusions apply to COVID-19 losses

Captain Skrip's Office LLC v Conifer Holdings, Inc
Case No. 20-11291
June 28, 2021

Madison Square Cleaners v State Farm Fire and Cas Co
Case No. 21-11273
September 2021

In these two cases, the court enforced the "virus exclusion" in each policy as an additional basis for denying the insured's business loss claims. *Captain Skrip's Office* involves a restaurant business. *Madison Square* involves a dry cleaning and laundry service business. Both opinions initially address the lack of coverage under the insuring agreement due to the lack of physical damage to the property, as discussed above. But both then go on to also apply the virus exclusions in each policy.

The exclusions, though worded a bit differently, both apply to damage caused by virus, bacteria, or other micro-organisms. Because a virus was the "essential link in the chain of causation leading to" plaintiff's losses, *Captain Skrip's Office*, and because the shutdown was triggered by the COVID-19 virus, *Madison Square*, each exclusion applied.

Complaint and counter-complaint alleging the same wrongs are a "single claim" for determining the effective date of claims-made coverage

Ric-Man Construction Inc v
Pioneer Special Risk Ins Services, Inc
Case No. 19-13374
June 23, 2021
Appeal Pending

At issue is "whether a 'Professional Claim' for construction design work" was made within the time period covered by Everest's claims-made professional liability policy. The claim arose out of work performed on a drainage project for the Oakland County Water Resource Commission. When the County failed to pay the project engineer for work performed by Ric-Man, the engineer sued the County for payment and added Ric-Man for having failed to follow contract specifications. That complaint was filed before Pioneer's policy took effect. The County responded with cross-complaint against Ric-Man for defective design and workmanship. That complaint was filed after Pioneer's policy took effect. Because both complaints alleged failures in the design, and were otherwise grounded in the same failures, the insured was faced with one claim first made prior to the effective date of its claims-made policy. Pioneer had no duty to defend.

Professional liability exclusion for sale of non-registered securities

Saoud v Everest Indemnity Ins Co
Case No. 19-12389
September 29, 2021

The insureds and their financial services company sold an investment product that lost all value a few years later, when the company responsible for the product declared bankruptcy. Four clients sued plaintiffs for their losses and plaintiffs tendered to their professional liability insurer, Everest Indemnity, for a defense and indemnity. When Everest failed to assume the insureds' defense in any of those actions, plaintiffs resolved the claims on their own and commenced this action for coverage. Both the insureds and Everest moved for rulings as a matter of law and the court responded on July 28, 2012, with a very thorough and meticulous analysis of the various coverage issues presented. That opinion is worth reading. But in the end, the court required supplemental briefing on an exclusion in the policy, applicable to "any Loss resulting from any Claim against an Insured . . . [b]ased upon, attributable to, or arising out of the use of or investment in any security that is not registered with the Securities and Exchange Commission." After that briefing, the court issued its final decision in the case on September 29, 2021, holding that the client claims were excluded from coverage because they arose out of the sale of a "security" that was not registered with the SEC. The investment product was not an exception to the SEC definition of "security" because it was not "commercial paper" and its maturity date exceeded nine months.

Federal District Court – Western District of Michigan

Bad faith while providing a defense can be a viable basis for establishing breach of the insurance contract

Stryker Corp v XL Insurance America, Inc
Case No. 17-cv-66
July 26, 2021
Appeal Pending

This coverage dispute is preceded by several lawsuits beginning in 2000. At issue is Stryker's product liability coverage for an artificial knee joint called Uni-Knee. XL Insurance, Stryker's primary insurer, settled the largest exposure on a claim by Pfizer in 2009, exhausting coverage limits. It then refused to settle claims filed by individual patients, but the commercial excess insurer, TIG Insurance, denied coverage because Stryker failed to obtain written consent for the Pfizer settlement as required by the contract. The 6th Circuit agreed. So, in this action, Stryker sued XL to recover the amounts it paid to settle the individual claims.

Stryker claims that XL breached its duty to act in good faith by failing to try and settle all claims 2009. The jury agreed and issued a judgment for Stryker. XL responded with several post-judgment motions, one of which was based on the lack of a recognized cause of action for bad faith under Michigan law. The court held that although Michigan does not recognize a "standalone" cause of action for bad faith, or a tort action for bad faith, it does recognize that a breach of contract claim may arise when an insurer assumes the defense of an insured and "exercises control over the settlement" but fails to act in good faith in proceeding with the settlement.

Sixth Circuit Court of Appeals

Federally regulated crop insurance allows insurers to recover overpayments caused by an insured's poor recordkeeping

Farmers Mut Hail Ins Co of Iowa v Miller
___ Fed Appx ___ (2021)
Case No. 20-1978
July 20, 2021

In this appeal from the Western District of Michigan, the court affirmed an arbitration award requiring Miller, an insured farmer, to reimburse his crop insurer for overpayments on prior claims. Miller had claimed losses in 2012 and 2013, for which he was compensated. But when he submitted a claim in 2014, Farmers Mutual looked more closely at Miller's recordkeeping and concluded that he had been overpaid $100,000 on the prior claims. Crop insurance is tightly regulated by the Federal Crop Insurance Corporation, which is controls the terms of coverage. Farmers Mutual pursued arbitration to recover the overpayments but Miller challenged its right to seek reimbursement under the terms of the policy. That question was submitted to the Crop Insurance Corporation, which ruled that the policy did allow for the recovery of overpayments caused by the insured's poor recordkeeping. ■

No Fault Report

Finally Some Finality – DIFS and The MAIPF Reach an Agreement Regarding Claims of "Strangers to the Insurance Contract," for Losses Occurring After June 11, 2019

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In my last articles, I discussed the uncertainty brought about as a result of the 2019 reform amendments, as applied to "strangers to the insurance contract." These individuals include occupants of insured motor vehicles who did not have a policy of nofault insurance of their own, whether individually or through a spouse or domiciled relative. These "strangers to the insurance contract" also included non-occupants of motor vehicles (such as pedestrians, bicyclists, moped operators, etc.) who likewise did not have insurance of their own, whether individually or through a spouse or domiciled relative. The articles also discussed, at some length, the ongoing litigation between the Department of Insurance and Financial Services (DIFS) and the Michigan Automobile Insurance Placement Facility (MAIPF), which operates the Michigan Assigned Claims Plan (MACP), regarding which insurer should be covering losses involving these "strangers to the insurance contract" occurring on or after June 11, 2019, the date that the NoFault reform amendments were filed with the Michigan Secretary of State. The most recent article on this topic also referenced some high-level discussions that were taking place between DIFS and the MAIPF regarding resolution of the issues identified in my last two articles.

To recap, the dispute between DIFS and the MAIPF/MACP pertains to the statutory changes set forth in MCL 500.3114(4) and MCL 500.3115(1), and the specific issue is when these changes took effect – June 11, 2019, when the No-Fault reform amendments became law, or some later date, depending on the language in any given insurance policy. It was DIFS' position that to the extent the insurance policy referenced the old No-Fault priority scheme, the policy insurer was obligated to pay no-fault benefits to those injured claimants. Beginning in December 2020, the MAIPF/MACP took the position that those "stranger to the insurance contract" claims would shift over to the MAIPF/MACP. In February 2021, DIFS notified the MAIPF that it would not approve of the shifting of claims over to the MAIPF from a policy insurer, except for the specific policy insurer (USAA Casualty Insurance Company) that had prevailed in the two Wayne County Circuit Court cases referenced in my prior articles. Indeed, DIFS issued Notices of Potential Violation of DIFS Order 19-048-M to many policy insurers, who were then forced to choose between recalling an assigned claim or facing the threat of administrative action from DIFS.

After months of discussions, DIFS and the MAIPF reached an agreement to resolve their dispute and policy insurers are now free to refer these "stranger to the insurance contract" claims, for losses occurring on or after June 11, 2019, at 3:22 pm, to the MAIPF/MACP for further handling. Alternatively, the policy insurers can continue handling the claim and be reimbursed by the MAIPF for the benefits paid thus far and benefits to be paid in the future. In addition, a policy insurer electing this latter option will be entitled to receive payment from the MAIPF for the time spent adjusting the claims of these "stranger to the insurance contract." The details regard-

ing the agreement reached between DIFS and the MAIPF are described more fully below.

Resolution of the DIFS Versus MAIPF Issue

In late July 2021, DIFS and the MAIPF reached a settlement agreement regarding their ongoing dispute pertaining to the claims of these "strangers to the insurance contract" and the application of the $250,000.00 cap on "allowable expenses," for claims arising between June 11, 2019, and July 2, 2020. The details regarding the settlement are discussed more fully below. However, they can be briefly summarized in the following bullet points:

- DIFS has agreed to withdraw all Notices of Potential Violations of DIFS Order No. 19048M, which had been issued to policy insurers in response to their attempts to shift the handling of these "strangers to the insurance contract" claims over to the MAIPF/MACP- those insurers will now be receiving Notices of No Action.;
- DIFS has agreed to rescind DIFS Order No. 19-048-M, which had required policy insurers to apply the old priority systems set forth in their insurance contracts, notwithstanding the change in the law that took effect on June 11, 2019;
- The MAIPF has agreed that it will continue to provide lifetime, unlimited no-fault benefits for these "strangers to the insurance contract" claims, so long as the accident occurred on or before July 1, 2020; for losses occurring after that date, the $250,000.00 "allowable expense" cap will apply.
- Policy insurers now have the option of (a) directly referring these "stranger to the insurance contract" claims to the MAIPF/MACP and its servicing insurers, or (b) continue handling these claims, and then getting reimbursed by the MAIPF/MACP for not only the benefits and expenses paid (including legal fees) but also its loss adjustment costs.

These points will be discussed more fully below.

Part 1 – Repeal of DIFS Order No. 19-048-M.

As noted in my two prior articles on this topic, DIFS Order No. 19-048-M essentially preserved the old priority system in cases where the loss occurred on or after June 11, 2019, but the insurance policy that was in effect still reflected the old priority provisions. USAA Casualty Insurance Company had successfully challenged DIFS Order No. 19-048-M in two separate lawsuits, and it was the USAA victories that prompted the MAIPF to issue its bulletin in late December 2020, accepting the claims of these "strangers to the insurance contract." However, DIFS pushed back in late February 2021 and began threating policy insurers with administrative action if they attempted to refer the claims of these "strangers to the insurance contract" over to the MAIPF/MACP, in violation of DIFS Order No. 19-048-M.

In fact, DIFS did issue some Notices of Potential Violation of DIFS Order No. 19-048-M, and threatened the policy insurers with administrative action if they did not immediately recall the claims that had been referred to the MAIPF, in accordance with its Bulletin from December 2020. The settlement agreement provides that DIFS would issue a Rescission Memorandum formally rescinding DIFS Order No. 19048M, and would also be issuing a No-Action Letter to the insurers that had received a Notice of Potential Violation. *This action provides the "green light" for policy insurers to refer these "stranger to the insurance contract" claims to the MAIPF/MACP for further handling.* To the extent that the policy insurer had already recalled a claim, in response to a DIFS Notice of Potential Violation, the policy insurer should now be free to "recall the recall." After all, it was not the fault of the policy insurer that it took two years for DIFS and the MAIPF to resolve this issue, particularly when the policy insurer is faced with the threat of administrative actions by DIFS if it did not recall the claim.

> In an important change from the December 2020 bulletin, the MAIPF has also agreed to accept "other information obtained by the applicable insurer which was determined by the insurer as adequate to initiate a claim."

Part 2. – Application of "Allowable Expense" Caps

As noted in my "Caught in Limbo" articles, a lawsuit between DIFS and the MAIPF was pending in the Court of Appeals, on the issue of whether or not the $250,000.00 "allowable expense" cap would apply to accidents occurring between June 11, 2019, and July 1, 2020. The Court of Appeals entered an order dismissing this lawsuit on July 19, 2021, pursuant to a stipulation signed by the parties. Although it does not affect policy insurers, we now have a "bright line" rule regarding the amount of "allowable expense" coverage available to any given Claimant in the MAIPF system. If the loss occurred between June 11, 2019, and July 1, 2020, the injured claimant will receive lifetime, unlimited "allowable expense" coverage. If the loss occurs on or after July 2, 2020, the injured claimant will receive $250,000 in "allowable expense" coverage. Given this agreement, if the policy insurer does find itself in a position whereby it wishes to refer, say, a catastrophic loss to the MAIPF and one of its servicing insurers, it can assure the injured claimant that he or she will continue to receive lifetime,

unlimited benefits, so long as the accident occurred on or before July 1, 2020. The only change involves which insurer is paying on the claim.

Part 3. – Procedure Going Forward

According to the MAIPF bulletin from July 2021, the MAIPF is offering policy insurers two options for handling these claims involving "strangers to the insurance contract" that accrued on or after June 11, 2019. If there is an open claim, it can be transitioned to the MAIPF pursuant to the procedure outlined in the December 2020 industry bulletin. The policy insurer would need to request a "one-time final payment" for reimbursement of all expenses incurred, including medical expenses, wage loss benefits, household replacement service expenses, legal fees, IME fees, and the like.

However, loss adjustment expenses (meaning the amount of time spent by the adjuster handling the claim) will not be reimbursed. Reimbursement will be made after 2022 industry assessment for any amounts over $100,000.00 on any individual claim. Payments for any amount under $100,000.00 would be made within 4 to 6 months from receipt of the required documentation. The MAIPF has pledged to "work with each insurer to establish a detailed reimbursement plan."

The second option is for the policy insurer to continue handling the open claim for the injured party. The MAIPF will reimburse the insurer for no-fault benefits paid by the policy insurer, together with certain other expenses such as legal fees and IME fees. The initial reimbursement payment will not include loss adjustment expenses. Again, the first reimbursement will be made after the next industry assessment for any amounts over $100,000.00 for an individual claim. Payments for amounts under $100,000.00 will be made within 4 to 6 months after MAIPF receives the required documentation.

Going forward, though, the policy insurer, which elects this option, should begin to track the time spent handling the claim, and the MAIPF will then reimburse the policy insurer annually for the benefits and expenses paid out, plus the time to handle the claim at the hourly rate currently being paid to MACP servicing insurers. *Essentially, the policy insurer becomes a quasi MAIPF/MACP servicing insurer, but only with regard to claims that it was originally handling under its policy.* The MAIPF is encouraging policy insurers to consider the second option, as it minimizes the impact on injured claimants who are forced to deal with different claims adjusters, and it eases the burden of the six servicing insurers for the MAIPF/MACP which, after all, "do not have unlimited capacity to handle new claims."

Consistent with the information contained in the MAIPF/MACP bulletin of December 2020, the MAIPF has agreed to waive the One-Year-Notice provision set forth in MCL 500.3145 and MCL 500.3174, for tendering an Order of Priority Claim to the MAIPF. The One Year Back Rule will be waived as well. The MAIPF will accept an Application for Benefits from the policy insurer, in lieu of requiring the injured claimant to complete the more-detailed MAIPF's standard application for benefits.

In an important change from the December 2020 bulletin, the MAIPF has also agreed to accept "other information obtained by the applicable insurer which was determined by the insurer as adequate to initiate a claim." The MAIPF has also agreed to withdraw any reservation of rights with regard to the potential cap on allowable expenses for losses occurring between June 11, 2019, and July 1, 2020, given the fact that the MAIPF/MACP has now agreed to accept those claims for lifetime, unlimited benefits, pursuant to DIFS Order No. 19-049-M.

Finally, with regard to any currently pending litigation between an injured claimant, a policy insurer and the MAIPF/MACP or its servicing insurer, counsel for the MAIPF/MACP or its servicing insurer have been instructed to "stipulate to the entry of orders accepting priority for payment of claims in litigation," but only if they involve a priority dispute, and for which the amended versions of MCL 500.3114(4) and MCL 500.3115(1) clearly indicate that the MAIPF/MACP would be first in priority for payment of these benefits. However, this stipulation does not apply if there are issues regarding the person's eligibility for no-fault benefits, or other priority issues.

> Given the amendment to MCL 500.3114(4) and the agreement reached between DIFS and the MAIPF/MACP, an occupant of an uninsured motor vehicle used in the business of transporting passengers now receives his or her benefits from the MAIPF/MACP, pursuant to the amendment to MCL 500.3114(4), if they have no insurance of their own.

Part 4. – What this Agreement Does Not Apply to.

By its terms, the agreement between DIFS and the MAIPF/MACP does not apply to claims arising under MCL 500.3114(2), regarding vehicles being operated in the business of transporting passengers.0 For example, if a policy insurer insures, say, a non-emergency medical transportation vehicle and one of the passengers in that vehicle was injured in a motor vehicle accident, the policy insurer would continue to occupy the highest order of priority pursuant to MCL 500.3114(2), as none of the enumerated exceptions to this higher priority provision would apply to non-emergency medical transportation vehicles.

MCL 500.3114(2) has an interesting history. When the NoFault Act was originally drafted in 1972, the commercial insurer always occupied the highest order of priority for payment of nofault benefits, regardless of whether or not the injured Claimant had a policy of nofault insurance of his or her own, whether individually or through a spouse or domiciled relative. Over the years, various special interests were successful in lobbying the Legislature to exempt passengers in certain motor vehicles from recovering benefits from the commercial insurer, under this "super priority" provision, if they had insurance of their own. As of the date that the reform amendments became law, passengers in the following types of vehicles had to look to their own insurer first for payment of benefits:

- Passengers in school buses providing transportation not prohibited by law;
- Buses operated by a common carrier passenger certified by the Department of Transportation, which would include charter buses and the like;
- A bus operating under a government sponsor transportation program, such as the Detroit Department of Transportation, SMART, Flint's Mass Transit Authority (MTA) and the like;
- A bus operated by or providing service to a nonprofit organization;
- Taxicabs;
- Buses operated by a canoe, watercraft, bicycle, or horse livery service; or
- A transportation network company vehicle, such as UBER, LYFT and the like.

For passengers in these specifically enumerated vehicles, they will turn first to their own household insurer. If there is no insurance in the household, they will then obtain benefits from the insurer of the specific vehicle they are occupying at the time of the accident.

So what happens if the specific commercial motor vehicle itself, occupied by the injured Claimant, was not insured, but the owner of that vehicle owned other commercial motor vehicles that were insured? How are they affected by the No-Fault reform amendments? Don't think that happens? Think again! In *Titan Ins Co v American Country Ins Co*, 312 Mich App 291, 876 NW2d 853 (2015), two occupants of two different commercial vehicles were injured in two unrelated motor vehicle accidents – one occurring in Detroit and the other occurring in Kalamazoo. Although the specific vehicles occupied by the injured claimants were uninsured, the owner of those vehicles had other commercial vehicles that were insured through Defendant American Country Insurance Company.

A plain reading of MCL 500.3114(2) ties the obligation to afford benefits to the insurer of the *specific vehicle* occupied by the injured claimant. By contrast, the former provisions of MCL 500.3114(4) provided that the insurer of the owner of the motor vehicle occupied by the injured Claimant would be responsible for paying benefits. In the Wayne County Circuit Court case, the court ruled that Titan Insurance Company, as assignee of the MAIPF/MACP, was responsible for payment of the benefits at issue. In the Kalamazoo case, the Kalamazoo County Circuit Court ruled just the opposite, and determined that American Country Insurance Company would be responsible for payment benefits, as the insurer of the owner of the otherwise uninsured motor vehicle involved in the accident, pursuant to the former provisions of MCL 500.3114(4).. The Court of Appeals resolved the conflict by adopting the rationale of the Kalamazoo County Circuit Court, and holding that, in cases where the specific commercial vehicle is uninsured, but the owner of that vehicle has other vehicles that are insured, the insurer of those vehicles occupies a higher order of priority for payment of the benefits at issue under the former provisions of MCL 500.3114(4). Given the amendment to MCL 500.3114(4) and the agreement reached between DIFS and the MAIPF/MACP, an occupant of an uninsured motor vehicle used in the business of transporting passengers now receives his or her benefits from the MAIPF/MACP, pursuant to the amendment to MCL 500.3114(4), if they have no insurance of their own.

To recap, the following rules seem to emerge from claims involving vehicles used in the business of transporting passengers, under MCL 500.3114(2):

- All *employees* of businesses operating vehicles utilized to transport passengers shall claim benefits from the insurer of the specific vehicle occupied;
- Passengers which are not subject to the enumerated exceptions, such as passengers in limousines, party buses, ambulances, airport shuttles, and the like shall claim their benefits first from the insurer of the commercial vehicle they are occupying, and if for some reason that specific vehicle is uninsured, these individuals will turn to their own household insurers; if they have no insurance of their own in their household, they will then turn to the MAIPF/MACP;
- Passengers in the motor vehicles referenced in the enumerated exceptions referenced above shall claim benefits first from their own household insurer; if they have no insurance in their household, they will then turn to the insurer of the specific commercial vehicle they are occupying for payment of their benefits;
- Occupants of uninsured commercial vehicles, regardless of whether they fall within the enumerated exceptions or not, shall claim benefits first from their own household insurer, and if they have no insurance of their own, they will turn to the MAIPF/MACP for payment of their benefits.

Essentially, the key holding in *Titan Ins Co v American Country Ins Co, supra,* has now been abrogated by virtue of the amendment to MCL 500.3114(4).

This agreement also does not apply to injuries to employees or their family members who are injured while occupying employer-furnished vehicles, under MCL 500.3114(3). Again, if the policy insurer insures an employer-furnished motor vehicle, and an employee, his or her spouse or a domiciled relative is injured while occupying same, the policy insurer still occupies the highest order of priority under MCL 500.03114(3), even though the employee may have auto insurance of their own.

Finally, this agreement does not apply to motorcyclists who are involved in an accident with a motor vehicle. The policy insurer would still occupy the highest order of priority for the payment of benefits to the injured motorcyclists pursuant to MCL 500.3114(5)(a), as the insurer of the owner of the motor vehicle involved in the accident. Again, this is true even though the motorcyclist may have had his own automobile no-fault policy in effect at the time of the accident.

Conclusion

It took over two years for the interested parties to finally arrive at an agreement over how to handle the claims of these "strangers to the insurance contract" – two years of profound uncertainty, with injured Claimants being shifted back and forth between the MAIPF/MACP and the policy insurer, over which insurer should be paying their nofault benefits. In other words, we finally has some finality, although as noted in my prior article, all this could have been avoided if, two years ago, the Representatives and Senators had treated the bill as a working draft, and not a final product, and had the Governor bothered to read the bill before she signed it. Now that this issue has finally been resolved, those of who play in the NoFault sandbox can now turn our attention to other matters, including the imposition of the fee schedule set forth in MCL 500.3157, including what I call the "45 percent haircut" that providers need to take on their charges for billing codes that are not subject to Medicare reimbursement. Although this "45 percent haircut" is undoubtedly draconian, and will force many providers out of business, actuarial studies have shown that imposition of the fee schedule was the only way to lower the PIP premiums by the amounts decreed by the Legislature. With the resolution of the *MAIPF v DIFS* litigation, we can now close the chapter of the nofault reform era involving "strangers to the insurance contract" and move on to other problems which have arisen due to the fact that, once again, no one in Lansing read the bill before they voted on it, and the Governor did not read the bill (or fully understand its implications) before she signed it. ■

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