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# ***CAUGHT IN LIMBO – WHO PAYS BENEFITS FOR "STRANGERS TO THE INSURANCE CONTRACT," FOR LOSSES OCCURRING AFTER JUNE 11, 2019?***

We are rapidly approaching the two-year anniversary of the passage of the 2019 No-Fault Reform Amendments, which made significant changes to Michigan's unique no-fault system. The author has been critical of many of these reform amendments, based primarily on the fact that the bills were drafted at a "midnight drafting session," with no ability for any interested parties to comment on the final product.

One of the most significant changes dealt with the priority provisions for what I term "strangers to the insurance contract;" that is, those individuals who are occupying someone else's automobile or non-occupants involved in accidents with motor vehicles, who have no insurance of their own – whether individually or through a spouse or domiciled relative. Under the former provision of MCL 500.3114(4), occupants of motor vehicles, who did not have insurance of their own, would turn to the insurer of the owner, registrant or operator of the motor vehicle occupied for payment of their benefits. See MCL 500.3114(a) and (b). For non-occupants of motor vehicles, the former provisions of MCL 500.3115(1) provided that these individuals would turn to the insurer of the owner, registrant or operator of the motor vehicles involved in the accident. See MCL 500.3115(1)(a) and (b). The 2019 reform amendments now provide that these individuals will receive their benefits through the Michigan Automobile Insurance Placement Facility (MAIPF), which operates the Michigan Assigned Claims Plan (MACP). These amendments took effect on June 11, 2019, but it was not at all clear when the changes to the priority scheme would take effect. If the statutory amendment took precedence over the old form policy language (discussed more fully below), these "strangers to the insurance contract" would turn to the MACP for payment of their benefits. If the old form policy language controlled over the amended statute, the insurer of the owner, registrant or operator of motor vehicle occupied by the injured Claimant, or involved in the accident with the injured non-occupant, would provide the benefits under the old policy forms.

The issue of who pays is certainly of consequence, particularly with regard to serious or catastrophic injuries. "Allowable expense" payments under the MACP are capped at $250,000.00, except in certain circumstances not relevant here. The issue of whether or not this $250,000.00 cap applies for losses occurring between June 11, 2019, and July 2, 2020, is currently being litigated in the Court of Appeals. See *Michigan Automobile Insurance Placement Facility v Dep't of Financial and Insurance Services,* Court of Appeals docket no. 355331. For losses occurring after July 2, 2020, there is no dispute but that the MACP "allowable expense" cap of $250,000.00 will apply. However, if the insurer of the owner, registrant or operator of the motor vehicle occupied by the injured Claimant, or involved in the accident with the injured non-occupant had in effect the old policy forms, the injured Claimant could conceivably be entitled to lifetime, unlimited benefits. This article will discuss the current conflict between the MAIPF/MACP and the Department of Insurance and Financial Services (DIFS) over which insurer would be responsible for paying first-party, no-fault insurance benefits to these "strangers to the insurance contract." Unfortunately, there are no clear answers, which leaves these "strangers to the insurance contract" in limbo regarding which insurer will ultimately pay their no-fault benefits and, with regard to catastrophic losses, the extent of those benefit payments.

## TYPICAL INSURANCE POLICY LANGUAGE REGARDING WHO IS AN "INSURED"

Most old form insurance policies include language which define which individuals qualify as an "insured" under the policy. These individuals can include "strangers to the insurance contract." For example, a typical old form insurance policy will contain the following insuring agreement:

"INSURING AGREEMENT

A. We will pay Personal Injury Protection benefits to or for an ***insured*** who sustains ***bodily injury***. The ***bodily injury*** must:

1. be caused by the accident; and

2. result from the ownership, maintenance, or use of an ***auto*** as an ***auto***.

B. These benefits are subject to the provisions of the Michigan Insurance Code. Subject to the limits shown in the Schedule or Declarations, Personal Injury Protection benefits consist of the following:

1. Medical expenses. Reasonable and necessary medical expenses incurred for an ***insured's***:

a. care;

b. recovery; or

c. rehabilitation."

The typical old form insurance policy language will also define the term "insured" to include "anyone . . . injured in an ***auto accident*** . . . while ***occupying your covered auto***" or, if a non-occupant, "involved in an accident with ***your covered auto***." (The bold print usually indicates terms that are specifically defined in the policy.) These policies will also contain an exclusion, which preclude coverage in those situations where the insured is either the named insured or a spouse or family member of a "named insured" on another no-fault policy. These exclusions were designed to effectuate the purposes behind the former provisions of MCL 500.3114(4) and MCL 500.3115(1), which was to make the injured person's household insurer (whether individually or through a spouse or domiciled relative) as the highest priority insurer. The question, of course, is whether this contractual language regarding these "strangers to the insurance contract" remains in effect, or whether the policy provisions were supplanted by the No-Fault Reform Amendments.

In order to illustrate the quandary these "strangers to the insurance contract" find themselves in, consider the following scenarios:

l. Anne is seriously injured in an accident while occupying her boyfriend Brian's automobile on February 1, 2020. Brian had a no-fault policy in effect with ZZZ Insurance Company, with an effective date of January 1, 2020, and a scheduled expiration date of January 1, 2021. Because the policy was not issued or renewed on or after July 2, 2020, this old form policy still provided for lifetime, unlimited benefits, which would theoretically include Anne, who is clearly a "stranger to the insurance contract."

2. Cathy is seriously injured in an automobile accident on August 1, 2020, after the PIP choice provisions took effect. She was occupying a motor vehicle operated by her boyfriend, David. David's automobile was insured under a one-year policy of insurance issued by ABC Insurance Company on May 1, 2020, with an expiration date of May 1, 2021. However, because the policy was issued prior to July 2, 2020, the policy issued by ABC Insurance Company still contains the old policy form language regarding who qualifies as an "insured" and still provides for payment of lifetime, unlimited benefits

Again, assume that both Anne and Cathy are catastrophically injured, and both Anne and Cathy have incurred medical expenses well in excess of $250,000.00 during their in-patient hospital stays. We will return to Anne and Cathy later in this article

## LEGAL ANALYSIS

As previously noted, the 2019 No-Fault Reform Amendments dramatically altered the no-fault priority scheme, particularly with regard to PIP claims filed by "strangers to the insurance contract;" that is, occupants and non-occupants of motor vehicles, involved in the accident, who do not have insurance of their own, whether individually or through a spouse or domiciled relative. Again, prior to June 11, 2019, those individuals would turn to the insurer of the owner or registrant of the motor vehicle occupied, or the insurer of the owner or registrant of the motor vehicle involved in the accident, pursuant to MCL 500.3114(4)(a) and MCL 500.3115(1), respectively. As amended, MCL 500.3114(4), dealing with occupants of a motor vehicle, now provides that such individuals "shall claim personal protection insurance benefits under the Assigned Claims Plan under sections 3171 to 3175." Unfortunately, the statutory amendments did not specify precisely when the change in priority was to take place. For the next few months after the No-Fault Reform Amendments took effect on June 11, 2019, there was a dispute as to whether or not the statutory amendment took precedence over the policy language, or whether the policy language would control over the statutory amendment.

After three months of uncertainty, the Insurance Director, Anita Fox, stepped into the fray and issued DIFS Order 19-048-M on September 20, 2019. This order essentially provided that until the insurance companies revised their policy forms to reflect the new priority provisions (and lowered premiums to reflect the lowered exposure), the old priority provisions reflected in the old policy forms would remain in effect. Furthermore, this order provided that insurance companies had to obtain approval from DIFS before they could implement any new policy forms, so that the Insurance Director could ensure that the appropriate premium savings were incorporated into the new filings. To put it another way, the *status quo* was to be maintained until the new policy forms could be issued, and for many carriers, they chose to implement the new policy forms in conjunction with the new PIP choice provisions, which would be applied to policies issued or renewed on or after July 2, 2020.

Prior to the issuance of DIFS Order 19-048-M, whenever a policy insurer attempted to refer a claim involving a "stranger to the insurance contract" to the MAIPF/MACP, the MAIPF/MACP would demand a certified copy of the underlying insurance policy in order to determine if the policy language would provide greater coverage for the injured person than what the new statutory amendment provided. Obviously, this meant a lot of work for the MAIPF and the servicing insurers. The MAIPF initially challenged the constitutionality of DIFS Order 19-048-M in the Michigan Court of Claims, which seemed unusual, given the fact that DIFS Order 19-048-M actually made it easier for the MACP and its servicing insurers and their adjusters to do their job, by shifting such claims back to the policy insurers! In other words, they no longer had to scrutinize each and every policy form involving these "strangers to the insurance contract." In reality, the reason why DIFS challenged Order 19-048-M was because it really focused its sight on DIFS Order 19-049-M, issued four days later on September 24, 2019, which required the MAIPF/MACP to continue providing lifetime, unlimited no-fault benefits to Claimants who were injured in auto accidents occurring on or before July 2, 2020.

DIFS Order 19-049 was issued in response to an article that appeared in the Detroit Free Press on Sunday, September 22, 2019. In that article, Mitch Album described the plight of a three-year-old girl, who was struck by an uninsured motor vehicle as she was running across the street. The parents did not have insurance of their own in their household. As a result, they filed a claim for no-fault benefits with the MAIPF/MACP. The problem was that this accident took place after the effective date of the No-Fault Reform Amendments — June 11, 2019 — which reduced the "allowable expense" coverage under the MACP to $250,000.00. The girl and her family incurred medical expenses from Children's Hospital totaling $140,000.00, which meant that there was only $110,000.00 available to the girl and her family to cover any remaining PIP claims. After that, they would have to obtain health coverage through

Medicaid. The Insurance Director, Anita Fox, remedied the situation on September 24, 2019 by issuing DIFS Order 19-049-M, which delayed the effective date of the $250,000.00 "allowable expense" cap to July 2, 2020.

The MAIPF subsequently instituted suit against the Insurance Director in the Michigan Court of Claims, and in the original Complaint, the MAIPF referenced both DIFS Order 19-048 (regarding changes to the priority scheme) and DIFS Order 19-049 (regarding the imposition of the $250,000.00 "allowable expense" cap). The MAIPF was broadly challenging the Insurance Director's legal ability to issue these orders as being outside the scope of her authority. She was, in essence, "making law" when that prerogative is reserved for the Legislative branch. The MAIPF subsequently abandoned its challenge to DIFS Order 19-048-M by way of a First Amended Complaint and focused its attention solely on the constitutionality of the DIFS Order 19-049-M pertaining to the $250,000.00 statutory cap on benefits. Court of Claims Judge Michael J. Kelly subsequently upheld DIFS Order 19-048-M, and his decision is currently under review by the Court of Appeals. See docket no. 355331. As matters now stand, the $250,000.00 "allowable expense" cap applies only to MACP claims arising on or after July 2, 2020

Most of us in the no-fault world believed that the issue was now resolved, except for USAA Casualty Insurance Company. USAA was sued by two "strangers to the insurance contract" who were involved in separate, unrelated motor vehicle accidents. Specifically, one John Thomas filed suit against USAA Casualty Insurance Company and the Michigan Automobile Insurance Placement Facility in the Wayne County Circuit Court. This lawsuit was given docket number 20-006497-NF and was assigned to the Honorable Leslie Kim Smith. The MAIPF filed a Motion for Summary Disposition, presumably based upon the provisions of DIFS Order 19-048-M and the language of the USAA Casualty Insurance Company contract. Pursuant to an Order dated September 28, 2020, Judge Smith denied the MAIPF's Motion for Summary Disposition and further indicated that:

> "It is further ordered that Defendant Michigan Automobile Insurance Placement Facility, is first in the order of priority pursuant to the Revised No-Fault Act."

Another lawsuit was filed by one Donnie Walker against USAA Casualty Insurance Company and the MAIPF's servicing insurer, AAA. Plaintiff Donnie Walker was an occupant of a motor vehicle whose owner was insured with USAA. The accident itself occurred in August 2019. USAA filed its Motion for Summary Disposition, arguing that pursuant to the No-Fault Reform Amendments, which took effect on June 11, 2019, "coverage can be obtained only by applying to the Michigan Automobile Insurance Placement Facility (MAIPF)." AAA responded to the Motion for Summary Disposition and relied upon DIFS Order 19-048-M. The Court refused to follow DIFS Order 19-048-M by arguing that the change in priority did not effect "the scope of coverage required to be provided under automobile policies." As stated by Judge Craig Strong, in his Opinion and Order dated October 21, 2020, granting USAA's Motion for Summary Disposition:

> "The remaining parties oppose the motion by focusing on the provisions of the order preventing 'implementation' of the amendments 'until automobile insurers have submitted revised forms and rates for the Director's review and approval.' According to these respondents, the accident at issue occurred before USAA submitted such forms, so that the amended provisions of the No-Fault Act do not apply to Plaintiff's claim. The problem with this argument is that the 'revised forms' provisions of the DIFS Order apply only to amendments that affect 'the scope of coverage required to be provided under automobile policies.' The amendments at issue in this motion, however, do not involve the scope of coverage, but the priority for payment of benefits when the Claimant is otherwise uninsured. Thus, even if USAA had not submitted its revised forms, this fact would not preclude USAA from invoking the new amendments."

Judge Strong concluded his opinion as follows:

> "In light of the foregoing, the Court agrees that the amendments to MCL 500.3114 regarding priority for otherwise uninsured vehicle occupants took effect on June 11, 2019 and applied to the August 2019 accident at issue in this case. Thus, Plaintiff can recover against USAA only if MAIPF assigns it to handle coverage for the August 2019 accident. And as it is undisputed that MAIPF has made no such assignment, USAA is therefore entitled to dismissal of the claims asserted against it in this case."

No appeals were filed from the rulings of Judge Smith or Judge Strong.

Based upon these two rulings, the MAIPF/MACP issued a Bulletin in late December 2020, which marked a dramatic shift in the MAIPF/MACP's position regarding which insurer was responsible for paying these claims. This Bulletin invited policy insurers who were handling claims of "strangers to the insurance contract," who were injured in motor vehicle accidents occurring after June 11, 2019, to refer those claims over to the MAIPF/MACP for further handling. As noted in this Bulletin:

> "As insurers are likely aware, based on court ruling indicating that the No-Fault Statute did not support the Department of Insurance and Financial Services Director's Order requiring the MAIPF to only accept claims for which filings had been approved, the MAIPF is notifying the Director that it will no longer be denying claims incurred post June 11, 2019, at 3:22 pm for which the owner and/or driver's insurance was in effect on the date of loss, but the insurer had not received approval for revised filings. Therefore, each insurer must now determine if it is in its best interest to send those qualifying claims to the MAIPF for handling."

The Bulletin then sets forth the procedures to be followed by the insurer which wishes to refer such claims to the MAIPF for further handling. In the FAQ Section, the MAIPF indicates that DIFS has not approved this change in position, but "they have been advised as to the position taken by the MAIPF."

The MAIPF/MACP Bulletin also makes it clear that for purposes of transferring matters involving these "strangers to the insurance contract" over to the MAIPF/MACP, the MAIPF/MACP will be waiving the One Year Notice requirement, set forth in MCL 500.3145(1), as well as the One Year Back Rule set forth in MCL 500.3145(2). The MAIPF/MACP has also agreed to utilize the Application for Benefits forms utilized by the policy insurer, even though that form is nowhere near as detailed as the MAIPF/MACP Application for Benefits. However, the Bulletin also makes it clear that some type of Application for Benefits must be filled out by the injured Claimant, as "this is a required document pursuant to MCL 500.3172 *et seq*."

The MAIPF/MACP Bulletin also indicates that the MAIPF/MACP would reimburse the policy insurer for all benefits paid by the policy insurer, although the details regarding the reimbursement procedures were still being worked out.

## FALLOUT FROM THE MAIPF/MACP BULLETIN

As noted by Judge Strong in his opinion, the DIFS Order 19-048 applies only to policy amendments that affect "the scope of coverage required to be provided under automobile policies." In most cases, the "scope of coverage" is not affected by which insurer is paying the benefits — the policy insurer or the MAIPF. If the damages sustained by the injured Claimant are less than $250,000.00, it makes no difference as to which insurer is actually paying those benefits.

However, the "scope of coverage required to be provided under automobile policies" may come into play if the claims exceed $250,000.00, as is the case with Anne and Cathy, in the two scenarios referenced above. With regard to the Court of Claims' lawsuit, challenging the validity of DIFS Order 19-049, regarding the $250,000.00 cap

on allowable expense coverage, the MAIPF has already lost in the Michigan Court of Claims. In that case, Court of Claims Judge Michael Kelly ruled that consistent with other provisions of the No-Fault Reform Amendments, DIFS was within its rights to order the MAIPF to delay implementation of the $250,000.00 cap to accidents occurring on or after July 2, 2020. That decision is now being reviewed in the Michigan Court of Appeals, but we do not anticipate a resolution of that issue, at the Court of Appeals level, until sometime in late 2021. In the FAQ section of the MAIPF Bulletin, the MAIPF indicates that if a claim in excess of $250,000.00 is being transferred to the MAIPF for further handling, any reimbursement to the policy insurer exceeding the $250,000.00 allowable expense limit "will be paid under a Reservation of Rights." Specifically, the MAIPF indicates the following:

> "However, the MAIPF will be accepting all eligible claims for which the insurer provides on the form, regardless if they are in litigation or if the allowable expenses will exceed $250,000.00. Please note, it is the MAIPF's position that claims with dates of loss post-June 11, 2019, 3:22 pm are subject to the $250,000.00 allowable expense limit, however, that position continues to be litigated and claims are not being subjected to the $250,000.00 allowable expense limit at this time. Payments exceeding the $250,000.00 allowable expense limit will be paid under Reservation of Rights."

If the MAIPF prevails in the Court of Claims on this issue, the author foresees a situation where if the MAIPF has issued a reimbursement payment to a policy insurer in excess of $250,000.00, the MAIPF will be asking the policy insurer to reimburse the MAIPF for any amounts above $250,000.00.

## DIFS RESPONSE

Two months after the MAIPF/MACP released its Bulletin, inviting policy insurers to refer their "strangers to the insurance contract" claims to the MAIPF/MACP, DIFS finally responded and notified the MAIPF/MACP that DIFS Order 19-048-M (which essentially preserved the former priority provisions in policies with the old form policy language) remains in effect except for the parties who were directly involved in the *John Thomas v USAA Casualty Ins Co* litigation (Wayne County Circuit Court docket no. 20-006497) and the *Donnie Walker v USAA Casualty Ins Co* litigation (Wayne County Circuit Court docket no. 19-008892-NF). The response from DIFS to the MAIPF threatens policy insurers with "administrative action" if they fail to comply with the terms of DIFS Order 19-048-M and attempt to refer these "strangers to the insurance contract" claims over to the MAIPF/MACP, as noted in the MAIPF/MACP Bulletin of late December 2020.

This threat of possible "administrative action" should not be taken lightly. One may ask who would possibly complain over transferring a file from the policy insurer to the MAIPF/MACP. Certainly not the policy insurer, as they are able to get a claim off of their books. Certainly not the MAIPF/MACP, since it has invited policy insurers to refer such claims to them, pursuant to its Bulletin issued in late December 2020. However, the injured claimant may very well complain if they feel that they are being bounced around like a Ping-Pong ball, from insurer to insurer, for payment of their benefits.

To see how this plays out, consider the plight of Anne, in Scenario #1. Again, she was injured during the "window period" between June 11, 2019, and July 2, 2020, during which time the MAIPF was ordered to pay lifetime, unlimited benefits to MACP Claimants pursuant to DIFS Order 19-049. If Judge Kelly's decision upholding this Order 19-049 is affirmed on appeal, the Anne may not care which insurer is paying her benefits – the policy insurer or the MAIPF/MACP. She is still receiving lifetime, unlimited no-fault benefits. If, however, Judge Kelly's decision is reversed by the Court of Appeals, and the MAIPF/MACP is permitted to impose the $250,000.00 "allowable expense" cap, Anne may very well end up filing a DIFS complaint if the MAIPF/MACP decides to pursue her or her medical providers for reimbursement of "allowable expense" payments made above $250,000.00. After all, if Anne had been covered by the policy insurer, she would have been entitled to lifetime, unlimited benefits.

This situation is even more pronounced in the case of Cathy, under Scenario #2. Because her accident occurred after July 2, 2020, there is no doubt but that her benefits through the MAIPF/MACP are capped at $250,000.00. However, if she is allowed to claim through the policy insurer, she is entitled to recover lifetime, unlimited benefits. A complaint by Cathy to DIFS over a referral of her claim by the policy insurer to the MAIPF/MACP would almost certainly provoke "administrative action" against the policy insurer, notwithstanding the MAIPF's invitation to refer such claims over to it, as her benefits are undoubtedly being reduced from lifetime, unlimited coverage to a $250,000.00 "allowable expenses" cap.

Maybe all this is academic. Maybe there are no "Annes" or "Cathys" in Michigan who find themselves in this quandary. The author suspects that, in fact, there may quite a few "Annes" or "Cathys" out there, and in the next few months, the issues raised in this article will be played out in the courts.

In conclusion, one might simply throw up their hands and say, "Let the courts sort it out." Frankly, it would have been better for everyone involved in the process – claimants, their providers, and insurers alike – if members of the Legislature and the Governor had taken the time to actually read the bill, understand what's in it, and consult with knowledgeable practitioners on both the Plaintiff and defense side over the impact these provisions. The version of SB 1 that was voted on should have been treated as a working draft- not a final product. If they had done so, the uncertainty that all parties find themselves in, regarding not only these issues but others as well, almost certainly could have been avoided.