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IN SUDDEN REVERSAL, THE MICHIGAN SUPREME COURT HOLDS THAT THE MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION MUST INDEMNIFY INSURERS FOR ALL “CATASTROPHIC” CLAIMS, WHETHER OR NOT CHARGES ARE REASONABLE

On July 21, 2009, the Michigan Supreme Court issued an opinion that could have a dramatic effect on the litigation of catastrophic injury claims under no-fault insurance plans in Michigan and on the insurance premiums that Michigan drivers must pay in order to fund the Michigan Catastrophic Claims Association (“MCCA”).

Michigan law does not limit personal injury protection (“PIP”) benefits under no-fault auto insurance policies. As a result, Michigan insurers have essentially unlimited liability to policyholders who sustain permanently debilitating injuries. To address this economic concern, the Michigan legislature created the MCAA, a private, nonprofit association that indemnifies insurers for payment of PIP benefits above a certain monetary threshold and that is ultimately funded by insurance premiums paid by Michigan consumers.

In last December’s *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass’n*, 482 Mich 414; 759 NW2d 154 (2008) (“*U.S. Fidelity I*”), the Michigan Supreme Court was asked to determine whether the MCCA was required to indemnify insurers in cases where those insurers agreed to pay PIP benefits that were unreasonable or excessive. *US Fidelity I* addressed this issue in the context of two consolidated cases. In the first, the insurer entered into a consent judgment with a policyholder who sustained devastating injuries in a car accident and required 24-hour nursing care. The insurer agreed to pay for nursing costs at an increasing hourly rate — one that eventually reached \$54.84 per hour. When presented with a request for indemnification from the insurer, the MCCA answered that it would provide indemnification only at the rate of \$22.05 per hour. In the second case, the insurer agreed to pay for nursing care at the rate of \$30 per hour. Once payments exceeded the statutory “catastrophic” level and the insurer sought indemnification from the MCCA, the MCCA stated that it would indemnify the insurer only at the rate of \$20 per hour.

The Court held that the MCCA’s indemnification obligations are ultimately limited by the policy in effect between the insurer and insured. If that policy limits the insurer’s liability to “reasonable” charges, the MCCA’s indemnification obligations under MCL 500.3104 are likewise limited to reasonable charges.

Now, less than seven months after *US Fidelity I*, the Michigan Supreme Court has reversed its position, overruling *US Fidelity I* and holding that the MCCA must indemnify *all* claims over the statutory threshold, whether or not those claims are reasonable. *United States Fidelity Ins & Guaranty Co v Michigan Catastrophic Claims Ass’n*, ___ Mich __; ___ NW2d __ (July 21, 2009) (“*US Fidelity II*”). Surprisingly, the majority’s opinion does not cite any new law or facts that came to light since *US Fidelity I* was issued. Rather, as the majority effectively acknowledges, the only reason for the Court’s about-face on this issue is the defeat of then-Chief Justice Taylor (a member of the *US Fidelity I* majority), the election of Justice Diane Hathaway, and Justice Hathaway’s decision to align herself with *US Fidelity I*’s dissenters.

US Fidelity II’s majority opinion is authored by Justice Elizabeth Weaver and is largely based on her dissenting opinion in *US Fidelity I*. The majority’s analysis focuses on the controlling provision of MCL 500.3104(2), which provides that the MCCA “shall provide and each member shall accept indemnification for 100% of the amount of ultimate loss sustained under personal protection insurance coverages in excess of the [statutory threshold for ‘catastrophic’ losses].” According to Justice Weaver, the statute’s reference to “coverages” must be contrasted with the term “benefits” in MCL 500.3107. Whereas “benefits” might have exceptions, the majority concludes that “coverages” must be construed more broadly. In Justice Weaver’s view, this broader definition of “coverages” must mean the amount *actually paid* by the insurer. Accordingly, the majority holds that “the MCCA must reimburse the insurers for 100 percent of the ultimate loss, which reflects the amount to which the insurer and the insured agreed”

In dissent, Justice Robert Young (joined by Justice Maura Corrigan and joined in part by Justice Stephen Markman) writes that he agrees with the majority’s statutory analysis – to a point. According to Justice Young, although “coverages” may be defined more broadly than “benefits,” it must also be defined by the underlying insurance policy. In other words, if “coverages” is defined as the “protection afforded by an insurance policy,” as the majority asserts, then the policy itself must control. The dissenting justices conclude, therefore, that where a policy limits policyholders to “reasonable” PIP benefits, the MCCA’s obligation to indemnify insurers is likewise limited to reasonable costs.

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US Fidelity II could have a substantial and immediate impact on Michigan citizens. As observed by the dissent, *US Fidelity II* minimizes insurers' incentives to limit coverage to *reasonable* costs when providing PIP benefits to policyholders. After all, because liability for unreasonable costs can be passed on with impunity to the MCCA, insurers can minimize their own litigation costs by agreeing to policyholders' demands for unreasonable and excess costs. Because the MCCA is ultimately funded by policyholders (i.e., by all Michigan citizens required to carry no-fault insurance policies), the dissent asserts that the expansion of the MCCA's liability will result in increased insurance costs for policyholders. The majority opinion dismisses the dissent's argument as "speculative," and contends that the MCCA's statutory right to adopt procedures for the review of proposed settlements and agreements will be sufficient to counter insurers' ability to pass excessive costs along to the MCCA under *US Fidelity II*.

Aside from its clear import for Michigan insurance law and its potential impact on the wallets of Michigan no-fault policyholders, *US Fidelity II* is also significant for what it suggests about the state of law in Michigan. By overruling *US Fidelity I* less than seven months after it was issued — and doing so without citing any new facts or legal arguments — the new "philosophical majority" of Chief Justice Kelly, Justice Weaver, Justice Cavanagh, and Justice Hathaway has cast a significant shadow over precedent established by the previous "philosophical majority." It may be open season in Michigan on what appeared to be settled questions of law. This uncertainty may not only increase the cost of litigation but may also lead to an overall increase in litigation, as potential litigants see opportunities to win judgments that were once prohibited by Michigan law — at least until the last election cycle.

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