

# Appellate Court Panel Denies PIP Benefits to Claimant in Unlawful 'Use' of Car Case

March 26, 2009

*Rapid Report*

A panel of the Michigan Court of Appeals "defines" that a driver can receive personal protection (PIP) benefits only if he/she is lawfully entitled to both "take" and "use" the vehicle.

In a case of first impression, the panel published its decision in *Amerisure Ins. Co. v. Plumb*, -- NW2d --, 2009 WL 330241 (Mich. App. Feb. 10, 2009), ruling that the defendant, who unlawfully took a vehicle, even with the reasonable belief that she had a legal right to "take" the vehicle, would not be entitled to receive PIP benefits because she knew that she was not legally entitled to "use" the vehicle.

The case turned on the appellate court's interpretation of MCL 500.3113(a), which provides, in part:

*A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:*

*(a) The person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle.*

The claimant driver, whose operator's license was suspended at the time, had spent the evening in question drinking at a bar in the company of several men. The vehicle in question, a Jeep, was owned for purposes of the No-Fault Act by another bar patron, with whom the claimant driver had no interaction. The owner had left his keys in the Jeep and frequently did not lock its doors. At the end of the evening, an unidentified man, who was not the owner of the vehicle, handed the Jeep's keys to the driver, and asked her to drive because he was on probation. She did as she was requested.

Later that evening she was found, severely burned, lying in a field 250 yards away from the Jeep. The vehicle had been destroyed by fire. Police determined that the Jeep had been driven into an open field where it struck an electrical transformer. The driver's blood alcohol content at the time of the accident was determined to be between .208 and .223 grams per hundred milliliters, nearly three times the legal limit of .08. Neither the owner of the Jeep nor the driver maintained no-fault insurance.

The driver filed a claim for personal protection insurance benefits (PIP) with the Michigan Assigned Claims Facility (MACF). The MACF assigned the claim to an insurer, who filed suit seeking a declaratory judgment that the driver was not entitled to PIP benefits because the driver unlawfully took

the Jeep and did not have a reasonable belief that she was entitled to "take and use" the vehicle. The trial court held that the driver was not entitled to PIP benefits. The driver appealed.

The majority of the appellate court affirmed, holding that there was no genuine issue of material fact because the claimant driver could not have had a reasonable belief that she was entitled to "use" the Jeep under the meaning of MCL 500.3113(a) because she was not eligible to legally operate the vehicle.

The court first noted that the meaning of the statutory phrase "take and use" had not been construed in Michigan jurisprudence. The court relied upon the dictionary definitions of each word of the phrase. The majority noted that "take" is defined as "to get into one's hands or possession by voluntary action" while "use" is defined as "to employ for some purpose; put into service." The majority stated that "take" and "use" were not synonymous or interchangeable and that "and" is a conjunction that means "with; as well as; in addition to." Therefore, the inclusion of "and" means that both conditions must be met, and that where, as in this case, a vehicle is taken unlawfully, the driver must show a reasonable belief of entitlement to both "take" the vehicle, as well as "use" the vehicle.

The court's majority then applied this statutory construction to the facts of the case. The driver testified that she received the keys to the car from a fellow bar patron. The majority noted that it would have been reasonable for her to assume that this individual was the vehicle's owner, therefore, had a reasonable belief that she was entitled to "take" the car. However, the majority held that because the driver was legally intoxicated and knew she could not legally drive at the time due to her suspended license, the driver did not have a reasonable belief that she was entitled to "use" the car. Therefore, the majority held that the driver was ineligible under MCL 500.3113 to receive PIP benefits.

The dissent concurred that the vehicle had been unlawfully taken and that there was no issue of material fact that the driver had a reasonable belief that she could take the vehicle. However, the dissent disagreed with the majority's holding that MCL 500.3113(a) requires that the use of a motor vehicle must be legal in order for PIP benefits to be available to an individual. The dissent stated that such a requirement is not found in the statute.

Therefore, the dissent would hold that a question of fact existed as to whether the driver had a reasonable belief that she was entitled to "use" the vehicle. The dissent noted that the fact that the driver may have stolen the vehicle, was intoxicated, and was an unlicensed driver were all factors that a jury could consider when determining the reasonableness of the driver's belief that she was entitled to take and use the vehicle.

As we have seen from many recent appellate opinions in Michigan, this is a very literal interpretation of this section of the Michigan No Fault Act. It is likely that the Supreme Court will be asked to consider and accept an appeal of this very interesting decision.