

# MCCA not statutorily entitled to determine 'reasonableness' of settlements

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*The Dispatch*

The Michigan Supreme Court recently held that the Michigan Catastrophic Claims Association (MCCA) is not statutorily entitled to determine the reasonableness of settlements for payment of Personal Protection Injury (PIP) benefits entered into by its member insurers and their insureds. In *United States Fidelity Insurance & Guaranty Company v. Michigan Catastrophic Claims Association*, --- N.W.2d ---, 2009 WL 2184822, the court held that the MCCA is required by statute to reimburse all of the PIP benefits paid by the insurer that exceed the statutory threshold.

The appeal arose from two separate cases in which insurers, USF&G and Hartford Insurance Company of the Midwest, sought declaratory judgments that the MCCA must indemnify the insurer for the total amount paid in excess of the No Fault Act's statutory threshold amount.

In USF&G, Plunkett Cooney represented the insurer, which in a 1990 consent judgment, agreed to pay the father of its insured, who suffered catastrophic injuries in a 1981 car accident, necessitating 24-hour-a-day nursing care at \$17.50 per hour. This hourly rate was subject to an annual increase of 8.5 percent compounded annually. The MCCA originally reimbursed USF&G, but as the hourly rate rose over time, the MCCA refused reimbursement on the grounds that the payments were no longer reasonable. By 2003, the year in which USF&G sought to compel payment from the MCCA, the hourly rate had been adjusted to \$54.84. The trial court granted USF&G's motion for summary disposition, holding that the MCCA was required to reimburse the insurer for the "ultimate loss," regardless of the reasonableness of the amount. The MCCA appealed.

In *Hartford Ins. Co.*, the insurer had agreed to pay \$30 per hour for 24-hour-a-day care for its insured. The MCCA refused to reimburse Hartford for any amount above \$20 per hour, which it deemed reasonable. The trial court held that reasonableness was an element in determining the amount that the MCCA must reimburse. Hartford appealed.

The Michigan Court of Appeals consolidated the cases and held that the pertinent section of the Michigan No-Fault Act, MCL 500.3104, "does not incorporate a 'reasonableness' requirement and requires the MCCA to reimburse insurers for the *actual* amount of PIP benefits paid in excess of the statutory threshold." The MCCA sought leave to appeal from the Michigan Supreme Court. The Supreme Court reversed the appellate court's decision, holding that when a member insurer's policy provides coverage for only reasonable charges, the MCCA is entitled to refuse to indemnify

unreasonable charges.

USF&G and Hartford both filed motions with the Michigan Supreme Court for rehearing. The court granted the motions, and the case was resubmitted for rehearing, without further oral argument or briefing.

Upon rehearing, in a 4-to-3 decision, the Michigan Supreme Court upheld the lower appellate court's decision.

The Supreme Court first turned its analysis to the language of §§ 3104(2) and 3107 of the Michigan No-Fault Act. The court noted that §3104(2) requires that the MCCA “shall provide and each member shall accept indemnification for 100 percent of the amount of ultimate loss sustained under personal protection insurance coverages in excess of the following amounts in each loss occurrence...” whereas §3107(1)(a) defines, “defines “personal protection insurance benefits ” as “[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery or rehabilitation.” The court noted this section requires that all PIP benefits between the insurer and the insured must be reasonable.

The court rejected the MCCA's argument that the definition of benefits found in §3107 should be read into §3104(2) where it refers to coverages, holding that the definition of PIP benefits found in §3701 (1)(a), which includes the reasonableness standard, is not equivalent to the definition of PIP coverages in §3104(2). The court stated that the meaning of “coverages” in MCL 500.3107 becomes clearer after considering “its placement and purpose in the statutory scheme.” The court reasoned that “coverages” is positioned just after “ultimate loss” in the statute and that “ultimate loss” is statutorily defined as the “actual loss amounts that a member is *obligated* to pay and that are paid or payable by the member ...” MCL 500.3104(25)(c).

The court stated that “the duty to perform the contract relates back to the ultimate loss insofar as the ultimate loss includes payment of the obligation, (i.e., the total contracted amount).” Therefore, the court held that the MCCA must reimburse the insurers for 100 percent of the ultimate loss, which reflects the amount agreed to by the insurer and insured and subject to PIP coverage. The court added that the ultimate loss specifically refers to coverage, which is broader than benefits and is not statutorily limited to reasonable payments.

The court went on to note that the MCCA is an indemnifier, not a no-fault insurer of its member companies. As such, the MCCA's relationship with its members is not subject to the reasonableness requirements of MCL 500.3107, and it is the insurer, not the MCCA, which has the statutory right to deny benefits as unreasonable. The court noted that the MCCA has statutorily granted powers to ensure against unreasonable settlements of claims by its members by adjusting the practices and procedures of its members before settlement, but these powers do not include the power to adjust a settlement once it has been reached.

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The dissent criticized the majority for agreeing to rehear the case without additional briefing or argument, arguing that nothing but the composition of the court had changed since the previous decision of the court in December 2008, in which it held that the MCCA had the right to refuse to indemnify its members for unreasonable charges. The dissent maintained that a rehearing should have been denied because neither party had raised an issue of fact or law that was not previously considered but which could affect the outcome of the case.

The dissent went on to argue that the majority was mistaken in its conclusion that the settlement agreement and consent judgment were "coverage." The dissent maintained that "coverage," even as defined by the majority, referred only to the underlying policy, not to the separate contracts between the parties that arose from the settlements, and the policy is the only relevant contract in relation to PIP benefits. The dissent noted that in its previous decision, the court did not incorporate the reasonableness standard of §3107 into §3104(2), but rather interpreted "coverages" to mean the protection afforded by the insurance policy and that the member insurer's policy will ultimately MCCA's review because it is the member insurer's policy which establishes the PIP coverages.

The decision will be helpful to insurers who have catastrophic no-fault benefit claims. The MCCA has other options provided by the Michigan No-Fault Act, to work with it's member insurers, to help them avoid possible payments that may not be reasonable.

If you have any questions about this decision, you can contact the Plunkett Cooney attorneys who worked on this matter, Gregory Gromek and Jeffrey C. Gerish.