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Naming Improper Entity in Suit for Michigan Property Protection Benefits Does Not Toll Statute of Limitations

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Mitchell McIntyre
(313) 983-4933
mmcintyre@plunkettcooney.com

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Recently, the Michigan Court of Appeals held that the Statute Of Limitations (SOL), pursuant to MCL 500.3142(2) in an action for property protection benefits, will not be tolled as a result of naming the improper entity.

In *DTE Elec Co v Theut Product, Inc,* 2015 WL 5707165 (Mich App Sept 29, 2015), a cement truck owned by Theut caught electrical lines and pulled down five utility poles on June 4, 2012, and DTE thereafter filed suit for recovery of Personal Property Protection benefits (PPI) benefits. However, the traffic crash report for the incident indicated that the insurance provider for the cement truck was "EMC Ins."

The plaintiff's attorney conducted a search for EMC Insurance Company but was unable to find an insurer by that name and thereafter filed suit against Theut, the owner of the cement truck, and "John Doe Insurance Company" on April 3, 2013. The practice of naming a "John Doe Insurance Company" has often been used as an attempt to preserve the statute in PPI and Personal Injury Protection (PIP) cases where the proper insurer remains unknown.

Theut's personal attorney forwarded the complaint to EMC Insurance Company on May 6, 2013 and then filed an answer on behalf of Theut on May 29, 2013. Thereafter, the plaintiff filed a motion to amend the complaint to list Socius Insurance Agency Services, as the insurance provider. Upon receipt of the motion, counsel for Theut advised the plaintiff's counsel that the truck was insured by EMC Insurance, which was reflected in Theut's response to the plaintiff's motion.

The plaintiff then filed a reply (after June 4, 2013) asking that John Doe Insurance Company be replaced by EMC Insurance Company (whose proper name was EMCASCO). The trial court denied the request, finding that the plaintiff did not make the proper inquiry within the statutory time period and further granted summary disposition to Theut because it was not a no-fault insurer and was not

uninsured. The plaintiff appealed.

The appellate court affirmed, holding that allowing an amendment of the complaint would have been futile pursuant to MCL 500.3145(2) which states an "action for recovery of property protection insurance benefits shall not be commenced later than 1 year after the accident."

The plaintiff tried to argue that the limitations period was tolled under MCL 600.5856, which states, in part, that the SOL will be tolled if a summons is either served within the time set forth by the Michigan Supreme Court or jurisdiction over the defendant is "otherwise acquired."

The appellate court rejected the plaintiff's argument, holding that the "filing of a 'John Doe' complaint does not toll the statute of limitation with respect to parties not yet specifically named." *Rheaume v Vandenberg*, 232 Mich App 417 (1998). Moreover, the court found that there was no jurisdiction over EMCASCO because it did not appear in the case before the statute ran.

Finally, the court noted that pursuant to *Secura Ins Co v Auto-Owners Ins Co*, 461 Mich 382 (2000), a property protection insurance claim under MCL 500.3142(2) is not subject to judicial tolling. Accordingly, the plaintiff's claim against EMCASCO was precluded.

Importantly, carriers should be aware that while the SOL will be strictly enforced with respect to PPI claims, judicial tolling arguments will still be permitted with respect to PIP claims. However, it is clear that naming a "John Doe Insurance Company," in and of itself, will not toll the SOL with respect to either type of claim because it is solely the plaintiff's duty to ascertain the appropriate insurer within the applicable statutory period.

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