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A ROAD MAP FOR MOTOR VEHICLE INSURERS AND OWNERS

Later Payment Has Frankenstein Effect

By: Drew W. Broaddus **March 22, 2016**

SECREST WARDLE NOTES

Jesperson reflects the Court's view that the meaning of a statute must be derived from its plain language whenever possible, without reference external sources such as canons of statutory construction, legislative history, or policy considerations.

The Supreme Court's holding in *Jesperson* means that adjusters must be very careful in paying any expense submitted more than one year after the accident. Adjusters must first confirm that written notice had been provided within that year; if not, the payment could be reviving an otherwise stale claim.

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In *Jesperson v Auto Club,* ___ Mich ___ (2016) (Docket No. 150332), the Supreme Court clarified an important aspect of the one year limitations period for filing PIP suits, set forth at MCL 500.3145(1). In *Jesperson,* the no-fault carrier (represented by Secrest Wardle), persuaded the trial court – and later, a 2-1 majority of the Court of Appeals – that the Plaintiff's PIP claim was time barred, where the Plaintiff did not provide the carrier with written notice within one year of the accident, the Plaintiff did not sue the carrier within one year of the accident, and the carrier did not make any payments within one year of the accident. Plaintiff argued that the suit was timely because the carrier made a payment approximately 14 months after the accident (in response to a written notice Plaintiff sent to the carrier about 13 months after the accident), and the Plaintiff filed suit against the carrier within a year of that payment. The Court of Appeals majority found that nothing in the plain language of § 3145(1) allowed a claimant to file suit within one year after a payment, where the payment had been made more than a year after the accident and the other requirements of § 3145(1) had not been satisfied. But the Supreme Court granted the Plaintiff's Application for Leave to Appeal, 497 Mich 987 (2015), and has now reversed.

MCL 500.3145(1) states that "[a]n action for recovery of personal protection insurance benefits payable under this chapter … may not be commenced … unless written notice of injury … has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury." This subpart actually "contains two limitations on the time for filing suit and one limitation on the period for which benefits may be recovered." *Joseph v Auto Club,* 491 Mich 200, 203 (2012). First, "[a]n action for [PIP] benefits must be commenced not later than one year after the date of accident, unless the insured gives written notice of injury or the insurer previously paid [PIP] benefits for the injury." *Id.* at 207. Second, "[i]f notice has been given or payment has been made, the action may be commenced at any time within

one year after the most recent loss was incurred." *Id.* Third, "[r]ecovery is limited to losses incurred during the one year preceding commencement of the action." *Id.*

Put another way, § 3145(1) does two things. First, it provides that an action to collect PIP benefits must be commenced within one year after the date of the accident. The period is tolled if a proper notice is given to the insurer within one year. Second, it provides that a claimant may not recover benefits for losses incurred more than one year before the date the action was commenced. This appeal dealt with the former, i.e. whether the suit was timely commenced. The Court of Appeals majority answered this question in the negative, but the Supreme Court unanimously reversed, holding that the suit was timely even though the Plaintiff did not provide Auto Club with written notice of the claim within one year of the accident, or file suit within one year of the accident. The Court explained:

> The critical issue here is the meaning of the word "previously" in the payment exception. The plaintiff contends that "previously" means prior to the commencement of the action; the defendant argues that "previously" means before the expiration of one year after the date of the accident….
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> We conclude that the statute's plain language supports the plaintiff's reading of the statute. First, the Legislature used the word "or" to separate the notice exception and the payment exception. "Or" is . . . a disjunctive [term], used to indicate a disunion, a separation, an alternative. Thus, the word "or" here indicates that the notice and payment exceptions should be treated as independent alternatives.
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> Second, the Legislature chose to use the phrase "within 1 year after the accident" in the notice exception and the word "previously" in the payment exception. … "Previous" means "coming or occurring before something else; prior[.]" We conclude that "previously" must mean something different from "within 1 year after the accident."
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> Third, the Legislature's word choice in the second sentence of § 3145(1) supports the plaintiff's reading of the payment exception that the exception is satisfied by any prior payment. The second sentence provides: "If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred."
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> …"The" and "a" have different meanings. "The" is defined as "definite article … with a specifying or particularizing effect, as opposed to the indefinite or generalizing force of the indefinite article a or an…." While the second sentence of § 3145(1) refers to "the notice," it also refers to "a payment," suggesting that while the Legislature was referring to a specific notice – the notice given to the insurer within 1 year after the accident – it was not referring to a specific payment made at any particular time but rather to any payment previously made….
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> The defendant argues that the plaintiff's reading of the statute renders the word "previously" surplusage. While this argument is not without merit, reading the word "previously" to mean "prior to the commencement of the action" does not leave it completely "surplusage," or devoid of meaning. At the same time, the defendant's proposed reading of the statute, i.e., interpreting "previously" to mean "within 1 year after the accident," would considerably undermine the significance of the payment exception. The notice exception applies if the required notice has been provided to the insurer within one year after the accident. MCL 500.3145(1). For an insurer to make a benefits payment for an injury from an accident, the insurer must have received notice that the accident occurred. That is, if an insurer makes a payment within one year after

> an accident, the insurer would in all likelihood have already received the required notice of the accident. In other words, if the payment exception only operates if payment has been made within one year after an accident, this exception operates only if the notice exception would also in all likelihood apply…. *Jesperson,* ___ Mich at ___; slip op at 5-7 (citations omitted).

The Court had granted leave on two other issues, both relating to whether Auto Club had properly pled this defense, but they were rendered moot by the Court's interpretation of the statute. *Id.* at ___; slip op at 1 n 1.

But if the stale claim is revived through such a payment, how long does the claimant then have to file suit? This remains an open question; the Court simply found that a suit is timely if the insurer "made a payment for no-fault benefits for the injury at any time before the action is commenced." *Jesperson,* ___ Mich at ___; slip op at 9. But any such suit would still be limited by § 3145(1)'s "one-year back" limitation on damages. *Id.* at ___; slip op at 8. This is, in part, why the Court rejected the Court of Appeals' finding that Plaintiff's interpretation of the statute produced an "absurd result." The Court of Appeals majority found Plaintiff's interpretation would "essentially eliminate the limitations period of MCL 500.3145(1) in cases in which an insurer has ever paid anything on a claim." *Jesperson,* ___ Mich at ___; slip op at 8. But the Supreme Court looked to other limitations contained in § 3145(1) and concluded that the result was not absurd.

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