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Loser Pays: When a Prevailing No-Fault Insurer Can Recover Attorney Fees

By Drew Broaddus

Both sides of the No-Fault bar have long recognized that the potential of an attorney fee award represents a critical part of evaluating a PIP claim. The discussion usually centers on how much of an attorney fee award *plaintiff* may be able to recover in a particular case. Under MCL 500.3148(1), a prevailing No-Fault claimant's entitlement to attorney fees is nearly automatic: "[a]n attorney *is entitled* to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee *shall* be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." (Emphasis added). Indeed, the Court of Appeals has noted that § 3148(1) "has a mandatory aspect to it." *Thomas v State Farm,* _ Mich App _ (2012).

What is often overlooked, however, is that the No-Fault Act also provides for prevailing *insurers* to recover attorney fees in certain cases. MCL 500.3148(2) provides that "[a]n insurer *may be allowed* by a court an award of a reasonable sum against a claimant as an attorney's fee for the insurer's attorney in defense against a claim that was in some respect fraudulent or so excessive as to have no reasonable foundation." (Emphasis added). A trial court's decision to award fees under this provision is discretionary. *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 627 (1996). There are very few reported decisions awarding relief to insurers under this provision. In *Thomas*, the Court of Appeals recently took a close look at when fees may be awarded under § 3148(2).

Thomas involved a claim for attendant care services allegedly provided to John Gentris by his mother, Ramona Thomas, his stepfather, Kelvin Thomas, and other family members. John, as a pedestrian, was struck by a motor vehicle and severely injured in 1997 at the age of 16. John's mother filed suit in April 2004, alleging underpayment and, at times, nonpayment of attendant

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Thomas underscores that a prevailing insurer may recover attorney fees under § 3148(2) – even where some aspects of the plaintiff's PIP claims are meritorious – if the claim has been exaggerated "with no reasonable foundation" or if part of the claim was fraudulent.

It is important to note that Thomas dealt with an attendant care claim. An attendant care provider need not have any specialized skill or training. Care is often provided (or claimed to be provided) by friends or family members. See Burris v Allstate Ins Co, 480 Mich 1081 (2008). Thus, the very nature of attendant care all but invites fraudulent or excessive claims.

MCL 500.3148(2) is the not the sole basis for a prevailing No-Fault insurer to recover attorney fees. MCR 2.114(E), MCR 2.625(A)(2), and MCL 600.2591 provide for the recovery of attorney fees if a claim is frivolous. These rules apply to civil litigation generally, including PIP claims. Bourne v Farmers Ins Exch, 449 Mich 193, 202 (1995). Therefore, if there is evidence that a claim is fraudulent or has been exaggerated (as there was in Thomas), insurers should consider seeking fees under these provisions as well.

care benefits spanning the timeframe of April 2004 until trial in 2010. State Farm paid attendant care benefits from April 2004 to July 22, 2008, based on a rate of approximately $9 per hour for 24 hours a day, 7 days a week. No attendant care benefits were paid from July 23, 2008, to November 30, 2008, as State Farm accused the Thomases of misrepresentations in paperwork submitted to State Farm in regard to services supposedly provided. Benefits were resumed per court order on December 1, 2008, and paid through July 31, 2009, at the same hourly rate of about $9, but for 16 and not 24 hours a day, 7 days a week. Thereafter, no attendant care benefits were paid by State Farm.

When the case finally went to trial in 2010, Plaintiff sought an award of nearly $800,000. However, the jury entered a no-cause verdict. Specifically, the first question on the verdict form was: "Were allowable expenses incurred by or on behalf of the Plaintiff arising out of the accidental bodily injury?" The jury answered: "no." State Farm then sought $101,415 in attorney fees under § 3148(2). In support of its request, State Farm pointed to evidence, adduced at trial, that the Plaintiff's daily attendant care reports were inaccurate, and that John was frequently left alone (even at times when the Plaintiff was supposedly with John), "resulting in John leaving the house by himself and smoking marijuana."

The trial court denied State Farm's request for attorney fees, finding that because John was undeniably injured and in need of *some* attendant care services. Therefore, the overall claim was not frivolous even though the jury determined that Plaintiff was not entitled to the additional attendant care time and rates sought at trial. State Farm appealed the denial of its attorney fee request.

The Court of Appeals vacated the order denying State Farm's attorney fees, and remanded for further proceedings. The Court found that the trial court's ruling "was based on [the] problematic and faulty legal premise … that simply because there was no dispute that John had injuries and was in need of attendant care services, there could be no finding that Plaintiff's claim for benefits was in some respect fraudulent or so excessive as to have no reasonable foundation." The Court noted that "Plaintiff's claim for benefits could still be deemed somewhat fraudulent or so excessive as to have no reasonable foundation," even though there was no dispute that some attendant care was reasonably necessary. "[A]n award of attorney fees under [§ 3148(2)] can be entered by a court based on either fraud standing alone or solely on excessiveness with no reasonable foundation, or, of course, on both factors."

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