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Supreme Court "Un-Grants" Leave; Court of Appeals Decision Finding No-Fault Policy Unambiguous Stands

By Sidney A. Klingler

In a major victory for DaimlerChrysler Insurance Company and for auto insurers that issue policies to corporate or other entities, the Supreme Court after full briefing and oral argument, has vacated its order granting leave to appeal a Court of Appeals finding of unambiguous contract language, and declined to further consider the case. The order "un-granting" leave was issued December 1, 2010 in the case of *Abay v DaimlerChrysler Insurance Company.* A majority consisting of Justices Cavanagh, Corrigan, Markman, and Young denied leave, with Chief Justice Kelly and Justices Hathaway and Davis dissenting.

SECREST WARDLE NOTES:

The Court of Appeals decision stands in this case, as the Supreme Court has now denied leave. The decision is significant for any auto insurer that issues commercial policies in which the named insured is not an individual. In such cases, persons such as corporate officers or their family members will not be considered the "named insured" under the policy, although they may be entitled to coverage under other policy provisions, such as *permissive user*.

The case involved a commercial policy issued by Defendant DCIC, insuring all Chrysler vehicles, from lease cars, to promotional vehicles, to freightliners. In this declaratory action, the Plaintiff sought a determination that DCIC was liable for a tort judgment in excess of $3.5 million. The underlying tort judgment in favor of the Plaintiff was against Kelly Rose Brooks, a drunk driver who caused the accident that took the decedent's life.

Ms. Brooks was driving a non-owned, borrowed vehicle at the time of the accident. Plaintiff sought to impose liability under the *non-owned vehicle* endorsement of the DCIC no-fault policy that insured the lease vehicles of Ms. Brooks' father, a Chrysler retiree. The policy endorsement for non-owned vehicle coverage applied to any auto that "you" don't own while being used by "you" or a family member. Pursuant to the policy terms, "you" was defined to mean the named insured, which was DaimlerChrysler Corporation and its subsidiaries. Defendant thus sought summary disposition on the grounds that pursuant to the unambiguous policy language, the *non-owned vehicle* endorsement did not apply in favor of Ms. Brooks.

In the trial court, Plaintiff introduced two themes to divert attention from the straightforward legal issue at the heart of this case — the unambiguous policy language. The first was the claim that the policy in question was patently ambiguous because it was a fronted policy, (essentially a type of self insurance in which the deductible equals the limit of liability). The second was that the policy violated the No-Fault Act by naming only DaimlerChrysler as the "named insured," so that PIP priority pursuant to MCL 500.3114(1) would fall to any other no fault policy existing in a household in which an individual was the named insured.

Facing counter motions for summary disposition, the trial court adopted the Plaintiff's position and essentially rewrote the policy to find that the *non-owned vehicle* endorsement applied to the Chrysler retiree and his family members.

The Court of Appeals reversed, based on the straightforward conclusion that the statutory language was unambiguous. The Court relied on its previous decision in *Michigan Twp Participating Plan v Pavolich,* which held that an uninsured motorist provision applying to "you or any family member" did not apply to a township employee, where the policy defined "you" as the "named insured." The fact that portions of the policy referring to "family members" of a corporate entity were rendered meaningless did not create an ambiguity in a policy that clearly identified "you" as the named insured. Furthermore, the Court in *Pavolich* stated, and the panel in *Abay* echoed, policy surplusage does not equate to ambiguity.

In a lengthy dissent, Judge Shapiro contended that the policy violated the No-Fault Act by shifting PIP liability through the designation of a corporate entity as the sole "named insured." Plaintiff sought leave to appeal to the Supreme Court. Allstate Insurance Company and ACIA filed an amicus brief in support of the application, also contending that the policy caused an illegal shifting of PIP liability.

The Supreme Court granted leave, apparently giving some credence to the asserted no fault "PIP shifting" issue. The issues the Court directed the parties to brief were: "(1) whether the insurance policy issued by DaimlerChrysler Company is ambiguous, and (2) whether the insurance policy violates any provision of the no-fault act, MCL 500.3101 et seq."

Appellate counsel sought to convey to the Court: (1) that the case did not involve any PIP issue, but was one of third party liability, and moreover a liability (for non-owned vehicles) that is non-mandatory and therefore governed totally by contract, and (2) that there is nothing nefarious or sinister about fronting policies. With those diversions stripped away, the case presents a simple issue of unambiguous contract language. While the thought processes of the Court are not revealed in its order, the order "un-granting" leave may well reflect the Court's understanding that this case not only involved no PIP issue, but simply did not implicate the No-Fault Act in any manner.

The briefing and oral argument in the Michigan Supreme Court were handled by Secrest Wardle Appellate Group member Sidney A. Klingler with direction by John H. Cowley, Jr., Motor Vehicle Litigation Practice Group Chair.

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We welcome your questions and comments.

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