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Insolvency No Excuse for Stale Claims

By David R. Kinzer **June 10, 2024**

The Michigan Supreme Court delivered positive news for insurers today with its unanimous decision in Childers and MPCGA v Progressive, ___ Mich ___ ; ___ NW3d ___ (June 7, 2024) (Docket Nos. 164190 164953-4), a case which promises to substantially limit an insurer's potential liability in the event of a competitor's insolvency.

SECREST WARDLE NOTES

Summary: The Supreme Court held that the one-year-back rule of MCL 3145(1) applies to a PIP action against a lower-priority insurer commenced after a higher-priority insurer declared insolvency. The decision reverses a published Court of Appeals decision, which held that such claims could be brought up to six years after an insurer's insolvency, even when the insolvency was declared years after the date of loss.

The case was brought by the mother of Justin Childers, a minor who was severely injured in an August 2011 car accident. The Childers were insured by American Fellowship Mutual Insurance Company, who paid PIP benefits through June 12, 2013, when the company was declared insolvent. At that point, the Childers' claim became the responsibility of the Michigan Property & Casualty Guaranty Association (MPCGA), which is not an insurance company but an association of insurers, created by the Guaranty Act, MCL 500.7301 et seq. "[T]he role of the MPCGA is that of an insurer of last resort," which an insured of an insolvent insurer can look to for coverage "only if there is no other insurance company to turn to for coverage." Mathis v Auto-Owners Ins Co, 339 Mich App 471, 477; 983 NW2d 447 (2021), quoting Auto Club Ins. Ass'n v Meridian Mut Ins Co, 207 Mich App 37, 41, 523 N.W.2d 821 (1994)

In Childers, the MPCGA tried to evade liability by arguing that Childers' PIP benefits should be paid by the next insurer in the order of priority, which was Progressive Marathon Insurance Company ("Progressive"). Progressive denied coverage in October 2013, and the Childers filed a PIP action against Progressive on November 22, 2013, with the MPCGA later intervening. At trial, Progressive presented two arguments against liability: first, that it was not in the order of priority, and second, that the claims were barred by the "one-year-back rule" of the Michigan no-fault act. MCL 500.3145(1). The trial court disagreed, finding the claims timely. However, it still granted Progressive summary disposition, agreeing with the insurer that it was not in priority.

The Court of Appeals reversed, siding with Plaintiffs on both issues. Regarding the timeliness, the panel observed that the MPCGA is exempt from most of the no-fault act and the insurance code. See MCL 500.7911(3). Indeed, the panel said that the MPCGA hadn't even filed under the no-fault act but the guaranty act, which provides it with the right to receive a credit on claims owed to an insured from any other benefits that insured is entitled to

recover. MCL 500.7931(3). The panel held that since the no-fault act and its one-year-back rule did not apply, and the guaranty act itself had no limitation period, the six-year default statute of limitations rule applied rather than the one year period set forth in MCL 500.3145(1). The Court of Appeals also found that the Childers' action arose from the guaranty act, since it obligates a claimant to pursue other possible insurers after a primary insurer's insolvency.

On June 7, 2024, the Supreme Court issued a unanimous decision reversing the Court of Appeals and dismissing both actions as untimely. It began its analysis with the Childers' claim. Here, the Court of Appeals believed their claim against Progressive arose, not out of the no-fault act, but the guarantee act. The Court of Appeals specifically relied the following sentence taken from MCL 500.7931(3): "The claimant, insured, or self-insured entity shall first exhaust all coverage provided by any policy or the self-insured retention of an excess insurance policy."

This sentence clearly imposes a duty on insureds to exhaust "all coverages provided by any policy," but the Supreme Court noted that imposing a duty is not the same as creating a right to recover. (Indeed, one might say they are the opposite of one another.) The Supreme Court stated that the guarantee act "does not change the nature of the action" against Progressive, which was still a claim for no-fault benefits. Childers at *9. "MCL 500.7931(3) only requires a claimant to pursue coverage that is 'provided by' another policy—it does not expand a claimant's right to recover on that policy or otherwise provide an independent cause of action against an insurer." Id. Since the Childers' claim was in essence, a claim for no-fault benefits, Childers, as the claimant, still had to comply with the no-fault act and the one-year-back rule.

The Supreme Court's analysis of the timeliness aspect of the MPCGA's claim was more complicated, but similar. Unlike the Childers, the MPCGA's right to recover did flow directly from the guarantee act. The Court referenced two specifics rules, the credit provision, which states:

> If damages or benefits are recoverable by a claimant . . . under an insurance policy other than a policy of the insolvent insurer, . . . the damages or benefits recoverable shall be a credit against a covered claim payable under this chapter. [MCL 500.7931(3) (emphasis added)].

In addition, the MPCGA's action was also premised on the assignment provision, which states:

> Considering the description of Medicare provided by the relevant federal statutes, it is apparent that Medicare provides "fee for service payments" as contemplated by MCL 500.3157(15)(f). Accordingly, *the first clause of the definition of Medicare in MCL 500.3157(15)(f) simply states the obvious: the Legislature's use of the term "Medicare" in MCL 500.3157 means Parts A, B, and D of the federal Medicare program, which provides fee-for-service-payment coverage, akin to insurance coverage, for certain medical expenses for eligible individuals. The second clause of MCL 500.3157(15)(f) instructs that certain other adjustments may be made under Medicare for purposes of administering the Medicare program, but those adjustments are not related to the actual reimbursement rates and therefore, are not to be considered for purposes of Michigan's no-fault act.*

Crucially, neither the credit nor assignment provisions expand a claimant's right to recovery. The credit provision regards benefits that "are recoverable by a claimant," whereas the assignment provision pertains to the rights a claimant "may have against another person for payment of the covered claim." The MPCGA could only recover benefits "that are recoverable" as credit, and it could only be assigned "the same rights that the assignor possessed." Jawad A Shah, MC, PC v State Farm Mut Auto Ins Co, 324 Mich App 182, 204; 920 NW2d 148 (2018). If the Childers' rights to recover were limited by the no-fault act and the one-year-back rule, they could only assign those same rights, subject to the same limitations, to the MPCGA. In other words, the Childers could not assign rights to recover benefits that they were never entitled to receive.

The Supreme Court was also unpersuaded by the appellate panel's reliance on the structure and purpose of the MPCGA, which it said should be interpreted broadly to except the Association from most requirements of the no-fault act. "But there is no inconsistency between the MPCGA's role as an insurer of last resort and requiring compliance with MCL 500.3145(1)," J. Cavanaugh wrote. The issue in the case was not whether the Childers would be denied no fault benefits—those benefits vested at the time of injury and were not in question. Rather, the parties were disputing who would pay those benefits, the MPCGA or Progressive. "Thus, under a proper interpretation of MCL 500.3145(1), the MPCGA is responsible for a greater share of PIP beneficiaries whose primary insurers have gone insolvent is not inconsistent with the statutory scheme." Id. at 13.

On the other hand, the purpose of the no-fault act and MCL 500.3145(1) would certainly be served by preventing stale claims and allowing the insurer to assess its liability within a year of the accident. Welton v Carriers Ins Co, 421 Mich 571, 578; 365 NW2d 170 (1984). Indeed, under the Court of Appeals' holding, an insurer "could conceivably be required to litigate whether it is a lower priority insurer—and ultimately be held responsible for paying PIP benefits—many decades after an accident occurred." Childers at *14.

Ultimately, the Court's decision expands the statutes of limitation and eliminates the possibility that insurers will be made to litigate stale claims after a competitor's insolvency, but these benefits to insurers come without curtailing an insured's ability to recover. In other words, Childers is the rare case without a clear loser. No wonder all seven justices signed on to the unanimous opinion.

We welcome your questions – please contact:

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