STATE OF MICHIGAN

IN THE SUPREME COURT

SUSAN CHILDERS, as Conservator for JUSTIN S. CHILDERS, LIP,

Plaintiff,

and

MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION,

Intervening Plaintiff-Appellee,

v

PROGRESSIVE MARATHON INSURANCE COMPANY,

Defendant-Appellant.
_____/

Supreme Court No. 164953

Court of Appeals Nos. 356914

Genesee County Circuit Court No. 13-101626-NF

SUSAN CHILDERS, as Conservator for JUSTIN S. CHILDERS, LIP,

Plaintiff-Appellee,

and

MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION,

Intervening Plaintiff-Appellee,

v

PROGRESSIVE MARATHON INSURANCE COMPANY,

Defendant-Appellant.
_____/

Supreme Court No. 164954

Court of Appeals Nos. 356915

Genesee County Circuit Court No. 13-101626-NF

APPENDIX TO SUPPLEMENTAL (MOAA) BRIEF IN SUPPORT OF THE APPLICATION FOR LEAVE TO APPEAL OF DEFENDANT-APPELLANT, PROGRESSIVE MARATHON INSURANCE COMPANY

GARAN LUCOW MILLER, P.C.
DANIEL S. SAYLOR (P37942)
Attorneys for Defendant-Appellant,
Progressive Marathon Ins. Co.
1155 Brewery Park Blvd., Ste. 200
Detroit, Michigan 48207
(313) 446-5520
dsaylor@garanlucow.com

LIST OF EXHIBITS

EXHIBIT 1

Court of Appeals published Opinion,
9/15/2022

STATE OF MICHIGAN

COURT OF APPEALS

JUSTIN CHILDERS, a Legally Incapacitated Person, by SUSAN CHILDERS, Conservator,

Plaintiff,

and

MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION,

Intervening Plaintiff-Appellant/Cross-Appellee,

v

PROGRESSIVE MARATHON INSURANCE COMPANY,

Defendant-Appellee/Cross-Appellant.

FOR PUBLICATION
September 15, 2022
9:00 a.m.

No. 356914
Genesee Circuit Court
LC No. 13-101626-NF

JUSTIN CHILDERS, a Legally Incapacitated Person, by SUSAN CHILDERS, Conservator,

Plaintiff-Appellant/Cross-Appellee,

and

MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION,

Intervening Plaintiff,

v

PROGRESSIVE MARATHON INSURANCE COMPANY,

No. 356915
Genesee Circuit Court
LC No. 13-101626-NF

Defendant-Appellee/Cross-Appellant.

Before: CAVANAGH, P.J., and GARRETT and YATES, JJ.

YATES, J.

Nothing in life is perfectly predictable, even when the Michigan no-fault act is involved. The passage of decades has revealed holes in what was intended to be a comprehensive scheme to simplify automobile insurance and expedite the payment of benefits to victims injured in motor-vehicle collisions. This case reveals yet another hole in the no-fault act that the courts must fill. Plaintiff's son, Justin Childers, was severely injured in a 2011 automobile accident and received no-fault personal protection insurance (PIP) benefits from plaintiff's insurer, which was the first-priority insurer. But when that insurer was declared insolvent, plaintiff filed this action against defendant, Progressive Marathon Insurance Company (Progressive), as the next-highest-priority insurer because Progressive insured a relative of the driver of the vehicle involved in the accident. Michigan Property & Casualty Guaranty Association (MPCGA), which had assumed liability for payment of no-fault benefits after the highest-priority insurer was declared insolvent, intervened in the action and agreed that Progressive was primarily liable for the payment of no-fault benefits. But Progressive responded that the complaints were untimely filed and Progressive was not in the line of priority insurers. On cross-motions for summary disposition, the trial court denied relief to plaintiff and MPCGA and granted summary disposition to Progressive on the basis that the driver of the relevant vehicle was uninsured. Plaintiff and MPCGA then appealed, and Progressive filed a cross-appeal, arguing that the complaints of plaintiff and MPCGA were barred by the one-year statute of limitations in MCL 500.3145(1). We conclude that the complaints were timely filed and the driver of the vehicle was an insured person under Progressive's policy. Therefore, we reverse and remand for entry of orders granting summary disposition in favor of plaintiff and MPCGA.

I. FACTUAL BACKGROUND

On August 6, 2011, Justin Childers was severely injured in a motor-vehicle accident while riding as a passenger. Shaina Groulx owned and was driving the vehicle in which Justin was riding when the collision occurred. Everybody agrees that Shaina's vehicle was uninsured at the time of the accident, which caused injuries to Justin's head and spine that rendered him quadriplegic. As a result of his injuries, Justin was declared legally incompetent and plaintiff, Susan Childers, was appointed as his conservator.

At first, Justin received no-fault PIP benefits from American Fellowship Mutual Insurance Company (American Fellowship) under an automobile policy issued to plaintiff that extended coverage to Justin as a resident relative of plaintiff's household. But on June 12, 2013, American Fellowship was declared insolvent and MPCGA assumed responsibility for its obligations, giving MPCGA a "covered claim" under Michigan's property and casualty guaranty association act, MCL 500.7901 *et seq*. Because MPCGA is a last-resort insurer, it investigated whether there were any other potential insurers liable for no-fault benefits for Justin's care. Progressive was identified as a potential responsible insurer under a policy it issued to Shaina's brother, Matthew, for a vehicle he owned. Progressive was informed of Justin's claim in September 2013, and it denied the claim

in October 2013. In its denial letter, Progressive relied upon a policy exclusion that made Shaina ineligible for PIP benefits under the circumstances of the accident.

Plaintiff and MPCGA filed this action, seeking to hold Progressive responsible for Justin's PIP benefits. They asserted that Shaina, as the driver of the vehicle involved in the accident that injured Justin, was an insured under the no-fault policy that Progressive issued to Matthew for a vehicle he owned. That policy defined an "eligible insured person,"[1] in part, as "you or any relative who sustains accidental bodily injury in an accident involving a motor vehicle." At the time of the accident in August 2011, Shaina had been living with Matthew since October 2010, and she had no other residence. She had changed her address to receive mail at Matthew's apartment. Shaina testified at her deposition that she sustained injuries in the accident, including bruises, fractured ribs, and a sprained ankle. All parties filed cross-motions for summary disposition. Moving under MCR 2.116(C)(10) (no genuine issue of material fact), plaintiff and MPCGA argued that Shaina was an insured person under Matthew's policy, which warranted holding Progressive liable for no-fault coverage under MCL 500.3114(4)(b). Progressive sought summary disposition under MCR 2.116(C)(7) (statute of limitations) and (10). Progressive not only denied that Shaina qualified as an insured person under its policy issued to Matthew, but also insisted that the claims of plaintiff and MPCGA were barred by the one-year statute of limitations in MCL 500.3145(1).

For purposes of their competing motions for summary disposition, the parties agreed to the following stipulated facts:

> 1. Justin S. Childers was severely injured in a motor vehicle accident on August 6, 2011. As a result of his injuries, including quadriplegia, he has incurred, and continues to incur, expenses for his care.
>
> 2. The motor vehicle in which Childers was a passenger when the accident occurred, a 1988 Oldsmobile, was owned, registered and operated by Shaina Lee Groulx, only. Shaina Lee Groulx did not possess any valid automobile insurance policy in her name at the time of the accident. Her 1988 Oldsmobile was itself uninsured at the time of the accident.
>
> 3. At the time of the subject automobile accident, Justin S. Childers did not own a motor vehicle, but he and his mother, Susan Childers, were domiciled in the same household. Since Susan Childers was at that time a named insured on a valid no-fault automobile insurance policy issued by American Fellowship Mutual Insurance Company, Justin S. Childers was entitled to receive whatever personal protection insurance ("PIP") benefits to which he was entitled from American Fellowship.

[1] Some opinions of this Court at times use the phrase "contractual insured." Because the relevant inquiry in this case is whether Shaina is an "insured person" as defined by the Progressive policy, we use that terminology.

4. For a period of time PIP benefits were paid to and for the benefit of Justin S. Childers by American Fellowship.

5. On October 29, 2012, a Rehabilitation Order was entered in the Ingham County Circuit Court placing American Fellowship Mutual Insurance Company into rehabilitation under MCL 500.8112. During this time American Fellowship continued to pay certain PIP benefits to or on behalf of Justin Childers.

6. On or about June 12, 2013, American Fellowship was declared insolvent by Order of the Ingham County Circuit Court, within the meaning of the property and casualty guaranty association act, MCL 500.7901, *et seq*.

7. Pursuant to its statutory duties under MCL 500.7901, *et seq*., and subject to any rights and limitations set forth in the act, the Intervening Plaintiff, Michigan Property and Casualty Guaranty Association" [sic] (hereinafter, "MPCGA") became responsible for the insolvent insurer's obligations that qualify as "covered claims" within the meaning of MCL 500.7925. Justin S. Childers' claim for PIP benefits against American Fellowship qualifies as a "covered claim" under MCL 500.7925.

8. After assuming responsibility for American Fellowship's "covered claims," the MPCGA investigated whether PIP benefits were recoverable by claimant Justin S. Childers from any other insurance policy since, under the governing statute, (a) Childers is required to exhaust all coverage provided under any other insurance policy, (b) any such benefits recoverable by Childers would be a credit against the "covered claim" payable by the MPCGA, and (c) to the extent of any benefit payments actually made by the MPCGA, Childers is deemed to have assigned to the MPCGA any rights he may have against any other insurer for payment of the "covered claim." MCL 500.7931(3); MCL 500.7935(2).

9. On or about September 24, 2013, Defendant, Progressive Marathon Insurance Company (hereinafter, "PMIC"), for the first time received notification of the injuries suffered by Justin S. Childers on August 6, 2011.

10. On November 22, 2013, this lawsuit was initiated on behalf of Justin S. Childers and his conservator, Susan Childers, against Defendant PMIC.

11. Defendant PMIC had issued an auto insurance policy to one Matthew M. Groulx, Policy Number 18940781-7 (a true and complete copy of which is attached hereto), which policy was in effect at the time of the subject accident on August 6, 2011. The only "Named Insured" on the policy is Matthew M. Groulx, and the only motor vehicle identified on the policy, a 2002 Buick Century, was not in any way involved in the Childers accident of August 6, 2011. The name of Shaina Lee Groulx does not appear in the policy issued to Matthew M. Groulx.

12. Matthew M. Groulx is the brother of Shaina Lee Groulx. Some months prior to the subject accident, Shaina Lee Groulx had begun staying with her brother in his apartment in Bloomfield Hills, Michigan, intending to remain there

> temporarily until she could move into an apartment of her own, although she was still staying at the apartment on the date of the accident, August 6, 2011. Whether Matthew M. Groulx and Shaina Lee Groulx were domiciled in the same household is not a stipulated fact but is a disputed point. Additionally, whether Shaina Lee Groulx was injured in the motor vehicle accident of August 6, 2011 is not a stipulated fact, but is a disputed point. For purposes of the issues presented in the parties' cross-motions for summary disposition, only, the parties will assume that Matthew M. Groulx and Shaina Lee Groulx were domiciled in the same household at the time of the subject accident and that Shaina Lee Groulx was injured in the accident.

Addressing the motions, the trial court disagreed with Progressive's statute-of-limitations defense, but agreed that Shaina was not an insured person under the terms of the Progressive policy issued to Matthew. Therefore, the trial court denied summary disposition to plaintiff and MPCGA and granted summary disposition under MCR 2.116(C)(10) to Progressive on the basis that Shaina was not an insured person under its policy. These appeals followed.

II. LEGAL ANALYSIS

The competing parties have presented a host of issues on appeal. First, Progressive argues in its cross-appeal of the denial of relief under MCR 2.116(C)(7) that the claims of plaintiff and MPCGA are time-barred under the statute of limitations set forth in MCL 500.3145(1). We review de novo the legal question of whether a claim is barred by a statute of limitations. *Citizens Ins Co of America v Univ Physician Group*, 319 Mich App 642, 647; 902 NW2d 896 (2017). "Pursuant to MCR 2.116(C)(7), a party may be entitled to summary disposition if a statute of limitations bars the claim." *Id*. at 648. " 'Which statute of limitations applied, whether the limitations period was tolled, and when the limitations period ended are questions of law.' " *Id*. at 647-648. "In deciding a motion under MCR 2.116(C)(7), the court considers all documentary evidence submitted by the parties in the light most favorable to the nonmoving party." *Id*. at 648. "If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred." *Holmes v Mich Capital Med Ctr*, 242 Mich App 703, 706; 620 NW2d 319 (2000). We review de novo all questions of statutory interpretation. *Citizens Ins Co*, 319 Mich App at 648. "The primary goal of statutory interpretation is to give effect to the Legislature's intent[.]" *Id*.

Because we conclude that plaintiff and MPCGA timely filed their complaints, we must next turn to their arguments that the trial court erred when it awarded summary disposition under MCR 2.116(C)(10) to Progressive based upon the conclusion that Shaina was not an insured person under the no-fault policy that Progressive issued to Matthew. "We review de novo a trial court's decision on a motion for summary disposition." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). A summary disposition motion under MCR 2.116(C)(10) "tests the *factual sufficiency* of a claim." *Id.* at 160. "A motion under MCR 2.116(C)(10) may only be granted when there is no genuine issue of material fact." *Id.* " 'A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ.' " *Id.* The court must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties, and must view that evidence in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Maiden v Rozwood,* 461 Mich 109, 119-120; 597 NW2d

817 (1999). Like matters of statutory interpretation, the interpretation of an insurance contract is a question of law that is reviewed de novo. *Meemic Ins Co v Jones*, ___Mich ___, ___; ___ NW2d ____ (2022) (Docket No. 161865), slip op at 10. With these principles in mind, we shall address the statute-of-limitations issues first, and then we shall consider the issues raised by the competing motions for summary disposition under MCR 2.116(C)(10).

A. STATUTE OF LIMITATIONS

Progressive moved for summary disposition under MCR 2.116(C)(7), contending that the complaints filed by plaintiff and MPCGA should have been dismissed because they were untimely filed pursuant to the one-year statute of limitations prescribed by MCL 500.3145(1) of the no-fault act. As a threshold matter, plaintiff and MPCGA insist that Progressive did not timely assert this defense, so Progressive is barred from relying upon it by dint of the "mend-the-hold" doctrine. We agree with the trial court and conclude that the doctrine is not applicable here, so Progressive may properly rely upon a statute-of-limitations defense. Nonetheless, we also agree with the trial court that the complaints of plaintiff and MPCGA were timely filed and, therefore, not time-barred by MCL 500.3145(1).

1. "MEND-THE-HOLD" DOCTRINE

As an initial matter, we must consider whether Progressive's statute-of-limitations defense is barred by the "mend-the-hold" doctrine. In response to Progressive's argument that the claims of plaintiff and MPCGA were untimely under the one-year statute of limitations set forth in MCL 500.3145(1), plaintiff and MPCGA contend that Progressive was estopped from raising the statute-of-limitations defense by the "mend-the-hold" doctrine because Progressive did not identify that defense as a basis for rejecting plaintiff's claim in its October 2013 denial letter. We disagree.

The "mend-the-hold" doctrine is an old concept, so we must repair to venerable precedent to explain how it operates. " 'Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law.' " *CE Tackels, Inc v Fantin*, 341 Mich 119, 124; 67 NW2d 71 (1954), quoting *Ohio & Mississippi Railway Co v McCarthy*, 96 US 258, 267, 268; 24 L Ed 693; 6 Otto 258 (1877). In 1926, our Supreme Court stated in the insurance context that:

> it must be accepted as the settled law of this State, that, when a loss under an insurance policy has occurred and payment refused for reasons stated good faith requires that the company shall fully apprise the insured of all of the defenses it intends to rely upon, and its failure to do so is, in legal effect, a waiver, and estops it from maintaining any defenses to an action on the policy other than those

> of which it has thus given notice. [*Smith v Grange Mut Fire Ins Co of Mich*, 234 Mich 119, 122-123; 208 NW 145 (1926).][2]

Much more recently, we stated that "[t]he doctrine is essentially an equitable theory of estoppel designed to prevent a party from changing positions after litigation has commenced." *Hahn v Geico Indemnity Co*, unpublished per curiam opinion of the Court of Appeals, issued June 12, 2018 (Docket No. 336583), pp 7-8.[3] In other words, the "mend-the-hold" doctrine appears to be an amalgamation of what we today consider waiver and estoppel.

But as with most legal concepts, there are some exceptions to the doctrine. For instance, it does not operate to "protect the insured against risks that were not included in the policy . . . ." *Kirschner v Process Design Assoc, Inc*, 459 Mich 587, 594; 592 NW2d 707 (1999). And while it has been applied to no-fault insurance policies, see *Gividen v Bristol West Ins Co*, 305 Mich App 639, 646-647; 854 NW2d 200 (2014), the doctrine's applicability is limited to only those defenses that are based upon the terms of the policy. *Ruddock v Detroit Life Ins Co*, 209 Mich 638, 652-655; 177 NW 242 (1920). In other words, the purpose of the doctrine is to prevent an insurance company from misleading an insured about the reasons for denying coverage under the terms of a policy. In those circumstances, the insurer is estopped from advancing new theories for denying coverage under the policy's provisions, particularly considering that the insurer is expected to be more intimately aware of the policy's terms.

Here, plaintiff and MPCGA cannot contend that Progressive misled them. Additionally, Progressive's statute-of-limitations defense is not predicated upon the terms of the policy. Instead, Progressive's argument relies upon statutes, and our Supreme Court has instructed courts not to employ equitable doctrines when they intersect and conflict with the edicts of our Legislature. See *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 406-407; 738 NW2d 664 (2007).[4] In any event, considering the history of the "mend-the-hold" doctrine, it seems unwarranted to extend the doctrine beyond defenses that involve the terms of a policy. Moreover, plaintiff and MPCGA were ultimately responsible for the timing of this action, even if that timing was eminently reasonable.

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[2] This Court recently discussed the *Smith* case in *Bartlett Investments, Inc v Certain Underwriters at Lloyd's London*, 319 Mich App 54, 57-58; 899 NW2d 761 (2017).

[3] "Although MCR 7.215(C)(1) provides that unpublished opinions are not binding under the rule of stare decisis," they may still be considered "for their instructive or persuasive value." *Cox v Hartman*, 322 Mich App 292, 307; 911 NW2d 219 (2017).

[4] Although we are not persuaded by Progressive's statutory argument on the present question, we acknowledge our Supreme Court's admonition that "if courts are free to cast aside a plain statute in the name of equity, even in such a tragic case as this, then immeasurable damage will be caused to the separation of powers mandated by our Constitution." *Trentadue*, 479 Mich at 406-407. "Statutes lose their meaning if an aggrieved party need only convince a willing judge to rewrite the statute under the name of equity." *Id.* at 407 (quotation marks and citations omitted).

Finally, we note that, under MCR 2.111(F)(3)(a), a statute of limitation is an affirmative defense that must be raised in a party's responsive pleading. The October 2013 denial letter was not issued during litigation. In its responsive pleadings, Progressive properly raised its statute-of-limitations defense. Consequently, the trial court did not err by refusing to apply the "mend-the-hold" doctrine, and thereby allowing Progressive to assert a statute-of-limitations defense.

2. APPLICABLE STATUTE OF LIMITATIONS

Having determined that Progressive may assert a statute-of-limitations defense pursuant to MCR 2.116(C)(7), we must turn to Progressive's argument on cross-appeal that MCL 500.3145(1) applies and mandates dismissal of the complaints. We disagree, concluding as the trial court did that the one-year limitations period in MCL 500.3145(1) does not apply.

At the time of the accident in 2011 and when this case was filed in 2013, MCL 500.3145(1) provided as follows:[5]

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein 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. 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. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury.

Plaintiff timely sought benefits from the first-priority insurer, American Fellowship. But the uncommon issue presented here concerns which statute of limitations applies to supplemental proceedings to obtain PIP benefits after a first-priority insurer has been declared insolvent. Indeed, this case differs from most cases because plaintiff and MPCGA are not seeking PIP benefits under the no-fault act; they are seeking credit for payments MPCGA made on behalf of a no-fault insurer, American Fellowship, which became insolvent.

MPCGA is not an insurance company. It was created by, and operates under, the guaranty act, MCL 500.7901 *et seq*., *Mathis v Auto-Owners Ins Co*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 354824), slip op at 2, and MPCGA's purpose "is to protect the public

[5] "[C]ourts commonly apply the version of the no-fault act in effect at the time of the accident." *Andary v USAA Cas Ins Co*, ___ Mich App ___, ___; ___ NW2d ___ (2022) (Docket No. 356487), slip op at 4.

against financial losses to either policyholders or claimants due to the insolvency of insurers." *Yetzke v Fausak*, 194 Mich App 414, 418-419; 488 NW2d 222 (1992). "The act accomplishes this purpose by imposing a statutory duty on the MPCGA to pay the obligations of insolvent insurers that constitute 'covered claims' as defined by MCL 500.7925." *Id*. But "MPCGA is not obligated to pay benefits for all 'covered claims[,]' " as MCL 500.7931(3) states that it "shall receive a credit against a covered claim if damages or benefits are recoverable by a claimant or insured under an insurance policy other than a policy of the insolvent insurer." *Mathis*, ___ Mich App at ___; slip op at 3. In other words, MPCGA's role " '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.' " *Id*. Thus, it is not merely a reinsurer, and the guaranty act "is not designed for the purpose of the MPCGA to step into the shoes of insolvent insurers."[6] *Id*.

Given the structure and purpose of MPCGA, we hold that the one-year limitations period in MCL 500.3145(1) does not govern because MPCGA is not generally subject to the no-fault act and has not brought this action directly under the no-fault act. Instead, MPCGA's right to proceed against Progressive flows from its authority to file a claim for reimbursement from another insurer in the chain of designated priority insurers. For this reason, we agree with MPCGA that because there is no specified limitations period for covered claims, the default six-year limitations period prescribed by MCL 600.5813 for actions not subject to other limitations periods applies. See *Titan Ins Co v Farmers Ins Exch*, 241 Mich App 258, 263; 615 NW2d 774 (2000).

To be sure, the one-year limitations period in MCL 500.3145(1) applies when one insurer seeks subrogation from another higher-priority insurer. See *Titan Ins Co v North Pointe Ins Co*, 270 Mich App 339, 343-344; 715 NW2d 324 (2006). But MPCGA does not simply stand in the shoes of an insured. *Mathis*, ___ Mich App at ___; slip op at 3. Because the Legislature has seen fit to largely exempt MPCGA from the Insurance Code, MCL 500.7911(3), MPCGA is not subject to the one-year limitations period that applies to a party pursuing benefits under the no-fault act, including other insurers asserting rights to subrogation. And because no such limitations period has been adopted for covered claims brought by MPCGA, it is appropriate to apply the default six-year limitations period in MCL 600.5813 to such claims.

Furthermore, even if MPCGA's claim against Progressive is governed by the one-year limitations period in MCL 500.3145(1), that claim could not have accrued until the highest-priority insurer was declared insolvent. Until American Fellowship became insolvent, MPCGA did not have any claim against the next-priority insurer. Under MCL 600.5827, unless otherwise expressly provided, the limitations period begins to run from the date the claim accrues. In a case where the

[6] This Court explained this process and MPCGA's duties in *Auto Club Ins Ass'n v Meridian Mut Ins Co*, 207 Mich App 37, 41-42; 523 NW2d 821 (1994). There, this Court observed that when a no-fault insurer becomes insolvent, MPCGA is the insurer of last resort and an injured claimant must look first to other possible insurers at lower levels of priority than the insolvent insurer before MPCGA will be obligated to cover the insolvent insurance company's obligations. *Id*. MPCGA, the Court said, "would be liable for the payment of personal protection insurance benefits only if there were no solvent insurer at any level of priority." *Id*.

applicable statute does not address accrual, MCL 600.5827 makes clear that "the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." In other words, the claim accrues on the date the plaintiffs first incurred the harms they assert, not the date the defendant breached its duty. *Frank v Linkner*, 500 Mich 133, 150; 894 NW2d 574 (2017). Considering MPCGA's purpose as an insurer of last resort for injured parties and that MPCGA's potential liability for PIP benefits does not arise until a higher-priority insurer is found to be insolvent, MPCGA should be afforded, at a bare minimum, one year from the date of insolvency to pursue its right to a covered claim. Any other approach would defeat the purpose of the guaranty act if MPCGA could only pursue covered claims that occur within the limitations period for the underlying automobile accident.

In this case, MPCGA filed its complaint against Progressive less than a year after American Fellowship was declared insolvent. Accordingly, the complaint was timely filed, regardless of whether the claim is subject to the one-year limitations period in MCL 500.3145(1) or the six-year limitations period in MCL 600.5813. And turning to plaintiff's complaint, even viewing plaintiff's claim as independent from MPCGA's claim, we agree that it, too, was timely filed. Plaintiff had timely filed a claim and received PIP benefits from American Fellowship, the original responsible insurer. Only after American Fellowship was declared insolvent did MPCGA become involved. But under MCL 500.7931(3), plaintiff was obligated to seek lower-priority insurers who might be required to provide PIP benefits for Justin Childers. Although the priority of insurers is governed by MCL 500.3114(4), plaintiff's obligation to pursue other priority insurers arises under MCL 500.7931(3) of the guaranty act. Because the Legislature has not adopted any limitations period for claims pursued under the guaranty act, the six-year limitations period applies. Alternatively, to the extent that the one-year limitations period under MCL 500.3145(1) applies, plaintiff's claim against Progressive did not accrue until American Fellowship was declared insolvent, and plaintiff filed this action less than one year after that event. Therefore, Progressive cannot rely on a statute-of-limitations defense to deny PIP benefits to Justin.

B. INSURED PERSON

We next take up the argument of plaintiff and MPCGA that the trial court erred by ruling that Progressive was not an insurer in the chain of priority insurers responsible for payment of no-fault benefits to Justin because Shaina, the driver of the vehicle involved in the accident, was not a contractually insured person under the terms of Matthew's policy with Progressive. "Michigan's no-fault insurance system aims to provide victims of automobile-related accidents with assured, adequate, and prompt payment for economic losses." *Miller v Farm Bureau Mut Ins Co*, 218 Mich App 221, 225; 553 NW2d 371 (1996). In *Detroit Automobile Inter-Ins Exch v Home Ins Co*, 428 Mich 43, 49; 405 NW2d 85 (1987), our Supreme Court noted that it was "the Legislature's intent that persons, not vehicles, be insured against loss[.]" This is especially true when the statutory provision at issue—like the former MCL 500.3114(4)—ties priority to an individual. *Lee v Detroit Automobile Inter-Insurance Exch*, 412 Mich 505, 508, 515; 315 NW2d 413 (1982); *Turner v Farmers Ins Exch*, 507 Mich 858, 863 n 2; 953 NW2d 204 (2021) (VIVIANO, J., dissenting).

Plaintiff and MPCGA contend that Progressive is a designated priority insurer under MCL 500.3114(4), which at the time of the accident in 2011 stated:

> Except as provided in subsections (1) to (3), a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of the vehicle occupied.
>
> (b) The insurer of the operator of the vehicle occupied.

Accordingly, we must consider whether Shaina, the operator of the vehicle, qualified as an insured person under Progressive's policy.

The trial court properly concluded that, under *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527; 740 NW2d 503 (2007), whether Shaina was an "insured" under Matthew's policy with Progressive should be determined by the terms of the policy. In *Dobbelaere*, this Court ruled that "whether the issuer of a no-fault insurance policy is the 'insurer' of a household member or family member for purposes of MCL 500.3114(4) 'depends on the language of the relevant insurance policy.' " *Id*. at 532-534; quoting *Amerisure Ins Co v Coleman*, 274 Mich App 432, 436 n 1; 733 NW2d 93 (2007). We also explained that although a vehicle owner may be otherwise uninsured, the owner may still qualify as an insured person for purposes of MCL 500.3114(4). *Dobbelaere*, 275 Mich App at 533. In *Coleman*, the relevant insurance policy defined "insured" as including "you or any family member[,]" so this Court concluded that the plaintiff's uncle, who resided with the policyholder (his wife), was an insured for purposes of MCL 500.3114(4)(b). *Coleman*, 274 Mich App at 436. In *Dobbelaere*, we ruled that the relevant relatives were not contractual insureds for purposes of MCL 500.3114(4)(b) because "the policy at issue here does not define who is an insured for purposes of the no-fault endorsement," and we were "unable to discover anything in the plain language of the policy's declaration or general verbiage to indicate an intent by the parties to that contract." *Dobbelaere*, 275 Mich App at 534.[7] Applying the *Coleman*/*Dobbelaere* rule in the case before us, Shaina would be an insured person under Matthew's policy if she was residing with him at the time of the accident. In other words, because *Coleman* and *Dobbelaere* clarify that whether MCL 500.3114(4) applies to an insurer depends upon how the insurer's policy defines the term "insured," we must examine the relevant policy language to determine if Shaina is an insured person under the policy.

The Progressive policy provides that PIP coverage is available in accordance with the no-fault act "for accidental bodily injury to an **eligible insured person** arising out of the ownership,

[7] In another case decided several years later, a plaintiff sought survivor benefits after the decedent, his wife, died in an automobile accident. *Stone v Auto-Owners Ins Co*, 307 Mich App 169, 171; 858 NW2d 765 (2014). The decedent's vehicle was a covered auto under her parents' no-fault policy. *Id*. at 171-172. But neither the plaintiff nor the decedent was a named insured on the policy, and neither was domiciled with the policyholders. *Id*. at 172. We held that because the decedent (the plaintiff's wife) did not live with the policyholders (the decedent's parents) and was not a named insured under their policy, she was not an insured for purposes of the statute even though her vehicle was added to the policy and the plaintiff and the decedent were both named as drivers on the policy. *Id*. at 177-178.

operation, maintenance or use of a **motor vehicle** as a **motor vehicle**, subject to the exceptions, exclusions and limitations specified herein and as additionally provided by the law of the State of Michigan." Subsection (2)(a) of the Progressive policy defines an "eligible insured person" in part as "**you** or any **relative** who sustains accidental bodily injury in an accident involving a **motor vehicle**." Significantly, subsection (2)(b) also defines an "eligible injured person" as "any other person who sustains accidental bodily injury while occupying a *covered auto*." Therefore, whereas the definition in subsection (2)(b) applies to a "covered auto," the definition in subsection (2)(a) applies more broadly to "a motor vehicle," which is not limited to a "covered auto." These policy terms indicate that a covered vehicle need not be involved in order for coverage to be available to a relative injured in a motor-vehicle accident under subsection (2)(a). So now we must determine whether Shaina was Matthew's relative by dint of the Progressive policy. We conclude that, under the policy and the record evidence before us, she was.

> The Progressive policy defines a "relative" as
>
> a person residing in the same household as you, and related to **you** by blood, marriage, or adoption, and includes a ward, stepchild, or foster child. **Your** unmarried dependent children temporarily away from home will qualify as a **relative** if they intend to continue to reside in **your** household.

The first sentence plainly applies here. Shaina, Matthew's sister, testified at her deposition that she had been residing exclusively at Matthew's apartment for several months before the accident. Moreover, she had changed her address to that location and was receiving her mail there. Although Progressive would not concede that Shaina was residing with Matthew at the time of the accident, Progressive offered no evidence that Shaina was not residing at Matthew's apartment at the time of the accident. Consequently, there existed no genuine issue of material fact that Shaina was a resident relative under the Progressive policy at the time of the accident.

As the final element required to satisfy the definition of an insured person under subsection (2)(a) of Progressive's policy, Shaina must have suffered accidental bodily injuries in the involved accident. Although Progressive did not concede that Shaina suffered injuries in the accident, at her deposition Shaina described suffering suspected rib fractures and other injuries in the accident. Even though she did not receive medical treatment for her injuries, that is not a requirement under the Progressive policy. Progressive did not present any evidence to refute Shaina's testimony on the subject of her injuries. Therefore, the record contained no genuine issue of material fact as to whether Shaina suffered accidental bodily injuries in the accident.

But our inquiry is not yet complete. Progressive directs us to a policy exclusion that it says prevents Shaina from receiving PIP benefits under the circumstances of the accident because she was not driving a covered vehicle at that time. Turning once again to Progressive's policy, Part I, ¶ 14, on pages 3-4 of the policy explains that "[c]overage . . . will not apply to any insured person for **bodily injury** or **property damage** arising out of the ownership, maintenance, or use of any vehicle owned by a **relative** or furnished or available for the regular use of a **relative**, other than a **covered auto** for which this coverage has been purchased." Essentially, Progressive argues that this exclusion defeats the claims of plaintiff and MPCGA because Shaina was driving an uninsured vehicle at the time of the accident. We reject this argument because it conflicts with the analysis

set forth in *Sours v Titan Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued December 27, 2011 (Docket No. 301328).

In *Sours*, a vehicle owned and operated by Nakeysha Vond was not insured, but Nakeysha resided with her father, Daniel Vond, who had coverage with Westfield Insurance Company under a policy that defined an "insured" as "you or any family member for the ownership, maintenance or use of any auto or trailer." *Id*. at 2. The policy defined "family member" as "a person related to you by blood . . . who is a resident of your household." *Id*. Citing *Coleman*, 274 Mich App at 432, this Court concluded that because Nakeysha was a "family member" under the policy and the policy extended coverage to "family members" who were not named insureds, Westfield was an "insurer" for purposes of applying MCL 500.3114(4). *Sours*, unpub op at 2. We also rejected Westfield's contention that exclusions under the policy prevented Nakeysha from being treated as an insured, explaining:

> Westfield attempts, however, to distinguish this case from *Coleman* by arguing that a policy exclusion applied to negate liability coverage under the circumstances of this case. That is, the policy indicated that liability coverage was not provided "for the ownership, maintenance or use of . . . any vehicle, other than your covered auto, which is owned by any family member . . . ." However, this exclusion is not relevant to defining *who* is an "insured" for purposes of MCL 500.3114(4). The exclusion merely sets forth a circumstance not covered by insurance. It is the presence of a contractual insured-insurer relationship, not the terms of that relationship, which is the determinative inquiry for defining the "insurer" under the plain language of MCL 500.3114(4).
>
> Similarly, Westfield argues that it was not the insurer of Vond for purposes of PIP benefits because of a policy exclusion. That is, under the PIP coverage section, an "insured" was defined as "anyone else injured in an auto accident . . . if the accident involves any other auto . . . which is operated by you or any family member . . . ." However, Westfield argues, an exclusionary provision indicated that it did not provide PIP coverage for bodily injury "sustained by the owner or registrant of an auto involved in the accident and for which the security required under the Michigan Insurance Code is not in effect." Again, this exclusion merely sets forth a circumstance not covered and is not relevant to defining *who* is an "insured" for purposes of MCL 500.3114(4). And, in any case, there is no requirement that an owner's PIP claim be successful for purposes of MCL 500.3114(4). [*Sours*, unpub op at 3.]

As in *Sours*, the case before us presents a policy exclusion that excludes coverage under a specific circumstance. Specifically, the exclusion purports to preclude Shaina from recovering PIP benefits under the policy because she was not driving a covered auto at the time of the accident. But as in *Sours*, the exclusion does not change *who* is an insured person under the policy, so it does not alter the application of MCL 500.3114(4). Indeed, the exclusion only applies to an "insured person," so Progressive's reliance upon it is an admission that Shaina was an insured *person*.

Progressive not only points out that *Sours* is not binding because it is unpublished, but also contends that it conflicts with *Dobbelaere* and *Coleman* and should not be followed for that reason.

Progressive correctly highlights that "unpublished opinions are not binding under the rule of stare decisis," but they may be considered "for their instructive or persuasive value." *Cox v Hartman*, 322 Mich App 292, 307; 911 NW2d 219 (2017). But because *Sours* is so factually similar to this case, it properly may be considered instructive in deciding this case. Moreover, we disagree that *Sours* conflicts with the earlier published cases upon which it (and we) rely. On the contrary, this Court in *Sours* followed *Coleman*, which in turn was followed in *Dobbelaere*. The *Sours* opinion offers a helpful reminder that the no-fault act generally covers persons, not vehicles. And just as in *Sours*, the fact that a policy exclusion may be grounds to deny Shaina PIP benefits does not alter our analysis for purposes of MCL 500.3114(4).[8]

In sum, the trial court erred by awarding Progressive summary disposition with respect to whether Shaina was an insured person under Progressive's policy issued to Matthew. Furthermore, the record reveals that there was no genuine issue of material fact that Shaina is Matthew's relative, she was residing in Matthew's household at the time of the accident, and she sustained accidental bodily injuries in the accident. Accordingly, Progressive qualifies as the next insurer in the chain of priority under MCL 500.3114(4)(b) because Progressive was the insurer of the operator of the vehicle occupied by Justin Childers at the time of the accident. Thus, we reverse the order granting summary disposition in favor of Progressive and remand for entry of an order awarding summary disposition to plaintiff and MPCGA.

III. CONCLUSION

We hold that the trial court correctly ruled that the "mend-the-hold" doctrine does not apply to Progressive's statute-of-limitations defense, and we further conclude that the trial court properly determined that the actions filed by plaintiff and MPCGA were timely. Additionally, we hold that the trial court erred by granting summary disposition in favor of Progressive on the basis that Shaina was not an insured person under Matthew's policy with Progressive. We find that there is no genuine issue of material fact that Shaina is Matthew's relative, she was residing in Matthew's household at the time of the accident, and she suffered bodily injuries in the accident. Thus, Shaina qualifies as an insured person under the terms of Matthew's Progressive policy. Because Shaina is an insured person under Progressive's policy and Shaina was the operator of the vehicle involved in the accident that injured Justin, Progressive qualifies as a designated priority insurer under MCL 500.3114(4)(b). Consequently, plaintiff and MPCGA were entitled to summary disposition under

[8] Progressive argues that *Sours* ignored *Dobbelaere*, as evidenced by a lack of citation to that case. Specifically, Progressive directs us to the proposition, stated in *Dobbelaere*, that "the fact that an individual might derivatively claim PIP benefits through a named insured under MCL 500.3114(1) does not render the policy issuer the 'insurer' of that individual for purposes of MCL 500.3114(4)." *Dobbelaere*, 275 Mich App at 532. Although Progressive correctly identifies this proposition, it ignores that the *Dobbelaere* Court was simply rejecting a bright-line rule that qualifying for PIP benefits and being an "insured" under MCL 500.3114(4) are synonymous by citing the exact language *Sours* relied on from *Coleman*: "this Court has held that whether the issuer of a no-fault insurance policy is the 'insurer' of a household member or family member for purposes of MCL 500.3114(4) 'depends on the language of the relevant insurance policy.' " *Dobbelaere*, 275 Mich App at 532-533.

MCR 2.116(C)(10). Therefore, we reverse the trial court's order awarding summary disposition to Progressive and remand for entry of an order granting summary disposition in favor of plaintiff and MPCGA.

Reversed and remanded for entry of an order granting summary disposition in favor of plaintiff and MPCGA. We do not retain jurisdiction.

/s/ Christopher P. Yates
/s/ Mark J. Cavanagh
/s/ Kristina Robinson Garrett

EXHIBIT 2

Opinion and Order Following Parties' Respective Motions for Summary Disposition Pursuant to MCR 2.116(C)(7) and (10), 3/29/2021

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

SUSAN CHILDERS, as Conservator for JUSTIN CHILDERS, a Legally Incapacitated Person,

Plaintiff,

and

MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION,

Intervening-Plaintiff,

v.

PROGRESSIVE MARATHON INSURANCE COMPANY,

Defendant.

Case Nos.: 12-098705 and 13-101626-NF

Judge Brian S. Pickell
(P-57411)

RICHARD F. BURNS, JR. (P26189)
Attorney for Plaintiff
30150 Telegraph Road
Suite 300
Bingham Farms, Michigan 48025
248-530-5540
rburns@concentric.net

SCOTT L. FEUER (P38185)
Attorney for Intervening-Plaintiff
888 West Big Beaver Road
Suite 850
Troy, Michigan 48084
248-723-7828 ext. 201
sfeuer@fklawyers.com

DANIEL S. SAYLOR (P37942)
R. MICHAEL JOHN (P29468)
Attorney for Defendant
8332 Office Park Drive
Grand Blanc, Michigan 48439
313-446-5520
dsaylor@garanlucow.com

OPINION AND ORDER FOLLOWING PARTIES' RESPECTIVE MOTIONS FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7) AND (10)

INTRODUCTION

Background

Plaintiff Justin Childers (hereinafter "Plaintiff") was seriously/severely injured in a motor-vehicle accident on August 6, 2011. As a result of the injuries, including quadriplegia, he has incurred and continues to incur expenses for his care. This is an action for "no fault" personal-injury-protection benefits (hereinafter "'no fault' benefits" or "PIP benefits") against Defendant Progressive Marathon Insurance Company (hereinafter "Defendant").

More specifically, in this action filed on November 22, 2013 (i.e., more than two years after the accident), based upon an insurance policy (hereinafter "the policy") issued by Defendant to Matthew Groulx (i.e., the brother of Shaina Groulx, whose uninsured vehicle was occupied by Plaintiff during the accident), Plaintiff and Intervening-Plaintiff Michigan Property & Casualty Guaranty Association (MPCGA) (hereinafter "Intervening-Plaintiff") seek to impose liability on Defendant for the PIP benefits. Intervening-Plaintiff has paid PIP benefits to or on behalf of Plaintiff since 2012. In addition to seeking a declaration from the Court that Defendant is the insurer highest in priority, Intervening-Plaintiff seeks also reimbursement for all such benefits so paid. Many facts have been largely agreed to by the parties.

Plaintiff and Intervening-Plaintiff argue essentially that: 1) by virtue of the language of the policy, Defendant is deemed to be the "insurer of the owner, registrant, operator of the motor vehicle" [MCL § 500.3114(4)(a) and (b)] occupied by Plaintiff at the time of the accident because: a) Ms. Groulx herself suffered accidental bodily injury as a result of the accident, thereby rendering her as an "eligible injured person" under the subject insurance policy (hereinafter "the policy"); and b) Plaintiff's claim is not excluded under "Exclusion 7" of the policy, which is the only exclusion upon which Defendant relied in its first letter denying coverage to Plaintiff and referencing MCL § 500.3114 of October 29, 2013 (hereinafter "the 'denial' letter"); 2) Defendant is now rendered the insurer of next-highest order of priority in place of the now-insolvent American Fellowship Mutual Insurance Company; 3) any attempt by Defendant to set forth any other reason(s) why coverage cannot and does not apply to Plaintiff must/should be disregarded by this Court as being in violation of the "mend the hold" doctrine; and 4) Defendant occupies a higher order of priority and is responsible for payment of: a) the PIP benefits (past and future) incurred by Plaintiff as a result of the injuries and due and owing to or on behalf of him in accordance with MCL § 500.3101 et seq.; b) reimbursement to Intervening-Plaintiff for all the PIP benefits it paid to or on behalf of Plaintiff ; c) statutory interest and penalty interest of 12% on all such benefits; d) "loss adjustment" cost; and e) reasonable attorney fees as provided under the Michigan No-Fault Act [MCL § 500.3148(1)] (hereinafter "the No-Fault Act").

In contrast, Defendant argues essentially that: 1) it is not the insurer of Ms. Groulx and the policy does not extend coverage to Plaintiff as an occupant of Ms.

Groulx's uninsured vehicle such that there is no substantive basis for coverage of the subject loss to be imposed on Defendant; and 2) even if there were a basis for imposing coverage on Defendant, the claims of Plaintiff and Intervening-Plaintiff for recovery of the PIP benefits from Defendant are explicitly barred by the one-year statute of limitations of MCL § 500.3145(1) since notice of the injuries was not given to Defendant until September 24, 2013 and the action was not commenced until November 22, 2013.

The Court incorporates herein by reference the facts, law, and arguments laid out in the record documents submitted to and considered by the Court (identified below) and, thereby, dispenses with a lengthy presentation here of same.

Issues to be Decided by Court

1) Whether Defendant waived the "one-year statute of limitations" defense contained in MCL § 500.3145(1) under the doctrine of "mend the hold," whereby, once Defendant set forth its lone "policy exclusion" defense (in conjunction with MCL § 500.3114) in the "denial" letter, Defendant could not then assert the new "one-year statute of limitations" defense during litigation;

2) Whether, assuming Defendant did not waive the "one-year statute of limitations" defense, this action is time-barred under MCL § 500.3145(1), whereby, subject to two listed exceptions that do not apply here, an action against a "no fault" insurer for recovery of PIP benefits may not be commenced more than one year after the date of the accident; and

3) Whether Ms. Groulx [who was living with Mr. Groulx (her brother) at the time of the accident] qualifies as an "insured" under the policy so as to render Defendant the "insurer" of the owner or registrant of the vehicle occupied by Plaintiff at the time of the accident (i.e., whether Plaintiff is entitled to claim "no fault" benefits from Defendant).

As can easily be seen, this matter presents questions concerning merely the proper interpretation of contractual or statutory language.

SUMMARY OF THIS COURT'S DETERMINATIONS

In short, under the facts and surrounding circumstances presented in this case, this Court determines that, first, Defendant did not waive the "one-year statute of limitations" defense contained in MCL § 500.3145(1) under the doctrine of "mend the hold." Once Defendant set forth its lone "policy exclusion" defense (in conjunction with MCL § 500.3114) in the "denial" letter, Defendant could still then assert the new "one-year statute of limitations" defense during litigation.

Second, this action is not time-barred under MCL § 500.3145(1). Accordingly, the action against Defendant (i.e., a "no fault" insurer) for recovery of PIP benefits may be commenced more than one year after the date of the accident.

Third, Ms. Groulx does not qualify as an "insured" under the policy so as to render Defendant the "insurer" of the owner or registrant of the vehicle occupied by Plaintiff at the time of the accident. As a result, Plaintiff is not entitled to claim "no fault" benefits from Defendant.

As such, summary disposition is GRANTED as to Defendant and, in turn, DENIED as to Plaintiff and Intervening-Plaintiff.

RECORD DOCUMENTS CONSIDERED BY COURT

In attempting to resolve these issues, this Court has considered to various extents the following documents of record in this case, including corresponding exhibits thereto (identified in chronological order):

1) "Stipulated Facts" (dated September 2, 2015);

2) "Plaintiff's Motion for Summary Disposition" and "Plaintiff's Brief in Support of Motion for Summary Disposition" (dated September 3, 2015);

3) "Intervening Plaintiff Michigan Property & Casualty Guaranty Association's Motion for Summary Disposition" and "Intervening Plaintiff Michigan Property & Casualty Guaranty Association's Brief in Support of Motion for Summary Disposition" (dated September 3, 2015);

4) "Defendant Progressive's Motion for Summary Disposition" and "Brief in Support of Defendant Progressive's Motion for Summary Disposition" (dated September 3, 2015);

5) "Intervening Plaintiff Michigan Property & Casualty Guaranty Association's Answer to Defendant Progressive Marathon Insurance Company's Motion for Summary Disposition" and "Intervening Plaintiff Michigan Property & Casualty Guaranty Association's Brief in Support of Answer to Defendant Progressive

Marathon Insurance Company's Motion for Summary Disposition" (dated October 8, 2015);

6) "Plaintiff's Response to Defendant Progressive Marathon Insurance Company's Motion for Summary Disposition" (dated October 8, 2015);

7) "Defendant Progressive's Response in Opposition to the Motions for Summary Disposition of Plaintiff Childers and the Intervening Plaintiff MPCGA" (dated October 8, 2015);

8) "Defendant Progressive's Reply to the Responses of Childers and the MPCGA to Defendant's Motion for Summary Disposition" (dated October 28, 2015);

9) "Intervening Plaintiff MPCGA's Reply to Defendant Progressive's Response in Opposition to the Motions for Summary Disposition of Plaintiff Childers and the Intervening Plaintiff MPCGA" (dated October 28, 2015);

10) "Plaintiff's Reply to Defendant Progressive Marathon Insurance Company's Response to Motion for Summary Disposition" (dated October 29, 2015);

11) Transcript of Hearing on Motions for Summary Disposition (dated October 29, 2016);

12) "Plaintiff Childers' Two-Page Argument Summary in Support of Motion for Summary Disposition" (dated November 15, 2016);

13) "Defendant Progressive's Supplemental Outline Brief in Support of its Motion for Summary Disposition" (dated November 16, 2016);

14) "Intervening Plaintiff Michigan Property & Casualty Guaranty Association's Outline of Oral Argument from October 25, 2016" (dated November 16, 2016);

15) "Intervening Plaintiff Michigan Property & Casualty Guaranty Association's Supplemental Brief in Support of Motion for Summary Disposition" (dated June 20, 2017);

16) "Intervening Plaintiff Michigan Property & Casualty Guaranty Association's Second Supplemental Brief in Support of Motion for Summary Disposition" (dated July 27, 2017);

17) "Defendant Progressive's Response to Intervening Plaintiff MPCGA's Supplemental Brief in Support of Motion for Summary Disposition" (dated August 11, 2017);

18) "Defendant Progressive's Response to Intervening Plaintiff MPCGA's Second Supplemental Brief in Support of Motion for Summary Disposition" (dated August 28, 2017); and

19) "Intervening Plaintiff, Michigan Property & Casualty Guaranty Association's, Supplemental Brief in Support of Motion for Summary Disposition" (dated July 16, 2020).

RELEVANT PROVISIONS OF SUBJECT INSURANCE POLICY

Auto Insurance Coverage Summary
This is your Renewal Declarations Page

Your coverage begins on July 14, 2011 at 12:01 a.m. This policy expires on January 14, 2012 at 12:01 a.m.

MATTHEW M. GROULX Named insured

2002 Buick Century

MICHIGAN AUTO POLICY
GENERAL DEFINITIONS

5. "**Covered auto**" means:
   a. any auto . . . shown on the declarations page for the coverages applicable to that auto . . . .
6. "**Declarations page**" means the document showing your coverages, limits of liability, covered autos, premium, and other policy-related information. . . .
9. "**Relative**" means a person residing in the same household as you, and related to you by blood . . . .
13. "**You**" and "**your**" mean:
   a. a person shown as a named insured on the declarations page . . . .

PART I – LIABILITY TO OTHERS

INSURING AGREEMENT – BODILY INJURY AND PROPERTY DAMAGE LIABILITY COVERAGE

If you pay the premium for this coverage, we will pay damages for bodily injury and property damage for which an insured person becomes legally responsible because of an accident.

ADDITIONAL DEFINITION

When used in this Part I:

"**Insured person**" means:

- you or a relative with respect to an accident arising out of the ownership, maintenance, or use of an auto . . . .

EXCLUSIONS – READ THE FOLLOWING EXCLUSIONS CAREFULLY. IF AN EXCLUSION APPLIES, COVERAGE WILL NOT BE AFFORDED UNDER THIS PART I.

Coverage under this Part I, including our duty to defend, will not apply to any insured person for:

14. bodily injury . . . arising out of the ownership, maintenance, or use of any vehicle owned by a relative or furnished or available for the regular use of a relative, other than a covered auto for which this coverage has been purchased. . . .

PART II – PERSONAL PROTECTION INSURANCE AND PROPERTY PROTECTION INSURANCE COVERAGE

INSURING AGREEMENT – PERSONAL PROTECTION INSURANCE COVERAGE (PIP)

If you pay the premium for this coverage, we will pay Personal Protection Insurance Benefits required by the Michigan No-Fault Law, Chapter 31 of the Michigan Insurance Code, as amended, for accidental bodily injury to an eligible injured person arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle, subject to the exceptions, exclusions, and limitations specified herein and as additionally provided by the law of the State of Michigan.

ADDITIONAL DEFINITIONS

When used in this Part II:

2. **"Eligible injured person"** means:
   - you or any relative who sustains accidental bodily injury in an accident involving a motor vehicle . . . .

EXCLUSIONS – READ THE FOLLOWING EXCLUSIONS CAREFULLY. IF AN EXCLUSION APPLIES, COVERAGE WILL NOT BE AFFORDED UNDER THIS PART II.

Coverage under Personal Protection Insurance does not apply to accidental bodily injury:

8. sustained by the owner or registrant of a motor vehicle . . . involved in an accident which is not covered by security as required by the Michigan No-Fault Law, Chapter 31 of the Michigan Insurance Code, as amended . . . .
11. sustained by a relative while occupying . . . a motor vehicle, other than a covered auto, which is:
    a. owned or registered by that relative; and

b. not covered by security as required by the Michigan No-Fault Law, Chapter 31 of the Michigan Insurance Code, as amended . . . .

LIMITS OF LIABILITY

No coverage will be provided under this Part II except as required by the Michigan No-Fault Law, Chapter 31 of the Michigan Insurance Code, as amended.

RELEVANT PROVISIONS OF DEFENDANT'S "DENIAL OF COVERAGE" LETTER TO PLAINTIFF DATED OCTOBER 29, 2013

According to the terms of the Progressive policy issued to MATTHEW GROULX effective July 14, 2011, Part II EXCLUSIONS as well as the Michigan No-Fault Act MCL 500.3114, COVERAGE DOES NOT EXIST for JUSTIN CHILDERS.

Part II EXCLUSIONS of the Progressive policy states that Personal Protection Insurance coverage does not apply to:

. . . any person, other than our POLICY HOLDER or domiciled relative of our POLICY HOLDER who is occupying a motor vehicle, which is not a COVERED VEHICLE; operated by policy holder or domiciled relative; and covered by security as required by the Michigan No-Fault Law Chapter 31 of the Michigan Insurance Code;

With regard to the Michigan No-Fault Act (MCL 500.3114), it provides a specific order of priority as to who pays an individual's allowable benefits. The following is the order of priority in which you must proceed to obtain Michigan No-Fault benefits:

Occupant of Motor Vehicle . . . :

1. Injured person's own policy, and if none . . .
2. Policy insuring any relative living in the same household, and if none . . .
3. Policy insuring the owner of the vehicle occupied, and if none . . .

4. Policy insuring operator of the vehicle occupied, and if none . . .
5. Assigned Claims Plan.

Our investigation has revealed that another insurance company should be providing your No-Fault benefits.

LEGAL STANDARDS

Michigan Court Rule 2.116(C)(7)

Summary disposition may be granted pursuant to MCR 2.116(C)(7) where "[e]ntry of judgment, dismissal of the action, or other relief is appropriate because of . . . prior judgment . . . or other disposition of the claim before commencement of the action." MCR 2.116(C)(7). A party is not required to submit any material in support of a motion under MCR 2.116(C)(7); the motion can be evaluated on the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 119 (1999). "The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Id.* "A party may support [or oppose] a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence," *Maiden*, 461 Mich at 119, which "shall only be considered to the extent that the content or substance would be admissible as evidence to establish or deny the grounds stated in the motion." MCR 2.116(G)(6).

"In reviewing the motion, a court must review all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Yono v Dep't of*

Transp (Yono I), 495 Mich 982, 982-983 (2014); see also MCR 2.116(G)(5). "If the movant properly supports his or her motion by presenting facts that, if left unrebutted, would show that there is no genuine issue of material fact that the movant [is entitled to summary disposition], the burden shifts to the nonmoving party to present evidence that establishes a question of fact." *Yono v Dep't of Transp* (On Remand) (*Yono II*), 306 Mich App 671, 679-680 (2014), rev'd on other grounds, 499 Mich 636 (2016). "If the trial court determines that there is a question of fact as to whether the movant [is entitled to summary disposition], the court must deny the motion." *Yono II*, 306 Mich App at 680, citing *Dextrom v Wexford Co*, 287 Mich App 406, 431 (2010).

Michigan Court Rule 2.116(C)(10)

Summary disposition may be granted where "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). This motion tests the factual sufficiency of the complaint and "must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact." MCR 2.116(G)(4). The moving party bears the initial burden of supporting its position. *Smith v Globe Life Ins Co*, 460 Mich 446, 455 (1999). "Affidavits, depositions, admissions, or other documentary evidence in support of the grounds asserted in the motion are required . . . when judgment is sought based on [MCR 2.116(C)(10)]." MCR 2.116(G)(3)(b). "The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue

rests on a nonmoving party, the nonmoving party may *not* rely on mere allegations or denials in pleadings, but *must* go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Smith*, 460 Mich at 455 (citations omitted; emphasis added). "[W]hen a witness's credibility is at issue, summary disposition is inappropriate." *Taylor Estate v Univ Physician Group*, ___ Mich App ___, ___ (2019).

It is not appropriate for the court to consider whether a record "might be developed" in an attempt to give the non-movant the benefit of reasonable doubt. *Smith*, 460 Mich at 455 n 2. The reviewing court should evaluate a motion for summary disposition under MCR 2.116(C)(10) by considering the substantively admissible evidence actually proffered in opposition to the motion. *Smith*, 460 Mich at 455 n 2; MCR 2.116(G)(6). A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. *Smith*, 460 Mich at 455 n 2. A promise is insufficient under the current court rules. *Id.*

In evaluating a motion for summary disposition on this ground, a trial court must consider any affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, subject to the limitations in MCR 2.116(G)(6) (material submitted for consideration must be admissible as evidence). MCR 2.116(G)(5). This evidence should be considered in the light most favorable to the non-moving party. *Brown v Brown*, 478 Mich 545, 551-552 (2007).

MOST RELEVANT STATUTORY PROVISIONS AND COURT RULES CITED BY PARTIES

MCL § 500.3030

In the original action brought by the injured person, or his or her personal representative in case death results from the accident, as mentioned in section 3006, the insurer shall not be made or joined as a party defendant, nor, except as otherwise provided by law, shall any reference whatever be made to such insurer or to the question of carrying of such insurance during the course of trial.

MCL § 500.3113

A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident . . . :

(b) The person was the owner or registrant of a motor vehicle . . . involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect.

MCL § 500.3114

(1) Except as provided in subsections (2), (3), and (5), a personal protection insurance policy described in section 3101(1) applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident. A personal injury insurance policy described in section 3103(2) applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motorcycle accident. If personal protection insurance benefits or personal injury benefits described in section 3103(2) are payable to or for the benefit of an injured person under his

or her own policy and would also be payable under the policy of his or her spouse, relative, or relative's spouse, the injured person's insurer shall pay all of the benefits up to the coverage level applicable under section 3107c to the injured person's policy, and is not entitled to recoupment from the other insurer.

(4) Except as provided in subsections (1) to (3), a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:

(a) The insurer of the owner or registrant of the vehicle occupied.

(b) The insurer of the operator of the vehicle occupied.

(5) Subject to subsections (6) and (7), a person who suffers accidental bodily injury arising from a motor vehicle accident that shows evidence of the involvement of a motor vehicle while an operator or passenger of a motorcycle shall claim personal protection insurance benefits from insurers in the following order of priority:

(a) The insurer of the owner or registrant of the motor vehicle involved in the accident.

MCL § 500.3145

(1) An action for recovery of personal protection insurance benefits payable . . . for an accidental bodily injury may not be commenced later than 1 year after the date of the accident that caused the injury unless written notice of injury . . . has been given to the insurer within 1 year after the accident . . . .

MCL § 500.7911

(3) The [property and casualty guaranty] association is subject to the requirements of this chapter and chapter 81 but is not subject to the other chapters of this act. The association shall be subject to other laws of this state to

the extent that it would be subject to those laws if it were an insurer organized and operating under chapter 50, to the extent that those other laws are consistent with this chapter.

MCL § 500.7931

(3) If damages or benefits are recoverable by an insurance policy owned or paid for by the claimant or by a claimant or insured under an insurance policy other than a policy of the insolvent insurer, or under a self-insured program of a self-insured entity, the damages or benefits recoverable shall be a credit against a covered claim payable under this chapter. 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.

MCL § 500.7935

(2) An insured or claimant entitled to the benefits of this chapter shall be considered to have assigned to the association, to the extent of any payment received from the association, his or her rights against the estate of the insolvent insurer, rights under the policy under which his or her claim arose, and any other rights the insured or claimant may have against another person for payment of the covered claim paid by the association.

(3) The association shall be entitled to receive, to the extent of the amount paid or payable by the association by reason of a covered claim, any amount recoverable by the receiver or the insolvent insurer by way of right of indemnification from the catastrophic claims association created in section 3104.

MCL § 600.5813

All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes.

Michigan Court Rule 2.111

(F) Defenses; Requirement That Defense Be Pleaded.

(3) Affirmative Defenses. Affirmative defenses must be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118. Under a separate and distinct heading, a party must state the facts constituting

(a) an affirmative defense, such as . . . statute of limitations . . . .

MOST RELEVANT CASE LAW CITED BY PARTIES

ACIA v Meridian Mutual Insurance Company, 207 Mich App 37, 40-42 (1994)

Amerisure Insurance Company v Auto-Owners Ins Co, 262 Mich App 10, 15 (2004)

Amerisure Insurance Company v Coleman, 274 Mich App 432, 435-438 (2007)

Auto Club Ins Assoc v Meridian Mut Ins Co, 207 Mich App 37, 40-42 (1994)

Auto-Owners Ins Co v Churchman, 440 Mich 560, 566-567 (1992)

Bartlett Invs Inc v Certain Underwriters at Lloy'd London, 319 Mich App 54, 61-62 (2017)

Belcher v Aetna Cas & Surety Co, 409 Mich 231, 251-253 (1980)

Cardinal Fabricating v Cincinnati Insurance, unpublished opinion, issued 6/18/20 (Docket 348339)

CE Tackels, Inc v Fantin, 341 Mich 119 (1954)

Dobbelaere v Auto-Owners Ins Co, 275 Mich App 527, 532, 534 (2007)

Felsner v McDonald Rent-A-Car, Inc, 173 Mich App 518, 522-524 (1988)

Heniser v Frankenmuth Mutual Insurance Company, 449 Mich 155, 161, 172 (1995)

Jackson v SMART, unpublished opinion, issued 7/6/17 (Docket 331253)

Kirschner v Process Design Associates, 459 Mich 587 (1999)

Lee v Evergreen Regency Coop & Mgt Syst, 151 Mich App 281, 285-288 (1986)

Levander v Home Owners Ins Co, unpublished opinion, issued 6/18/15 (Docket 320101)

Michigan Twp Participating Plan v Federal Insurance Company, 233 Mich App 422, 435-436 (1999)

Rory v Continental Insurance Company, 473 Mich 457, 491 (2005)

Ruddock v Detroit Life Ins Co, 209 Mich 638, 652-654 (1920)

Smith v Grange Mut Fire Ins Co, 234 Mich 119, 122-123 (1926)

Sours v Titan Insurance Company and Westfield Insurance Company, unpublished opinion, issued 12/27/11 (Docket 301328)

South Macomb Disposal Authority v American Ins Co, 225 Mich App 635, 695-696 (1997)

Stone v Auto-Owners Ins Co, 307 Mich App 169, 177-178 (2014)

Titan Insurance Company/Hughes v State Farm, unpublished opinion, issued 3/27/12 (Docket 301978)

Yetzke v Fausak, 194 Mich App 414, 418, 422 (1992)

SUMMARY OF RESPECTIVE ARGUMENTS OF PARTIES

Defendant

1) Plaintiff is not entitled to claim "no fault" benefits from Defendant because he is not a policyholder of Defendant, resident relative of Mr. Groulx (who was a policyholder and insured of Defendant), and MCL § 500.3114(4) does not apply.

2) If Plaintiff were injured while occupying a vehicle owned or being operated by Mr. Groulx, Plaintiff could claim benefits under MCL § 500.3114(4)(a) or (b), respectively, from Defendant as the insurer of Mr. Groulx (who would be the owner or operator of the vehicle).

3) But, Plaintiff was not occupying a vehicle owned or being operated by Mr. Groulx; he was occupying an uninsured vehicle owned and operated by Ms. Groulx.

4) Plaintiff is not entitled to claim "no fault" benefits from Defendant as the insurer of Ms. Groulx because she was not covered by Defendant in any way (i.e., it had assumed no risk of loss)—including whatsoever under the policy—in connection with her, the accident, or her use of her own uninsured vehicle.

5) Plaintiff and Intervening-Plaintiff are attempting to bootstrap Ms. Groulx's potential entitlement to PIP benefits (i.e., by virtue of her status as a "relative domiciled in the same household" as Mr. Groulx) for purposes of characterizing Defendant as the "insurer" of Ms. Groulx.

6) While Ms. Groulx is an "eligible injured person," her claim is excluded under "Exclusion 8" of the policy (i.e., providing that no PIP benefits are payable for

injuries sustained by "the owner or registrant of a motor vehicle involved in an accident" that was not insured for PIP benefits), which operates to exclude Plaintiff's claim under the policy.

7) Intervening-Plaintiff essentially has no greater rights than does Plaintiff; Intervening-Plaintiff's right of recovery is limited to a theory of subrogation only.

8) The determination of whether Defendant must be deemed the "insurer" of Ms. Groulx for purposes of applying MCL § 500.3114(4) to the circumstances of this case is governed by the controlling authorities of *Amerisure* and *Dobbelaere* (i.e., the two published and, in turn, precedential and binding opinions from the Court of Appeals most directly on point) . . . not on *Sours* (an unpublished and, thus, non-precedential and non-binding opinion).

9) The governing/operative test is set by *Amerisure*: an insurance company is one's insurer under circumstances in which, by its contract with a person, it assumes risk of the person's loss and compensating her/him for the loss.

10) *Dobbelaere* directly rejects a broad reading of *Amerisure* and limits this test: "[T]he fact that an individual might derivatively claim PIP benefits through a named insured under MCL § 500.3114(1) does not render the policy issuer the 'insurer' of that individual for purposes of MCL § 500.3114(4)."

11) The fact that Ms. Groulx (as a resident relative of Mr. Groulx) might be able to, for example, from Defendant claim PIP benefits if she were injured as a pedestrian or passenger in another vehicle or seek "bodily-injury liability" coverage if

she were driving Mr. Groulx's vehicle (i.e., circumstances in which Defendant would bear the corresponding risk) does not render Defendant her insurer.

12) Unlike the derivatively insured in *Amerisure* (who qualified for coverage under the policy of the insurance company of his wife), Ms. Groulx does not qualify for coverage under the terms of the policy since no risk of loss was assumed by Defendant, which is the test.

13) Defendant does not qualify as the insurer of Ms. Groulx, she had no insurer in this case, MCL § 500.3114(4) does not apply, Plaintiff has no claim against Defendant, and Intervening-Plaintiff remains responsible for providing all "no fault" benefits owed to Plaintiff.

14) The policy is nowhere in the order of priority for Plaintiff's loss; had there been no policy of American Fellowship Mutual Insurance Company and, thus, no involvement of Intervening-Plaintiff in this loss, the Michigan Assigned Claims Plan (i.e., not Defendant) would have been responsible for Plaintiff's claim.

15) This claim against Defendant is barred by MCL § 500.3145(1) in any event [with the two listed exceptions of this statutory provision (i.e., "notice" and "prior payment") not applying here].

16) Plaintiff filed the instant lawsuit against Defendant well after the statute of limitations clearly applicable to him had run, and Intervening-Plaintiff joined even later.

17) Intervening-Plaintiff's rights of recovery against Defendant are expresly defined by Intervening-Plaintiff's own statutory provisions [i.e., MCL §§ 500.7931(3)

and 500.7935(2)] as consisting of those rights possessed by Plaintiff such that Intervening-Plaintiff has a credit only if damages or benefits are recoverable by Plaintiff (stated another way, Intervening-Plaintiff stands in Plaintiff's shoes such that its right of recovery is no greater than that possessed by Plaintiff).

18) *Felsner* said that MCL § 500.7911(3) was intended to merely relieve Intervening-Plaintiff from only complying with burdens imposed on insurance companies by the insurance code, and MCL § 500.3145(1), by its terms, imposes no burden on insurance companies at all such that reliance by Plaintiff and Intervening-Plaintiff on this statutory provision is misplaced.

19) Since MCL § 500.3145(1) applies to bar Plaintiff's claim, benefits are simply not recoverable.

20) Any vague claim of unfairness by Intervening-Plaintiff is more than offset by the inequity that would be imposed on Defendant for it to be compelled to respond to potentially decades-old claims of which it never had notice; Plaintiff has no viable claim of unfairness at all, as his benefits would continue to be paid by Intervening-Plaintiff [in substitution for American Fellowship Mutual Insurance Company (which was the ultimately responsible insurer that became insolvent)].

21) "Mend the hold" or "waiver/estoppel" is a red herring and does not apply to this case because it has no bearing on the substantive issue of coverage and may not be applied against a defense of "no coverage" (i.e., used to broaden coverage to protect Plaintiff against risks not included in the policy or expressly excluded from the policy).

22) "Mend the hold" or "waiver/estoppel" does not apply to this case because it further does not apply to the affirmative defense of statute of limitations—a defense that, by its very nature, is applicable where a lawsuit is filed after the statute of limitations has passed, does not exist and need not be raised unless and until a lawsuit is initiated, is timely as long as it was asserted in Defendant's first responsive pleadings, and is not a "lack of notice" defense.

23) Defendant does not have nor was there ever occasion for it to assert a "lack of notice" defense; rather, Plaintiff clearly is subject to and the action clearly is barred by the one-year statute of limitations of the "No Fault Act" [i.e., MCL § 500.3145(1)].

24) Intervening-Plaintiff clearly is subject to such statute of limitations as well since Intervening-Plaintiff "stands in the shoes" of Plaintiff (i.e., having no rights greater than Plaintiff himself has).

25) If Defendant had received written "notice" during the first year post-accident, then, by its terms, the statute of limitations would not apply; "notice" would have been for Plaintiff to assert, if available, as an exception to the statute of limitations.

Plaintiff and Intervening-Plaintiff

1) MCL § 500.3114 is both a "priority" and "entitlement" statute used to determine the next insurer in priority to pay PIP benefits to Plaintiff

2) Plaintiff is entitled to recover the PIP benefits from Defendant since it is the next "no fault" insurer in the chain of priority as the insurer of Ms. Groulx.

3) Defendant is the contractual "insurer" of Ms. Groulx (who qualifies as an "insured person" by virtue of her status as an "eligible injured person") pursuant to the terms of both the "PIP" section (which extends coverage beyond its "named insured") and the "liability" section of the policy such that Defendant is responsible for payment of the PIP benefits under MCL § 500.3114(4).

4) Under MCL § 500.3114, Plaintiff looks to the insurer of Ms. Groulx (i.e., as the operator of the vehicle occupied) such that the analysis under this statutory provision—for purposes of determining the next insurer in priority for Plaintiff—stops at this point.

5) A "no fault" insurance carrier can be responsible for PIP benefits even if the vehicle it insures was not the actual vehicle involved in the accident.

6) The defense that Ms. Groulx may be disqualified from her entitlement to actual payment/recovery of PIP benefits from Defendant under the policy for treatment of her injuries [by virtue of the fact that she was the "owner" of the vehicle (which was uninsured at the time of the accident)] is irrelevant and of no concern for purposes of determining who is the next insurer in line to pay PIP benefits to Plaintiff.

7) Defendant's argument that both "coverage" and "policy" defenses are considered at the same time when determining if Ms. Groulx is an "insured" under the policy is flawed and contrary to *Heniser*.

8) This is a two-step process: determining whether, first, there is coverage for Ms. Groulx's claim and, second, any exclusions apply to the claim.

9) The statutory mandate of MCL § 500.7831(3)—that a lower-priority "no fault" insurer is obligated to pay PIP benefits to Plaintiff before Intervening-Plaintiff does so—trumps MCL § 500.3145.

10) Focus is not on the insurer of the vehicle actually occupied by Plaintiff, but, rather, that of the owner, registrant, or operator thereof, and the language of the policy is examined to determine whether Defendant is the insurer of Shaina Groulx.

11) Defendant is the insurer of Ms. Groulx pursuant to MCL § 500.3114(4).

12) For purposes of "bodily injury" and PIP coverage, Ms. Groulx qualifies as an insured person under the policy as it defines the terms "insured person," "relative," and "eligible injured person" used in the policy.

13) The fact that "liability" coverage for Ms. Groulx under the policy may be excluded by the "owned vehicle" exclusion therein and MCL § 500.3113(b) does not affect the existence of a contractual "insured/insurer" relationship between Defendant and Ms. Groulx because such exclusion merely sets forth a circumstance not covered by the policy and is not relevant to defining who is an "insured" for purposes of MCL § 500.3114(4) [that is to say, it is the presence of such relationship—not the terms of it—that is the determinative inquiry for defining the "insurer" under the plain language of MCL § 500.3114(4)].

14) There is no requirement that Ms. Groulx's PIP claim be successful for purposes of MCL § 500.3114(4).

15) Unlike the policy here, the insurance contract in *Dobbelaere* did not define who was an "insured" thereunder, and there was nothing in the plain language of the contract to indicate an intent to render a relative of the insured an insured as well under the contract.

16) The Michigan Court of Appeals addressed this very issue under a set of facts strikingly similar to the case at bar in *Sours*, concluding that the defendant occupied a higher order of priority as the insurer of the "owner," "registrant," and "operator" of the uninsured motor vehicle occupied by the injured plaintiff at the time of the occurrence [i.e., the "liability coverage" and "PIP coverage" exclusions merely set forth respective circumstances not covered and are not relevant to defining who is an "insured" for purposes of MCL § 500.3114(4)].

17) The policy clearly and unequivocally extended coverage beyond just its "named insured" (i.e., Mr. Groulx) to "insured persons," who include relatives (such as Ms. Groulx) living in the same household as Mr. Groulx.

18) Intervening-Plaintiff can be liable only if there is no other insurance available (irrespective of priority) such that, if Defendant were liable for PIP benefits and American Fellowship Mutual Insurance Company and Intervening-Plaintiff did not exist, then Defendant is liable for the benefits (i.e., Plaintiff can obtain the benefits from "last resort" Intervening-Plaintiff only if there is no other insurer on the risk).

19) Intervening-Plaintiff is not a substitute insurer at the highest priority; rather, Intervening-Plaintiff is strictly an insurer of last resort and liable only if no other solvent insurer exists at any level of priority.

20) As a result of the insolvency, the legal effect is that there is no American Fellowship Mutual Insurance Company such that there is no question that Defendant (indisputably being a solvent insurer at some level of priority) is liable and definitionally at a higher priority than Intervening-Plaintiff.

21) Defendant makes no reference whatsoever to the one and only exclusion upon which Defendant relies in the "denial" letter denying Plaintiff's claim (i.e., "Exclusion 7.c") and, in such denial, did not assert that Ms. Groulx was operating the uninsured vehicle at the time of the accident or Plaintiff failed to provide notice of the accident within one year thereof.

22) Defendant has waived these and any other potential defenses under the doctrine of "mend the hold," whereby, once Defendant set forth its defenses in a denial, it could not assert new defenses during litigation.

23) Intervening-Plaintiff is exempted from the "one-year back" rule and "one-year notice" provision set forth in MCL § 500.3145(1).

24) When Defendant refused payment, Defendant must have fully apprised Plaintiff of all defenses upon which it intended to rely, and its failure to do so constituted a waiver and precluded Defendant from asserting any defenses other than those of which it had previously given notice (i.e., "mend the hold" or "waiver/estoppel").

25) Defendant is precluded from obtaining relief on ay defense not explicitly stated in the "denial" letter.

26) Plaintiff and Intervening-Plaintiff are not required to show prejudice by Defendant's failure to assert the proper defenses in the "denial" letter.

27) Once Defendant denied coverage to Plaintiff and stated its defenses, Defendant waived or was estopped from raising new defenses such that an analysis of prejudice needed not be undertaken.

28) Defendant admitted that it did not raise in the "denial" letter the defense of "notice of the claim," upon which Defendant is now relying [i.e., Defendant claims that Plaintiff and Intervening-Plaintiff failed to provide notice within one year (which, of course, was impossible because American Fellowship Mutual Insurance Company was still solvent during that period of time)].

29) Once Defendant learned of the claim, Defendant knew or should have known that the notice was not timely; despite that, Defendant did not raise nor specifically reference the defense of lack of notice in the "denial" letter, so Defendant waived that defense.

30) The claims of Plaintiff are derivative of those of Intervening-Plaintiff.

31) MCL § 500.7911(3) assures that Intervening-Plaintiff is not subject to the other chapters of the insurance code.

ANALYSIS OF COURT

Is "Statute of Limitations" Defense Waived Under "Mend the Hold" Doctrine?

The Court now turns its attention to whether Defendant waived the "one-year statute of limitations" defense contained in MCL § 500.3145(1) under the doctrine of "mend the hold." In other words, once Defendant set forth its lone "policy exclusion" defense (in conjunction with MCL § 500.3114) in the "denial" letter, could Defendant then assert the new "one-year statute of limitations" defense during litigation?

When Defendant denied coverage to Plaintiff on October 29, 2013, the only rationale given for the denial was the policy exclusion (in conjunction with MCL § 500.3114). In the "denial" letter, Defendant did not reserve the right for it to rely upon other provisions of the policy nor cite to any other provisions of the No-Fault Act. Only after litigation commenced did Defendant raise the one-year statute of limitations as a potential defense.

As supported by decades of good case law cited by Plaintiff and Intervening-Plaintiff in connection with this issue, Michigan subscribes to the "mend the hold" doctrine (more commonly referred to as "waiver" and/or "estoppel"). The doctrine states essentially that, once an insurance company has denied coverage and stated its defenses, it has waived or is estopped from raising new defenses. For instance, an insurer cannot deny coverage to Plaintiff on one basis and then seek another rationale to support the denial once litigation has commenced. Thus, here, once Defendant cited the policy exclusion in the "denial" letter, Defendant could not then backpedal and look for

new reasons to support the denial. Defendant is stuck with its original denial. Having selected its defense, Defendant was not entitled to raise new defenses for its failure to provide PIP coverage once it was sued for doing so.

With that said, however, Defendant's affirmative "one-year statute of limitations" defense is based solely upon the fact that the instant lawsuit was filed more than one year after the accident . . . it is not in support of lack of coverage. MCL § 500.3145(1) contemplates that a lawsuit be commenced (i.e., not merely a claim be filed with an insurance company). By its very nature, then, the defense did not even exist and needed not be raised by Defendant unless and until the lawsuit was initiated by Plaintiff. In that regard, pursuant to MCR 2.111(F)(3)(a), Defendant asserted the defense in its first responsive pleadings. The "unless written notice of injury" clause of the statutory provision is an exception to the one-year bar that Plaintiff could have used in response to the defense (i.e., Defendant was not required to assert that the exception did not apply even before the lawsuit was commenced). Therefore, Defendant's argument that "mend the hold" does not apply to the defense has merit, and the defense is not waived under the "mend the hold" doctrine.

Is Action Time-Barred under MCL § 500.3145(1)?

The Court now turns its attention to, assuming Defendant did not waive the "one-year statute of limitations" defense, whether this action would be time-barred under MCL § 500.3145(1). There is no dispute that the first time Defendant received notice of the accident occurred on or about September 24, 2013, shortly after the

insolvency of American Fellowship Mutual Insurance Company (which was not declared insolvent until more than a year after the accident).

Intervening-Plaintiff contends that it is not subject to the general provisions of the Michigan Insurance Code, including the No-Fault Act and, hence, MCL § 500.3145. Intervening-Plaintiff contends further that it was not required to put Defendant on notice within one year and MCL § 500.3145(1) does not preclude Intervening-Plaintiff from seeking reimbursement for PIP benefits from Defendant. Intervening-Plaintiff contends even further that MCL § 500.7931(3) shifts any payment burden from Intervening-Plaintiff to a solvent insurer.

In response thereto, Defendant contends that MCL § 500.7911(3) was intended to relieve Intervening-Plaintiff from complying only with burdens imposed on insurance companies by the insurance code. In this regard, Defendant contends further that MCL § 500.3145(1) imposes no burden on insurers; rather, it benefits them.

MCL § 500.3145(1), by its terms, imposes that an action must be commenced against a "no fault" insurer for recovery of PIP benefits no more than one year after the subject accident. In this respect, the Court finds that this statutory provision can apply to both individuals and other insurers alike. In this way, the Court finds further this imposition can be a burden/obligation on an insurance company such that Intervening-Plaintiff is relieved from complying with it. Wherefore, this action is not time-barred under MCL § 500.3145(1).

In addition and as a practical matter, Intervening-Plaintiff's claim against Defendant did not and could not even exist until the insolvency of American

Fellowship Mutual Insurance Company occurred in June 2013 (i.e., nearly two years after the accident) because Plaintiff's claim against Defendant could not accrue until that time. Before that time, Intervening-Plaintiff could not have been involved in this case for it to investigate the "insurance coverage" issue. Plaintiff would have had no reason for him to pursue other potential insurers for coverage because the then-existing order of priority made clear that American Fellowship Mutual Insurance Company was the insurer highest in priority to pay PIP benefits to Plaintiff. A claim against any other insurer (including Defendant) did not and could not exist until the claim accrued. A claim against Defendant could not accrue in this case until the insolvency.

Is Plaintiff Entitled to Claim "No Fault" Benefits from Defendant?

The Court now turns its attention to whether Ms. Groulx qualifies as an "insured" under the policy so as to render Defendant the "insurer" of the owner or registrant of the vehicle occupied by Plaintiff at the time of the accident. In so doing, the Court notes that this inquiry is not simply to see whether Ms. Groulx is listed as an "insured" or an "eligible injured person" under the terms of the policy. Michigan law requires "no fault" coverage potentially to extend to a resident relative pursuant to MCL § 500.3114(4).

Yet, *Dobbelaere*—as binding precedent—held that such coverage does not necessarily render an insurance company the "insurer" of the resident relative for purposes of MCL § 500.3114(4) (even the resident relative in *Dobbelaere* was listed in the policy at issue there as an "insured," an "eligible injured person," or some equivalent to

either of those). *Dobbelaere* further states that the term "insurer" is not defined in the No-Fault Act and a dictionary defines it as "one who agrees, by contract, to assume the risk of another's loss and to compensate for that loss."

So, the fact that Ms. Groulx can derivatively claim PIP benefits through Mr. Groulx does not necessarily render Defendant the "insurer" of Ms. Groulx for purposes of MCL 500.3114(4). To the contrary, whether Defendant is such "insurer" depends upon the language of the relevant insurance policy.

Transitioning to *Amerisure* (also binding precedent), the test is and the Court must determine whether, under the terms of the policy, Defendant was the "insurer" of Ms. Groulx (i.e., agreed, by contract, to assume the risk of loss on the part of Ms. Groulx and compensate her for it). Toward that end, the Court examined the policy (which necessarily includes the terms and conditions of coverage, exceptions, and exclusions). And, based upon results of such examination, the Court finds that Defendant was not an "insurer" of Ms. Groulx.

More specifically, Ms. Groulx could claim PIP benefits under the policy and would have a viable claim against Defendant under certain circumstances (e.g., if she were injured as a passenger in Mr. Groulx's vehicle or struck as a pedestrian by a stranger's vehicle). But, under the very circumstances presented in this case, Ms. Groulx could not claim PIP benefits from Defendant because she was statutorily disqualified from PIP benefits, from any source, while operating her own vehicle that she had failed to insure. Had she properly insured the vehicle, the corresponding insurer would have been her insurer. Her having failed to do so, Defendant did not

become her "insurer" (i.e., Defendant assumed no risk whatsoever in connection with her use of her own vehicle); rather, she was disqualified from entitlement to PIP benefits altogether.

To elaborate even more, the policy at issue here defines who is an insured, and the plain language of the policy indicates an intention by the parties to it to render Ms. Groulx an exclusion to coverage under it. Defendant assumed no such risk and would not compensate Ms. Groulx for any loss, whether for her own injuries or liability for those of someone else. Plus, there is no rational basis for concluding that Defendant was her "insurer" when it neither insured the vehicle nor Ms. Groulx [i.e., Ms. Groulx did not maintain insurance on the vehicle as she was required to do so under MCL § 500.3101(1)]. To wit, Ms. Groulx was not only the operator of the uninsured vehicle at the time of the accident, but owned the vehicle as well. She was not insured to recover PIP benefits and had no coverage with Defendant at such time. Bottom line, Defendant had not assumed a risk of loss with respect to operation of the vehicle by Ms. Groulx and was not her "insurer."

MCL § 500.3114(4) does not apply to Defendant. Consequently, Plaintiff is not entitled to claim "no fault" benefits from Defendant under the policy.

CONCLUSION

Under the facts and circumstances presented in this case with Plaintiff bearing the burden of proof on the last issue, the Court finds that:

1) Defendant did not waive the "one-year statute of limitations" defense contained in MCL § 500.3145(1) under the doctrine of "mend the hold";

2) This action is not time-barred under MCL § 500.3145(1); and

3) Plaintiff is not entitled to claim "no fault" benefits from Defendant.

In turn, the Court orders that:

1) Summary disposition be **GRANTED** as to Defendant and **DENIED** as to Plaintiff and Intervening-Plaintiff;

2) No costs or fees be awarded to any party;

3) This is NOT a final order, does NOT resolve the last pending claim, and does NOT close the case.

IT IS SO ORDERED.

March 29, 2021

Judge Brian S. Pickell (P57411)

EXHIBIT 3

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13-101626-NF JUDGE PICKELL FILE 11/22/13
GENESEE COUNTY JDF COD

P 001 CHILDERS,JUSTIN, VS D 001 PROGRESSIVE MARATHON INS,,
CNS-CHILDERS,SUSAN,, RES-BONTEMPO,CHRISTOPHER,,
46333 FIVE MILE RD SUITE 100
PLYMOUTH MI 48170
ATY:BURNS,RICHARD F ATY:JOHN,R. MICHAEL
P-26189 248-530-5540 P-29468 810-695-3700
SERVICE/ANS 01/15/14 ANS

XP001 PROGRESSIVE MARATHON INS CO,, VS XD001 MICHIGAN PROPERTY & CASUALTY,,
ATY:SAYLOR,DANIEL S 04/29/21 ATY:FEUER,SCOTT L., 04/29/21
P-37942 313-446-5520 P-38185 248-723-7828
SERVICE/ANS 10/01/21 ROS

IV001 MICHIGAN PROPERTY & CASUALTY,,
-INTERVENING PLAINTIFF,,
ATY:FEUER,SCOTT L., 06/09/14
P-38185 248-723-7828

IP001 BEAN,TEDD,E,
ATY:BEAN,TEDD E., 08/22/16
P-26530 810-695-6460

Actions, Judgments, Case Notes

Num	Date	Judge	Chg/Pty	Event Description/Comments
1	11/22/13	FULLERTON		SUMMONS AND COMPLAINT FILED RECEIPT# 00392586 AMT $150.00
2		YUILLE		CASE REASSIGNMENT FROM: FULLERTON,JUDITH ANNE, TO: YUILLE,RICHARD B., ORDER REASSIGNING CASE FROM JUDGE FULLERTON TO JUDGE YUILLE PER CASE NO.12-98500-NI FILED
3	12/04/13		D 001	RETURN OF SERVICE OF SUMMONS FILED 12/12/13 (BY ACKNOWLEDGMENT OF SERVICE BY CLAIMS PROCESSOR CHERYLA

			WILLSON)
4		D 001	RETURN OF SERVICE OF SUMMONS FILED 12/16/13 (CERT MAIL)
5	01/08/14	D 001	APPEARANCE ATTORNEY: P-35733 DE POLO AND PROOF OF SERVICE FILED.
6	01/14/14		PLTF'S REPLY TO DEFT'S SPECIAL AND/OR AFFIRMATIVE DEFENSES FILED RELIANCE ON JURY DEMAND FILED PROOF OF SERVICE 1/10/14 ON DEFT ATTY FILED
7	01/15/14		JURY DEMAND PAID RECEIPT# 00394495 AMT $85.00
8		D 001	ANSWER FILED ATTORNEY: P-35733 DE POLO AFFIRMATIVE DEFENSES AND JURY DEMAND PROOF OF SERVICE 1/9/14 ON PLTF ATTY FILED
9		D 001	JURY DEMAND FILED ATTORNEY: P-35733 DE POLO
10	01/31/14		CASE MANAGEMENT ORDER DATES: WIT LIST - 3/7/14 EXPERTS P - 3/7/14 EXPERTS D - 4/4/14 DISC CUTOFF - 7/3/14 SDM CUTOFF - 8/1/14 FAC/MED BY - 7/3/14 CEV AFTER - 9/1/14
11			FACILITATIVE MEDIATION (ADR)
12	02/07/14		MOTION FEE PAID RECEIPT# 00395561 AMT $20.00
13			SET NEXT DATE FOR: 03/03/14 9:00 AM MOTION HEARING HON. RICHARD B. YUILLE PLTF/TO REMOVE CASE FROM MEDIATION MOTION & NOTICE OF HEARING & PROOF OF SERVICE FILED NOTICE OF HEARING FILED PLTF'S MOTION TO REMOVE CASE FROM MEDIATION FILED AFFIDAVIT IN SUPPORT OF MOTION TO REMOVE CASE FROM MEDIATION FILED
14			SET NEXT DATE FOR: 03/03/14 9:00 AM MOTION HEARING HON. RICHARD B. YUILLE PLTF/TO COMPEL DISCOVERY MOTION & NOTICE OF HEARING & PROOF OF SERVICE FILED
15			NOTICE OF HEARING FILED MOTION TO COMPEL DISCOVERY FILED AFFIDAVIT IN SUPPORT OF MOTION TO COMPEL DISCOVERY FILED
16	03/03/14		MOTION HEARING ATTORNEY PRESENT: BURNS PROCEEDING DIGITALLY RECORDED

		PLTF'S MOTION TO REMOVE CASE
		FROM MEDIATION HEARD. MOTION
		GRANTED.
17		STIPULATED ORDER COMPELLING
		DISCOVERY FILED
18	03/04/14	ORDER REMOVING CASE FROM
		MEDIATION FILED
19	03/10/14	PLAINTIFF'S WITNESS LIST FILED
		& EXPERT LIST
		PROOF OF SERVICE OF SAME UPON
		ATTY DEPOLO ON 3/7/14 FILED
20	03/12/14	PROGRESSIVE MARATHON INS.
		CO.'S PRELIMINARY WITNESS LIST
		& EXHIBIT LIST & PROOF OF
		SERVICE ON 3/10/14 FILED
21	03/18/14	RETURN FROM ADR
22		PROOF OF SERVICE FILED
		OF DEFT'S RESPONSE TO PLTF'S
		NOTICE FOR PRODUCTION OF
		DOCUMENTS DATED 11/20/13 UPON
		ATTYS OF RECORD ON 3/14/14
23	06/02/14	MOTION FEE PAID
		RECEIPT# 00400809 AMT $20.00
24		SET NEXT DATE FOR: 06/09/14 9:00 AM
		MOTION HEARING
		HON. RICHARD B. YUILLE
		MOTION TO INTERVENE
		NOTICE OF HEARING FILED
		MICHAIGAN PROPERTY & CASUALTY
		GUARANTY ASSOC.'S MOTION TO
		INTERVENE AS INTERVENING PLTF
		FILED
		BRIEF IN SUPPORT & PROOF OF
		SERVICE ON 5/30/14 FILED
25	06/09/14	MOTION HEARING
		ATTORNEY PRESENT: SANGSTER
		PROCEEDING DIGITALLY RECORDED
		ATTY BURNS, JR PRESENT FOR
		ATTY SANGSTER'S MOTION TO
		INTERVENE. MOTION HEARD &
		AGREED UPON BY ATTY BURNS.
		MOTION GRANTED.
26		ORDER GRANTING MOTINO FOR
		LEAVE TO INTERVENE ON BEHALF
		OF MICHIGAN PROPERTY &
		CASUALTY GUARANTY ASSOC FILED
27		COMPLAINT OF INTERVENING
		PLTF MICHIGAN PROPERTY &
		CASUALTY GUARANTY ASSOC FILED
28	06/10/14	PROOF OF SERVICE FILED
		OF ORDER GRANTING MOTION TO
		INTERVENE AND INTERVENING
		COMPLAINT UPON ALL ATTYS OF
		RECORD ON 6/9/14 FILED
29	08/14/14	PROGRESSIVE MARATHON INS.
		CO'S ANSWER TO COMPLAINT OF
		INTERVENING PLTF. MICHIGAN
		PROPERTY & CASUALTY GUARANTY
		ASSOC. AND PROOF OF SERVICE OF
		SAME UPON ATTYS OF RECORD ON
		08/12/14 FILED

30	10/09/14		DENIAL OF AND DEMAND FOR SPECIFIC RECITATION OF FACT CONSTITUTING EACH AND EVERY AFFIRMATIVE DEFENSE SET FORTH BY DEFENDANT, PROGRESSIVE MARATHON INSURANCE COMPANY AND PROOF OF SERVICE ON 09/30/14 FILED
31	10/10/14		MOTION FEE PAID RECEIPT# 00407432 AMT $20.00
32		IV001	SET NEXT DATE FOR: 10/27/14 9:00 AM MOTION HEARING HON. RICHARD B. YUILLE IV1- EXTEND CASE MANAGEMENT DATES NOTICE OF HEARING AND PROOF OF SERVICE ON 10/8/14 FILED
33			INTERVENING PLAINTIFF, MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION'S MOTION TO EXTEND CASE MANAGEMENT DATES FILED
34	10/13/14		INTERVENING PLAINTIFF, MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION'S PRELIMINARY EXHIBIT LIST AND PROOF OF SERVICE ON 10/08/14 FILED
35			INTERVENING PLAINTIFF, MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION'S PRELIMINARY WITNESS LIST AND PROOF OF SERVICE ON 10/08/14 FILED
36	10/27/14		MOTION HEARING NOT RECORDED. COURT GRANTED AND SIGNED MOTION.
37			ORDER FOR EXTENSION OF CASE MANAGEMENT DATES DISCOVERY - 02/08/15 EXP WIT - 01/08/15 SUM DISP - 04/08/15
38	10/28/14		CONCURRENCE IN MOTION FOR EXTENSION OF CASE MANAGEMENT DATES AND PROOF OF SERVICE ON 10/23/14 FILED
39	12/10/14		PROOF OF SERVICE FILED ON 12/04/14 OF ORDER FOR EXTENSION OF CASE MANAGEMENT DATES UJPON ALL COUNSEL ON RECORD BY MAIL
40	12/18/14		STIPULATED ORDER COMPELLING DEFT, PROGRESSIVE MARATHON INS CO'S DISCOVERY RESPONSES FILED
41	01/09/15		PLNT'S WITNESS AND EXPERT LIST FILED
42			PROOF OF SERVICE FILED ON 01/07/15 OF PLNT'S WITNESS LIST AND EXPERT LIST UPON ATTYS DEPOLO AND SANGSTER

		BY MAIL
43	01/14/15	INTERVENING PLNT, MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCATION'S, SUPPLEMENTAL WITNESS LIST AND PROOF OF SERVICE ON 01/08/15 FILED
44		PROOF OF SERVICE FILED ON 01/9/15 OF ORDER COMPELLING DEFT, PROGRESSIVE MARATHON INS CO'S, DISCOVERY RESPONSES UPON ALL COUNSEL ON RECORD BY MAIL
45	01/26/15	MOTION FEE PAID RECEIPT# 00411829 AMT $20.00
46		PLNT'S CONCURRENCE TO DEFT, MPCGA'S MOTION TO EXTEND CASE MANAGEMENT DATES FILED
47		PROOF OF SERVICE FILED ON 01/22/15 OF PLNT'S CONCURRENCE TO DEFT, MPCGA'S MOTION TO EXTEND CASE MANAGEMENT DATES UPON ATTYS DEPOLO AND SANGSTER BY MAIL
48		SET NEXT DATE FOR: 02/02/15 9:00 AM MOTION HEARING HON. RICHARD B. YUILLE IV/MI PROP - EXTEND CASE MANAGEMENT DATES RE-NOTICE OF HEARING AND PROOF OF SERVICE ON 01/23/15 FILED
49		INTERVENING PLNT, MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION'S, MOTION TO EXTEND CASE MANAGEMENT DATES FILED
50	01/27/15	MOTION FEE PAID RECEIPT# 00411878 AMT $20.00
51		NOTICE OF HEARING FILED
52		INTERVENING PLAINTIFF, MI PROPERTY & CASUALTY GUARNATY ASSOCIATION'S, MOTION TO EXTEND CASE MANAGEMENT DATES FILED
53	01/30/15	CONCURRENCE IN MOTION FOR EXTENSION OF CASE MANANEMENT DATES AND PROOF OF SERVICE ON 01/27/15 FILED
54	02/02/15	ORDER GRANTING MOTION FOR SECOND EXTENSION OF CASE MANAGEMENT DATES FILED DISCOVERY CUTOFF - 05/08/15 LAY & EXP. WIT - 04/08/15 DISP. MOTIONS - 07/08/15
55	02/23/15	PROOF OF SERVICE FILED ON 02/19/15 OF ORDER GRANTING SECOND EXTENSION OF CASE MANAGEMENT DATES UPON ALL COUNSEL BY MAIL
56	03/03/15	TENDER PAID OUT IN THE AMOUNT OF $20.00 TO ATTY SANGSTER DUE TO

		DUPLICATE PAYMENT
57	04/09/15	PLNT'S WITNESS AND EXPERT LIST FILED
58		PROOF OF SERVICE FILED ON 04/07/15 OF PLNT'S WITNESS LIST UPON ATTYS DEPOLO AND SANGSTER BY MAIL
59	05/20/15	STIPULATED ORDER EXTENDING DISCOVERY DEADLINE THROUGH CASE EVALUATION HEARING FILED
60	05/27/15	CASE EVALUATION ORDERED MCR 2.403
61	06/02/15	PROOF OF SERVICE AND NOTICE TO APPEAR FOR ADR HEARING 8/13/15 @ 9:00
62	08/07/15	STIPULATION TO REMOVE MATTER FROM CASE EVALUATION AND TO ESTABLISH DATES FOR FILING FOR SUMMARY DISPOSITION FILED
63		ORDER TO REMOVE MATTER FROM CASE EVALUATION AND TO ESTABLISH SUMMARY DISPOSITION FILING DATES FILED
64	08/31/15	STIPULATION TO AMEND PREVIOUS ORDER REGARDING DATES FOR FILING MOTIONS FOR SUMMARY DISPOSITION FILED
65		ORDER TO AMEND PREVIOUS ORDER REGARDING SUMMARY DISPOSITION FILING DATES FILED MOTION FOR SUMMARY DISPOSITION DUE BY 09/03/15
66	09/03/15	MOTION FEE PAID RECEIPT# 00421891 AMT $20.00
67		MOTION FEE PAID RECEIPT# 00421893 AMT $20.00
68		NOTICE OF HEARING FILED
69		PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION FILED
70		PROOF OF SERVICE FOR PLTF'S MOTION FOR SUMMARY DISPOSITION, BRIEF IN SUPPORT, NOTICE OF HEARING UPON ATTY'S OF RECORD ON 09/03/15 FILED
72		NOTICE OF HEARING FILED
73		INTERVENING PLAINTIFF MI PROPERTY & CASUALTY GURANTY ASSOCIATION'S MOTION FOR SUMMARY DISPOSITION FILED
74		INTERVENING PLTF MI PROPERTY & CASUALTY GUARANTY ASSOCIATION'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION FILED
75		CERTIFICATE OF SERVICE FOR NOTICE OF HEARING, MOTION AND BRIEF IN SUPPORT OF SUMMARY DISPOSITION UPON ATTY'S OF RECORD ON 09/03/15 FILED
71	09/08/15	MOTION FEE PAID RECEIPT# 00421927 AMT $20.00
76		NOTICE OF HEARING FILED

77		DEFENDANT PROGRESSIVE'S MOTION FOR SUMMARY DISPOSITION FILED
78		STIPULATED FACTS FILED
79		PROOF OF SERVICE FOR PROGRESSIVE MARATHON INSURANCE COMPANY'S MOTION FOR SUMMARY DISPOSITION UPON ATTY'S OF RECORD ON 09/03/15 FILED
80	09/18/15	SET NEXT DATE FOR: 10/19/15 3:30 PM SHOW CAUSE HEARING HON. RICHARD B. YUILLE MICHAEL DE POLO OWES ADR FEES ORDER FOR SHOW CAUSE FILED
81	09/30/15	STIPULATION TO AMEND COURT'S SCHEDULING ORDER REGARDING DATES FOR FILING RESPONSES TO MOTIONS FOR SUMMARY DISPOSITION FILED
82		ORDER TO AMEND PREVIOUS SCHEDULING ORDER REGARDING THE FILING OF RESPONSES TO MOTIONS FOR SUMMARY DISPOSITION FILED MOTIONS FOR SUMMARY DISPOSITION DUE: 10/08/15
83	10/05/15	REMOVE NEXT EVENT: 10/19/15 3:30 PM SHOW CAUSE HEARING HON. RICHARD B. YUILLE ATTY DE POLO PAID FEES
84	10/08/15	INTERVENING PLAINTIFF MI PROPERTY & CASUALTY GUARANTY ASSOCIATION'S ANSWER TO DEFENDANT PROGRESSIVE MARATHON INSURANCE COMPANY'S MOTION FOR SUMMARY DISPOSITION FILED
85		INTERVENING PLAINTIFF MI PROPERTY & CASUALTY GUARANTY ASSOCIATION'S BRIEF IN SUPPORT OF ANSWER TO DEFENDANT PROGRESSIVE MARATHON INSURANCE COMPANY'S MOTION FOR SUMMARY DISPOSITION AND PROOF OF SERVICE OF THE SAME UPON ATTY'S OF RECORD ON 10/08/15 FILED
86		PLAINTIFF'S CONCURRENCE TO INTERVENING PLAINTIFF, MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION'S MOTION FOR SUMMARY DISPOSITION FILED
87		PLAINTIFF'S RESPONSE TO DEFENDANT PROGRESSIVE MARATHON INSURANCE COMPANY'S MOTION FOR SUMMARY DISPOSITION FILED
88		PROOF OF SERVICE FOR PLAINTIFF'S RESPONSE TO DEFENDANT PROGRESSIVE MARATHON INSURANCE COMPANY'S MOTION FOR SUMMARY DISPOSITION UPON ATTY'S OF RECORD ON 10/08/15 FILED

89			DEFENDANT PROGRESSIVE'S RESPONSE IN OPPOSITION TO THE MOTIONS FOR SUMMARY DISPOSITION OF PLAINTIFF CHILDERS AND THE INTERVENING PLAINTIFF MPCGA AND PROOF OF SERVICE OF THE SAME UPON ATTY'S OF RECORD ON 10/08/15 FILED
90	10/28/15		DEFT. PROGRESSIVE'S REPLY TO THE RESPONSES OF CHILDERS AND THE MPCGA TO DEFT'S MOTION FOR SUMMARY DISP. FILED
91			PROOF OF SERVICE FILED OF SAME UPON ATTYS OF RECORD ON 10/28/15 FILED
92	10/30/15		INTERVENING PLTF. MPCGA'S REPLY TO DEFT. PROGRESSIVE'S RESPONSE IN OPPOSITION TO THE MOTIONS FOR SUMMARY DISP. OF PLTF. CHILDERS AND THE INTERVENING PLTF. MPCGA FILED
93			CERTIFICATE OF SERVICE OF SAME UPON ATTYS OF RECORD ON 10/28/15 FILED
94			PLAINTIFF'S REPLY TO DEFENDANT PROGRESSIVE MARATHON INSURANCE COMPANY'S RESPONSE TO MOTION FOR SUMMARY DISPOSITION FILED
95			PROOF OF SERVICE FOR PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO MOTION FOR SUMMARY DISPOSITION UPON ATTY'S OF RECORD ON 10/29/15 FILED
97	07/14/16		NOTICE SENT FOR: 08/25/16 2:00 PM MISCELLANEOUS HEARING HON. RICHARD B. YUILLE ORAL ARGUMENT ON SUMMARY DISPOSITION MOTION
98	08/03/16		REMOVE NEXT EVENT: 08/25/16 2:00 PM MISCELLANEOUS HEARING HON. RICHARD B. YUILLE
99			NOTICE SENT FOR: 09/29/16 3:30 PM MISCELLANEOUS HEARING HON. RICHARD B. YUILLE ORAL ARGUMENT ON SUMMARY DISPOSITION MOTION. ADJ FROM 8/25/16.
100	08/22/16	P 001	APPEARANCE AS CO-COUNSEL FOR PLTF FILED
101	09/29/16		REMOVE NEXT EVENT: 09/29/16 3:30 PM MISCELLANEOUS HEARING HON. RICHARD B. YUILLE ADJ TO A DATE TO BE SET/COURT GAVE ATTYS DATES/THEY WILL CALL COURT WITH AGREED UPON ADJOURN DATE.
102			NOTICE SENT FOR: 10/25/16 2:00 PM

			MISCELLANEOUS HEARING HON. RICHARD B. YUILLE ORAL ARGUMENT ON MOTION FOR SUMMARY DISPOSITION ADJ FROM 9/29/16
103	10/25/16		MISCELLANEOUS HEARING PROCEEDING DIGITALLY RECORDED CROSS MOTIONS FOR SUMMARY DISPOSITION HEARD. COUNSEL TO SUMMARIZE THEIR ARGUMENTS AND FILE THEIR BRIEFS. COURT ORDERED THAT THE TRANSCRIPT OF THIS HEARING BE PRODUCED. BRIEFS ARE DUE 14 DAYS AFTER THE FILING OF THE TRANSCRIPT.
104	11/02/16		TRANSCRIPT OF PROCEEDINGS FILED (MOTIONS FOR SUMMARY DISPOSITION 10/25/16) FILED
105	11/16/16	P 001	PLTF CHILDERS TWO PAGE ARGUMENT SUMMARY IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION FILED.
106			PROOF OF SERVICE OF SAME UPON ATTY MICHAEL DEPOLO ON 11/16/2016. FILED.
107	11/17/16	IV001	INTERVENING PLTF MICHIGAN PROP & CASUALTY GUARANTY ASSOC'S OUTLINE OF ORAL ARGUMENT FROM 10/25/2016 WITH CERT OF SERVICE UPON ALL PARTIES ON 11/16/2016. FILED.
108	11/18/16		PROOF OF SERVICE REGARDING COPY OF PLTF'S CHILDERS TWO PAGE ARGUMENT SUMMARY IN SUPPORT FOR SUMMARY DISP. ON 11/16/2016. FILED.
109	11/21/16		PROOF OF SERVICE UPON ALL PARTIES ON 11/16/2016. FILED
110	06/15/17	IV001	SUBSTITUTION OF ATTYS. FILED
111		IV001	APPEARANCE ATTORNEY: P-38185 FEUER ORDER OF SUBSTITUTION OF ATTYS FILED.
112		IV001	FROM: SANGSTER,RONALD M.,JR. TO: FEUER,SCOTT L.,
113	06/22/17		INTERVENING PLTF. MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISP. FILED
114			PROOF OF SERVICE FILED OF SAME UPON ALL PARTIES ON 06/20/17 FILED
115	07/24/17		**ATTY BURNS AND SAYLOR HAVE 21 DAYS FROM TODAY TO RESPOND TO INTERVENING PLTF MICH PROP & CASUALTY GUARANTY ASSOC'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR SD**

116	07/31/17		IV001	INTERVENING PLTF MI PROP & CAS GUARANTY ASSOC'S SECOND SUPPL BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION. FILED
117				PROOF OF SERVICE OF SAME UPON ATTYS OF RECORD ON 07/27/2017. FILED.
118	08/29/17		D 001	DEFT PROGRESSIVE'S RESPONSE TO INTERVENING PLTF MPCGA'S SECOND SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION. FILED.
119				PROOF OF SERVICE OF SAME UPON ALL PARTIES ON 08/29/2017. FILED.
120	09/08/17		D 001	DEFT PROGRESSIVE'S RESPONSE TO INTERVENING PLTF MPCGA'S SUPPL BRIEF IN SUPPORT OF MOTION FOR SUMMARY DISPOSITION. FILED.
121				PROOF OF SVC OF SAME UPON ATTYS OF RECORD ON 09/05/2017 FILED.
122	12/23/19			CORRESPONDENCE TO COURT FROM ATTY STUART FRASER IV RE: PARTIES HAVE NOT REACHED AGREEMENT DURING FACILITATION_ FILED
123	01/07/20			CASE REASSIGNMENT ORDER (PURSUANT TO MCR 8.11(C)(1) FILED
124		PICKELL		CASE REASSIGNMENT FROM: YUILLE,RICHARD B., TO: PICKELL,BRIAN S.,
125				PARTY NOTIFICATION FILED
126	01/27/20		D 001	FROM: DE POLO,MICHAEL J., TO: JOHN,R. MICHAEL,
127			D 001	SUBSTITUTION OF COUNSEL/ORDER FILED
128	02/07/20			PROOF OF SERVICE FILED OF SUBSTITUTION OF COUNSEL; CONSENT TO SUBSTITUTION AND ORDER ON 1/31/20 BY MAIL AND EMAIL
129	02/19/20			NOTICE SENT FOR: 03/25/20 10:00 AM STATUS CONFERENCE
130	03/24/20			REMOVE NEXT EVENT: 03/25/20 10:00 AM STATUS CONFERENCE COMPANION CASE WITH 12-098705 AND STATUS CONFERENCE HELD 3/18/20.
131				SET NEXT DATE FOR: 04/07/20 5:01 PM DOCKET CONTROL STATUS OF CASE.
132	04/03/20			REMOVE NEXT EVENT: 04/07/20 5:01 PM DOCKET CONTROL
133				SEND NOTICE FOR: 05/08/20 5:01 PM DOCKET CONTROL STATUS OF CASE.
134	05/20/20			NOTICE SENT FOR: 07/15/20 10:00 AM STATUS CONFERENCE **ONLY COUNSEL APPEAR - VIA

		ZOOM; INSTRUCTIONS ATTACHED**
135	06/11/20	CODEFENDANT/CONSOLIDATION
		W/12-98705-NF
136		STIP/ORDER TO CONSOLIDATE
		CASES FILED
137	07/15/20	NOTICE SENT FOR: 10/16/20 5:01 PM
		DOCKET CONTROL
		COUNSEL DO NOT APPEAR
		ADVISE COURT STATUS OF CONT'D
		FACILITATION.
138		** SECRETARY NOTE **
		STATUS CONFERENCE HELD 7/15/20
		SCOTT FEUER-AFM; DAN SAYLOR,
		PROGRESSIVE & PLT ATTY BURNS
		APPEARED VIA ZOOM. DKC DATE
		10/16/20 - ADVISE CT STATUS OF
		CONT'D FACILITATION. THEN
		COURT WILL DECIDE MSD
		RULINGS.
		** END NOTE **
139	07/20/20	INTERVENING PLTF, MICHIGAN
		PROPERTY & CASAULTY GUARANTY
		ASSOCIATION'S, SUPPLEMENTAL
		BRIEF IN SUPPORT OF MOTION FOR
		SUMMARY DISPOSITION FILED
140		PROOF OF SERVICE FILED
		OF SAME ON 7/16/20 BY MAIL
141	10/19/20	SET NEXT DATE FOR: 12/04/20 5:01 PM
		DOCKET CONTROL
		** COUNSEL DO NOT APPEAR **
		ADVISE COURT OF FACILITATION.
		SET TRIAL DATE.
142	11/03/20	** SECRETARY NOTE **
		ATTY SAYLOR OFFICE CALLED &
		ADVISED FACILITATION IS
		1/12/21. I WILL SET NEW
		DKC DATE.
		** END NOTE **
143		NOTICE SENT FOR: 02/01/21 5:01 PM
		DOCKET CONTROL
		COUNSEL DO NOT APPEAR
		ADVISE COURT STATUS OF
		FACILITATION.
		SET TRIAL DATE.
		FACILITATION 1/12/21
144	01/13/21	** SECY NOTE **
		PARTIES ADVISED COURT THEY
		HAVE NOT REACHED RESOLUTION
		THROUGH FACILITATION. ASK
		THE COURT TO RULE ON CROSS-
		MOTIONS FOR SD.
		** END NOTE **
145		REMOVE NEXT EVENT: 02/01/21 5:01 PM
		DOCKET CONTROL
146		NOTICE SENT FOR: 02/19/21 5:01 PM
		DOCKET CONTROL
		COUNSEL DO NOT APPEAR
		ADVISE COURT STATUS OF
		FACILITATION.
		RULE ON MOTIONS FOR SD.
147	01/29/21	DEFT PROGRESSIVE RESPONSE TO

			INTERVENING PLTF MPCGA'S THIRD
			SUPPLEMENTAL BRIEF IN SUPPORT
			OF MOTION FOR SUMMARY DISPOSI-
			TION FILED
148			PROOF OF SERVICE FILED
			OF SAME ON 1/28/21 BY MAIL
			AND EMAIL
149	02/18/21		REMOVE NEXT EVENT: 02/19/21 5:01 PM
			DOCKET CONTROL
150			SET NEXT DATE FOR: 03/12/21 5:01 PM
			DOCKET CONTROL
			HAS OPINION BEEN ISSUED?
151	03/29/21		OPINION AND ORDER FOLLOWING
			PARTIES RESPECTIVE MOTIONS FOR
			SUMMARY DISPOSITION PURSUANT
			TO MCR 2.116(C)(7) AND (10)
			FILED
152			CERTIFICATE OF MAILING FILED
			OF SAME ON 3/29/21 BY MAIL
153	04/12/21		NOTICE SENT FOR: 06/04/21 9:00 AM
			STATUS CONFERENCE
			TO BE HELD VIA ZOOM - COUNSEL
			ONLY. 834 487 7653. COUNSEL TO
			HAVE CONSULTED W/CLIENTS
			PRIOR TO STATUS CONFERENCE.
154	04/19/21		APPEAL FROM CIRCUIT COURT
			RECEIPT# 00495367 AMT $25.00
155	04/21/21		APPEAL FROM CIRCUIT COURT
			RECEIPT# 00495410 AMT $25.00
156			CLAIM OF APPEAL FILED
157			INTERVENING PLTF, MICHIGAN
			PROPERTY & CASUALTY GUARANTY
			ASSOCIATION'S NOTICE OF CLAIM
			OF APPEAL AS OF RIGHT FILED
158			PROOF OF SERVICE FILED
			OF SAME ON 4/21/21 BY EMAIL
159	04/26/21		COPY OF OPINION & ORDER
			BEING APPEALED FILED
160			CLAIM OF CROSS-APPEAL
			NOTICE OF FILING CLAIM OF
			CROSS-APPEAL COPY OF
			OPINION & ORDER BEING
			APPEALED; REGISTER OF
			ACTIONS; JURISDICTIONAL
			CHECKLIST; PROOF OF SERVICE
			FILED
161	04/29/21		CLAIM OF CROSS-APPEAL FILED
162			NOTICE OF FILING CLAIM OF
			CROSS-APPEAL FILED
163	06/04/21		** SECY NOTE **
			STATUS: CASE IN COA -- SET
			DOCKET CONTROL DATE TO
			CHECK ON STATUS OF COA.
			** END NOTE **
164			SET NEXT DATE FOR: 10/22/21 5:01 PM
			DOCKET CONTROL
			STATUS OF COA.
165	10/01/21	XD001	RE-ASSIGNED PRO-PER TO FEUER
166		XD001	RETURN OF SERVICE
			ATTORNEY APPEARANCE
.....		END OF SUMMARY	.....

EXHIBIT 4

Hearing Transcript,
10/25/2016

STATE OF MICHIGAN
IN THE 7TH CIRCUIT COURT (COUNTY OF GENESEE)

SUSAN CHILDERS, Conservator for
JUSTIN CHILDERS,

Plaintiff,

vs Case No. 13-101626-NF

PROGRESSIVE MARATHON INS., et al.,

Defendants.

_____/

MOTIONS FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE RICHARD B. YUILLE, CIRCUIT JUDGE
FLINT, MICHIGAN - TUESDAY, OCTOBER 25, 2016

APPEARANCES:

For the Plaintiff:	RICHARD F. BURNS JR P26189 Attorney at Law 30150 Telegraph Road, Suite 300 Bingham Farms, Michigan 48025 (248) 530-5540
For Intervening Plaintiff:	RONALD SANGSTER P39253 Attorney for Michigan 901 Wilshire Drive #230 Troy, Michigan 48084 (248) 269-7040
For the Defendant:	MICHAEL J. DE POLO P35733 Attorney for Progressive 10801 S. Saginaw St #D Grand Blanc, MI 48439 (810) 695-3700
Recorded by:	Via Video Recorder
Transcribed by:	Shelie Robinson CER 6913 Certified Electronic Recorder (810) 424-4454

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Flint, Michigan

Tuesday, October 25, 2016 - 2:20 PM

(All parties present)

THE COURT: All right. I'll call case 13-101626, Childers and Michigan Property and Casualty Guarantee versus Progressive Marathon Insurance Company. All right. Somebody has to go first.

MR. SANGSTER: We were just talking about that.

MR. SAYLOR: We all filed summary disposition motions the same day. I am representing the defendant. They have a plaintiff and an intervening plaintiff.

MR. SANGSTER: Ron Sangster for intervening plaintiff Michigan Property and Casualty Guarantee Association.

MR. BURNS: Richard Burns on behalf of Justin Childers.

MR. SAYLOR: And Dan Saylor appearing on behalf of Progressive, Your Honor.

MR. BURNS: So, who would you like to go first?

THE COURT: Well, I guess I'd like Progressive to go first.

MR. SAYLOR: All right then. Good afternoon,

Your Honor. Again, Dan Saylor appearing on behalf of Progressive. This is our motion for summary disposition, and, of course, the other parties have moved for summary disposition as well.

Progressive is the defendant in this no-fault insurance case in which the plaintiffs are attempting to obtain no-fault benefits from Progressive. Progressive is advancing two defenses. They're entirely independent of each other. One is that the action is barred by the statute of limitations. The other is that there is no coverage that applies in any event.

I will begin with the one that's most conceptually simple and that would be the statute of limitations, Your Honor. Section 3145 of the No Fault Act says -- it's a little bit long because it talks about a couple exceptions. Nobody claims that there's any exception here. It's a very simple statement. An action for recovery of PIP benefits payable under this chapter for accidental bodily injury may not be commenced later than one year after the date of the accident.

THE COURT: Let me stop you there because the argument that I read that's been raised against that one year issue is that the remedial legislation that

permits the Michigan Property and Casualty Guarantee Association to become involved is such that it may occur five years after the accident, ten years after the accident, and if one were to apply the statute of limitations as you are arguing, wouldn't that defeat the whole purpose of that remedial legislation?

MR. SAYLOR: Well, of course let's begin with the fact that we've got two plaintiffs. One is plaintiff Childers. He's the injured person claiming benefits, and the other of course is the Guarantee Association.

THE COURT: Right.

MR. SAYLOR: As to plaintiff Childers, there really is nowhere to point to for protection from the one year statute of limitations. So, therefore, it really only -- the question can only pertain to the Guarantee Association. In that regard--

THE COURT: Wait a minute. So, Childers is out? He's done? He's through?

MR. SAYLOR: Well, he began this case by filing a complaint against Progressive. Progressive asserts a statute of limitations and he has no valid response to that defense. There's nothing he can point to in the statute or anywhere in the law that gives them a way around that statute of limitations,

and, quite frankly, it's consistent with the Guarantee Association as well because, while you might say but in a general way, but then doesn't that kind of destroy the purpose of the Guarantee Association. How could they ever get reimbursement from an applicable carrier?

Well, number one -- well, I have two responses to that. First, by their own -- by the statute's own terms, the Guarantee Association just stands in the shoes of the injured claimant. The statute does not purport to suggest that the Guarantee Association will always get its money back when it pays benefits under its mission.

If there is available coverage, if there is a source of recovery, certainly, by standing in the claimant's shoes, the Guarantee Association is allowed to or can proceed by assignment. The statute actually uses the assignment. The injured person's rights are deemed to be assigned to the Association. It can certainly pursue recovery from any obligor, so to speak.

That's the wrong one. I wanted to just call attention specifically to the language of the statute. First of all, this whole thing that elevates Progressive -- let's assume for the moment that we did

have coverage here, potential coverage here. The statute says that if damages or benefits -- if benefits are recoverable by a claimant or an insured under an insurance policy, then the damages or benefits recoverable shall be a credit against a covered claim payable under this chapter.

In the case law I quoted too uses the same language. It's all contingent on if the injured person would have a right of recovery against such and such insured, then the Guarantee Association either gets a set off or can get their money back, but it's all contingent on if there's a viable claim, and the other--

THE COURT: Well, let me interrupt here. Aren't we assuming that the injured party here has a viable claim? It's just a question of--

MR. SAYLOR: Well, I'm saying -- well, I'm going back to the fact that their claim under the very express terms of the statute is time barred and there's no exception--

THE COURT: As to you.

MR. SAYLOR: --as to the injured person.

THE COURT: As to you.

MR. SAYLOR: As to -- I am a defendant -- I'm an insurance company in an action for recovery of PIP

benefits, and so no action can be commenced against me more than a year after the accident by -- certainly by the injured person.

THE COURT: You're not saying it's time barred against Michigan Property and Casualty?

MR. SAYLOR: I am saying it is because their rights are no greater or no less than the injured person's. They stand in their shoes, and I pointed that out in the statute 500.7931(3) which is the very statute that they claim their ability to claim benefits substantively, but it's contingent on benefits being recoverable by the injured person. So, it is -- they stand in their shoes, and the other statute I cite to even reinforce that more--

THE COURT: Well, let me back up because you've got me really confused now and I thought I read this. Childers was entitled to get benefits from -- I can't even remember now -- the company--

MR. SAYLOR: American Fellowship originally.

THE COURT: --American Fellowship and they paid the benefits and they went under.

MR. SAYLOR: That's right.

THE COURT: Okay. Then there is a statutory provision that brings Michigan Property and Casualty into the mix, right?

MR. SAYLOR: Right. They stepped in in the shoes of the American Fellowship--

THE COURT: American Fellowship.

MR. SAYLOR: --and they take over and they pay benefits.

THE COURT: Right, and so they're obligated to pay the benefits by statute.

MR. SAYLOR: That's right. That's right.

THE COURT: Okay. Now, they're saying, well, you know, if all of those stipulated facts that are in the agreement fall into place, that you owe the money. That's what they're saying, right?

MR. SAYLOR: Well, I'm not 100 percent--

THE COURT: They're entitled to be reimbursed by you for the monies that they have paid.

MR. SAYLOR: To the extent that the injured person would have a claim against another insurer or some other -- it could be a tort case against anyone who is obligated to pay, then they, Guarantee Association, standing in the injured person's shoes has the right to get their money back.

THE COURT: That's what they're trying to do with you.

MR. SAYLOR: That's what they're trying to do with me.

THE COURT: All right.

MR. SAYLOR: And -- but they stand in the shoes. They have no greater or lesser rights than the injured person would have against that alleged obligor, that second source of recovery, and my point about these two statutory provisions, one being the 7931(3) is that's what we're talking about. That's the one that says that when there is somebody else, they can go after them and get their money back or take a credit for what they would owe, but by its very terms, it's contingent on what the injured person would be able to recover.

And the other one that I emphasize to show that it's truly no greater or lesser than what the injured person would be able to do under the circumstances is -- and that's 500.7935(2), and that's the statute that says that an insured or claimant entitled to the benefits of this chapter shall be considered to have assigned to the Association to the extent of any payment received from the Association his or her rights against whoever might they claim to be paid -- whoever they claim to be liable, any other rights the insured claimant may have against another person for payment of the covered claim by the Association. It says that he is deemed to -- Childers

is deemed to have assigned his rights against whoever to the Association.

So, on those two statutory bases, it's clear that the Association's ability to get their money back is dependent on the injured person's ability to make a claim against that entity, and as far as the purpose of the Guarantee Association, you're right when you talk about American Fellowship goes under, and so the Guarantee Association, its mission in life is to step in and take the place of that defunct insurer and just be the one who pays the benefits.

As a side note to that, yeah, if there is a way that they can get some of their money back because there's somebody else who actually received premiums for this loss or for this risk and everything and there's a viable claim, fine, they can do that, but it doesn't -- the statute doesn't expect that that's always going to be the case for them. When it's there, it's there, but if it's not, it's not.

And here, I'm done with the statute of limitations, but it's not here because there just is no legal route to get around the statute of limitations here. They are subject to it and it's barred.

And then now independent of the statute of

limitations is there is no coverage here anyway. There just is no -- Progressive never was on the hook or potentially on the hook for Justin Childers' injuries in the first place. By its terms, I mean nobody claims that Justin Childers qualifies, is entitled to benefits, based on the language of the policy that was issued to this Groulx. I can't remember his first name, but the brother.

You have this guy who lives in an apartment or a house, and he owns a car, and it's insured by Progressive. He's not involved in the accident. His car is not involved in the accident. There is no connection between him and his insurance policy and this accident.

The only connection that they claim is Sheila -- what's her name -- Sheila Groulx, something like that.

MR. BURNS: Shaina.

MR. SAYLOR: Shaina Groulx. She was living with him, saying there. This is in the stipulated facts. She may have been a resident relative. We're assuming for the sake of argument that she's a resident relative of her brother who has a Progressive policy, but she's driving her own car, and Childers is in the car, and she gets in an accident. She failed

to insure her own car.

Now, the question is, under the statute, if Progressive was her insurer--

THE COURT: She's not the one seeking benefits however, right?

MR. SAYLOR: Correct.

THE COURT: Okay.

MR. SAYLOR: She's not. Now, under certain circumstances different from this case, could she be in a position to claim benefits from the Progressive policy? Yeah, under certain circumstances. For instance, if she was walking on the sidewalk and gets hit by a car, she's a resident relative of her brother, she gets to claim PIP benefits from her brother's insurer, Progressive, and that's the only connection.

That's the closest you can say that, well, maybe Progressive is her insurer, but that's not the case. The case law comes down very clearly to say that that connection, that potential ability to make a claim under it's section 31141, the resident relative. You can -- you know, a named insured can claim benefits, a spouse can claim benefits, and a resident relative can claim benefits. That connection, that potential entitlement to claimed benefits is not

enough to say that that insurer is your insurer. When it comes down to, well now, I'm operating a car or I own a car, I'm driving a car, and someone gets injured, and the statute says you can recover your benefits from the insurer of the owner of the car or from the insurer of the operator of the car.

That's the connection they're trying to say is, aha, well, Shaina Groulx was the operator of this car. She was the owner of this car, and since she's a resident relative of her brother and therefore sometimes she might be able to actually claim benefits from Progressive, we should say that Progressive is her insurer, and that way he can claim his benefits, Childers can, from the insurer of Shaina Groulx.

But the *Dobbelaere* case, that's exactly what they argued in *Dobbelaere*, that, aha, well, she can claim benefits as a resident relative. So, therefore, that company must be her insurer. They said no. Just because you're a resident relative and you might be able to claim benefits yourself sometime doesn't mean they're your insurer. That's not good enough.

She's not a named insured or on the policy. She's not even a listed driver on the policy. Her car is not listed on the policy. There's no connection.

THE COURT: Well, I don't know that they're

arguing that she's an insured, are they?

MR. SAYLOR: Well, they have to -- that's their only way in.

THE COURT: I think they're arguing that under their view of the facts, your company has a higher priority than the state's casualty company.

MR. SAYLOR: Well, before you can say whether we are higher or lower in priority, first, you have to have -- like, for instance, you have insurer A and insurer B, both providing coverage to the person. Insurer A, let's say the typical situation, yeah, well, there's a named insured here, and then there's another policy that says, yeah, but they were occupying the insured vehicle or something like that. Now, you've got two coverage situations and you've got to look at the priorities.

But if there's no coverage at all, there's no question of priority. It's one to nothing, and there's just no coverage here. Progressive is not in the line of priority because Justin Childers is not somebody who is insured under the policy and he was not injured while occupying a vehicle being owned or operated by Progressive's insured. Progressive is not Shaina Groulx's insurer.

They are, Your Honor -- they are -- their

position is dependent on establishing that Progressive must be deemed to be Shaina Groulx's insurer. If they can't establish that, I think they will concede they lose. They have to prove that. They have to establish that, and my point here is that the only way they can argue that Progressive is her insurer is by saying, well, look at 3114(1), she's a resident relative. Sometimes she could actually claim PIP benefits from Progressive, but as I -- but those are different circumstances.

She couldn't in this case because she has no claim for PIP benefits. She's disqualified because she was occupying her own car. It's uninsured. She has no claim for PIP benefits from anybody.

THE COURT: Why doesn't her son fall within that category that you just described that would allow her to recover benefits?

MR. SAYLOR: Why doesn't who?

THE COURT: What did he do to disqualify himself from receiving--

MR. SAYLOR: Childers you're talking about?

THE COURT: Yes.

MR. SAYLOR: He's not disqualified. He's entitled to benefits. That's why American Fellowship paid and the Guarantee Association is paying.

THE COURT: Okay. All right.

MR. SAYLOR: But he's not -- but he still -- so, he can claim benefits. He just can't claim them from Progressive because Progressive doesn't have any exposure for this risk. They might as well say, you know, State Farm should pay because they're a big company in Michigan and they've got enough money to pay it. There's no closer connection to this loss for Progressive than there is for State Farm. They're just not -- Shaina Groulx is not Progressive's insurer -- the other way around. Progressive is not Shaina Groulx insurer.

THE COURT: I don't think anybody says that she is, do they?

MR. SAYLOR: Well, I think they will say that Progressive is Shaina Groulx's insurer.

THE COURT: I think they will say Progressive is liable to pay benefits. I don't know that they -- I'll let them say what they're going to say.

MR. SAYLOR: Yeah, we'll see. Well, I will say, Your Honor, carefully look back and look at the arguments on both sides. Their only route for Justin Childers to get benefits from Progressive is through 3114(4) of the No Fault Act and that's the provision that says somebody who is injured in an accident while

occupying a motor vehicle can claim benefits from the insurer of the owner of the vehicle, or that person occupying a vehicle and gets injured in an accident can claim benefits from the insurer of the operator of the vehicle. That's what 3114(4) says.

So, they have to argue that Progressive is that insurer, the insurer of the owner or the insurer of the operator of that vehicle, and my whole point here today is that Progressive is not that insurer because Shaina Groulx didn't have an insurer. She's the owner of the involved car, but she didn't have a policy, and she's the operator of that car, but she didn't have a policy, and Progressive just assumed no risk with regard to her.

I believe the Guarantee Fund, Mr. Sangster at one point argued that, well, what about for liability coverage? There was no risk with regard to no-fault benefits for Shaina Groulx because she's disqualified. But what about liability? If she got in an accident and ran somebody over, wouldn't she look to Progressive to defend her and pay benefits? Well, the answer to that is no, too. They have no exposure to pay liability coverage for a person who is driving their own uninsured car. Every policy has other owned vehicle exclusion and that certainly would

apply here.

Progressive had no risk in connection with Shaina Groulx in connection with her use of her car, and so therefore, Progressive is not her insurer, and you can press them on this. They will have to concede that if Progressive is not Shaina Groulx's insurer on this day, they have no claim.

THE COURT: That's not certainly what I read them say, but I'll listen to what they have to say.

MR. SAYLOR: All right, and, you know, if need be -- if they say something surprising, you know, I may have just a minute for rebuttal or something. Thank you.

THE COURT: Everybody -- everybody will want some rebuttal probably.

MR. SANGSTER: Again, good afternoon, Your Honor. Ron Stangster for defendant Michigan Property and Casualty Guarantee Association.

First, with regard to the statute of limitations argument raised by Progressive, MCL 500.7911(3) makes it clear that we, the Guarantee Fund, are not bound by the other provisions of the Michigan insurance code. That includes the one year notice provision, the one year back rule, what have you.

The reason for that is quite simple and you alluded to it when you questioned Mr. Saylor on this issue. When a person is involved in a motor vehicle accident, they have no idea if five years down the road, ten years down the road, 20 years down the road, 40 years down the road, whether their insurance company will become insolvent. American Fellowship, for example, was around since the 1920s, a Johnny-come-lately into the Michigan insurance market. Yes, it was a small carrier, but they managed to survive and do business for, geez, you know, almost 100 years before they went insolvent.

The Guarantee Fund is set up to handle the claims of persons who were previously insured by insolvent insurers, but the primary task is to find the next highest priority insurer, and in this case there is no other household insurer for Mr. Childers. It was only American Fellowship.

I've been handling cases involving insolvent insurers for going on 30 years. I, like you, remember the old Cadillac Insurance Company from the 1990s -- from the 1980s. They went insolvent in 1990. I was three years out of law school and Cadillac was a client of our firm. Lincoln Mutual Insurance Company went under in 1997. Reliance Insurance Company went

out in 2000. American Fellowship went out in 2013.

For the past 28 years I've been doing insolvent carrier claims. It's been a nice, neat system. You go to the next highest priority insurer. They pick up the claim whether it's ten, 20, 30 years out. They adjust the claim. They will get a credit for whatever was paid by American Fellowship.

So, if, for example, this matter -- this is a CAT loss. So, if it's already in the CAT fund or near the CAT fund, they are going to apply whatever American Fellowship paid as a credit against their ultimate exposure. So, they just basically step into the shoes of American Fellowship, they get credit against their MCC assessment for what was paid, and life goes on.

This is the first time that I've ever had this argument raised in all my years of doing this, and they, again, conveniently ignore MCL 500.7911(3) that says we're not bound by any statute of limitations. We can go after them as the next highest priority insurer for reimbursement of what we paid and to -- we can keep doing that. We can continue handling the claim and go back after Progressive every year, or every two years. Sorry. We've paid out $500,000 on this claim. Reimburse us. Do they really

want to do that or do they simply want to handle the claim and have control over the claim itself?

Now, let's talk about -- do you have questions on our position--

THE COURT: No.

MR. SANGSTER: --regarding statute of limitations?

THE COURT: I follow you on that. I guess I'd like you to respond to the argument that was raised that under no circumstance can Progressive be deemed to be the insurer for--

MR. SANGSTER: That's where I'm headed.

THE COURT: --these litigants.

MR. SANGSTER: Yeah. That's where I'm headed right now.

THE COURT: All right.

MR. SANGSTER: Okay. It's our position that Progressive is the contractual insurer of Shaina Groulx by virtue of their insurance contract, and let me walk you through this argument. Again, there is no other household insurer in the Childers household.

So, now, the next highest order of priority for occupants in motor vehicles is 3114(4), the insurer of the owner, registrant, or operator of the motor vehicle occupied by the injured party, in this

case, Justin Childers, and note that it doesn't tie insurance to the specific vehicle occupied. It doesn't say the insurer of the vehicle occupied. It says the insurer of the owner, or registrant, or operator of the motor vehicle occupied by the injured claimant.

So, now, we have to look to who is the insurer if there is an insurer, and in this case there are. That insurance company is Progressive by virtue of its contractual language.

How do we determine whether or not an insurance company is an insurer of the owner or operator? We look at the contractual language, and that's what the *Amerisure* versus *Coleman* case was all about. *Amerisure* was my case. I represented Titan Insurance Company in that lawsuit and I was the stuckee on that. Okay. In that case, one Reginald Coleman was involved in an auto accident while an occupant of an uninsured motor vehicle that was being driven by a gentleman by the name of Bernard Coleman. Bernard was married to Tonya Page Coleman. Okay.

THE COURT: You've lost me already.

MR. SANGSTER: Sure.

THE COURT: But go ahead.

MR. SANGSTER: Well, Titan insured Tonya.

Titan insured Tonya. I'll just use first names. The Titan policies has under the definition of the term insured who is an insured. The person named in the policy Tonya, his or her spouse, Bernard. So, by virtue of our insurance contract, we were the insurer of the operator, Bernard, of the vehicle occupied by the injured party, Reginald.

So, *Coleman* stands for the proposition that you look to the insurance contract to see how it defines who is or is not an insured and, indeed, even if it uses the term insured because there are some insurance contracts that don't use the term insured or, in the case of Auto Owners, define it so narrowly as to mean only, to mean only the person named in the policy. Everyone else is something else, but not an insured.

So, you can also look at another case I cited in my motion for summary disposition, a case called *Titan Insurance Company* versus *State Farm,* docket number 301978. It was an unpublished decision released on March 27th, 2012 where I walk the Court through an analysis of, you know, how to tear apart a policy language and to see if a person is the insurer of the owner, registrant, or operator of a motor vehicle, and in that case it was ultimately determined

that State Farm was the insurer of the operator by virtue of its contractual language in a case involving an injured motorcyclist.

You're really delving deep into policy language and trying to understand what it means, but once you do that, it becomes pretty clear in this case that Progressive is the contractual insurer of Shaina Groulx subject to exclusions for Shaina, for example, on the liability side or on the PIP side that don't apply to Justin Childers. We contend--

THE COURT: Let me ask you this.

MR. SANGSTER: Sure.

THE COURT: You stipulated for purposes of this motion that she was a resident of the house.

MR. SANGSTER: Yes.

THE COURT: If it turns out that she was not a resident of the house, does that eliminate coverage for--

MR. SANGSTER: Yes.

THE COURT: --the injured party, too?

MR. SANGSTER: Yes.

THE COURT: Because -- okay.

MR. SANGSTER: Yes. We contend that Shaina Groulx qualifies as an insured under two provisions of the policy.

Under the PIP coverage, it defines the phrase eligible injured person as an insured and the eligible injured person is defined as one who is injured in a motor vehicle accident. Specifically, an eligible injured person means you, which is Matthew Groulx who was the name insured, or any relative, and there's no doubt that if she is a resident of that household, she is a relative for purposes of the Progressive policy, who sustains accidental bodily injury in an accident involving a motor vehicle.

More importantly, under the BI coverage, she is definitely considered an insured person because of the liability coverage defines the phrase insured person means you, Matthew Groulx, our named insured, or a relative, Shaina, with respect to an accident arising out of the ownership, maintenance, or use of an auto. The term relative is defined in their policy as meaning a person residing in the same household as you and related to you by blood.

So, there is no doubt she's a relative. For purposes of today's proceeding and these motions, you have to assume that she is residing there, if not domiciled there. She falls within the definition of the term insured person under the Progressive policy by its contractual language.

Therefore, under these two sections, she is what we call a contractual insured. That renders Progressive the owner or the insurer of the owner, registrant, and operator of the motor vehicle occupied by Justin Childers.

The case that is directly on point and that was highlighted in my response to Progressive's motion is *Sours* versus *Titan and Westfield Insurance Company* (phonetic), and if you remember when you reviewed the briefs, I made a nice neat little chart that summarized here is the policy language of the Westfield policy. Here is the policy language of the Progressive policy. BI -- take you all the way down. They match identical.

In the *Sours* case, we had an occupant, a passenger, in an uninsured motor vehicle just as we do here. We have an owner of a vehicle who was living with a relative, just as we do here. The relative was insured with Westfield Insurance Company in the *Sours* case. The relative here is insured with Progressive.

And when you go through the language, the Court of Appeals had no problem concluding that, yes, Westfield was the insurer of the owner, and registrant, and operator of the vehicle occupied by the insured party, Mr. Sours. Therefore, it occupied

a higher order of priority than did Titan Insurance Company which was assigned to handle that claim by the Michigan Assigned Claims Plan.

In the *Sours* case, the *Sours* case, the Court of Appeals specifically rejected, specifically rejected, the same arguments relied upon by Progressive in this case. First, Westfield argued even though she may be considered an insured person under the Westfield policy, we have this other vehicle -- other vehicle exclusion that would bar us -- preclude us from having to afford her a defense, and the Court of Appeals said you can't use that policy exclusion as to the owner and operator of the vehicle to bar the claim of the occupant.

Westfield likewise argued that -- in fact, here's what the Court of Appeals said about the BI exclusion. It said Westfield attempts to distinguish this case from *Coleman* by arguing that a policy exclusion applies to negate liability coverage under the circumstances of this case. That is the policy indicated that liability coverage was not provided for the ownership, maintenance, or use of any vehicle other than your covered auto which is owned by any family member. That exclusion appears in almost every insurance company I've looked at, and it's in the

Progressive policy.

But the Court of Appeals went on to say this exclusion is not relevant to defining who is an insured for purposes of 500.3114(4). The exclusion merely sets forth a circumstance not covered by insurance. It is the presence of a contractual insured/insurer relationship, not the terms of that relationship, which is the determinative inquiry for defining the insurer under the plain language of 3114(4). So much for the liability argument.

On the PIP side, they argue, well, Shaina Groulx would be disqualified under MCL 500.3113(b) because she is the owner of an uninsured motor vehicle. That argument is eerily familiar with what the Court of Appeals addressed in *Sours*.

Quoting again, similarly, Westfield argues that it was that the insurer of Vond. Vond was the owner and operator of a motor vehicle occupied by Mr. Sours for purposes of PIP benefits because of a policy exclusion. The Court sets that aside and says that this exclusion merely sets forth a circumstance not covered and is not relevant, is not relevant to divining who is an insurer for purposes of MCL 500.3114(4) and -- the Court went on to say and in any case, there is no requirement that an owner’s PIP

claim be successful for purposes of triggering MCL 500.3114(4) as to the passenger.

Mr. Childers' ability to claim benefits under the Progressive policy and indeed the Guarantee Fund's ability to force Progressive to occupy the highest order -- the next highest order of priority and to reimburse us for what we paid is not contingent upon what Shaina Groulx can or cannot do, what benefit she may or may not be entitled to, what defenses she can or cannot force Progressive to do for her.

All that depends upon is, as quoted by the Court of Appeals, the presence of a contractual insured/insurer relationship, not the terms of that relationship, and that is exactly what we have here by virtue of the Progressive definition of the term insured person on the liability side and the definition of the phrase named or eligible injured person on the PIP side.

If it's there in the contract, as these cases hold, if it's there in the Progressive contract, Progressive is the insurer of Shaina Groulx, the owner, registrant, and operator of the vehicle occupied by Justin Childers. It is the next highest priority insurer. It steps in. It pays the benefits. It reimburses us. It gets credit from American

Fellowship, and then it goes up to the CAT fund and life goes on. Any questions?

THE COURT: No.

MR. SANGSTER: Did I -- okay.

THE COURT: No. I don't have any questions.

MR. BURNS: Richard Burns on behalf of Justin Childers, the innocent victim.

In this case -- and I'll address the issues raised by the Court in the same order.

The statute of limitations, on its face, it would seem that 3145 mandates you've got a year to give notice. He didn't do that. Notice was given some 13, 14 months after the fact, and that presents a problem except when you look at the Guarantee Act, it is the more specific act, and mandates that Justin Childers must proceed against any lower priority insurer. It turns the No Fault Act upside down. Says anybody in the lower priority, you are mandated to go after them, and so we did after receiving notice.

Now, the Guarantee Association has a statute that helps it because under 7911(3) it is relieved of any -- of complying with any other provisions within the insurance code. So, it gets a pass.

The only thing that I have is the policy argument that, well, wait a second, if I have to

provide notice under 3145 within a year, that means I have to file my action, anticipate that the insurer, be it AAA, State Farm, American Fellowship, may, in fact, file for liquidation or be forced into liquidation, and therefore, I now have to explore all other possible lower priority insurers and put them on notice.

I don't think that was the intent either of the Guarantee Association Act or the intent of No Fault. Certainly we've got enough litigation with providers and others that we don't need additional litigation.

I think the statute is properly read and there are no cases directly on point that say that 3145 is not applicable. However, it is clear from the intent of the statute that the Guarantee Association certainly can proceed beyond the one year.

Now, the question is as to Progressive, when you look at the statute on priority under 3114, you of course look to the insurer as a resident relative, and in this case Justin Childers did not have a vehicle of his own. His mother, with whom he resided, was insured with American Fellowship, and they in turn were paid benefits shortly after the accident which was in 2011, this liquidation taking place in 2012 and

then into ‘13.

Upon getting notice, we immediately filed against Progressive as far as a claim. The reasons provided in their claim in response, a denial, was that the same reason they are using today, 3145. They are attempting to mend the hold.

The Court has seen -- and I have briefed extensively mend the hold. I adopt that argument orally now, but I will focus more importantly on what the Court raised which is, wait a second, is Shaina Groulx insured and is that a basis for Justin Childers to make a claim against Progressive? Well, under -- there’s two Supreme Court cases.

Heniser which is cited which says in examining coverage, you first make a determination if the policy provides coverage to the insured. In this case, it would be Shaina Groulx, and you look at page seven of the policy that’s attached and Progressive agrees that it will pay to an eligible injured person who is injured no-fault benefits, an eligible injured person means you or any relative, and for the purposes of this argument and this motion, Progressive has agreed that Shaina Groulx is a resident relative and that she was injured. So, on the face of it, she’s entitled to benefits.

The next question would be does she get benefits actually paid to her. That's a separate issue. She is an insured under the policy, and once she is an insured, then you look to 3114 which is both an entitlement statute and a priority statute, and you drop down because American Fellowship is no longer there, that's under 3114(1), you drop down to (4) and Shaina Groulx is the owner/operator. That's under section four.

All right. Who insures her, and in this case she didn't have her own policy, but she would be entitled to coverage under her brother's policy. If, hypothetically, she were driving a total stranger's car and that was the first time, she would have been afforded benefits and Progressive could not make the argument its making today.

But the trigger is if there is coverage for her, before you look at disqualifiers, that is the point where the analysis stops and you then have your order of priority. That was the lower priority, and therefore, Justin Childers is entitled to coverage based upon that, the actual language of the policy because you look to the statute under 3114 to determine the next order. Whether Shaina Groulx is entitled to coverage herself, actual payment, is a red

herring, a separate issue.

Now, and also cited in the brief is the case of *Belcher* which sets forth that 3114 is both an entitlement and a priority statute and is mandated under the Guarantee Association act. I, Justin Childers, have to proceed against the lower priority insurer, and that's what we've done here. Thank you, Your Honor.

THE COURT: Thank you.

MR. SAYLOR: May I respond to--

THE COURT: You get the final word here. Yes.

MR. SAYLOR: Thank you. Your Honor, Dan Saylor again for Progressive.

Responding to Mr. Burns' last point, and, in fact, it was his first point, too, that he says that the Guarantee Act requires that the injured person must go after the next highest insurer in priority. It doesn't say that anywhere. There's nothing -- you can look at all of the citations of the statutes and read all of the case -- all of the subsections that are cited or quoted. There's nothing in there that talks about where an injured claimant should go after the next highest priority. It's the Guarantee Association that pays and then the Guarantee

Association, as I said before, when available if there's actually an action, a recoverability, the Guarantee Association can seek reimbursement.

But -- and while I'm talking about misstatements of what the statute says. On the statute of limitations issue, Mr. Sangster said relying on 7911(3) that, you know, it says that we're not bound by the statute of limitations, the Guarantee Association. It says we're not bound by the statute of limitations. It doesn't say anything close to that.

It's a very general statute that simply says that the Guarantee Association is not subject to other laws, other chapter -- you know, the requirements of the insurance code and the case law -- there's a case cited that kind of fleshes that out, but basically burdens imposed on insurance companies by statute are not imposed on the Guarantee Association. That's what the statute is that they're relying on for saying that we get a free pass on statute of limitations. It's a very general provision that just says the Guarantee Association is not subject to the burdens of the insurance code.

But the 3145 statute of limitations is not a burden imposed on insurance companies. It's very much

a benefit to an insurance company. I'm not exposed to a lawsuit if more than a year has gone by and I've never had notice of the injury.

So, that's all I'll say about the statute of limitations. I believe that it totally applies. The statute definitely puts the insurer -- the Guarantee Association in the shoes of the claimant, and any claimant, their action against an insurance company who never heard of this accident for five or ten years, as the examples were given, would have no viable claim. So, therefore, neither does the Guarantee Association.

And as for the coverage question, I think you heard both Mr. Burns and Mr. Sangster are scrambling around trying their best to show that, in fact, Progressive is the insurer of Shaina Groulx. It is necessary for their claim. I hope you picked up on that. That was -- they're scrambling to try to make that showing that Progressive is her insurer.

Mr. Sangster says that, well, his theory that Progressive is the insurer is she is a contractual insured, that if you just really look at the Progressive policy, you'll find that Progressive is her insurer, and he relies on the *Sours* case. It's unpublished. So, therefore, it's a nonbinding. It's

none precedential. If you find it persuasive, then you can rely on it to the extent that you desire, but I would submit that *Sours* is entirely unpersuasive because it is fundamentally wrong.

It reaches the wrong result for the wrong reason. It says that because she can make a claim as his resident relative, albeit in other situations, that makes Progressive her insurer. That because she could look to Progressive for protection to indemnify her loss, that makes Progressive her insurer even though she couldn't collect in this situation.

Well, that flies directly in the face of the two pillar cases on this issue. One is *Dobbelaere* and one is the *Coleman* case which Mr. Sangster was involved in, and *Coleman* specifically says that you are someone's insurer if you assume the risk of another's loss, and it proceeds to say very specifically at the time of the accident.

Now, so, you have to ask yourself what risk was Progressive assuming with respect to Shaina Groulx on that day? No risk whatsoever. If she's driving her uninsured motor vehicle out there, Progressive has no obligation to protect her, and, in fact, if she made a claim of any sort, it would be turned back because she just has no ability to get benefits from

Progressive, and therefore, under the very tests that *Coleman* lays out, Progressive cannot be deemed her insurer.

And the *Dobbelaere* case, as I pointed out before, specifically answered the question, well, what about the fact that, you know, she is a resident relative. She could claim under the statute to get benefits from Progressive. They said that's not enough. That's specifically that was exactly what *Dobbelaere* addressed, and they said that's not enough to make a company her insurer.

So, Your Honor, I would just ask that you grant summary disposition in favor of Progressive unless you have any further questions.

THE COURT: I do not.

MR. SAYLOR: Thank you.

THE COURT: Thank you.

MR. SANGSTER: Any further rebuttal?

THE COURT: Just responding to what -- I know you were writing notes furiously during some of his comments. If you want to respond to those comments?

MR. SANGSTER: I have two very short -- first, it did assume the risks associated with Shaina Groulx when it used the term relative in its policy. It didn't have to. Progressive could have simply

defined the term insured as meaning the person named in the policy, period, and called everyone else something else, but it did not. It assumed the risk of relatives driving automobiles in the household subject to other exclusions.

The statute of limitations -- I'm just applying the -- by statute of limitations, I want to make it clear that I am simply referring to the statute of limitations on the one year back rule set forth in the insurance code. I'm not referring to RJA statute of limitations 79 -- or MCL 500.7911 makes it clear that we are not bound by the other provisions of this chapter unless we choose to be, but it's -- we're not bound by it because, again, what if you have an insurance carrier that goes belly up after 40 years of handling a claim, and we know Michigan's lifetime unlimited no-fault benefits is unique. It's one of a kind out of all 50 states. We're the only state that has the system. How do you know if your insurer is going to be around in 40 years? You don't.

As Mr. Burns points out, it is impossible, unduly burdensome, and indeed would produce an absurd result if an injured claimant had put every conceivable insurer on notice of a claim within one year in order to guard against the remote possibility

of their highest prior insurer becoming insolvent. It's not what the system was designed to do.

Again, in 30 years of handling claims of insolvent insurers, this is the first time I have any carrier raise this argument. Everyone else accepts the claim, picks it up, and life goes on. Thank you, Your Honor.

THE COURT: Thank you. I'm going to order a transcript of today's proceedings and I'll see that you get copies. I'm also going to ask you for some assistance. You are not from Genesee County, but you've probably heard about our water issues here, and I have been assigned the water cases.

MR. BURNS: Oh my goodness.

THE COURT: Well, I do the first one and I guess they all follow. We're up to about 500 or 600, and we had a session here two weeks ago with attorneys from California, New York, Virginia, and they come, and the estimate is it will be somewhere in the area of 9,000 when we get all done.

So, I know we're not going to try all of those, but the administration of that has become problematic. In fact, effective just a day or so ago I'm not getting any new civil cases until we get through this process.

So, I would like to ask you so that you can get an opinion while I'm still here and hopefully within -- before the end of the year, if you could outline your arguments that you made to me. Just not more than two pages with cases that you feel that I should look at. With that and with the transcript of the proceedings, I think I'll be able to put something together hopefully before, don't quote me, but hopefully before the end of the year. The water cases won't really pick up momentum until sometime next year, but it's going to be fun. Anything further?

MR. SANGSTER: When would you like the two page outline submitted to your Honorable Court?

THE COURT: Ten days. I mean next Friday, a week from Friday. Is that doable?

MR. SANGSTER: That takes us to October 28th?

THE COURT: No. October 28th is this Friday. It would be November--

MR. SANGSTER: November 4.

THE COURT: --4th.

MR. SANGSTER: No problem.

THE COURT: Okay.

(At 3:15 PM, proceedings concluded)

Tape No. 10/25/16 3:15 PM

STATE OF MICHIGAN)
COUNTY OF GENESEE)

I, Shelie Robinson, do hereby certify that this transcript, consisting of 43 pages, is a complete, true and correct transcript to the best of my ability of the videotaped proceedings taken in this case on Tuesday, October 25, 2016, before the Honorable Richard B. Yuille, Circuit Judge.

October 29, 2016 Shelie Robinson

SHELIE ROBINSON CER 6913
Circuit Courthouse
900 S. Saginaw Street
Flint, Michigan 48502
(810) 424-4454

EXHIBIT 5

Stipulated Facts,
9/2/2015

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

SUSAN CHILDERS,
Conservator for
JUSTIN S. CHILDERS, LIP,

Plaintiffs,

and

MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION,

Intervening Plaintiff,

v.

PROGRESSIVE MARATHON INSURANCE COMPANY,

Defendant.

Case No. 13-101626-NF

Hon. Richard B. Yuille

Richard F. Burns, Jr. (P26189) **Law Offices of Richard F. Burns Jr. P.C.** Attorney for Plaintiff Childers 31780 Telegraph Road, Suite 130 Bingham Farms, Michigan 48205 (248) 530-5540	Ronald M. Sangster, Jr. (P39253) **Law Offices of Ronald M. Sangster PLLC** Attorney for Int. Plaintiff MPCGA 901 Wilshire Drive, Suite 230 Troy, Michigan 48084 (248) 269-7040	Michael J. DePolo (P35733) Daniel S. Saylor (P37942) **Garan Lucow Miller, P.C.** Attorneys for Defendant Progressive 8332 Office Park Drive Grand Blanc, MI 48439 (810) 695-3700

STIPULATED FACTS

NOW COME the above-captioned parties, by and through their undersigned counsel, and hereby stipulate to the following facts:

1. Justin S. Childers was severely injured in a motor vehicle accident on August 6, 2011. As a result of his injuries, including quadriplegia, he has incurred, and continues to incur, expenses for his care.

2. The motor vehicle in which Childers was a passenger when the accident occurred, a 1988 Oldsmobile, was owned, registered and operated by Shaina Lee Groulx, only. Shaina Lee Groulx did not possess any valid automobile insurance policy in her name at the time of the accident. Her 1988 Oldsmobile was itself uninsured at the time of the accident.

3. At the time of the subject automobile accident, Justin S. Childers did not own a motor vehicle, but he and his mother, Susan Childers, were domiciled in the same household. Since Susan Childers was at that time a named insured on a valid no-fault automobile insurance policy issued by American Fellowship Mutual Insurance Company, Justin S. Childers was entitled to receive whatever personal protection insurance ("PIP") benefits to which he was entitled from American Fellowship.

4. For a period of time PIP benefits were paid to and for the benefit of Justin S. Childers by American Fellowship.

5. On October 29, 2012, a Rehabilitation Order was entered in the Ingham County Circuit Court placing American Fellowship Mutual Insurance Company into rehabilitation under MCL 500.8112. During this time American Fellowship continued to pay certain PIP benefits to or on behalf of Justin Childers.

6. On or about June 12, 2013, American Fellowship was declared insolvent by Order of the Ingham County Circuit Court, within the meaning of the property and casualty guaranty association act, MCL 500.7901, *et seq*.

7. Pursuant to its statutory duties under MCL 500.7901, *et seq*., and subject to any rights and limitations set forth in the act, the Intervening Plaintiff, Michigan Property and Casualty Guaranty Association" (hereinafter, "MPCGA") became responsible for the insolvent

insurer's obligations that qualify as "covered claims" within the meaning of MCL 500.7925. Justin S. Childers' claim for PIP benefits against American Fellowship qualifies as a "covered claim" under MCL 500.7925.

8. After assuming responsibility for American Fellowship's "covered claims," the MPCGA investigated whether PIP benefits were recoverable by claimant Justin S. Childers from any other insurance policy since, under the governing statute, (a) Childers is required to exhaust all coverage provided under any other insurance policy, (b) any such benefits recoverable by Childers would be a credit against the "covered claim" payable by the MPCGA, and (c) to the extent of any benefit payments actually made by the MPCGA, Childers is deemed to have assigned to the MPCGA any rights he may have against any other insurer for payment of the "covered claim." MCL 500.7931(3); MCL 500.7935(2).

9. On or about September 24, 2013, Defendant, Progressive Marathon Insurance Company (hereinafter, "PMIC"), for the first time received notification of the injuries suffered by Justin S. Childers on August 6, 2011.

10. On November 22, 2013, this lawsuit was initiated on behalf of Justin S. Childers and his conservator, Susan Childers, against Defendant PMIC.

11. Defendant PMIC had issued an auto insurance policy to one Matthew M. Groulx, Policy Number 18940781-7 (a true and complete copy of which is attached hereto), which policy was in effect at the time of the subject accident on August 6, 2011. The only "Named Insured" on the policy is Matthew M. Groulx, and the only motor vehicle identified on the policy, a 2002 Buick Century, was not in any way involved in the Childers accident of

August 6, 2011. The name of Shaina Lee Groulx does not appear in the policy issued to Matthew M. Groulx.

12. Matthew M. Groulx is the brother of Shaina Lee Groulx. Some months prior to the subject accident, Shaina Lee Groulx had begun staying with her brother in his apartment in Bloomfield Hills, Michigan, intending to remain there temporarily until she could move into an apartment of her own, although she was still staying at the apartment on the date of the accident, August 6, 2011. Whether Matthew M. Groulx and Shaina Lee Groulx were domiciled in the same household is not a stipulated fact but is a disputed point. Additionally, whether Shaina Lee Groulx was injured in the motor vehicle accident of August 6, 2011 is not a stipulated fact, but is a disputed point. For purposes of the issues presented in the parties' cross-motions for summary disposition, only, the parties will assume that Matthew M. Groulx and Shaina Lee Groulx were domiciled in the same household at the time of the subject accident and that Shaina Lee Groulx was injured in the accident.

Respectfully submitted,

Law Offices of Richard F. Burns Jr. P.C.	**Law Office of Ronald M. Sangster PLLC**	**Garan Lucow Miller, P.C.**
By: R. Burns w/Consent	By: R. Sangster w/Consent	By: M J DePolo
Richard F. Burns, Jr., Esq. Attorney for Plaintiff Childers 31780 Telegraph Rd., Ste. 130 Bingham Farms, MI 48025 (248) 530-5540	Ronald M. Sangster, Jr., Esq. Attorney for Int. Plaintiff 901 Wilshire Drive, Ste. 230 Troy, MI 48084 (248) 269-7040	Michael J. DePolo, Esq. Daniel S. Saylor, Esq. Attorneys for Defendant 8332 Office Park Drive Grand Blanc, MI 48439 (810) 695-3700

September 2, 2015

1236162.1

EXHIBIT 6

Progressive Michigan Auto Policy issued to Matthew Groulx, 7/14/2011 to 1/14/2012
(submitted below as an exhibit to the parties' Stipulated Facts, ¶10)

PROGRESSIVE
P.O. BOX 31260
TAMPA, FL 33631

PROGRESSIVE DIRECT

Policy Number: 18940781-7
Underwritten by:
Progressive Marathon Insurance Co
June 16, 2011
Policy Period: Jul 14, 2011 - Jan 14, 2012
Page 1 of 1

progressive.com
Online Service
Make payments, check billing activity, update policy information or check status of a claim.

1-800-PROGRESSIVE (1-800-776-4737)
For customer service and claims service, 24 hours a day, 7 days a week.

MATTHEW M GROULX
1641 BLOOMFIELD PL DR 611
BLOOMFIELD HILLS, MI 48302

Auto Insurance Coverage Summary
This is your Renewal Declarations Page

The coverages, limits and policy period shown apply only if you pay for this policy to renew.

Your coverage begins on July 14, 2011 at 12:01 a.m. This policy expires on January 14, 2012 at 12:01 a.m.

Your insurance policy and any policy endorsements contain a full explanation of your coverage. The policy contract is form 9610D MI (05/06). The contract is modified by forms Z445 MI (07/10) and 4884 MI (03/07).

Drivers and household residents

	Additional Information
MATTHEW M GROULX	Named Insured

Outline of coverage

2002 Buick Century
VIN 2G4WS52J121138169
Primary use of the vehicle: Commute

	Limits	Deductible	Premium
Liability To Others			$191
Bodily Injury Liability	$20,000 each person/$40,000 each accident		
Property Damage Liability	$10,000 each accident		
Personal Protection Insurance (PIP)		$500	276
Primary Medical/Excess Workloss			
Uninsured/Underinsured Motorist	$20,000 each person/$40,000 each accident		6
Property Protection Insurance	$1,000,000	$0	17
Subtotal policy premium			**$490.00**
MCCA assessment recoupment			72.50
Statutory assessment recoupment			8.50
Total 6 month policy premium			**$571.00**

Premium discounts

Policy	
18940781-7	Online Quote, Paperless, Five-Year Accident Free, Continuous Insurance: Platinum, Electronic Funds Transfer (EFT) and J1 credit

Vehicle	
2002 Buick Century	Airbag

LOYAL CUSTOMER SINCE 2008

CERTIFICATE OF NO-FAULT INSURANCE - Michigan

Policy Number: 10940781-7 Effective Date: 07/14/2011 to 01/14/2012
Insurer: Progressive Marathon Insurance Co
Customer Service: 1-800-776-4737
Named Insured: MATTHEW M GROULX

Year	Make	Model	VIN
2002	Buick	Century	2G4WS52J121138169

A person who supplies false information to the Secretary of State or who issues or uses an invalid certificate of insurance is guilty of a misdemeanor punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00, or both.
WARNING: KEEP THIS CERTIFICATE IN YOUR VEHICLE AT ALL TIMES. If you fail to produce it upon a police officer's request, you will be responsible for a civil infraction.

PENALTY FOR OPERATION WITHOUT INSURANCE
Michigan law (MCLA 500.3101) requires that the owner or registrant of a motor vehicle registered in this state must have insurance or other approved security for the payment of no-fault benefits on the vehicle at all times. An owner or registrant who drives or permits a vehicle to be driven upon a public highway without the proper insurance or other security is guilty of a misdemeanor. An owner or registrant convicted of such a misdemeanor shall be fined not less than $200.00 nor more than $500.00, imprisoned for not more than 1 year, or both.

Form 4851 MI (03/10)

Rest easy. We're here 24/7 when you need us. To report a claim, go to claims.progressive.com or call 1-800-274-4499.

When it comes to where your car is repaired, it's your choice - always. You can use a shop of your own, or use a shop in our network. And, you may be able to choose Progressive's concierge level of service, too. When you use our concierge service or use a shop in our network, repairs are guaranteed by the shop and Progressive.

Concierge service available in:
Sterling Heights, Michigan
Livonia, Michigan

Contact Customer Service at 1-800-776-4737
Manage your policy online at progressive.com
Sign up online for e-mail reminders and alerts - you can even go paperless and stop receiving mail through USPS

LOYAL CUSTOMER SINCE 2008

CERTIFICATE OF NO-FAULT INSURANCE - Michigan

SECRETARY OF STATE'S COPY

Policy Number: 10940781-7 Effective Date: 07/14/2011 to 01/14/2012
Insurer: Progressive Marathon Insurance Co
Customer Service: 1-800-776-4737
Named Insured: MATTHEW M GROULX

Year	Make	Model	VIN
2002	Buick	Century	2G4WS52J121138169

A person who supplies false information to the Secretary of State or who issues or uses an invalid certificate of insurance is guilty of a misdemeanor punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00, or both.
WARNING: KEEP THIS CERTIFICATE IN YOUR VEHICLE AT ALL TIMES. If you fail to produce it upon a police officer's request, you will be responsible for a civil infraction.

PENALTY FOR OPERATION WITHOUT INSURANCE
Michigan law (MCLA 500.3101) requires that the owner or registrant of a motor vehicle registered in this state must have insurance or other approved security for the payment of no-fault benefits on the vehicle at all times. An owner or registrant who drives or permits a vehicle to be driven upon a public highway without the proper insurance or other security is guilty of a misdemeanor. An owner or registrant convicted of such a misdemeanor shall be fined not less than $200.00 nor more than $500.00, imprisoned for not more than 1 year, or both.

Form 4851 MI (03/10)

I CERTIFY THIS DOCUMENT
TO BE A TRUE AND ACCURATE COPY.
BY: DEBRA HENRY

Driving history

Progressive uses driving and claims history to determine your premium. Driving and claims history may include events such as motor vehicle violations, at-fault accidents, not-at-fault accidents and comprehensive claims. We obtain driving and claims history from one or more of the following sources:

- Your application (APP)
- Progressive claims history (PROG)
- Motor Vehicle Reports - provided by state agencies (MVR)
- Comprehensive Loss Underwriting Exchange - provided by ChoicePoint, Inc. (CLUE)

We considered the following events:

Driver and Description	Date	Source
MATTHEW M GROULX		
driving under the influence of alcohol/drugs	Aug 1, 2009	MVR

Please contact Customer Service if any of the information above is inaccurate.

Form 5481 (05/06)

Important notice

Unlike most other insurers, Progressive may lower your rate in the middle of a policy term in certain circumstances.

When we determine your rate, we consider the driving history for all drivers on the policy. The accidents and violations that we have considered are set forth in the Driving History section of your Declarations Page.

Now, if one of the rated drivers has an accident or violation that is more than 35 months old, and none of the drivers have had new accidents or violations, then we may be able to lower your rate. You don't have to wait until your next policy period begins to enjoy the savings! If you believe you qualify, call us at 1-800-776-4737 and ask for a mid-term driving history review.

If you don't call, we will re-evaluate the driving history of the drivers on your policy at next renewal.

Form Z570 (09/07)

Do you still qualify?

As a Progressive customer, you are receiving the highest discount available for our group program. If you are no longer affiliated with a qualified group, please contact us as you will no longer be eligible for our program.

Form Z575 MI (06/08)

Important information about your policy premium

Our Use of Credit History in Determining Your Rate

Your insurance premium or rate is based on many factors including the type of vehicle you drive, the amount and types of coverages you purchase, and the driving and claims history of those on your policy. We also use your credit history to calculate an insurance credit score, which is another factor we use to determine your rate.

Because your credit history can change over time, we automatically review your credit history every few years. You do not, however, have to wait for this periodic review. At your request, we will review your credit history and update the rate for your next renewal, but you may request this review only once in a 12 month period.

It's important to know that our review of your credit history may affect your renewal rate positively or negatively depending on changes to your history and how we review it. There are many other factors, such as changes in your driving history or changes in the premium we charge, that may also affect your renewal rate.

To request a review of your credit history, please call Customer Service. We can also provide additional information about how we use credit history and insurance credit scores.

Continued

Risk Tier Reviews

When we determine the rate for your policy, we review certain information to place you in a "risk tier." A risk tier is a category of customers with certain similar risk characteristics. Once we've determined your tier, we look at additional information to refine and finalize your rate.

We review and adjust your risk tier if you make changes to your policy mid-term and at renewal. These are partial reviews because we make adjustments only for certain changes.

After you have been with us for a few years, we look at your payment, claim, and driving history to see if you qualify for a full risk tier review. If you qualify, we'll look at all of the information used to determine your risk tier, and make appropriate adjustments. Please note that our practices may change over time.

Because we don't review all of your tier information at every renewal, you may be in a different tier at renewal than you would be in if you came to us as a new customer. That means your rate as a new customer could be different. You always have the right to cancel your policy and apply for a new one. Our practices may change over time.

Rate Stability Program

Customers tell us they like more stable insurance rates over time, so we've made some changes that will help us give you what you want.

Your insurance rate is affected both by what *you* do and by how *we* calculate rates. Now, with this program, when *we* need to revise the way we calculate rates, if the total effect of our changes would cause your rate to change up or down substantially, we will usually not apply them fully to your policy when it renews. Instead, we will apply them more gradually over time. Your rate will not change dramatically due to changes *we* make, such as when we adjust rates based on where customers live, types of accidents or violations, vehicle types, particular limits and deductibles, age groups, or marital status.

On the other hand, your rate will change fully when things about you, other drivers on your policy, or the vehicles on your policy change. For example, your rate generally will change when you move to a new location, have an accident, receive a violation, change a vehicle or driver, change your limits or deductibles, or change your marital status.

Because of this program, your renewal rate may be higher or lower than the rate you would pay if this program were not in effect. (Note that you always have the option of canceling your current policy and purchasing a new policy, if you prefer.) This approach will help us deliver more stable rates over time to you.

Provider Network Program Notification

This notification is to advise you that, in the event you are injured as a result of an accident, you may have available to you the services of PPOM a medical provider network. You can call 1-800-831-1166, or visit www.PPOM.com, 24 hours a day, 7 days a week, to find out which medical providers are included in the PPOM network.

This program is designed to provide better customer service. **You are under no obligation to use the network above. You are free to see a medical service provider of your choice.** This notice is for informational purposes only. Using a provider within the network should not be considered confirmation of coverage.

Form Z272 (12/05)

PROGRESSIVE
P.O. BOX 31260
TAMPA, FL 33631

PROGRESSIVE DIRECT

MATTHEW M GROULX
Policy Number: 18940781-7
Underwritten by:
Progressive Marathon Insurance Co
Date of Mailing: June 15, 2011
Policy Period: Jul 14, 2011 - Jan 14, 2012
Page 1 of 1
Online Service
progressive.com
Customer Service
1-800-776-4737

MATTHEW M GROULX
1641 BLOOMFIELD PL DR 611
BLOOMFIELD HILS, MI 48302

Electronic Funds Transfer (EFT) Payment Schedule

Thank you for choosing Progressive. We appreciate having you as our customer.

Remaining balance $[illegible]

Following is your updated payment schedule for your review.

Date	Amount	Date	Amount
Jul 14, 2011	$96.20	Nov 14, 2011	$96.17
Aug 14, 2011	$96.17	Dec 14, 2011	$96.12
Sep 14, 2011	$96.17		
Oct 14, 2011	$96.17		

An installment fee of $1.00 has been included in each payment.

Please note that due to payment processing time, your transaction may not post immediately. If your scheduled payment falls on a weekend or holiday, your payment will be made on the next business day.

If you have questions, please call us.

Form 6273 (07/08)

Policy information

Policy Number: 18940781-7
Print Date: June 16, 2011

state code: MI
company code: 30
rate revision: 201103
agent code: IC-94601
rate plan: D
quote amount: $0.00
fixed charge: $85.00
pay plan: H2
factor: 1.000
user ID:
Confirmation number:
RS end factor: 1.000
flat acq RS factor: 0.955
preferred status code: N
pip claims:

upload mkt: MM
final mkt: MM
expnd mkt:
comm level: A
comm amt: 0.0%
upload u/w: 2B
final u/w: 1Y
cession:
inel sdip:
family size: 01
lp/lf count:
nsf count:
Length of Residency: Z
omitted incident: 00
DSV indicator:

non charge accident:
non charge comp loss:
at fault accident:
proof of prior: Y
pop eff:
pop exp:
pop lapse days: 0
pop limits:
pop company:
carrier name: PROGRESSIVE - INTERNAL CONVERSION
prior carrier type: N
advance shopping date:
health insurance:
excess residents: N

final FR: J1
upload FR: J1
app source: 9
rate cap factor: 0.00
unit code: 12
branch code: 09
rate manual: 3(
muni-tax: 000
no-fault: 0

Municipality Tax

City code:
City tax percent:
County code:
County tax percent:
Primary garaging address:
City: State: ZIP code: 00000

Driver information

#	first	last	sex	m/s	relation-ship	vehicle	dob	yrs lic	yrs exp	tier	NB driver
001	MATTHEW M	GROULX	M	S	I	001	Dec 9, 1979	00	00		

#	first	last	status	principal/ occasional	occupation/ education	total driver points	driver suppressed points
001	MATTHEW M	GROULX	Rated	P	/4	001	000

Driving history

#	violation	date	points	source
001	DWI	Aug 1, 2009	1	MVR

Vehicle information

#	year	make	model	VIN	UBI value	UBI device id	UBI status	UBI disc %	zip	terr	dr#
1	2002	Buick	Century	2G4WS52J121138169	0.000			0%	48302	27	001

#	year	make	iso make	iso model	iso style	iso symbol	iso auxiliary	veh code	veh use	annual miles	ops expense
1	2002	Buick	BU	CE	XX	00	XX	XXX	Commute		$48.00

#	year	make	iso comp	iso coll	acquisition expense
1	2002	Buick	00	00	$0.00

I CERTIFY THIS DOCUMENT
TO BE A TRUE AND ACCURATE COPY.
BY: DEBRA HENRY

Continued

Rate stability factors

#	BI	PD	UM	MED/PIP	COMP	COLL	OTHER
001	1.032	1.036	1.057	1.129	0.000	0.000	0.000

Premium discount and surcharge codes

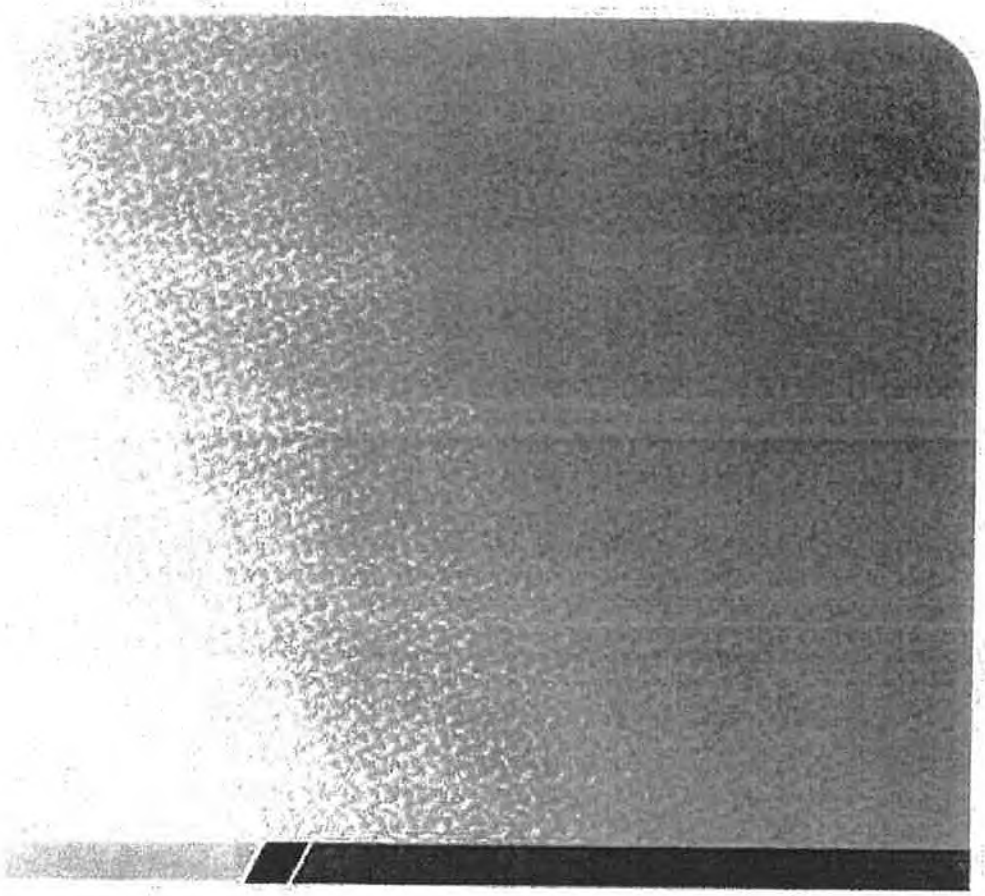
Policy
IQD IPP SD5 NP3 EFT

Driver

Vehicle
001 AR2

9610D MI 0506

MICHIGAN
AUTO POLICY



Form 9610D MI (05/06)
version 2.0

PROGRESSIVE DIRECT

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BY: DEBRA HENRY

CONTENTS

MICHIGAN AUTO POLICY

INSURING AGREEMENT

In return for **your** payment of the premium, **we** agree to insure **you** subject to all the terms, conditions, and limitations of this policy. **We** will insure **you** for the coverages and the limits of liability shown on this policy's **declarations page. Your** policy consists of the policy contract, **your** insurance application, the **declarations page**, and all endorsements to this policy.

GENERAL DEFINITIONS

The following definitions apply throughout the **policy**. Defined terms are printed in boldface type and have the same meaning whether in the singular, plural, or any other form.

1. **"Additional auto"** means an **auto you** become the owner of during the policy period that does not permanently replace an **auto** shown on the **declarations page** if:
   a. **we** insure all other **autos you** own;
   b. the **additional auto** is not covered by any other insurance policy;
   c. **you** notify **us** within 30 days of becoming the owner of the **additional auto**; and
   d. **you** pay any additional premium due.

   An **additional auto** will have the broadest coverage **we** provide for any **auto** shown on the **declarations page**. If **you** ask **us** to insure an **additional auto** more than 30 days after **you** become the owner, any coverage **we** provide will begin at the time **you** request coverage.
2. **"Auto"** means a land motor vehicle:
   a. of the private passenger, pickup body, or cargo van type;
   b. designed for operation principally upon public roads;
   c. with at least four wheels; and
   d. with a gross vehicle weight rating of 12,000 pounds or less, according to the manufacturer's specifications.

   However, **"auto"** does not include step-vans, parcel delivery vans, or cargo cutaway vans or other vans with cabs separate from the cargo area.
3. **"Auto business"** means the business of selling, leasing, repairing, parking, storing, servicing, delivering, or testing vehicles.
4. **"Bodily injury"** means bodily harm, sickness, or disease, including death that results from bodily harm, sickness, or disease.
5. **"Covered auto"** means:
   a. any **auto** or **trailer** shown on the **declarations page** for the coverages applicable to that **auto** or **trailer**;
   b. any **additional auto**;
   c. any **replacement auto**; or
   d. a **trailer** owned by **you**.
6. **"Declarations page"** means the document showing **your** coverages, limits of

liability, **covered autos**, premium, and other policy-related information. The **declarations page** may also be referred to as the Auto Insurance Coverage Summary.

7. **"Occupying"** means in, on, entering, or exiting.
8. **"Property damage"** means physical damage to, destruction of, or loss of use of, tangible property.
9. **"Relative"** means a person residing in the same household as **you**, and related to **you** by blood, marriage, or adoption, and includes a ward, step-child, or foster child. **Your** unmarried dependent children temporarily away from home will qualify as a **relative** if they intend to continue to reside in **your** household.
10. **"Replacement auto"** means an **auto** that permanently replaces an **auto** shown on the **declarations page**. A **replacement auto** will have the same coverage as the **auto** it replaces if the **replacement auto** is not covered by any other insurance policy. However, if the **auto** being replaced had coverage under Part IV - Damage To A Vehicle, such coverage will apply to the **replacement auto** only during the first 30 days after **you** become the owner unless **you** notify **us** within that 30-day period that **you** want **us** to extend coverage beyond the initial 30 days. If the **auto** being replaced did not have coverage under Part IV - Damage To A Vehicle, such coverage may be added, but the **replacement auto** will have no coverage under Part IV until **you** notify **us** of the **replacement auto** and ask **us** to add the coverage.
11. **"Trailer"** means a non-motorized trailer, including a farm wagon or farm implement, designed to be towed on public roads by an **auto** and not being used:
    a. for commercial purposes;
    b. as an office, store, or for display purposes; or
    c. as a passenger conveyance.
12. **"We"**, **"us"**, and **"our"** mean the underwriting company providing the insurance, as shown on the **declarations page**.
13. **"You"** and **"your"** mean:
    a. a person shown as a named insured on the **declarations page**; and
    b. the spouse of a named insured if residing in the same household at the time of the loss.

PART I - LIABILITY TO OTHERS

INSURING AGREEMENT - BODILY INJURY AND PROPERTY DAMAGE LIABILITY COVERAGE

If **you** pay the premium for this coverage, **we** will pay damages for **bodily injury** and **property damage** for which an **insured person** becomes legally responsible because of an accident.

Damages include prejudgment interest awarded against an **insured person**.

We will settle or defend, at **our** option, any claim for damages covered by this Part I.

INSURING AGREEMENT - LIMITED PROPERTY DAMAGE COVERAGE

If **you** pay the premium for this coverage, **we** will pay for damage to a motor vehicle, up to the limits of liability shown on the **declarations page**, for which an **insured person** becomes legally responsible because of an accident occurring within the State of Michigan, which arises out of the ownership, maintenance, or use of an **auto**, to the extent that such damage is not otherwise covered by insurance.

ADDITIONAL DEFINITION

When used in this Part I:

"Insured person" means:

a. **you** or a **relative** with respect to an accident arising out of the ownership, maintenance, or use of an **auto** or **trailer**;
b. any person with respect to an accident arising out of that person's use of a **covered auto** with the permission of **you** or a **relative**;
c. any person or organization with respect only to vicarious liability for the acts or omissions of a person described in a or b above; and
d. any Additional Interest shown on the **declarations page** with respect only to its liability for the acts or omissions of a person described in a or b above.

ADDITIONAL PAYMENTS

In addition to **our** limit of liability, **we** will pay for an **insured person**:

1. all expenses **we** incur in the settlement of any claim or defense of any lawsuit;
2. interest accruing after entry of judgment, until **we** have paid, offered to pay, or deposited in court, that portion of the judgment which does not exceed **our** limit of liability. This does not apply if **we** have not been given notice of suit or the opportunity to defend an **insured person**;
3. the premium on any appeal bond or attachment bond required in any lawsuit **we** defend. **We** have no duty to purchase a bond in an amount exceeding **our** limit of liability, and **we** have no duty to apply for or furnish these bonds;
4. up to $250 for a bail bond required because of an accident resulting in **bodily injury** or **property damage** covered under this Part I. **We** have no duty to apply for or furnish this bond; and
5. reasonable expenses, including loss of earnings up to $200 per day, incurred at **our** request.

EXCLUSIONS - READ THE FOLLOWING EXCLUSIONS CAREFULLY. IF AN EXCLUSION APPLIES, COVERAGE WILL NOT BE AFFORDED UNDER THIS PART I.

Coverage under this Part I, including **our** duty to defend, will not apply to any **insured person** for:

1. **bodily injury** or **property damage** arising out of the ownership, maintenance, or use of any vehicle or trailer while being used to carry persons or property for compensation or a fee, including, but not limited to, pickup or delivery of maga-

zines, newspapers, food, or any other products. This exclusion does not apply to shared-expense car pools;

2. any liability assumed under any contract or agreement by **you** or a **relative**;
3. **bodily injury** to an employee of that **insured person** arising out of or within the course of employment. This exclusion does not apply to domestic employees if benefits are neither paid nor required to be provided under workers' compensation, disability benefits, or similar laws;
4. **bodily injury** or **property damage** arising out of an accident involving any vehicle while being maintained or used by a person while employed or engaged in any **auto business**. This exclusion does not apply to **you**, a **relative**, or an agent or employee of **you** or a **relative**, when using a **covered auto**;
5. **bodily injury** or **property damage** resulting from, or sustained during practice or preparation for:
   a. any pre-arranged or organized racing, stunting, speed, or demolition contest or activity; or
   b. any driving activity conducted on a permanent or temporary racetrack or racecourse;
6. **bodily injury** or **property damage** due to a nuclear reaction or radiation;
7. **bodily injury** or **property damage** for which insurance:
   a. is afforded under a nuclear energy liability insurance contract; or
   b. would be afforded under a nuclear energy liability insurance contract but for its termination upon exhaustion of its limit of liability;
8. any obligation for which the United States Government is liable under the Federal Tort Claims Act;
9. **bodily injury** or **property damage** which is intended or reasonably expected by an **insured person**, even if the actual injury or damage is different than that which was intended or expected;
10. **property damage** to any property owned by, rented to, being transported by, used by, or in the charge of that **insured person**. This exclusion does not apply to a rented residence or a rented garage;
11. **bodily injury** to **you** or a **relative**. This exclusion applies only to damages in excess of the minimum limit mandated by the motor vehicle financial responsibility law of Michigan;
12. **bodily injury** to **you** or a **relative** arising out of the operation of an **auto** that is not owned by or furnished or available for the regular use of **you** or a **relative** while in the custody of or being operated by **you** or a **relative** with the permission of the owner of the **auto** or the person in lawful possession of the **auto**;
13. **bodily injury** or **property damage** arising out of the ownership, maintenance, or use of any vehicle owned by **you** or furnished or available for **your** regular use, other than a **covered auto** for which this coverage has been purchased;
14. **bodily injury** or **property damage** arising out of the ownership, maintenance, or use of any vehicle owned by a **relative** or furnished or available for the regular use of a **relative**, other than a **covered auto** for which this coverage has been purchased. This exclusion does not apply to **your** maintenance or use of such vehicle;
15. **bodily injury** or **property damage** arising out of **your** or a **relative's** use of a vehicle, other than a **covered auto**, without the permission of the owner of the vehicle or the person in lawful possession of the vehicle;

If multiple auto policies issued by **us** are in effect for **you**, **we** will pay no more than the highest limit of liability for this coverage available under any one policy.

An **auto** and attached **trailer** are considered one **auto**. Therefore, the limits of liability will not be increased for an accident involving an **auto** that has an attached **trailer**.

FINANCIAL RESPONSIBILITY LAWS

When **we** certify this policy as proof of financial responsibility, this policy will comply with the law to the extent required. The **insured person** must reimburse **us** if **we** make a payment that **we** would not have made if this policy was not certified as proof of financial responsibility.

OTHER INSURANCE

If there is any other applicable liability insurance or bond, **we** will pay only **our** share of the damages. **Our** share is the proportion that **our** limit of liability bears to the total of all applicable limits. However, any insurance **we** provide for a vehicle or **trailer**, other than a **covered auto**, will be excess over any other collectible insurance, self-insurance, or bond.

Limited Property Damage Coverage provided under this policy will be excess over any other collectible insurance, self-insurance or bond, including, but not limited to, coverage on the damaged motor vehicle.

OUT-OF-STATE COVERAGE

If an accident to which this Part I applies occurs in any state, territory, or possession of the United States of America or any province or territory of Canada, other than the one in which a **covered auto** is principally garaged, and the state, province, territory, or possession has:

1. a financial responsibility or similar law requiring limits of liability for **bodily injury** or **property damage** higher than the limits shown on the **declarations page**, this policy will provide the higher limits; or
2. a compulsory insurance or similar law requiring a non-resident to maintain insurance whenever the non-resident uses an **auto** in that state, province, territory, or possession, this policy will provide the greater of:
   a. the required minimum amounts and types of coverage; or
   b. the limits of liability under this policy.

PART II - PERSONAL PROTECTION INSURANCE AND PROPERTY PROTECTION INSURANCE COVERAGE

INSURING AGREEMENT - PERSONAL PROTECTION INSURANCE COVERAGE (PIP)

If **you** pay the premium for this coverage, **we** will pay Personal Protection Insurance Benefits required by the Michigan No-Fault Law, Chapter 31 of the Michigan Insurance Code, as amended, for accidental bodily injury to an **eligible injured person** arising out of the ownership, operation, maintenance or use of a **motor vehicle** as a **motor vehicle**, subject to the exceptions, exclusions and limitations specified herein and as additionally provided by the law of the State of Michigan.

Personal Protection Insurance Benefits consist of:

1. **allowable expenses;**
2. **replacement services** sustained during the three years after the date of the accident;
3. **work loss** sustained during the three years after the date of the accident; and
4. **survivors' loss** sustained during the three years after the date of the accident.

INSURING AGREEMENT - PROPERTY PROTECTION INSURANCE COVERAGE (PPI)

If **you** pay the premium for this coverage, **we** will pay Property Protection Insurance Benefits in accordance with the Michigan No-Fault Law, Chapter 31 of the Michigan Insurance Code, as amended, for accidental damage to tangible property arising out of the ownership, operation, maintenance or use of a **motor vehicle** as a **motor vehicle** by **you** or a **relative.**

ADDITIONAL DEFINITIONS

When used in this Part II:

1. **"Allowable expenses"** means all reasonable charges incurred for reasonably necessary products, services and accommodations for an **eligible injured person's** care, recovery, or rehabilitation. However, **"allowable expenses"** shall not include:
   a. charges for a hospital room in excess of a reasonable and customary charge for semiprivate accommodations except when the **eligible injured person** requires special or intensive care; or
   b. charges for total funeral and burial expenses in excess of $1,750.
2. **"Eligible injured person"** means:
   a. **you** or any **relative** who sustains accidental bodily injury in an accident involving a **motor vehicle;**
   b. any other person who sustains accidental bodily injury while occupying a **covered auto;** and

c. any person who, while not occupying a **motor vehicle**, sustains accidental bodily injury as a result of an accident involving:
   (i) a **covered auto**; or
   (ii) a **motor vehicle** owned by, registered to or operated by **you**, if the person injured in the accident is not entitled to personal protection insurance under any policy described in Section 500.3114(1) of the Michigan No-Fault Law, Chapter 31 of the Michigan Insurance Code, as amended.

3. **"Motor vehicle"** means a vehicle, including a trailer, operated or designed for operation upon a public highway, by power other than muscular power, which has more than two wheels. However, **"motor vehicle"** does not include:
   a. motorcycles;
   b. mopeds; or
   c. farm tractors or implements of husbandry, which are not required to be registered pursuant to Section 216 of the Michigan Vehicle Code, as amended.
4. **"Replacement services"** means expenses, not exceeding $20.00 per day, the **eligible injured person** or dependents of the **eligible injured person** reasonably incur in obtaining the benefit of ordinary and necessary services in lieu of those that the **eligible injured person** would have performed if the **eligible injured person** had not been injured.
5. **"Survivors' loss"** means loss sustained by dependent survivors because of the death of an **eligible injured person**, limited to:
   a. net lost wages and contributions of tangible things of economic value, subject to the statutory maximum limit, not including services, that such dependent survivors would have received for support during their dependency from the deceased if the deceased had not suffered the injury which caused death; and
   b. expenses, not exceeding $20.00 per day, reasonably incurred by dependent survivors during their dependency in obtaining ordinary and necessary services in lieu of those that the deceased person would have performed for their benefit if the deceased person had not suffered the injury which caused death.
6. **"Work loss"** means actual loss of income from work an **eligible injured person** would have performed if the **eligible injured person** had not been injured, subject to the statutory maximum limit and not more than 85% of gross income. However, **"work loss"** does not include any loss of income after the date on which the **eligible injured person** dies.

EXCLUSIONS - READ THE FOLLOWING EXCLUSIONS CAREFULLY. IF AN EXCLUSION APPLIES, COVERAGE WILL NOT BE AFFORDED UNDER THIS PART II.

Coverage under Personal Protection Insurance does not apply to accidental bodily injury:

1. sustained by a person who has intentionally caused the bodily injury;
2. arising out of the use of a **motor vehicle** as a residence or premises;

3. sustained by any person using a **motor vehicle** or motorcycle that he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle;
4. arising out of the ownership, operation or use of a parked **motor vehicle**, unless:
   a. the **motor vehicle** was parked in such a way as to cause unreasonable risk of the accidental bodily injury that occurred;
   b. the accidental bodily injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used;
   c. the accidental bodily injury was a direct result of physical contact with property being lifted onto or lowered from the vehicle in the loading or unloading process; or
   d. the accidental bodily injury was sustained by the **eligible injured person** while occupying, entering into, or alighting from the **motor vehicle**;
5. arising out of the ownership, operation, maintenance or use of a parked **motor vehicle** while the **eligible injured person** is loading, unloading, doing mechanical work on, or entering into or alighting from the parked **motor vehicle**, if:
   a. the accidental bodily injury was sustained in the course of employment; and
   b. benefits are available under the Michigan Workers' Disability Compensation Act, as amended;
6. sustained while an operator or passenger of a **motor vehicle** operated in the business of transporting passengers which is:
   a. not **your covered auto**; and
   b. insured as required by the Michigan No-Fault Law, Chapter 31 of the Michigan Insurance Code, as amended.

   However, this exclusion does not apply to a passenger in the following:
   (i) a school bus providing transportation not prohibited by law;
   (ii) a bus operated by a common carrier of passengers certified by the department of transportation;
   (iii) a bus operated under a government sponsored transportation program;
   (iv) a bus operated by or servicing a nonprofit organization;
   (v) a taxi cab insured as prescribed in Section 500.3101 or 500.3102; or
   (vi) a bus operated by a canoe or other watercraft, bicycle or horse livery used only to transport passengers to or from a destination point;
7. to any person, other than **you** or a **relative**, who is:
   a. injured when struck by a **motor vehicle** or trailer outside the State of Michigan, while not occupying a **motor vehicle**;
   b. entitled to Personal Protection Insurance under another policy as a named insured or **relative**;
   c. occupying a **motor vehicle**, or struck as a pedestrian by a **motor vehicle**, which is:
      (i) not a **covered auto**;
      (ii) operated by **you** or a **relative**; and
      (iii) covered by security as required by the Michigan No-Fault Law, Chapter 31 of the Michigan Insurance Code, as amended; or

d. occupying a **motor vehicle** which is:
   (i) not a **covered auto**;
   (ii) operated outside the State of Michigan by **you** or any **relative**; and
   (iii) not required to be covered by security under the Michigan No-Fault Law, Chapter 31 of the Michigan Insurance Code, as amended;

8. sustained by the owner or registrant of a **motor vehicle** or motorcycle involved in an accident which is not covered by security as required by the Michigan No-Fault Law, Chapter 31 of the Michigan Insurance Code, as amended;
9. sustained by a person who resides outside the State of Michigan, when occupying a **motor vehicle** or motorcycle not registered in Michigan, which is not insured by a company which has filed a certification in compliance with Section 500.3163, as amended;
10. sustained by **you** while occupying or when struck as a pedestrian by a **motor vehicle**, other than a **covered auto**, which is owned by or registered to **you**;
11. sustained by a **relative** while occupying or when struck as a pedestrian by a **motor vehicle**, other than a **covered auto**, which is:
    a. owned or registered by that **relative**; and
    b. not covered by security as required by the Michigan No-Fault Law, Chapter 31 of the Michigan Insurance Code, as amended;
12. sustained by **you** or a **relative** while occupying a **motor vehicle**, other than a **covered auto**, which is:
    a. owned or registered by the employer of **you** or a **relative**; and
    b. covered by the security required by the Michigan No-Fault Law, Chapter 31 of the Michigan Insurance Code, as amended;
13. sustained by a **relative** who is entitled to No-Fault benefits under another policy as a named insured;
14. sustained by **you** or a **relative** which is a result of an intentional physical attack that occurs while occupying a **motor vehicle**, which does not arise out of the ownership, operation, maintenance or use of a **motor vehicle** as a **motor vehicle**; or
15. excluded by the Michigan No-Fault Law, Chapter 31 of the Michigan Insurance Code, as amended, or the law of the State of Michigan.

Coverage under Property Protection Insurance does not apply to accidental damage to tangible property:

1. sustained by any person who has intentionally caused the **property damage**;
2. arising out of the use of a **motor vehicle** as a residence or premises;
3. to **motor vehicles** and their contents, including trailers, unless the **motor vehicle** is parked in a manner so as not to cause unreasonable risk of the damage which occurred;
4. sustained by **you** or a **relative** if a **motor vehicle** owned by **you** or a **relative** is involved in the accident;
5. sustained in an accident occurring outside the State of Michigan;

6. to utility transmission lines, wires, or cables, which have not been located and erected as required by Michigan law;
7. arising out of the operation, maintenance or use of a motorcycle or **motor vehicle** by any person who has unlawfully taken the motorcycle or **motor vehicle**, unless the person reasonably believed that he or she was entitled to take and use the vehicle;
8. other than to a **covered auto**, arising out of an accident involving a **motor vehicle** while being used by a person in the course of a business of repairing, servicing, or otherwise maintaining **motor vehicles**. However, this exclusion does not apply to **you** or a **relative** when using a **covered auto**;
9. owned by **you** or a **relative** if **you** or a **relative** were the owner, operator, or registrant of a vehicle involved in the **motor vehicle** accident out of which the accidental damage to tangible property arose; or
10. excluded by the Michigan No-Fault Law, Chapter 31 of the Michigan Insurance Code, as amended, and the law of the State of Michigan.

LIMITS OF LIABILITY

Personal Protection Insurance Benefits otherwise payable shall be reduced by any benefits provided or required to be provided under the laws of any state or federal government, including, but not limited to:

1. Social Security Survivor Benefits;
2. Social Security Disability Benefits;
3. Workers' Compensation Benefits; and
4. Social Security Dependent Benefits.

No coverage will be provided under this Part II except as required by the Michigan No Fault Law, Chapter 31 of the Michigan Insurance Code, as amended.

Personal Protection Insurance Benefits otherwise payable shall also be reduced by any applicable deductible shown on the **declarations page**.

EXCESS COVERAGE OPTION

1. If **you** have elected Personal Protection Insurance Benefits for **allowable expenses** as excess coverage, it is agreed that the primary source of protection will be all other medical insurance, health care benefit plans, or similar benefit insurance, self-insurance or plans available to **you** and **relatives**, including, but not limited to:
   a. individual, blanket or group accident disability or hospitalization insurance, self-insurance, or plans;
   b. medical or surgical reimbursement insurance or plans;
   c. automobile or premises insurance affording medical expense benefits; and
   d. Health Maintenance Organization (HMO) service plans.

You and **relatives** seeking benefits under this Part II as excess coverage must first obtain benefits from all other available medical insurance, health care benefit plans, or similar benefit plans.

Coverage under this Part II is excluded to the extent that any elements of **allowable expenses** are paid, payable or required to be provided to, or on behalf of, **you** or a **relative** under the provisions of any medical insurance, health care benefit plans, or similar benefit insurance, self-insurance or plan. **We** will pay **allowable expenses** in excess of any valid limitations as to amount or duration of benefits which are not paid or payable under any other insurance, self-insurance or plans.

2. If **you** have elected Personal Protection Insurance Benefits for **work loss** as excess coverage, it is agreed that **your** primary source of protection will be all other valid and collectible:
   a. individual, blanket or group accident, sickness and accident, or disability insurance, or plans; and
   b. insurance or plans covering mortgage or **motor vehicle** loans which provide for direct payment to the lender.

   Coverage under this Part II is excluded to the extent that any elements of loss covered under Personal Protection Insurance **work loss** benefits are paid, payable or required to be provided to, or on behalf of, **you** or a **relative** under the provisions of any other insurance, benefit plan, or similar plan.

WORK LOSS BENEFITS WAIVER

Any **eligible injured person** 60 years of age or older who has elected the Work Loss Benefits Waiver will not be eligible to receive **work loss** benefits under Personal Protection Insurance.

OTHER INSURANCE

If there is other applicable Personal Protection Insurance or **motor vehicle** medical payments insurance, **we** will pay in accordance with the Michigan No-Fault Law, Chapter 31 of the Michigan Insurance Code, as amended, and as specified therein at M.C.L.A. Section 500.3114, 500.3115, and 500.3171, as amended.

If there is other applicable Property Protection Insurance, **we** will pay in accordance with the Michigan No-Fault Law, Chapter 31 of the Michigan Insurance Code, as amended, and as specified therein at M.C.L.A. Section 500.3125 and 500.3127, as amended.

COORDINATION OF BENEFITS

If there is any other insurance, self-insurance, or insurance plan providing coverage for expenses or loss covered under this Part II, the coverage provided under this Part II shall

be coordinated with the coverage available under all such policies and plans so that up to, but no more than, 100% of any such expenses or loss shall be recoverable under this and all such policies and plans combined.

PART III - UNINSURED/UNDERINSURED MOTORIST COVERAGE

INSURING AGREEMENT

If **you** pay the premium for this coverage, **we** will pay for damages that an **insured person** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** because of **bodily injury**:

1. sustained by an **insured person**;
2. caused by an accident; and
3. arising out of the ownership, maintenance, or use of an **uninsured motor vehicle.**

We will pay under this Part III only after the limits of liability under all applicable bodily injury liability bonds and policies have been exhausted by payment of judgments or settlements.

Any judgment or settlement for damages against an owner or operator of an **uninsured motor vehicle** that arises out of a lawsuit brought without **our** written consent is not binding on **us.**

ADDITIONAL DEFINITIONS

When used in this Part III:

1. **"Insured person"** means:
   a. **you** or a **relative**;
   b. any person while operating a **covered auto** with the permission of **you** or a **relative**;
   c. any person **occupying**, but not operating, a **covered auto**; and
   d. any person who is entitled to recover damages covered by this Part III because of **bodily injury** sustained by a person described in a, b, or c above.
2. **"Uninsured motor vehicle"** means a land motor vehicle or trailer of any type:
   a. to which no bodily injury liability bond or policy applies at the time of the accident;
   b. to which a bodily injury liability bond or policy applies at the time of the accident, but the bonding or insuring company:
      (i) denies coverage; or
      (ii) is or becomes insolvent;
   c. to which a bodily injury liability bond or policy applies at the time of the accident, but its limit of liability for bodily injury is less than the minimum limit

of liability for bodily injury specified by the financial responsibility law of the state in which the **covered auto** is principally garaged;

d. that is a hit-and-run vehicle whose owner or operator cannot be identified and which strikes:
   (i) **you** or a **relative**;
   (ii) a vehicle that **you** or a **relative** are **occupying**; or
   (iii) a **covered auto**;
   provided that the **insured person**, or someone on his or her behalf, reports the accident to the police or civil authority within 24 hours or as soon as practicable after the accident; or
e. to which a bodily injury liability bond or policy applies at the time of the accident, but the sum of all applicable limits of liability for **bodily injury** is less than the coverage limit for Uninsured/Underinsured Motorist Coverage shown on the **declarations page**.

An "**uninsured motor vehicle**" does not include any vehicle or equipment:

a. owned by **you** or a **relative** or furnished or available for the regular use of **you** or a **relative**;
b. owned or operated by a self-insurer under any applicable motor vehicle law, except a self-insurer that is or becomes insolvent;
c. owned by any governmental unit or agency;
d. operated on rails or crawler treads;
e. designed mainly for use off public roads, while not on public roads;
f. while located for use as a residence or premises; or
g. that is a **covered auto**.

EXCLUSIONS - READ THE FOLLOWING EXCLUSIONS CAREFULLY. IF AN EXCLUSION APPLIES, COVERAGE WILL NOT BE AFFORDED UNDER THIS PART III.

Coverage under this Part III will not apply:

1. to **bodily injury** sustained by any person while using or **occupying**:
   a. a **covered auto** while being used to carry persons or property for compensation or a fee, including, but not limited to, pickup or delivery of magazines, newspapers, food, or any other products. This exclusion does not apply to shared-expense car pools; or
   b. a motor vehicle that is owned by or available for the regular use of **you** or a **relative**. This exclusion does not apply to a **covered auto** that is insured under this Part III;
2. to **bodily injury** sustained by **you** or a **relative** while using any vehicle, other than a **covered auto**, without the permission of the owner of the vehicle or the person in lawful possession of the vehicle;
3. directly or indirectly to benefit any insurer or self-insurer under any of the following or similar laws:
   a. workers' compensation law; or
   b. disability benefits law;

4. to any punitive or exemplary damages; or
5. to **bodily injury** sustained by any person if that person or the legal representative of that person settles without **our** written consent.

LIMITS OF LIABILITY

The limit of liability shown on the **declarations page** for Uninsured/Underinsured Motorist Coverage is the most **we** will pay regardless of the number of:
1. claims made;
2. **covered autos**;
3. **insured persons**;
4. lawsuits brought;
5. vehicles involved in the accident; or
6. premiums paid.

If **your declarations page** shows a split limit:
1. the amount shown for "each person" is the most **we** will pay for all damages due to **bodily injury** to one person; and
2. subject to the "each person" limit, the amount shown for "each accident" is the most **we** will pay for all damages due to **bodily injury** sustained by two or more persons in any one accident.

The "each person" limit of liability includes the total of all claims made for **bodily injury** to an **insured person** and all claims of others derived from such **bodily injury**, including, but not limited to, emotional injury or mental anguish resulting from the **bodily injury** of another or from witnessing the **bodily injury** to another, loss of society, loss of companionship, loss of services, loss of consortium, and wrongful death.

If the **declarations page** shows that "combined single limit" or "CSL" applies, the amount shown is the most **we** will pay for the total of all damages resulting from any one accident. However, without changing this total limit of liability, **we** will comply with any law that requires **us** to provide any separate limits.

The limits of liability under this Part III will be reduced by all sums:
1. paid because of **bodily injury** by or on behalf of any persons or organizations that may be legally responsible;
2. paid under Part I - Liability To Others; and
3. paid or payable because of **bodily injury** under any of the following or similar laws:
   a. workers' compensation law; or
   b. disability benefits law.

We will not pay under this Part III any expenses paid or payable under Part II - Personal Protection Insurance and Property Protection Insurance Coverage.

No one will be entitled to duplicate payments for the same elements of damages.

If multiple auto policies issued by **us** are in effect for **you**, **we** will pay no more than the highest limit of liability for this coverage available under any one policy.

OTHER INSURANCE

If there is other applicable uninsured or underinsured motorist coverage, **we** will pay only **our** share of the damages. **Our** share is the proportion that **our** limit of liability bears to the total of all available coverage limits. However, any insurance **we** provide with respect to a vehicle that is not a **covered auto** will be excess over any other uninsured or underinsured motorist coverage.

ARBITRATION

If **we** and an **insured person** cannot agree on:
1. the legal liability of the operator or owner of an **uninsured motor vehicle**; or
2. the amount of the damages sustained by the **insured person**;

this will be determined by arbitration if **we** and the **insured person** mutually agree to arbitration prior to the expiration of the bodily injury statute of limitations in the state in which the accident occurred. If **we** and the **insured person** do not agree to arbitration, the disagreement may be resolved in a court of competent jurisdiction. Any lawsuit against **us** by an **insured person** for benefits under this Part III must be commenced prior to the expiration of the bodily injury statute of limitations in the state in which the accident occurred.

If **we** and an **insured person** have agreed to arbitration, the decision shall be made by an arbitrator agreed to by the parties. If the parties cannot agree on an arbitrator within 30 days, then on joint application by the **insured person** and **us**, the arbitrator will be appointed by a court having jurisdiction.

Each party will pay the expenses it incurs. The costs and fees of the arbitrator will be shared equally by both parties.

Unless both parties agree otherwise, arbitration will take place in the county in which the **insured person** resides. Local rules of procedure and evidence will apply.

A decision by the arbitrator will be binding with respect to a determination of:
1. the legal liability of the operator or owner of an **uninsured motor vehicle**; and
2. the amount of the damages sustained by the **insured person**.

The arbitrator will have no authority to award an amount in excess of the limit of liability.

We and an **insured person** may agree to an alternate form of arbitration.

PART IV - DAMAGE TO A VEHICLE

INSURING AGREEMENT - STANDARD COLLISION COVERAGE AND BROAD FORM COLLISION COVERAGE

If **you** pay the premium for this coverage, **we** will pay for sudden, direct, and accidental loss to a:
1. **covered auto,** including an attached **trailer**; or
2. **non-owned auto;**

and its **custom parts or equipment**, resulting from **collision.**

In addition, **we** will pay the reasonable cost to replace any child safety seat damaged in an accident to which this coverage applies.

INSURING AGREEMENT - LIMITED COLLISION COVERAGE

If **you** pay the premium for this coverage, **we** will pay for sudden, direct, and accidental loss to a:
1. **covered auto,** including an attached **trailer**; or
2. **non-owned auto;**

and its **custom parts or equipment**, resulting from **collision**, if the operator of the **covered auto** or **non-owned auto** is not **substantially at-fault** in the accident from which the loss arose.

Determination of whether the operator of the **covered auto** or **non-owned auto** is **substantially at-fault**, and the amount of the loss, will be made by agreement between **you** and **us**. **We** may require **you** to provide reasonable proof that the operator of the **covered auto** or **non-owned auto** was not **substantially at-fault** for the accident. If no agreement is reached as to whether an operator was **substantially at-fault**, the decision will be determined by arbitration in accordance with the Collision Arbitration provision specified in this Part IV.

In addition, **we** will pay the reasonable cost to replace any child safety seat damaged in an accident to which this coverage applies.

INSURING AGREEMENT - COMPREHENSIVE COVERAGE

If **you** pay the premium for this coverage, **we** will pay for sudden, direct, and accidental loss to a:
1. **covered auto**, including an attached **trailer**; or
2. **non-owned auto;**

and its **custom parts or equipment**, that is not caused by **collision.**

A loss not caused by **collision** includes:
1. contact with an animal (including a bird);
2. explosion or earthquake;

3. fire;
4. malicious mischief or vandalism;
5. missiles or falling objects;
6. riot or civil commotion;
7. theft or larceny;
8. windstorm, hail, water, or flood; or
9. breakage of glass not caused by **collision.**

In addition, **we** will pay for:

1. reasonable transportation expenses incurred by **you** if a **covered auto** is stolen; and
2. loss of use damages that **you** are legally liable to pay if a **non-owned auto** is stolen.

A combined maximum of $900, not exceeding $30 per day, will apply to these additional benefits. The additional benefit for transportation expenses will not apply if **you** purchased Rental Reimbursement Coverage for the stolen **covered auto.**

Coverage for transportation expenses and loss of use damages begins 48 hours after **you** report the theft to **us** and ends the earliest of:

1. when the **auto** has been recovered and returned to **you** or its owner;
2. when the **auto** has been recovered and repaired;
3. when the **auto** has been replaced; or
4. 72 hours after **we** make an offer to settle the loss if the **auto** is deemed by **us** to be a total loss.

We must receive written proof of transportation expenses and loss of use damages.

INSURING AGREEMENT - ADDITIONAL CUSTOM PARTS OR EQUIPMENT COVERAGE

We will pay for sudden, direct, and accidental loss to **custom parts or equipment** on a **covered auto** for which this coverage has been purchased. This coverage applies only if **you** have purchased both Comprehensive Coverage and Collision Coverage for that **covered auto** and the loss is covered under one of those coverages. This coverage applies in addition to any coverage automatically provided for **custom parts or equipment** under Comprehensive Coverage or Collision Coverage.

INSURING AGREEMENT - RENTAL REIMBURSEMENT COVERAGE

We will reimburse rental charges incurred when **you** rent an **auto** from a rental agency or auto repair shop due to a loss to a **covered auto** for which Rental Reimbursement Coverage has been purchased. This coverage applies only if **you** have purchased both Comprehensive Coverage and Collision Coverage for that **covered auto** and the loss is covered under one of those coverages.

Additional fees or charges for insurance, damage waivers, optional equipment, fuel, or accessories are not covered.

This coverage is limited to the each day limit shown on the **declarations page** for a maximum of 30 days.

If Rental Reimbursement Coverage applies, no other coverage under this policy for rental expenses will apply.

Rental charges will be reimbursed beginning:

1. when the **covered auto** cannot be driven due to a loss; or
2. if the **covered auto** can be driven, when **you** deliver the **covered auto** to an auto repair shop or one of **our** Claims Service Centers for repairs due to the loss;

and ending the earliest of:

1. when the **covered auto** has been returned to **you**;
2. when the **covered auto** has been repaired;
3. when the **covered auto** has been replaced;
4. 72 hours after **we** make an offer to settle the loss if the **covered auto** is deemed by **us** to be a total loss; or
5. when **you** incur 30 days worth of rental charges.

You must provide **us** written proof of **your** rental charges to be reimbursed.

INSURING AGREEMENT - LOAN/LEASE PAYOFF COVERAGE

If **you** pay the premium for this coverage, and the **covered auto** for which this coverage was purchased is deemed by **us** to be a total loss, **we** will pay, in addition to any amounts otherwise payable under this Part IV, the difference between:

1. the actual cash value of the **covered auto** at the time of the total loss; and
2. any greater amount the owner of the **covered auto** is legally obligated to pay under a written loan or lease agreement to which the **covered auto** is subject at the time of the total loss, reduced by:
   a. unpaid finance charges or refunds due to the owner for such charges;
   b. excess mileage charges or charges for wear and tear;
   c. charges for extended warranties or refunds due to the owner for extended warranties;
   d. charges for credit insurance or refunds due to the owner for credit insurance;
   e. past due payments and charges for past due payments; and
   f. collection or repossession expenses.

However, **our** payment under this coverage shall not exceed the limit of liability shown on the **declarations page**. The limit of liability is a percentage of the actual cash value of the **covered auto** at the time of the loss.

This coverage applies only if **you** have purchased both Comprehensive Coverage and Collision Coverage for that **covered auto** and the loss is covered under one of those coverages.

ADDITIONAL DEFINITIONS

When used in this Part IV:

1. **"Collision"** means the upset of a vehicle or its impact with another vehicle or object.
2. **"Custom parts or equipment"** means equipment, devices, accessories, enhancements, and changes, other than those that are offered by the manufacturer specifically for that **auto** model, or that are installed by the auto dealership as part of the original sale of a new **auto**, that:
   a. are permanently installed or attached; and
   b. alter the appearance or performance of the **auto**.
3. **"Mechanical parts"** means operational parts on a vehicle that wear out over time or have a finite useful life or duration typically shorter than the life of the vehicle as a whole. **Mechanical parts** do not include external crash parts, wheels, paint, or windshields and other glass.
4. **"Non-owned auto"** means an **auto** that is not owned by or furnished or available for the regular use of **you** or a **relative** while in the custody of or being operated by **you** or a **relative** with the permission of the owner of the **auto** or the person in lawful possession of the **auto**.
5. **"Substantially at-fault"** means that the proportionate share of fault or liability for the accident is more than 50%.

EXCLUSIONS - READ THE FOLLOWING EXCLUSIONS CAREFULLY. IF AN EXCLUSION APPLIES, COVERAGE WILL NOT BE AFFORDED UNDER THIS PART IV.

Coverage under this Part IV will not apply for loss:

1. to any vehicle while being used to carry persons or property for compensation or a fee, including, but not limited to, pickup or delivery of magazines, newspapers, food, or any other products. This exclusion does not apply to shared-expense car pools;
2. to a **non-owned auto** while being maintained or used by a person while employed or engaged in any **auto business**;
3. to any vehicle resulting from, or sustained during practice or preparation for:
   a. any pre-arranged or organized racing, stunting, speed, or demolition contest or activity; or
   b. any driving activity conducted on a permanent or temporary racetrack or racecourse;
4. to any vehicle for which insurance:
   a. is afforded under a nuclear energy liability insurance contract; or
   b. would be afforded under a nuclear energy liability insurance contract but for its termination upon exhaustion of its limit of liability;
5. to any vehicle caused by an intentional act committed by or at the direction of **you**, a **relative**, or the owner of a **non-owned auto**, even if the actual damage is different than that which was intended or expected;
6. to a **covered auto** while it is leased or rented to others or given in exchange for compensation. This exclusion does not apply to the operation of a **covered auto** by **you** or a **relative**;

7. due to destruction or confiscation by governmental or civil authorities of any vehicle because **you** or any **relative** engaged in illegal activities;
8. to any vehicle that is due and confined to:
   a. wear and tear;
   b. freezing;
   c. mechanical, electrical, or electronic breakdown or failure; or
   d. road damage to tires.

   This exclusion does not apply if the damage results from the theft of a vehicle;
9. to portable equipment, devices, accessories, and any other personal effects that are not permanently installed. This includes, but is not limited to:
   a. tapes, compact discs, cassettes, DVDs, and other recording or recorded media;
   b. any case or other container designed for use in storing or carrying tapes, compact discs, cassettes, DVDs, or other recording or recorded media;
   c. any device used for the detection or location of radar, laser, or other speed measuring equipment or its transmissions; and
   d. CB radios, telephones, two-way mobile radios, DVD players, personal computers, personal digital assistants, or televisions;
10. to any vehicle for diminution of value;
11. to any vehicle caused directly or indirectly by:
   a. war (declared or undeclared) or civil war;
   b. warlike action by any military force of any government, sovereign or other authority using military personnel or agents. This includes any action taken to hinder or defend against an actual or expected attack; or
   c. insurrection, rebellion, revolution, usurped power, or any action taken by a governmental authority to hinder or defend against any of these acts;
12. to any vehicle caused directly or indirectly by:
   a. any accidental or intentional discharge, dispersal or release of radioactive, nuclear, pathogenic or poisonous biological material; or
   b. any intentional discharge, dispersal or release of chemical or hazardous material for any purpose other than its safe and useful purpose; or
13. to any vehicle caused by, or reasonably expected to result from, a criminal act or omission of **you**, a **relative**, or the owner of a **non-owned auto**. This exclusion applies regardless of whether **you**, the **relative**, or the owner of the **non-owned auto** is actually charged with, or convicted of, a crime. For purposes of this exclusion, criminal acts or omissions do not include traffic violations.

LIMITS OF LIABILITY

1. The limit of liability for loss to a **covered auto**, **non-owned auto**, or **custom parts or equipment** is the lowest of:
   a. the actual cash value of the stolen or damaged property at the time of the loss reduced by the applicable deductible;
   b. the amount necessary to replace the stolen or damaged property reduced by the applicable deductible;
   c. the amount necessary to repair the damaged property to its pre-loss condition reduced by the applicable deductible; or

d. the Stated Amount shown on the **declarations page** for that **covered auto**;

However, the most **we** will pay for loss to:

a. **custom parts or equipment** is $1,000 unless **you** purchased Additional Custom Parts or Equipment Coverage ("ACPE"). If **you** purchased ACPE, the most **we** will pay is $1,000 plus the amount of ACPE **you** purchased.

b. a **trailer** is the limit of liability shown on the **declarations page** for that **trailer**. If the **trailer** is not shown on the **declarations page**, the limit of liability is $500.

2. Payments for loss to a **covered auto**, **non-owned auto**, or **custom parts or equipment** are subject to the following provisions:

a. If coverage applies to a **non-owned auto**, **we** will provide the broadest coverage applicable to any **covered auto** shown on the **declarations page**.

b. If **you** have elected a Stated Amount for a **covered auto**, the Stated Amount is the most **we** will pay for all loss to that **covered auto**, including its **custom parts or equipment**.

c. Coverage for **custom parts or equipment** will not cause **our** limit of liability for loss to an **auto** under this Part IV to be increased to an amount in excess of the actual cash value of the **auto**, including its **custom parts or equipment**.

d. In determining the amount necessary to repair damaged property to its pre-loss condition, the amount to be paid by **us**:

(i) will not exceed the prevailing competitive labor rates charged in the area where the property is to be repaired and the cost of repair or replacement parts and equipment, as reasonably determined by **us**; and

(ii) will be based on the cost of repair or replacement parts and equipment which may be new, reconditioned, remanufactured, or used, including, but not limited to:

(a) original manufacturer parts or equipment; and

(b) nonoriginal manufacturer parts or equipment.

e. To determine the amount necessary to repair or replace the damaged property as referred to in subsection 1, the total cost of necessary repair or replacement may be reduced by unrepaired prior damage. Unrepaired prior damage includes broken, cracked, or missing parts; rust; dents; scrapes; gouges; and peeling paint. The reduction for unrepaired prior damage is the cost of labor, parts, and materials necessary to repair or replace damage, deterioration, defects, or wear and tear on exterior body parts, windshields and other glass, wheels, and paint, that existed prior to the accident and that is eliminated as a result of the repair or replacement of property damaged in the loss.

f. To determine the amount necessary to repair or replace the damaged property as referred to in subsection 1, an adjustment may be made for betterment or depreciation and physical condition on:

(i) batteries;

(ii) tires;

(iii) engines and transmissions, if the engine has greater than 80,000 miles; and

(iv) any other **mechanical parts** that are nonfunctioning or inoperative. **We** will not make an adjustment for the labor costs associated with the replacement or repair of these parts.

g. The actual cash value is determined by the market value, age, and condition of the vehicle at the time the loss occurs.

h. The limits of liability under this Part IV shall be reduced by any amount of a loss which has been paid under any Property Protection Insurance.

3. No deductible will apply to a loss to window glass when the glass is repaired instead of replaced.
4. Duplicate recovery for the same elements of damages is not permitted.
5. Payments for loss under Broad Form Collision Coverage are also subject to the following provisions:
   a. notwithstanding any other provision contained in this policy, no deductible will apply to Broad Form Collision Coverage for loss to a **covered auto** when the operator of the **covered auto** is not **substantially at-fault** for the accident from which the loss arose; and
   b. if no agreement is reached as to whether an operator was **substantially at-fault**, the decision will be determined by arbitration in accordance with the Collision Arbitration provision specified in this Part IV.

COLLISION ARBITRATION

If **you** pay the premium for Limited Collision Coverage or Broad Form Collision Coverage, any disagreement **you** have with **us** as to whether an operator was **substantially at-fault** will be determined by arbitration. **We** will notify **you** in writing of **our** determination as to whether an operator was **substantially at-fault. Your** demand for arbitration must be in writing and must be made within 30 days after receiving **our** written determination.

If a written demand for arbitration has been made, then each party shall select an arbitrator. The two arbitrators will select a third. If the two arbitrators cannot agree on a third arbitrator within 30 days, then on joint application by **us** and the **insured person,** the third arbitrator will be appointed by a court having jurisdiction.

Each party will pay the costs and fees of its arbitrator as well as any other expenses it incurs. The costs and fees of the third arbitrator will be shared equally by the parties. Unless both parties agree otherwise, arbitration will take place in the county in which the **insured person** resides. Local rules of procedure and evidence will apply.

A decision agreed to by two of the arbitrators will be binding as to whether an operator was **substantially at-fault.**

Any dispute as to the amount of damages may be joined in the arbitration by **us** in lieu of appraisal.

PAYMENT OF LOSS

We may, at **our** option:
1. pay for the loss in money; or
2. repair or replace the damaged or stolen property.

At **our** expense, **we** may return any recovered stolen property to **you** or to the address shown on the **declarations page**, with payment for any damage resulting from the theft. **We** may keep all or part of the property at the agreed or appraised value.

We may settle any loss with **you** or the owner or lienholder of the property.

NO BENEFIT TO BAILEE

Coverage under this Part IV will not directly or indirectly benefit any carrier or other bailee for hire.

LOSS PAYABLE CLAUSE

Payment under this Part IV for a loss to a **covered auto** will be made according to **your** interest and the interest of any lienholder shown on the **declarations page** or designated by **you**. At **our** option, payment may be made to both jointly, or to either separately. Either way, **we** will protect the interest of both. However, if the **covered auto** is not a total loss, **we** may make payment to **you** and the repairer of the **auto**.

Protection of the lienholder's financial interest will not be affected by any act or omission by any person entitled to coverage under this policy. However, protection under this clause does not apply:
1. in any case of conversion, embezzlement, secretion, or willful damaging or destruction, of the **covered auto** by or at the direction of **you**, a **relative**, or the owner of the **covered auto**; or
2. to any loss caused by, or reasonably expected to result from, a criminal act or omission of **you**, a **relative**, or the owner of the **covered auto**. This applies regardless of whether **you**, the **relative**, or the owner of the **covered auto** is actually charged with, or convicted of, a crime. For purposes of this clause, criminal acts or omissions do not include traffic violations.

If this policy is cancelled, nonrenewed, or voided, the interest of any lienholder under this agreement will also terminate.
When **we** make payment to a lienholder for loss under this policy, **we** will be subrogated to the rights of the party **we** pay, to the extent of **our** payment. When **we** pay a lienholder for a loss for which **you** are not covered, **we** are entitled to the lienholder's right of recovery against **you** to the extent of **our** payment. **Our** right to subrogation will not impair the lienholder's right to recover the full amount of its claim.

OTHER SOURCES OF RECOVERY

If other sources of recovery also cover the loss, **we** will pay only **our** share of the loss. **Our** share is the proportion that **our** limit of liability bears to the total of all applicable limits. However, any insurance **we** provide for a **non-owned auto**, or **trailer** not shown on the **declarations page**, will be excess over any other collectible source of recovery including, but not limited to:

1. any coverage provided by the owner of the **non-owned auto** or **trailer**;
2. any other applicable physical damage insurance; and
3. any other source of recovery applicable to the loss.

APPRAISAL

If **we** cannot agree with **you** on the amount of a loss, then **we** or **you** may demand an appraisal of the loss. Within 30 days of any demand for an appraisal, each party shall appoint a competent and impartial appraiser and shall notify the other party of that appraiser's identity. The appraisers will determine the amount of loss. If they fail to agree, the disagreement will be submitted to a qualified and impartial umpire chosen by the appraisers. If the two appraisers are unable to agree upon an umpire within 15 days, **we** or **you** may request that a judge of a court of record, in the county where **you** reside, select an umpire. The appraisers and umpire will determine the amount of loss. The amount of loss agreed to by both appraisers, or by one appraiser and the umpire, will be binding. **You** will pay **your** appraiser's fees and expenses. **We** will pay **our** appraiser's fees and expenses. All other expenses of the appraisal, including payment of the umpire if one is selected, will be shared equally between **us** and **you**. Neither **we** nor **you** waive any rights under this policy by agreeing to an appraisal.

PART V - ROADSIDE ASSISTANCE COVERAGE

INSURING AGREEMENT

If **you** pay the premium for this coverage, **we** will pay for **our** authorized service representative to provide the following services when necessary due to a **covered emergency**:

1. towing of a **covered disabled auto** to the nearest qualified repair facility; and
2. labor on a **covered disabled auto** at the place of disablement.

If a **covered disabled auto** is towed to any place other than the nearest qualified repair facility, **you** will be responsible for any additional charges incurred.

ADDITIONAL DEFINITIONS

When used in this Part V:

1. **"Covered disabled auto"** means a **covered auto** for which this coverage has been purchased that sustains a **covered emergency**.

2. **"Covered emergency"** means a disablement that is a result of:
   a. mechanical or electrical breakdown;
   b. battery failure;
   c. insufficient supply of fuel, oil, water, or other fluid;
   d. flat tire;
   e. lock-out; or
   f. entrapment in snow, mud, water, or sand, within 100 feet of a road or highway.

EXCLUSIONS - READ THE FOLLOWING EXCLUSIONS CAREFULLY. IF AN EXCLUSION APPLIES, COVERAGE WILL NOT BE AFFORDED UNDER THIS PART V.

Coverage under this Part V will not apply to:

1. the cost of purchasing parts, fluid, lubricants, fuel, or replacement keys, or the labor to make replacement keys;
2. installation of products or material not related to the disablement;
3. labor not related to the disablement;
4. labor on a **covered disabled auto** for any time period in excess of 60 minutes per disablement;
5. towing or storage related to impoundment, abandonment, illegal parking, or other violations of law;
6. assistance with jacks, levelers, airbags, or awnings;
7. towing from a service station, garage, or repair shop;
8. labor or repair work performed at a service station, garage, or repair shop;
9. auto storage charges;
10. a second service call or tow for a single disablement;
11. disablement that occurs on roads not regularly maintained, sand beaches, open fields, or areas designated as not passable due to construction, weather, or earth movement;
12. mounting or removing of snow tires or chains;
13. tire repair;
14. repeated service calls for a **covered disabled auto** in need of routine maintenance or repair;
15. disablement that results from an intentional or willful act or action by **you**, a **relative**, or the operator of a **covered disabled auto**; or
16. a trailer.

UNAUTHORIZED SERVICE PROVIDER

When service is rendered by a provider in the business of providing roadside assistance and towing services, other than one of **our** authorized service representatives, **we** will pay only reasonable charges, as determined by **us**, for:

1. towing of a **covered disabled auto** to the nearest qualified repair facility; and

2. labor on a **covered disabled auto** at the place of disablement;
which is necessary due to a **covered emergency.**

OTHER INSURANCE

Any coverage provided under this Part V for service rendered by an unauthorized service provider will be excess over any other collectible insurance or towing protection coverage.

PART VI - DUTIES IN CASE OF AN ACCIDENT OR LOSS

For coverage to apply under this policy, **you** or the person seeking coverage must promptly report each accident or loss even if **you** or the person seeking coverage is not at fault. **You** or the person seeking coverage must provide **us** with all accident/loss information including time, place, and how the accident or loss happened. **You** or the person seeking coverage must also obtain and provide **us** the names and addresses of all persons involved in the accident or loss, the names and addresses of any witnesses, and the license plate numbers of the vehicles involved.

If **you** or the person seeking coverage cannot identify the owner or operator of a vehicle involved in the accident, or if theft or vandalism has occurred, **you** or the person seeking coverage must notify the police within 24 hours or as soon as reasonably possible. Notification to **our** authorized agent shall be deemed to be notice to **us.**

Coverage will not be denied due to lack of timely notice if:

- **you** or an insured person can show that it was not reasonably possible to provide notice within the required time; and
- notice is provided as soon as reasonably possible.

A person seeking coverage must:

1. cooperate with **us** in any matter concerning a claim or lawsuit;
2. provide any written proof of loss **we** may reasonably require;
3. allow **us** or **our** representative to take signed and recorded statements, including sworn statements and examinations under oath, which **we** may conduct outside the presence of **you** or any other person claiming coverage, and answer all reasonable questions we may ask as often as **we** may reasonably require;
4. promptly call to notify **us** about any claim or lawsuit and send **us** any and all legal papers relating to the claim or suit;
5. attend hearings and trials as **we** require;
6. take reasonable steps after a loss to protect the **covered auto**, or any other vehicle for which coverage is sought, from further loss. **We** will pay reasonable expenses incurred in providing that protection. If failure to provide such protection results in further loss, any additional damages will not be covered under this policy;

7. allow **us** to have the damaged **covered auto**, or any other damaged vehicle for which coverage is sought, inspected and appraised before its repair or disposal;
8. submit to medical examinations at **our** expense by doctors **we** select as often as **we** may reasonably require; and
9. authorize **us** to obtain medical and other records.

PART VII - GENERAL PROVISIONS

POLICY PERIOD AND TERRITORY

This policy applies only to accidents and losses occurring during the policy period shown on the **declarations page** and that occur within a state, territory, or possession of the United States of America, or a province or territory of Canada, or while a **covered auto** or **trailer** shown on the **declarations page** is being transported between their ports.

CHANGES

This policy contract, **your** insurance application (which is made a part of this policy as if attached hereto), the **declarations page**, and all endorsements to this policy issued by **us**, contain all the agreements between **you** and **us**. Subject to the following, the terms of this policy may not be changed or waived except by an endorsement issued by **us**.

The premium for this policy is based on information **we** received from **you** and other sources. **You** agree to cooperate with **us** in determining if this information is correct and complete, and to notify **us** if it changes during the policy period. If this information is incorrect, incomplete, or changes during the policy period, **you** agree that **we** may adjust **your** premium accordingly. Changes that may result in a premium adjustment are contained in **our** rates and rules. These include, but are not limited to, **you** or a **relative** obtaining a driver's license or operator's permit, or changes in:

1. the number, type, or use classification of **covered autos**;
2. operators using **covered autos**;
3. an operator's marital status;
4. the place of principal garaging of any **covered auto**;
5. coverage, deductibles, or limits of liability; or
6. rating territory or discount eligibility.

The coverage provided in **your** policy may be changed only by the issuance of a new policy or an endorsement by **us**. However, if during the policy period **we** broaden any coverage afforded under the current edition of **your** policy without additional premium charge, that change will automatically apply to **your** policy as of the date the coverage change is implemented in **your** state.

If **you** ask **us** to delete a vehicle from this policy, no coverage will apply to that vehicle as of the date and time **you** ask **us** to delete it.

DUTY TO REPORT CHANGES

You must promptly notify **us** when:

1. **your** mailing or residence address changes;
2. the principal garaging address for a **covered auto** or a **trailer** shown on the **declarations page** changes;
3. there is a change with respect to the residents in **your** household or the persons who regularly operate a **covered auto**;
4. an operator's marital status changes; or
5. **you** or a **relative** obtain a driver's license or operator's permit.

SETTLEMENT OF CLAIMS

We may use estimating, appraisal, or injury evaluation systems to assist **us** in adjusting claims under this policy and to assist **us** in determining the amount of damages, expenses, or loss payable under this policy. Such systems may be developed by **us** or a third party and may include computer software, databases, and specialized technology.

TERMS OF POLICY CONFORMED TO STATUTES

If any provision of this policy fails to conform to the statutes of the state listed on **your** application as **your** residence, the provision shall be deemed amended to conform to such statutes. All other provisions shall be given full force and effect. Any disputes as to the coverages provided or the provisions of this policy shall be governed by the law of the state listed on **your** application as **your** residence.

TRANSFER

This policy may not be transferred to another person without **our** written consent. However, if a named insured shown on the **declarations page** dies, this policy will provide coverage until the end of the policy period for the legal representative of the named insured, while acting as such, and for persons covered under this policy on the date of the named insured's death.

FRAUD OR MISREPRESENTATION

This policy was issued in reliance upon the information provided on **your** insurance application.

We may void this policy at any time, including after the occurrence of an accident or loss, if **you**:

1. made incorrect statements or representations to **us** with regard to any material fact or circumstance;
2. concealed or misrepresented any material fact or circumstance; or

3. engaged in fraudulent conduct;

at the time of application. If **we** void this policy, this shall not affect coverage under Part I - Liability To Others of this policy up to the minimum limits required by the financial responsibility law of the state shown on **your** application as **your** residence for an accident that occurs before **we** notify the named insured that the policy is void. No payment will be made to any person who engages in fraudulent conduct. If **we** void this policy, **you** must reimburse **us** if we make a payment.

We may deny coverage for an accident or loss if **you** or a person seeking coverage has knowingly concealed or misrepresented any material fact or circumstance, or engaged in fraudulent conduct, in connection with the presentation or settlement of a claim.

PAYMENT OF PREMIUM AND FEES

If **your** initial premium payment is by check, draft, electronic funds transfer, or similar form of remittance, coverage under this policy is conditioned on payment to **us** by the financial institution. If the financial institution upon presentment does not honor the check, draft, electronic funds transfer, or similar form of remittance, this policy may, at **our** option, be deemed void from its inception. This means **we** will not be liable under this policy for any claims or damages that would otherwise be covered if the check, draft, electronic funds transfer, or similar form of remittance had been honored by the financial institution. Any action by **us** to present the remittance for payment more than once shall not affect **our** right to void this policy.

In addition to premium, fees may be charged on **your** policy. **We** may charge fees for installment payments, late payments, and other transactions. Payments made on **your** policy will be applied first to fees, then to premium due.

CANCELLATION

You may cancel this policy during the policy period by calling or writing **us** and stating the future date **you** wish the cancellation to be effective.

We may cancel this policy during the policy period by mailing a notice of cancellation to the named insured shown on the **declarations page** at the last known address appearing in **our** records.

We will give at least 10 days notice of cancellation if the policy is cancelled for nonpayment of premium. If **we** cancel this policy for any reason other than nonpayment of premium within the first 55 days following the initial issuance of this policy, notice will be mailed at least 20 days before the effective date of cancellation.

We will give at least 30 days notice of cancellation in all other cases.

We may cancel this policy for any reason if the notice is mailed within the first 55 days of the initial policy period.

After this policy is in effect for more than 55 days, or if this is a renewal or continuation policy, **we** may cancel only for one or more of the following reasons:

1. nonpayment of premium;
2. material misrepresentation or fraud in the submission of any claim under this policy;
3. loss of driving privileges through suspension or revocation of an operator's license issued to **you**, any driver in **your** household, or any regular operator of a **covered auto**;
4. **your** place of residence or the state of registration or license of a **covered auto** is changed to a state or country in which **we** do not accept applications for the insurance provided by this policy;
5. **we** have agreed to issue a new policy within the same or an affiliated company; or
6. any other reason permitted by law.

Proof of mailing will be sufficient proof of notice. If this policy is cancelled, coverage will not be provided as of the effective date and time shown in the notice of cancellation. For purposes of cancellation, this policy is neither severable nor divisible. Any cancellation will be effective for all coverages for all persons and all vehicles.

CANCELLATION REFUND

Upon cancellation, **you** may be entitled to a premium refund. However, **our** making or offering of a refund is not a condition of cancellation.

If this policy is cancelled, any refund due will be computed on a daily pro rata basis. However, **we** are entitled to retain **our** minimum earned premium.

NONRENEWAL

If neither **we** nor one of **our** affiliates offers to renew or continue this policy, **we** will mail notice of nonrenewal to the named insured shown on the **declarations page** at the last known address appearing in **our** records. Proof of mailing will be sufficient proof of notice. Notice will be mailed at least 30 days before the end of the policy period.

AUTOMATIC TERMINATION

If **we** or an affiliate offers to renew or continue this policy and **you** or **your** representative does not accept, this policy will automatically terminate at the end of the current policy period. Failure to pay the required renewal or continuation premium when due will mean that **you** have not accepted **our** offer.

If **you** obtain other insurance on a **covered auto**, any similar insurance provided by this policy will terminate as to that **covered auto** on the effective date of the other insurance.

If a **covered auto** is sold or transferred to someone other than **you** or a **relative**, any insurance provided by this policy will terminate as to that **covered auto** on the effective date of the sale or transfer.

LEGAL ACTION AGAINST US

We may not be sued unless there is full compliance with all the terms of this policy.

We may not be sued for payment under Part I - Liability To Others until the obligation of an insured person under Part I to pay is finally determined either by judgment after trial against that person or by written agreement of the insured person, the claimant, and **us**. No one will have any right to make **us** a party to a lawsuit to determine the liability of an insured person.

If **we** retain salvage, **we** have no duty to preserve or otherwise retain the salvage for any purpose, including evidence for any civil or criminal proceeding.

OUR RIGHTS TO RECOVER PAYMENT

We are entitled to the rights of recovery that the insured person to whom payment was made has against another, to the extent of **our** payment. That insured person may be required to sign documents related to the recovery and must do whatever else **we** require to help **us** exercise those recovery rights, and do nothing after an accident or loss to prejudice those rights.

When an insured person has been paid by **us** and also recovers from another, the amount recovered will be held by the insured person in trust for **us** and reimbursed to **us** to the extent of **our** payment. If **we** are not reimbursed, **we** may pursue recovery of that amount directly against that insured person.

If an insured person recovers from another without **our** written consent, the insured person's right to payment under any affected coverage will no longer exist.

If **we** elect to exercise **our** rights of recovery against another, **we** will also attempt to recover any deductible incurred by an insured person under this policy unless **we** are specifically instructed by that person not to pursue the deductible. **We** have no obligation to pursue recovery against another for any loss not covered by this policy.

We reserve the right to compromise or settle the deductible and property damage claims against the responsible parties for less than the full amount. **We** reserve the right to incur reasonable expenses and attorney fees in pursuit of the recovery.

If the total recovery is less than the total of **our** payment and the deductible, **we** will reduce reimbursement of the deductible based on the proportion that the actual recovery bears to the total of **our** payment and the deductible. A proportionate share of collection expenses and attorney fees incurred in connection with these recovery efforts will also reduce reimbursement of the deductible.

These provisions will be applied in accordance with state law.

JOINT AND INDIVIDUAL INTERESTS

If there is more than one named insured on this policy, any named insured may cancel or change this policy. The action of one named insured will be binding on all persons provided coverage under this policy.

BANKRUPTCY

The bankruptcy or insolvency of an insured person will not relieve **us** of any obligations under this policy.

PROGRESSIVE
DIRECT

3610D MI 0508

I CERTIFY THIS DOCUMENT
TO BE A TRUE AND ACCURATE
BY: DEBRA HENRY

Window Glass Coverage Endorsement

Your policy is amended as follows:

Part IV - Damage To A Vehicle

The following is added to Part IV - Damage to a Vehicle:

INSURING AGREEMENT - FULL COMPREHENSIVE WINDOW GLASS COVERAGE

If **you** pay the premium for this coverage, **we** will pay under Comprehensive Coverage for loss to:

1. glass used in the windshield, doors, and windows of a **covered auto**; and
2. the glass, plastic or other materials used in the lights of a **covered auto** or a **non-owned auto**.

All other terms, limits, and provisions of this policy remain unchanged.

Form 4884 MI (03/07)

Michigan Auto Policy Endorsement

Your policy is amended as follows:

1. **General Definitions**

   The definition of **"you"** and **"your"** is deleted and replaced by the following:

   "You" and "your" mean:

   a. a person shown as a named insured on the **declarations page**; and

   b. the spouse of a named insured if residing in the same household at the time of the loss. The spouse is considered to be a resident of the household when there is a legitimate marital covenant, shared economic and non-economic burdens, and legitimate reasons for the spouse to be staying in another home or location. If the spouse ceases to be a resident of the same household during the policy period or prior to the inception of this policy, the spouse will be considered **you** and **your** under this policy but only until the earliest of:

      (i) the end of 90 days following the spouse's change of residency;
      (ii) the effective date of another policy listing the spouse as a named insured; or
      (iii) the end of the policy period.

2. **Part I - Liability To Others**

   a. The Additional Payments provision is deleted and replaced by the following:

      ADDITIONAL PAYMENTS

      In addition to **our** limit of liability, **we** will pay for an **insured person**:

      1. all expenses **we** incur in the settlement of any claim or defense of any lawsuit;
      2. interest accruing after entry of judgment, until **we** have paid, offered to pay, or deposited in court, that portion of the judgment which does not exceed **our** limit of liability. This does not apply if **we** have not been given notice of suit or the opportunity to defend an **insured person**. **You** are permitted to file a lawsuit against **us** within the statute of limitations to have any dispute settled by a court of proper jurisdiction when **you** believe **we** have not appropriately responded to **your** requests concerning such proceedings or **you** believe **we** have acted inappropriately in handling **your** claim;
      3. the premium on any appeal bond or attachment bond required in any lawsuit **we** defend. **We** have no duty to purchase a bond in an amount exceeding **our** limit of liability, and **we** have no duty to apply for or furnish these bonds;
      4. up to $250 for a bail bond required because of an accident resulting in **bodily injury** or **property damage** covered under this Part I. **We** have no duty to apply for or furnish this bond; and
      5. reasonable expenses, including loss of earnings up to $200 per day, incurred at **our** request.

Continued

b. Exclusion 1 is deleted and replaced by the following:

1. **bodily injury** or **property damage** arising out of the ownership, maintenance, or use of any vehicle or trailer while being used:

a. to carry persons or property for compensation or a fee; or

b. for retail or wholesale delivery, including, but not limited to, the pickup, transport, or delivery of magazines, newspapers, mail, or food.

This exclusion does not apply to shared-expense car pools or to the use of a **covered auto** for volunteer or charitable purposes or for which reimbursement for normal operating expenses is received;

c. Exclusion 18 is deleted and replaced by the following:

18. **bodily injury** or **property damage** caused by, or reasonably expected to result from, a criminal act or omission of that **insured person**. This exclusion applies regardless of whether that **insured person** is actually charged with, or convicted of, a crime. However, for us to establish a criminal act or omission for purposes of this exclusion by other than a criminal conviction, we must independently prove beyond a reasonable doubt that the **insured person** committed such a criminal act or omission. For purposes of this exclusion, criminal acts or omissions do not include traffic violations.

d. The Other Insurance provision is deleted and replaced by the following:

OTHER INSURANCE

If there is any other applicable liability insurance or bond, **we** will pay only **our** share of the damages. **Our** share is the proportion that **our** limit of liability bears to the total of all applicable limits. However, any insurance **we** provide for a vehicle or trailer, other than a **covered auto**, will be excess over any other collectible insurance, self-insurance or bond.

Limited Property Damage Coverage provided under this policy will be excess over any other collectible insurance, self-insurance or bond, including, but not limited to, coverage on the damaged motor vehicle. For Limited Property Damage Coverage provided under this policy, **we** will share on a pro rata basis with other valid and collectible insurance purchased on a primary basis. **Our** share will be the proportion that **our** limit of liability bears to the total of all applicable limits.

3. **Part II - Personal Protection Insurance and Property Protection Insurance Coverage**

a. The following exclusion is deleted from Part II - Personal Protection Insurance and Property Protection Insurance Coverage:

7. arising out of the operation, maintenance or use of a motorcycle or **motor vehicle** by any person who has unlawfully taken the motorcycle or **motor vehicle**, unless the person reasonably believed that he or she was entitled to take and use the vehicle;

b. The following is added to the Excess Coverage Option provision:

3. If **you** have elected Personal Protection Insurance Benefits as excess coverage, **allowable expenses** and **work loss** benefits payable to **you** or a **relative** who sustains **bodily injury** in a **motor vehicle** accident shall be reduced by the deductible shown on the **declarations page**. However, this deductible shall be reduced by any benefits paid by a primary carrier for similar benefits.

Continued

4. **Part III - Uninsured/Underinsured Motorist Coverage**

   a. The Insuring Agreement is deleted and replaced by the following:

   INSURING AGREEMENT

   If **you** pay the premium for this coverage, **we** will pay for damages that an **insured person** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** because of **bodily injury**:

   1. sustained by an **insured person**;
   2. caused by an accident; and
   3. arising out of the ownership, maintenance, or use of an **uninsured motor vehicle**.

   We will pay under this Part III only after the limits of liability under all applicable bodily injury liability bonds and policies have been exhausted by payment of judgments or settlements.

   Any judgment or settlement for damages against an owner or operator of an **uninsured motor vehicle** that arises out of a lawsuit brought without **our** written consent is not binding on **us**. **You** are permitted to file a lawsuit against **us** within the statute of limitations to have any dispute settled by a court of proper jurisdiction when **you** believe **we** have not appropriately responded to **your** requests concerning such proceedings or **you** believe **we** have acted inappropriately in handling **your** claim.

   b. Exclusion 1 is deleted and replaced by the following:

   1. to bodily injury sustained by any person while using or **occupying**:
      a. a **covered auto** while being used:
         i. to carry persons or property for compensation or a fee; or
         ii. for retail or wholesale delivery, including but not limited to, the pickup, transport or delivery of magazines, newspapers, mail or food.

         This exclusion does not apply to shared-expense car pools or to the use of a **covered auto** for volunteer or charitable purposes or for which reimbursement for normal operating expenses is received;
      b. a motor vehicle that is owned by or available for the regular use of **you** or a **relative**. This exclusion does not apply to a **covered auto** that is insured under this Part III:

   c. Exclusion 5 is deleted and replaced by the following:

   5. to **bodily injury** sustained by any person if that person or the legal representative of that person settles without our written consent. **You** are permitted to file a lawsuit against **us** within the statute of limitations to have any dispute settled by a court of proper jurisdiction when **you** believe **we** have not appropriately responded to **your** requests concerning such proceedings or **you** believe **we** have acted inappropriately in handling **your** claim.

5. **Part IV - Damage To A Vehicle**

   a. Exclusion 1 is deleted and replaced by the following:

   1. to any vehicle while being used:
      a. to carry persons or property for compensation or a fee; or
      b. for retail or wholesale delivery, including, but not limited to, the pickup, transport, or delivery of magazines, newspapers, mail, or food.

      This exclusion does not apply to shared-expense car pools or to the use of a **covered auto** for volunteer or charitable purposes or for which reimbursement for normal operating expenses is received.

Continued

b. Exclusion 13 is deleted and replaced by the following:

13. to any vehicle caused by, or reasonably expected to result from, a criminal act or omission of **you**, a **relative**, or the owner of a **non-owned auto**. This exclusion applies regardless of whether **you**, the **relative**, or the owner of the **non-owned auto** is actually charged with, or convicted of, a crime. However, for us to establish a criminal act or omission for purposes of this exclusion by other than a criminal conviction, **we** must independently prove beyond a reasonable doubt that **you**, the **relative**, or the owner of the **non-owned auto** committed such a criminal act or omission. For purposes of this exclusion, criminal acts or omissions do not include traffic violations.

c. The Loss Payable Clause provision is deleted and replaced by the following:

LOSS PAYABLE CLAUSE

Payment under this Part IV for a loss to a **covered auto** will be made according to **your** interest and the interest of any lienholder shown on the **declarations page** or designated by **you**. At **our** option, payment may be made to both jointly, or to either separately. Either way, **we** will protect the interest of both. However, if the **covered auto** is not a total loss, **we** may make payment to **you** and the repairer of the **auto**.

Protection of the lienholder's financial interest will not be affected by any act or omission by any person entitled to coverage under this policy. However, protection under this clause does not apply:

1. In any case of conversion, embezzlement, secretion, or wilful damaging or destruction, of the **covered auto** by or at the direction of **you**, a **relative**, or the owner of the **covered auto**;
2. to any loss caused by, or reasonably expected to result from, a criminal act or omission of **you**, a **relative**, or the owner of the **covered auto**. This applies regardless of whether **you**, the **relative**, or the owner of the **covered auto** is actually charged with, or convicted of, a crime. However, for us to establish a criminal act or omission for the purposes of this exclusion by other than a criminal conviction, **we** must independently prove beyond a reasonable doubt that **you**, the **relative**, or the owner of the **covered vehicle** committed such a criminal act or admission. For purposes of this clause, criminal acts or omissions do not include traffic violations; or
3. if the **covered auto** has Limited Collision Coverage and the operator was **substantially at-fault** for the accident.

If this policy is cancelled, nonrenewed, or voided, the interest of any lienholder under this agreement will also terminate.

When **we** make payment to a lienholder for loss under this policy, **we** will be subrogated to the rights of the party **we** pay, to the extent of **our** payment. When **we** pay a lienholder for a loss for which **you** are not covered, **we** are entitled to the lienholder's right of recovery against **you** to the extent of **our** payment. **Our** right to subrogation will not impair the lienholder's right to recover the full amount of its claim.

Continued

d. The Appraisal provision is deleted and replaced by the following:

APPRAISAL

If **we** cannot agree with **you** on the amount of a loss, then **we** or **you** may demand an appraisal of the loss. Within 30 days of any demand for an appraisal, each party shall appoint a competent appraiser and shall notify the other party of that appraiser's identity. The appraisers will determine the amount of loss. If they fail to agree, the disagreement will be submitted to a qualified umpire chosen by the appraisers. If the two appraisers are unable to agree upon an umpire within 15 days, **we** or **you** may request that a judge of a court of record, in the county where **you** reside, select an umpire. The appraisers and umpire will determine the amount of loss. The amount of loss agreed to by both appraisers, or by one appraiser and the umpire, will be binding. **You** will pay **your** appraiser's fees and expenses. **We** will pay **our** appraiser's fees and expenses. All other expenses of the appraisal, including payment of the umpire if one is selected, will be shared equally between **us** and **you**. Neither **we** nor **you** waive any rights under this policy by agreeing to an appraisal.

6. **Part VII - General Provisions**

a. The Duty To Report Changes provision is deleted and replaced by the following:

DUTY TO REPORT CHANGES

You must promptly notify **us** when:

1. **your** mailing or residence address changes;
2. the principal garaging address for a **covered auto** changes;
3. there is a change with respect to the residents in **your** household or the persons who regularly operate a **covered auto**;
4. an operator's marital status changes; or
5. **you** or a **relative** obtain a driver's license or operator's permit.

b. The Transfer provision is deleted and replaced by the following:

TRANSFER OF INTEREST

The rights and duties under this policy may not be transferred to another person without **our** written consent. However, if a named insured shown on the **declarations page** dies, this policy will provide coverage until the end of the policy period for the legal representative of the named insured, while acting as such, and for persons covered under this policy on the date of the named insured's death.

c. The Cancellation provision is deleted and replaced by the following:

CANCELLATION

You may cancel this policy by notifying **us** of cancellation on or before the date of cancellation.

We may cancel this policy during the policy period by mailing a notice of cancellation to the named insured shown on the **declarations page** at the last known address appearing in **our** records.

We will give at least 10 days notice of cancellation if the policy is cancelled for nonpayment of premium. If **we** cancel this policy for any reason other than nonpayment of premium within the first 55 days following the initial issuance of this policy, notice will be mailed at least 20 days before the effective date of cancellation.

We will give at least 30 days notice of cancellation in all other cases.

We may cancel this policy for any reason if the notice is mailed within the first 55 days of the initial policy period.

Continued

After this policy is in effect for more than 55 days, or if this is a renewal or continuation policy, **we** may cancel only for one or more of the following reasons:

1. nonpayment of premium;
2. material misrepresentation or fraud in the submission of any claim under this policy;
3. loss of driving privileges through suspension or revocation of an operator's license issued to **you**, any driver in **your** household, or any regular operator of a **covered auto**;
4. **we** have agreed to issue a new policy within the same or an affiliated company; or
5. any other reason permitted by law.

Proof of mailing will be sufficient proof of notice. If this policy is cancelled, coverage will not be provided as of the effective date and time shown in the notice of cancellation. For purposes of cancellation, this policy is neither severable nor divisible. Any cancellation will be effective for all coverages for all persons and all vehicles.

d. The Automatic Termination provision is deleted and replaced by the following:

AUTOMATIC TERMINATION

If **we** or an affiliate offers to renew or continue this policy and **you** or **your** representative does not accept, this policy will automatically terminate at the end of the current policy period. Failure to pay the required renewal or continuation premium when due will mean that **you** have not accepted **our** offer.

For coverage under this policy, **we** will share on a pro rata basis with other valid and collectible insurance purchased on a primary basis. **Our** share will be the proportion that **our** limit of liability bears to the total of all applicable limits.

e. The Legal Action Against Us provision is deleted and replaced by the following:

LEGAL ACTION AGAINST US

We may not be sued unless there is full compliance with all the terms of this policy.

We may not be sued for payment under Part I - Liability To Others until the obligation of an insured person under Part I to pay is finally determined either by judgment after trial against that person or by written agreement of the insured person, the claimant, and **us**. No one will have any right to make **us** a party to a lawsuit to determine the liability of an insured person. **You** are permitted to file a lawsuit against **us** within the statute of limitations to have any dispute settled by a court of proper jurisdiction when **you** believe **we** have not appropriately responded to **your** requests concerning such proceedings or **you** believe **we** have acted inappropriately in handling **your** claim.

If **we** retain salvage, **we** have no duty to preserve or otherwise retain the salvage for any purpose, including evidence for any civil or criminal proceeding.

Continued

f. The Our Rights To Recover Payment provision is deleted and replaced by the following:

OUR RIGHTS TO RECOVER PAYMENT

We are entitled to the rights of recovery that the insured person to whom payment was made has against another, to the extent of **our** payment. That insured person may be required to sign documents related to the recovery and must do whatever else **we** require to help **us** exercise those recovery rights, and do nothing after an accident or loss to prejudice those rights.

When an insured person has been paid by **us** and also recovers from another, the amount recovered will be held by the insured person in trust for **us** and reimbursed to **us** to the extent of **our** payment. If **we** are not reimbursed, **we** may pursue recovery of that amount directly against that insured person.

If an insured person recovers from another without **our** written consent, the insured person's right to payment under any affected coverage will no longer exist. **You** are permitted to file a lawsuit against **us** within the statute of limitations to have any dispute settled by a court of proper jurisdiction when **you** believe **we** have not appropriately responded to **your** requests concerning such proceedings or **you** believe **we** have acted inappropriately in handling **your** claim.

If **we** elect to exercise **our** rights of recovery against another, **we** will also attempt to recover any deductible incurred by an insured person under this policy unless **we** are specifically instructed by that person not to pursue the deductible. **We** have no obligation to pursue recovery against another for any loss not covered by this policy.

We reserve the right to compromise or settle the deductible and property damage claims against the responsible parties for less than the full amount. **We** also reserve the right to incur reasonable expenses and attorney fees in pursuit of the recovery.

If the total recovery is less than the total of **our** payment and the deductible, **we** will reduce reimbursement of the deductible based on the proportion that the actual recovery bears to the total of **our** payment and the deductible. A proportionate share of collection expenses and attorney fees incurred in connection with these recovery efforts will also reduce reimbursement of the deductible.

These provisions will be applied in accordance with state law.

All other terms, limits, and provisions of this policy remain unchanged.

Form 2445 MI (07/10)

EXHIBIT 7

Defendant Progressive's Motion for
Summary Disposition,
9/3/2015

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

SUSAN CHILDERS,
Conservator for JUSTIN S. CHILDERS, LIP,

Plaintiff,

Case No. 13-101626-NF

and

Hon. Richard B. Yuille

MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION,

Intervening Plaintiff,

v.

PROGRESSIVE MARATHON INSURANCE COMPANY,

Defendant.

Richard F. Burns, Jr. (P26189)
Law Offices of Richard F. Burns Jr. P.C.
Attorney for Plaintiff Childers
31780 Telegraph Rd., Ste. 130
Bingham Farms, MI 48205
(248) 530-5540

Ronald M. Sangster, Jr. (P39253)
Law Offices of Ronald M. Sangster PLLC
Attorney for Int. Plaintiff MPCGA
901 Wilshire Drive, Ste. 230
Troy, MI 48084
(248) 269-7040

Michael J. DePolo (P35733)
Daniel S. Saylor (P37942)
Garan Lucow Miller, P.C.
Attorneys for Defendant PMIC
8332 Office Park Drive
Grand Blanc, MI 48439
(810) 695-3700

DEFENDANT PROGRESSIVE'S MOTION FOR SUMMARY DISPOSITION

Defendant, PROGRESSIVE MARATHON INSURANCE COMPANY, through its undersigned counsel, GARAN LUCOW MILLER, P.C., hereby moves pursuant to MCR 2.1 16(C)(7) and MCR 2.116(C)(10) that summary disposition be granted in its favor on all claims asserted, stating as follows:

1. Based on a motor vehicle accident, Plaintiff, Justin Childers, received no-fault insurance benefits from his mother's insurer, American Fellowship Mutual Insurance Company. When American Fellowship was declared insolvent, Intervening Plaintiff MPCGA began paying Childers' benefits.

2. Plaintiff Childers and Intervening Plaintiff MPCGA seek to impose liability on Defendant for Childers' benefits, in this action filed more than two years after the accident, based on an insurance policy issued to one Matthew Groulx. Mr. Groulx is the brother of Shaina Groulx, whose uninsured car was the accident vehicle in which Childers was injured.

3. Progressive is not the insurer of Shaina Groulx, and the Progressive policy does not extend coverage to Childers as an occupant of Ms. Groulx's uninsured vehicle. Therefore, as detailed in the ensuing brief, there is no substantive basis for coverage of the subject loss to be imposed on Progressive.

4. Even if there was a basis for imposing coverage on Progressive, this action for recovery of PIP benefits from Progressive is explicitly barred by the 1-year statute of limitations of MCL 500.3145(1), since the accident occurred on August 6, 2011, notice of injury was not given to Progressive until September 24, 2013, the action was not commenced until November 22, 2013. Therefore, as detailed in the ensuing brief, the claims of Plaintiff Childers and Intervening Plaintiff MPCGA are barred by the statute of limitations.

WHEREFORE, Defendant, PROGRESSIVE MARATHON INSURANCE COMPANY, respectfully requests that the Court render summary disposition against both Plaintiffs and in favor of Defendant on all claims, by entry of a final order dismissing this matter with prejudice.

Respectfully submitted,

GARAN LUCOW MILLER, P.C.

By: _____
DANIEL S. SAYLOR (P37942)
MICHAEL J. DePOLO (P35733)
Attorneys for Defendant Progressive
1155 Brewery Park Boulevard, Ste. 200
Detroit, Michigan 48207-2641
(313) 446-5520

September 3, 2015

1235869.1

BRIEF IN SUPPORT OF DEFENDANT PROGRESSIVE'S MOTION FOR SUMMARY DISPOSITION

Introduction -- Summary of Argument

This is a no-fault automobile insurance case, in which the Defendant, Progressive Marathon Insurance Company, is alleged to be responsible for payment of personal protection insurance ("PIP") benefits for claimant Justin S. Childers. The issues are whether Progressive was "the insurer of" Shaina L. Groulx, owner and operator of the involved vehicle, so as to provide coverage for the loss; and even if so, whether any claim against Progressive nevertheless is barred by the statute of limitations.

Justin S. Childers was rendered quadriplegic in an automobile accident while riding in an *uninsured* 1988 Oldsmobile. Justin was entitled to no-fault benefits for his injuries, and since he resided with his mother, Susan Childers, he would receive his benefits from her automobile insurer, American Fellowship Mutual Insurance Company. MCL 500.3114(1). The insurer in fact paid Justin's benefits until June 12, 2013, when American Fellowship was declared insolvent. At that point, the Michigan Property & Casualty Guaranty Association ("MPCGA") assumed responsibility for the ongoing payment of Justin's benefits, and proceeded to pay them, pursuant to its duties under MCL 500.7901, *et seq*.

When the MPCGA is compelled to assume responsibility for an insolvent insurer's claims it does so essentially as an insurer of last resort. In the event benefits "are recoverable ... by a claimant or insured under an insurance policy other than a policy of the insolvent insurer," the MPCGA's liability is subordinated to the other "'available'" coverage. MCL 500.7931(3) (emphasis added); *Auto Club Ins Assoc v Meridian Mut Ins Co*, 207 Mich App 37, 40-41; 523 NW2d 821 (1994), quoting *Yetzke v Fausak*, 194 Mich App 414, 422; 488 NW2d 222 (1992) (emphasis added). In short, if a claimant who is entitled to benefits from an insolvent insurer has a viable claim for like benefits from any other insurer, the claimant is required to pursue those

benefits from the other insurer, and the MPCGA is entitled to pursue reimbursement based on those benefits being "recoverable" from the other insurer.

This action represents the attempt of the Plaintiff and the Intervening Plaintiff to shift responsibility for Childers' no-fault benefits from the MPCGA to Defendant, Progressive Marathon Insurance Company. Their theory is based on §3114(4) of the No-Fault Act, which permits auto accident victims to claim benefits from "[t]he insurer of the owner or registrant of the vehicle occupied" or from "[t]he insurer of the operator of the vehicle occupied." MCL 500.3114(4). Justin Childers sustained his injuries as the occupant of a 1988 Oldsmobile. The vehicle was owned and registered by Shaina Groulx, and was also being operated by Ms. Groulx. Accordingly, since Susan Childers' policy under §3114(1) was no longer available to provide Justin's benefits, the question became whether there was an "insurer" of Shaina Groulx -- the owner and operator of the vehicle occupied -- from whom benefits might be available.

In fact, there was and is no insurer of Shaina Groulx. It is undisputed that Ms. Groulx maintained no insurance policy of her own at the time of the accident, and that her 1988 Oldsmobile itself was uninsured. Plaintiffs' theory is based on a no-fault policy Progressive issued to Shaina's brother, Matthew M. Groulx. According to the plaintiffs, since Shaina was living with Matthew at the time of the accident,[1] and therefore could, under the right circumstances, recover PIP benefits herself from Progressive as a resident relative of Matthew, it follows that Progressive should be regarded as Shaina's "insurer" for purposes of §3114(4) so that Justin could claim benefits from Progressive -- "the insurer of the owner" and "the insurer of the operator" of the vehicle Justin was occupying.

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[1] Although Shaina has testified that her intent was to remain only temporarily at her brother's apartment, for purposes of the instant motion it may be assumed that she was "domiciled" in the same household as her brother Matthew and qualified as his resident relative. *See*, Stipulated Facts, No. 12.

Plaintiffs' theory is contrary to law and must be rejected. Since Shaina Groulx is neither identified as Progressive's insured on the Matthew Groulx policy nor contractually rendered an "insured" by its terms, the mere fact that she could derivatively obtain benefits from her brother's policy does not make Progressive her "insurer" for purposes of §3114(4). *Stone v Auto-Owners Ins Co*, 307 Mich App 169, 177-178; 858 NW2d 765 (2014), *citing*, *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 534; 740 NW2d 503 (2007). The Court should conclude that no claim against Defendant Progressive exists for coverage on behalf of Justin Childers, and grant summary disposition against Plaintiffs Childers and MPCGA accordingly.

Yet even if there was coverage under the Progressive policy, the claims asserted in this case would be barred by the statute of limitations. Under MCL 500.3145(1), an action against a no-fault insurer for recovery of benefits must be filed within 1 year of the accident (unless notice of the loss was given to the insurer within 1 year of the accident or the insurer already had paid benefits for the injury, neither of which occurred here). Justin Childers' accident occurred on August 6, 2011, and Progressive was first notified of the loss more than two years later on or about September 24, 2013. Childers filed the instant lawsuit on November 22, 2013, and the MPCGA joined as intervening plaintiff on June 9, 2014. No tolling or special statutory exemption applies to free the plaintiffs from the effect of the 1 year statute of limitations having run. On the contrary, the plain language of §3145(1) must be applied as written. *Joseph v Auto Club Ins Assoc*, 491 Mich 200, 215; 815 NW2d 412 (2012); *Burns v Auto-Owners Ins Co*, 88 Mich App 663; 279 NW2d 43 (1979).

The Court ultimately may not reach the statute of limitations issue since the Progressive policy did not extend coverage to occupants of Shaina Groulx's car in any event. But even if coverage had existed, any claim *by Childers* was time-barred by the time this action was filed, and the MPCGA likewise was barred since its rights are limited to those instances in which benefits

"*are recoverable*" *by the* "*claimant or insured*" under the insurance policy at issue. MCL 500.7931(3) (emphasis added). In other words, the MPCGA has no greater rights than the claimant himself would have had, and here, any claim for benefits was barred by the statute of limitations.

Whether on the basis of Progressive's lack of coverage or on statute of limitations grounds, therefore, the Court should grant summary disposition in favor of Defendant.

Factual Background

The facts bearing on the issues presented in this motion are undisputed, as the parties have stipulated to all the material facts: On August 6, 2011, Justin Childers was injured in an automobile accident (Stipulated Facts, No. 1). He was a passenger in a 1988 Oldsmobile, whose owner and operator, Shaina L. Groulx, possessed no policy of insurance on the vehicle (Stipulated Facts, No. 2). Childers was covered under his mother's no-fault insurance policy issued by American Fellowship Mutual Insurance Company (Stipulated Fact, No. 3), which paid benefits for Justin Childers until it was declared insolvent in June 2013 (Stipulated Facts, Nos. 4-6).

Pursuant to its statutory duties, the MPCGA stepped in and began paying Childers' benefits in place of American Fellowship, while investigating whether Childers was entitled to PIP benefits available under any other insurance policy, since the MPCGA's coverage would be lower in priority to any other such coverage (Stipulated Facts, Nos. 7-8).

Progressive first received notification of the injuries suffered by Justin Childers on or about September 24, 2013 (Stipulated Facts, No. 9). Progressive had issued a no-fault insurance policy to Shaina's brother, Matthew M. Groulx, which policy was in effect at the time of the August 6, 2011, accident (Stipulated Facts, No. 11). Neither Shaina Groulx nor her 1988 Oldsmobile were identified on the Progressive policy (*id.*). Yet on the basis that Shaina was living with her brother at that time (*see* Stipulated Facts, No. 12), the MPCGA has alleged that Progressive qualified as

Shaina Groulx's "insurer" and thus bears responsibility under MCL 500.3114(4) for payment of Justin Childers' benefits.

Plaintiff Childers initiated this action on November 2, 2013. Progressive answered by denying the allegations that it provided coverage for Justin Childers' injuries and asserting among its affirmative defenses that the action is barred by the No-Fault Act's statute of limitations, MCL 500.3145(1). The MPCGA was granted leave to intervene as plaintiff by Order of June 9, 2014. Progressive answered the Intervening Plaintiff's Complaint, again denying the allegations of applicable coverage and asserting, in any event, that the action is time-barred by the statute of limitations. For the reasons that follow, the Court should grant summary disposition in favor of Defendant Progressive and enter a final order dismissing the plaintiffs' claims with prejudice.

Argument

This motion is brought pursuant to MCR 2.116(C)(10), under which summary disposition is appropriate when no genuine issue of material fact exists and the law, when applied to those undisputed facts, entitles the moving party to judgment in its favor. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In this case the material facts are undisputed; the only areas of dispute concern application of the governing law to the agreed-upon facts. Defendant also relies on MCR 2.116(C)(7), under which summary disposition is properly granted where the claim asserted is barred by the applicable statute of limitations.

As the following will show, Progressive did not insure Matthew Groulx's sister, Shaina Groulx, and thus did not cover the injuries sustained by the passenger in Ms. Groulx's car, Justin Childers. Childers' claim is properly maintained against the MPCGA, whose coverage substitutes for the insolvent insurer, American Fellowship, who clearly did provide coverage for Childers' loss. To be sure, the MPCGA is entitled to last priority status when coverage under another applicable policy is available, but in this instance there simply is no such alternative coverage.

And independent of the coverage issue, the plaintiffs' claims in this case are time-barred by MCL 500.3145(1), despite any vague and unsupported assertion that the No-Fault Act's 1-year statute of limitations does not apply to the MPCGA. Based on either or both of the arguments that follow, summary disposition should be granted in favor of Progressive.

I. Progressive was not Shaina Groulx's "insurer" and, therefore, does not qualify as "the insurer of the owner" or "insurer of the operator" of the occupied vehicle so as to trigger coverage under §3114(4).

In order for the claims against Progressive to prevail, Plaintiffs must be able to establish that, under the Progressive no-fault policy issued to Matthew Groulx, Progressive was the "insurer" not only of Matthew Groulx but also of Shaina Groulx, whose name does not appear on the policy. Since Plaintiffs are unable to do so, the essential basis for their claims is lacking. "[W]here a policy only provides for a named insured and does not extend coverage to other persons, the insurer is only an 'insurer' of the named insured." *Stone v Auto-Owners Ins Co*, 307 Mich App at 177, *citing*, *Amerisure Ins Co v Coleman*, 274 Mich App 432, 438; 733 NW2d 93 (2007), and *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 15; 684 NW2d 391 (2004) (holding that a named insured's insurer was *not* an insurer of the vehicle owner and operator under §3114(4) when the policy did not expand the definition of "insured" to include the vehicle's owner or operator).

Unquestionably, American Fellowship was the insurer first in priority for providing PIP benefits to Justin Childers, based on its policy issued to a resident family member of Childers. American Fellowship was responsible for his loss, regardless of whose vehicle he was occupying and whether or not it was insured. MCL 500.3114(1).[2] When American Fellowship was declared

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[2] In pertinent part, §3114(1) states that "a personal protection insurance policy ... applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises out of a motor vehicle accident. ... "

insolvent, the MPCGA stepped into this position as the entity responsible for Childers' benefits -- except when "damages or benefits are recoverable by ... a claimant or insured under [another] insurance policy[.]" MCL 500.7931(3)[3]; *accord*, *ACIA v Meridian Mut Ins Co*, 207 Mich App at 40 (MPCGA is statutorily intended to be the "insurer of last resort").

The question presented is whether coverage is, in fact, available under another policy. Contending that there is, Childers and the MPCGA point to Matthew Groulx's Progressive policy since Shaina Groulx was a resident relative of Matthew and was the owner/operator of the vehicle occupied by Justin Childers. Their claim is based on MCL 500.3114(4):

> Except as provided in subsection (1) to (3), a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> a. The insurer of the owner or registrant of the vehicle occupied.
>
> b. The insurer of the operator of the vehicle occupied.

MCL 500.3114(4). Childers alleges that "Shaina Groulx was a contractual insured under the terms of the Progressive policy [issued to Matthew Groulx]" and, therefore, Progressive was the insurer of "Shaina Groulx, the owner/operator of the uninsured vehicle in which Justin Childers was a passenger" (Complaint, ¶¶12-13), *citing*, MCL 500.3114(4)(b). The MPCGA makes the same allegation that Progressive was "the 'contractual insurer'" of Shaina Groulx so as to implicate MCL 500.3114(4). (Complaint of Intervening Plaintiff, ¶¶12-13), *citing*, MCL 500.3114(4).

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[3] (3) ***If*** damages or benefits *are recoverable* ... *by a claimant or insured* under an insurance policy other than a policy of the insolvent insurer, or under a self-insured program of a self-insured entity, the damages or benefits recoverable shall be a credit against a covered claim payable under this chapter.

MCL 500.7931 (emphasis added).

Case law conclusively defeats Plaintiffs' theory. The issue comes down to whether Progressive was "the insurer" of Shaina Groulx within the meaning of §3114(4) for purposes of the subject accident. Shaina was not a Progressive policyholder; it is undisputed that she was not a "named insured" of Progressive. This fact does not by itself defeat the contention that Progressive was Shaina's "insurer"–*Coleman* held that §3114(4) can reach beyond named insureds–but subsequent case law and the narrow limits of *Coleman* itself do. Progressive was *not* Shaina Groulx's "insurer."

The injured claimant in *Coleman*, as in the case at bar, was a passenger of an uninsured vehicle. Bernard Coleman was the operator of the uninsured vehicle (it was owned by his mother-in-law). Although Coleman and his wife, Tonya, had an insurance policy with Titan (for a car being repaired at the time), *only Tonya Coleman* was listed as a "named insured" on the Titan policy. The question was whether Titan nevertheless was also "the insurer" of Bernard, for purposes of applying §3114(4)(b). The Court relied on a dictionary definition: "Black's Law Dictionary (7th ed.) defines "insurer" as "'[o]ne who agrees, by contract, to assume the risk of another's loss and to compensate for that loss.'" *Coleman*, 274 Mich App at 435.

Applying the dictionary test, the Court held that Titan was Bernard's insurer as a matter of contract, based on the terms of the policy. First, even though Bernard technically was not a "named insured," the policy's terms effectively elevated a spouse of the named insured to the status of another named insured. The insuring agreement stated, "'[i]n return for **your** premium payment, we agree to insure **you** subject to all the terms of this policy'" – and according to the policy definitions, the terms **you** and **your** applied not only to "'the named insured' shown on the Declarations'" but also to "'a spouse if a resident of the same household.'" *Coleman*, 274 Mich App at 436 (quoting the policy) (underlining added). Further, in the section specifically devoted

to no-fault coverages, the Titan policy defined "insured" to include "'**you** or any family member" (which by policy definition included a resident spouse). *Id.* (underlining added).

Bernard thus qualified under the Titan policy both as "**you**" (equivalent to a named insured) and as an "insured" under the no-fault coverage provisions. He was a person as to whom Titan, by contract, agreed to assume a risk of loss and to compensate for that loss. And since he was the operator of the vehicle in which the claimant was injured, the Court of Appeals concluded that Titan must be regarded as "the insurer of the operator of the vehicle occupied" for purposes of MCL 500.3114(4)(b) and thus obligated to pay the accident victim's benefits. *Coleman*, 274 Mich App at 436-437.

In the case at bar, unlike the insurer in *Coleman*, Progressive did not agree to assume any risk of loss as to Shaina Groulx with respect to her use of her 1988 Oldsmobile. The decision in *Coleman* turned on the unique terms of the policy contract itself; and when such explicit language making someone an "insured" under the policy is absent, the holding in *Coleman* does not apply. Such was the result in *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527; 740 NW2d 503 (2007), which makes this clear.

In *Dobbelaere*, the passenger of an uninsured car suffered fatal injuries in an accident. The car was owned by David Jones, who had no insurance policy in his name, and was operated by David Jones II, who likewise had no insurance. Since the passenger also had no insurance, the assigned claims insurer, ACIA, like the MPCGA in this case, would be required to pay PIP benefits unless somehow there nevertheless was an "insurer of the owner" or an "insurer of the operator" of the occupied vehicle. In fact, a no-fault policy had been issued by Auto-Owners to Ms. Randi Jones–*wife* of the subject vehicle's owner (David Jones) and *mother* of the vehicle's operator (David Jones II). The issue was whether the status of these two individuals as spouse and resident relative, which typically triggers coverage under such a household policy pursuant to

§3114(1), rendered Auto-Owners the "insurer" of David Jones and David Jones II and, thus, the "insurer of the owner" and "insurer of the operator" of the involved vehicle. The Court said no.

The Court in *Dobbelaere* found *Coleman* distinguishable on grounds that nothing in the Randi Jones policy issued by Auto-Owners, by its terms, rendered either David Jones or David Jones II a contractual "insured" for purposes of no-fault PIP coverage:

> Unlike the policy at issue in *Amerisure* [*v Coleman*], the policy at issue here does not define who is an insured for purposes of the no-fault endorsement, and we are unable to discover anything in the plain language of the policy's declaration of general verbiage to indicate an intent by the parties to that contract to render either David Jones or David Jones II a contractual insured.[4]

Dobbelaere, 275 Mich App at 534. For its argument that Auto-Owners nevertheless should be regarded as "the insurer" of David Jones and David Jones II, ACIA relied on the family members' rights to seek benefits under their resident-relative's policy under §3114(1): "ACIA argues that the benefit coverage mandated by MCL 500.3114(1) renders [Auto-Owners] the insurer of both David Jones and David Jones II, regardless of whether they are named insureds under the policy issued by [Auto-Owners] to Randi Jones." *Dobbelaere*, 275 Mich App at 532. The Court directly rejected this argument:

> [T]he fact that an individual might derivatively claim PIP benefits through a named insured under MCL 500.3114(1) *does not render the policy issuer the "insurer" of that individual* for purposes of MCL 500.3114(4).

Dobbelaere, 275 Mich App at 532 (emphasis added). *Accord*, *Stone v Auto-Owners Ins Co*, 307 Mich App 169, 177-178; 858 NW2d 765 (2014) ("[W]here a policy only provides for a named

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[4] Although both David Jones and David Jones II were identified as additional drivers on the Auto-Owners policy, the Court recognized that a listed driver is *not* regarded as a "named insured" or "a person named in the policy." Such a designation does not render the person a contractual insured. *Dobbelaere*, 275 Mich App at 534 n. 3, *citing*, *Transamerica Ins Corp v Hastings Mut Ins Co*, 185 Mich App 249, 254-255; 460 NW2d 291 (1990). In the case at bar, Shaina Groulx's name does not appear *anywhere*, in any capacity, in the Progressive policy.

insured and does not extend coverage to other persons, the insurer is only an 'insurer' of the named insured. ... This is true even if the vehicle's owner, registrant, or operator could derivatively obtain no-fault benefits under MCL 500.3114(1) through a third person's policy"); *Prishtina v Auto Club Ins Assoc*, COA unpublished opinion (No. 318912, March 10, 2015) (**Exhibit A**).

Under the combined authorities of *Coleman* and *Dobbelaere*, Progressive thus cannot be held to be the "insurer" of Shaina Groulx for purposes of Childers' claim for PIP benefits. The finding of "insurer" status in *Coleman* was based on Bernard Coleman falling within the definition of "insured" in the PIP section of the no-fault insurer's policy, and on his qualifying as "**you**"–the equivalent of a named insured–in the policy's general insuring agreement. These elements were absent in *Dobbelaere* and, as a consequence, even though David Jones (husband) and David Jones II (resident relative) potentially could claim benefits from the named insured's PIP coverage per §3114(1), the insurance company was *not* "the insurer" of David Jones or David Jones II for purposes of §3114(4).

The case at bar is like *Dobbelaere*. Shaina Groulx is *not* Progressive's policyholder, either as a named insured or by any definition making her an additional "You" or "Your" (equivalent to a named insured, like the spouse in *Coleman*). And, as in *Dobbelaere*, nothing in the Progressive policy declares Shaina to be an "insured" for purposes of PIP coverage. *Dobbelaere*, 275 Mich App at 534.

Importantly, it is the *Plaintiffs' burden* in this case to identify any contractual language that would make Shaina Groulx an insured of Progressive; it is not *Defendant's* burden to cite policy language affirmatively *denouncing* her status as an insured. *Stone v Auto-Owners Ins Co*, 307 Mich App at 178, *citing*, *Dobbelaere*, *supra*, *Coleman*, *supra*, and *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10; 684 NW2d 391 (2004). And yet, very explicitly, the Progressive policy *does* affirmatively denounce Shaina's status as an insured in this instance.

Recall that the applicable test is whether one's risk of loss has been contractually assumed by the insurer. *Coleman*, 274 Mich App at 435 (stating that an "insurer" is "'[o]ne who agrees, by contract, to assume the risk of another's loss and to compensate for that loss'"). Here, in the context of the subject accident, Progressive did not agree by contract to assume any risk whatsoever incurred by Shaina Groulx -- it is explicitly excluded. Since the inquiry is whether the risk was contractually assumed, it is necessary that all relevant contract provisions be considered, including applicable exclusions. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566-567; 489 NW2d 431 (1992). And here (like the relatives in *Dobbelaere*), while Shaina might have potentially qualified as an "Eligible injured person" for purposes of entitlement to PIP benefits as a resident "relative" who sustains injury in an accident,[5] here this risk of loss was affirmatively disavowed as a matter of contract by Progressive because Exclusion 8 in the PIP section clearly applies:

> EXCLUSIONS - READ THE FOLLOWING EXCLUSIONS CAREFULLY. IF AN EXCLUSION APPLIES, COVERAGE WILL NOT BE AFFORDED UNDER THIS PART II.
>
> Coverage under Personal Protection Insurance does not apply to accidental bodily injury:
>
> * * *
>
> 8. sustained by the owner or registrant of a motor vehicle or motorcycle involved in an accident which is not covered by security as required by the Michigan No-Fault Law, Chapter 31 of the Michigan Insurance Code, as amended.

(Policy, pp. 8,10). It is undisputed that the accident in this case involved Shaina Groulx's operation of a motor vehicle that *she owned* and which was *not* covered by insurance as required

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[5] The "Insuring Agreement" for "Personal Protection Insurance Coverage (PIP)" states that Progressive will pay benefits "for accidental bodily injury to an **eligible injured person** ... subject to the exceptions, exclusions and limitations specified herein and as additionally provided by the law of the State of Michigan." (Policy, p. 7, top of page) (underlined emphasis added). The PIP coverage then defines "Eligible injured person" to include "... any **relative** who sustains accidental bodily injury in an accident involving a motor vehicle" (*id.*, para. 2.a.)

by Michigan law. Progressive clearly did not contract to assume any risk of loss on the part of Shaina Groulx in this matter. Progressive, therefore, cannot be regarded as her "insurer" for purposes of §3114(4) of the no-fault act. *Coleman*, *supra*; *Dobbelaere*, *supra*.

Plaintiffs' claim against Progressive on behalf of Justin Childers, therefore, fails as a matter of law. Their claim is dependent upon §3114(4) applying to impose liability on Progressive, but Shaina Groulx is not a "contractual insured" of Progressive; and since Progressive is not Shaina's "insurer," it is not "the insurer of the owner" or "the insurer of the operator" of the motor vehicle Childers was occupying when he sustained his injuries. The Court should grant summary disposition in favor of Defendant.

II. Even if benefits in favor of Childers were available under the Progressive policy, any action for recovery from Progressive is barred by the 1-year statute of limitations of MCL 500.3145(1).

This action against Defendant Progressive was filed by Plaintiff Justin S. Childers, the injured claimant, on November 22, 2013. Intervening Plaintiff, the MPCGA, joined the action by filing its Complaint on or about June 9, 2014. The motor vehicle accident in which Childers sustained his injuries occurred two-to-three years earlier on August 6, 2011.

These bare chronological facts immediately suggest that any claims against Progressive would be barred by the 1-year statute of limitations of MCL 500.3145(1).

In relevant part, the statute provides:

> An action for recovery of personal protection insurance benefits payable under this chapter may not be commenced more than 1 year after the date of the accident causing the injury unless written notice as provided herein 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.

MCL 500.3145(1) (emphasis added). Under this statute, the action filed on behalf of Justin Childers and by the MPCGA is time-barred -- it "may not be commenced" -- because it was filed

more than 1 year after the subject accident. (And neither of the statutory exceptions–prior payment by Progressive or notice to Progressive within one year of the accident–is applicable).

Childers thus would have no viable claim for recovery of benefits against Progressive even if the policy issued to Matthew Groulx did somehow extend coverage to Childers through Shaina Groulx. And since the MPCGA's ability to pursue reimbursement is derivative of Childers' right to pursue available benefits, the MPCGA's claim likewise is time-barred.

The contrary position asserted by the MPCGA, without citation of any applicable legal authority, is simply that the No-Fault Act's statute of limitations does not apply to the MPCGA. Yet under the statutory scheme that governs its operation and duties, the MPCGA clearly *is* subject to whatever defenses a defendant-insurer would have against the injured claimant himself, including the 1-year statute of limitations.

The MPCGA was ordered into creation, MCL 500.7901, *et seq.*, to handle claims against insolvent insurers to the extent such claims are "covered claims" under MCL 500.7925. There is no doubt that Justin S. Childers' claim for PIP benefits against the insolvent insurer American Fellowship Insurance Company qualifies as a "covered claim" within the meaning of §7925. And while the MPCGA's responsibility for paying the insolvent insurer's claims is limited by the extent to which any other coverage for the loss exists, when there simply is no other coverage from which benefits "are recoverable," the MPCGA is responsible for the loss.

Under MCL 500.7931(3), the injured claimant is required to exhaust all coverage provided under any other insurance policy, and any such benefits thus recoverable *by the claimant* would be a credit against the "covered claim" payable by the MPCGA. To be sure, when the MPCGA steps in to handle an insolvent insurer's claims, it is regarded as "an insurer of last resort rather than merely a reinsurer who simply assumes the obligations of an insolvent insurance company." *Auto Club Ins Assoc v Meridian Mut Ins Co*, 207 Mich App 37, 40; 523 NW2d 821 (1994). Yet

as the *Auto Club* opinion confirms based on the statute, the MPCGA's position is only subordinated to other coverage when such other coverage is available: "'[T]he setoff provision of [§7931(3)] clearly states that ***if coverage is available*** *under another valid policy*, that coverage must be exhausted before the MPCGA becomes involved.'" *Id.*, 207 Mich App at 41, *quoting*, *Yetzke v Fausak*, 194 Mich App 414, 422; 488 NW2d 222 (1992) (emphasis added). The statute itself states as follows:

> (3) ***If*** damages or benefits *are recoverable* ... *by a claimant or insured* under an insurance policy other than a policy of the insolvent insurer, or under a self-insured program of a self-insured entity, the damages or benefits recoverable shall be a credit against a covered claim payable under this chapter.

MCL 500.7931 (emphasis added). Unambiguously, this statute allows the MPCGA to subordinate itself to another insurer's coverage *only* if benefits from that other insurer are, in fact, recoverable – specifically, recoverable by the underlying claimant.

Accordingly, "*if* damages or benefits are *recoverable*" by Justin Childers under another policy, such as the Progressive policy issued to Matthew Groulx (or, as the *Auto Club v Meridian* opinion puts it, "if coverage is *available*" under this other policy), then ultimate responsibility for the claimed benefits would fall on the issuer of the other policy and not on the MPCGA. Yet under §7931(3) above, it simply cannot be said that benefits are "available" or "recoverable" – "*by a claimant or insured*" – when that person's claim is barred by the statute of limitations. Unless notice was given or the lawsuit itself was filed within one year of the accident, benefits are *not* available or recoverable under a no-fault policy. §3145(1). Thus, even if Childers was covered under the Groulx policy issued by Progressive, the MPCGA would be entitled to a "credit" based on the benefits under that coverage *only* if those benefits are recoverable by the "claimant or insured," and here they would not be recoverable by Childers because the claim is barred by the 1-year statute of limitations.

Another section of the MPCGA statute reinforces that the MPCGA's rights as against another insurer are defined by those the underlying claimant would have had when it comes to seeking reimbursement from that insurer – i.e., the MPCGA stands in the shoes of the injured claimant, Childers, against Progressive. MCL 500.7935(2) provides:

> (2) An insured or claimant entitled to the benefits of this chapter [i.e., Childers] shall be considered to have assigned to the association, to the extent of any payment received from the association, his or her rights against the estate of the insolvent insurer, rights under the policy under which his or her claim arose, and any other rights the insured or claimant may have against any other person [i.e., Progressive] for payment of the covered claim paid by the association.

MCL 500.7935 (emphasis added).

According to this statute, Childers is deemed to have assigned to the MPCGA any rights he has against Progressive, to the extent he has received payments from the MPCGA. The MPCGA's action against Progressive, in other words, is a subrogation action. The rights held by the MPCGA are those that were assigned to it by Childers. The MPCGA has no greater rights than Childers would have in pursuing recovery from Progressive. *Titan Ins Co v North Pointe Ins Co*, 270 Mich App 339, 343; 715 NW2d 324 (2006) (an insurer who becomes subrogated to the rights of the insured to whom benefits were paid substitutes for the insured and acquires no greater rights than those possessed by the insured; thus if the insured's claim against the primary insurer for recovery of PIP benefits would be barred by the 1-year statute of limitations, the subrogee-insurer's claim to recover those benefits would be barred, as well).

In short, the MPCGA's right to take "a credit" for benefits under another insurance policy is dependent upon those benefits being "recoverable ... *by* [*the*] *claimant or insured*," §7931(3); and likewise, the MPCGA's ability to pursue another insurer for reimbursement of benefits it already paid is based entirely on the rights that the "*insured or claimant*" has against that insurer,

since they are deemed to have been "assigned" to the MPCGA by the underlying claimant. §7935(2).

For its contention that it is somehow immune to any time limitations for pursuing a reimbursement claim against an insurer, the MPCGA has referenced a subsection of the very statute that creates the MPCGA, MCL 500.7911. The subsection relied upon, §7911(3), states as follows:

> (3) The association is subject to the requirements of this chapter and chapter 81 but is not subject to the other chapters of this act. The association shall be subject to other laws of the state to the extent that it would be subject to those laws if it were an insurer organized and operating under chapter 50, to the extent those other laws are not inconsistent with this chapter.

MCL 500.7911(3). The MPCGA apparently would infer from this very general language that it is not subject to the time limitations of a PIP claim under §3145(1). By its terms, however, the statute certainly does not say this, and there is no case law supporting this proposition.

Nor could there be: Since the MPCGA's rights against the insurer (in this case, Progressive) are *expressly* based on those possessed by the claimant (in this case, Childers), what matters is *not* whether *the MPCGA* is subject to §3145(1), but the fact that, under §3145(1), any action for recovery of benefits by *Childers* "may not be commenced more than 1 year after the date of the accident causing the injury." Again, the MPCGA is limited in its reimbursement claim to whatever rights the claimant himself possesses against Progressive -- MCL 500.7935(2), and is entitled to a credit *only* if benefits are "recoverable" *by the claimant* -- MCL 500.7931(3). And where, as here, a claim against Progressive by the accident victim is barred by the statute of limitations, then so is the assigned claim of the MPCGA.

In conclusion, there is no support for any assertion that §3145(1) does not apply to bar the instant claims of both Childers and the MPCGA. Progressive's first notice of injury was in

September of 2013, more than 2 years after the accident. Justin Childers' claim for PIP benefits arose on the date of the accident, August 6, 2011. To be sure, an action against Progressive at that time would have been against the wrong insurer, since American Fellowship was the insurer first in priority. Yet by its terms, §3145(1) clearly states that an action for recovery of PIP benefits -- subject to the two exceptions that do not apply here (notice in the first year or previous payment) -- "may not be commenced later than one year after the date of the accident causing the injury[.]" There is no statute, and no case opinion, that states a PIP claim can accrue a second time when the insurer becomes insolvent; and under the statutory provisions of MCL 500.7901, *et seq.*, the MPCGA has no independent right to receive a credit or recover reimbursement from another insurer. If the claimant is barred from receiving PIP benefits based upon the statute of limitations, then the MPCGA is also barred.

Accordingly, whether on the basis of Progressive's substantive lack of coverage or on statute of limitations grounds, the Court should grant summary disposition in favor of Defendant.

Relief

For all the reasons set forth above, Defendant, PROGRESSIVE MARATHON INSURANCE COMPANY, respectfully requests that the Court grant summary disposition in favor of Defendant on all claims asserted by entry of a final order dismissing this matter with prejudice.

Respectfully submitted,

GARAN LUCOW MILLER, P.C.

By: _____
DANIEL S. SAYLOR (P37942)
MICHAEL J. DePOLO (P35733)
Attorneys for Defendant Progressive
1155 Brewery Park Boulevard, Ste. 200
Detroit, Michigan 48207-2641
(313) 446-5520

September 3, 2015

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EXHIBIT 8

Defendant Progressive's Response in Opposition to the Motions for Summary Disposition of Plaintiff Childers and the Intervening Plaintiff MPCGA, 10/8/2015

10-815

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

SUSAN CHILDERS,
Conservator for JUSTIN S. CHILDERS, LIP,

Plaintiff,

Case No. 13-101626-NF

and

Hon. Richard B. Yuille

MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION,

Intervening Plaintiff,

v.

PROGRESSIVE MARATHON INSURANCE COMPANY,

Defendant.

Richard F. Burns, Jr. (P26189) **Law Offices of Richard F. Burns Jr. P.C.** Attorney for Plaintiff Childers 31780 Telegraph Rd., Ste. 130 Bingham Farms, MI 48205 (248) 530-5540	Ronald M. Sangster, Jr. (P39253) **Law Offices of Ronald M. Sangster PLLC** Attorney for Int. Plaintiff MPCGA 901 Wilshire Drive, Ste. 230 Troy, MI 48084 (248) 269-7040	Michael J. DePolo (P35733) Daniel S. Saylor (P37942) **Garan Lucow Miller, P.C.** Attorneys for Defendant PMIC 8332 Office Park Drive Grand Blanc, MI 48439 (810) 695-3700

DEFENDANT PROGRESSIVE'S RESPONSE IN OPPOSITION TO THE MOTIONS FOR SUMMARY DISPOSITION OF PLAINTIFF CHILDERS AND THE INTERVENING PLAINTIFF MPCGA

NOW COMES Defendant, Progressive Marathon Insurance Company ("Progressive"), through its undersigned counsel, and hereby responds to the motions for summary disposition concurrently submitted by Plaintiff, Susan Childers, conservator for Justin S. Childers, LIP ("Childers"), and Intervening Plaintiff, Michigan Property & Casualty Guaranty Association ("MPCGA"). For the reasons detailed herein, Progressive submits that the motions should be denied and, instead, pursuant to MCR 2.116(I)(2), and for the reasons detailed in its own motion

for summary disposition previously filed, summary disposition should be granted in favor of Defendant and the case dismissed.

Introduction

Both Plaintiff Childers and Intervening Plaintiff MPCGA seek to impose liability on Defendant Progressive for Childers' no-fault insurance benefits. Progressive has already shown, and will show further here, that no legal basis for such liability exists.

On the fundamental question of coverage, Childers has no viable basis for claiming benefits under the Progressive policy principally because the "contractual insured" theory on which both plaintiffs rely simply does not fit the facts. The theory is that Progressive was "the insurer" of Shaina Groulx, within the meaning of §3114(4) of the No-Fault Act, MCL 500.3114(4), which would give Childers a claim for benefits as an occupant of her automobile–again, assuming Progressive was her "insurer." The problem with this theory is that the Progressive policy extended no coverage -- it assumed no risk of loss whatsoever -- with respect to Shaina Groulx and her use of her own vehicle. This fact is irrefutable; and it means Progressive cannot be regarded as her "insurer." *See*, *Stone v Auto-Owners Ins Co*, 307 Mich App 169, 178; 858 NW2d 765 (2014), citing *Amerisure Ins Co v Coleman*; 274 Mich App 432, 435; 733 NW2d 93 (2007); *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 532; 740 NW2d 503 (2007).

Progressive also has shown, quite apart from the "contractual insured" issue, that the instant action is barred by the statute of limitations. It is not a *contractual* defense (such as lack of notice, or untimely proofs of loss forms), which would cause a forfeiture of coverage and which potentially could be waived prior to suit. It is, rather, a *statutory*, affirmative defense to

a lawsuit, which was timely asserted in the Affirmative Defenses Progressive raised in response to both Childers' Complaint and the MPCGA's Intervening Complaint, and which, by definition, comes into play only when litigation is commenced.

Finally, both Childers and the MPCGA assert in their motions what ultimately is a classic "red herring" argument based on the waiver and estoppel principle known as the "mend the hold" doctrine. As is detailed below, Progressive's position is simply that its policy does not, and never did, provide coverage for the injuries suffered by Justin Childers. Progressive's denial letter of October 29, 2013, states this directly, even though, to be sure, it also references an exclusion provision that does not apply. Yet even if the letter had not asserted that "[a]ccording to the terms of the Progressive policy ... COVERAGE DOES NOT EXIST for JUSTIN CHILDERS," or indeed, even if no denial letter had been sent at all, the so-called "mend the hold" theory would be of no benefit to plaintiffs because under Michigan law (as with "most jurisdictions")[1] the doctrine does not be apply to make a contract of insurance "cover a loss it never covered by its terms, to create a liability not created by the contract and never assumed by the defendant under the terms of the policy." *Ruddock v Detroit Life Ins Co*, 209 Mich 638, 654; 177 NW 242 (1920).

The parties ultimately do not dispute the case law stating that no waiver occurs under "mend the hold" if the insurance policy, by its terms, does not cover the loss at issue. Plaintiffs' "mend the hold" argument thus is truly a red herring since, either way, both plaintiffs agree (in identical language) that the issue ultimately comes down to whether Childers' injury is, in fact, a loss covered under the terms of the Progressive policy and §3114(4) of the No-Fault Act. *See*,

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[1] *See, Lee v Evergreen Regency Co-op & Mgmt Systems, Inc*, 151 Mich App 281, 285; 390 NW2d 183 (1986), *quoting*, 1 ALR3d 1139, 1144.

Plaintiff Childers' Motion for Summary Disposition, ¶18; Int. Plaintiff MPCGA's Motion for Summary Disposition, ¶13. And on this point, simply by consulting the relevant provisions in the Progressive policy (shown below), it becomes clear that no viable claim against Progressive on behalf of Childers ever existed.

Argument I -- Progressive's Policy Does Not Cover Justin Childers' Injury

Under the Insuring Agreement for the "Personal Protection Insurance Coverage (PIP)" section of its policy Progressive promises to pay benefits required under the Michigan No-Fault Law "for accidental bodily injury to an **eligible injured person** ..." (Michigan Auto Policy, Part II - Personal Protection Insurance and Property Protection Insurance Coverage, p. 7) (attached to the "Stipulated Facts" submitted by the parties). The question of Justin Childers' coverage thus turns on whether or not he qualified as an **eligible injured person** under the policy.[2] He did not, as the policy's definition reveals. In full, it states as follows:

> When used in this Part II:
>
> * * *
>
> 2. "**Eligible injured person**" means:
>
> a. **you** or any **relative** who sustains accidental bodily injury in an accident involving a **motor vehicle**;
>
> b. any other person who sustains accidental bodily injury while occupying **covered auto**; and
>
> c. any person who, while not occupying a **motor vehicle**, sustains accidental bodily injury as a result of an accident involving:
> (i) a **covered vehicle**; or

---

[2] Actually, since the promise to pay benefits to an "**eligible injured person**" is expressly made "subject to the exceptions, exclusions and limitations specified herein" (Progressive's Michigan Auto Policy, Insuring Agreement, p. 7), even a person qualifying as an "**eligible injured person**" might not be entitled to benefits, depending on whether or not an exclusion applies. With regard to Justin Childers, however, no exclusion is needed. He did not qualify as an "**eligible injured person**" in the first place.

(ii) a **motor vehicle** owned by, or registered to or operated by **you**, if the person injured in the accident is not entitled to personal protection insurance under any policy described in Section 500.3114(1) of the Michigan No-Fault Law, Chapter 31 of the Michigan Insurance Code, as amended.

(Progressive's Michigan Auto Policy, Part II -- "ADDITIONAL DEFINITIONS," pp. 7-8).

Justin Childers was not an "**Eligible Injured Person**" under the Progressive policy. Definition "a." does not apply, since it only identifies **you** or a **relative** -- i.e., the named insured (Matthew M. Groulx) or a relative of the named insured residing in the same household (*see*, Progressive's Michigan Auto Policy, p. 2 -- "GENERAL DEFINITIONS" Nos. 9 and 13).

Definition "b." also does not apply, since, although Justin Childers qualifies as "any other person," he needs to have been occupying a **covered auto**, which refers to the automobile actually listed on the Progressive policy. Childers was occupying an uninsured 1988 Oldsmobile owned by Shaina Groulx, not the 2002 Buick Century owned and insured by Progressive's named insured, Matthew Groulx.

Definition "c." also does not apply, since it applies only to a person injured "while not occupying a motor vehicle." Since Childers *was* occupying a motor vehicle, this last definition of "**eligible injured person**" likewise does not apply to him.

In short, the PIP section of Progressive's insurance policy promises to pay benefits (subject to any applicable exclusions) to anyone qualifying as an "eligible injured person." According to the basis terms of the policy issued to Matthew Groulx, however, coverage did not, and does not, exist for Justin Childers.

Argument II -- Progressive Has Not Waived Non-Coverage by "Mend the Hold"

When Progressive received notice from counsel for Justin Childers that a claim was being made for benefits on the policy Progressive issued to Matthew Groulx, it responded that, according to the terms of the policy (including its Exclusions and §3114 of the No-Fault Act), coverage does not exist for Justin Childers (Progressive letter of October 29, 2013). The letter also included a quotation of an exclusion that, in addition to being a slightly modified version of one actually contained in the Matthew Groulx policy, did not by its terms apply to the circumstances of Mr. Childers' accident. In fact, there was no need to mention any exclusion at all, since Childers did not qualify as an "**eligible injured person**" in the first place.

Yet, in what can only be described as an eager attempt at lawyerly gamesmanship, both Plaintiff and the Intervening Plaintiff seek to take technical advantage of the mistake in the Progressive letter with the assertion of the "mend the hold" doctrine. The attempt fails, however, for at least two reasons.

First, even though the letter included an inapplicable exclusion, it also directly stated that Childers did not have coverage "[a]ccording to the terms of the Progressive policy," and that he did not have coverage according to "the Michigan No-Fault Act MCL 500.3114[.]" Progressive has shown that, in fact, Childers did *not* have coverage under the terms of the policy, without regard to whether any exclusions otherwise would have applied. Further, as all have agreed, the coverage issue in the case comes down to the "contractual insured" question of whether Progressive must be deemed "the insurer" of Shaina Groulx (owner and operator of the car occupied by Childers) so that Childers could claim benefits under MCL 500.3114(4).

Progressive's letter directly states that coverage does not exist for Justin Childers under §3114. In short, the factual predicate for plaintiffs even to raise a "mend the hold" argument is absent.

As indicated above, however, the entire "mend the hold" argument becomes a genuine red herring, since all agree that it applies only to prevent an insurer from relying on an insured's forfeiture based on contractual defenses in claims where otherwise there would be coverage under the policy. The doctrine is "bottomed on the doctrine of estoppel," under which the insured would be misled to its detriment by the content of the insurer's denial letter; it presumes that the insured would be prejudiced by the insurer's failure to inform it of a policy defense that later is raised in the resulting litigation. *See*, *South Macomb Disposal Authority v American Ins Co*, 225 Mich App 635, 696-696; 572 NW2d 686 (1997), *citing*, *Ruddock v Detroit Life Ins Co*, 209 Mich 638; 177 NW 242 (1920), and *Lee v Evergreen Regency Co-op & Mgmt Systems, Inc*, 151 Mich App 281; 390 NW2d 183 (1986).

In other words, the doctrine can apply where a claimant *would* have coverage under the policy, but has failed to meet a pre-condition or claim requirement. In that event, if the insurer denies on a different ground and thus implies that the claimant's technical failure is not being asserted as a forfeiture, a waiver of the defense might occur. But where coverage under the policy is itself the ultimate issue, "mend the hold" does not apply. "[T]he doctrine may not be used to broaden policy coverage to protect an insured against risks not included in the policy or expressly excluded from the policy." *South Macomb Disposal Authority*, 225 Mich App at 695. As the Supreme Court well explained:

> The cases where the doctrine of waiver, or estoppel, has been applied have largely been cases where the insurance companies have relied on a forfeiture of the contract, upon breaches of warranties and conditions to work such forfeitures; and

> in many such cases this court and other courts of last resort have held that if the companies have led the other party, to prejudice, to his expense, to understand that such forfeitures, such breached warranties and conditions, would not be insisted upon, then the companies would be estopped from asserting such defenses. **But here the defendant makes no claim of forfeiture of the contract; on the contrary, it is insisting upon the contact itself**, and insisting that by its terms it did not insure the deceased when engaged in military services in time of war. **To apply the doctrine of estoppel and waiver here would make this contract of insurance cover a loss it never covered by its terms**, to create a liability not created by the contract and never assumed by the defendant under the terms of the policy. In other words, by invoking the doctrine of estoppel and waiver it is sought to bring into existence a contract not made by the parties, to create a liability contrary to the express provisions of the contract the parties did make.

Ruddock, 209 Mich at 653-654 (emphasis added). *Accord*, *Lee*, 151 Mich App at 285-288 (insurer denied coverage based on lack of timely notice under the contract, then later sought to defend on grounds that the policy specifically excluded coverage; the trial court disallowed the later defense, but was reversed by the Court of Appeals since the waiver/estoppel doctrine does not apply to bar a no-coverage defense).

Plaintiff Childers directly acknowledges that the issue of coverage itself (or lack thereof) is not waived by "mend the whole," but simply maintains that Childers' loss *was* covered under the Progressive policy (Plaintiff's Motion for Summary Disposition, LEGAL ARGUMENT IV, pp. 15-18). Intervening Plaintiff MPCGA does not directly acknowledge the limited scope of the "mend the hold" doctrine (MPCGA's Motion for Summary Disposition, pp. Argument III, pp. 9-1 1), but ultimately argues that the case comes down to its "contractual insured" argument that Progressive was "the insurer" of Shaina Groulx under §3114 of the No-Fault Act and thus

responsible for injuries suffered by an occupant of her vehicle (MPCGA's Motion for Summary Disposition, ¶13, and Argument IV, pp. 11-15).

The "mend the hold" argument should thus be regarded as a moot point. Progressive maintains that its letter of October 29, 2013, does not even provide the factual predicate for asserting the argument; but irrespective of the content of the letter, the issue in the case is whether or not coverage under the Matthew Groulx policy extended to Childers' injuries in the first place. This is a pure question of coverage, to which the waiver and estoppel rule known as "mend the hold" does not apply. Plaintiffs' pursuit of relief under this theory is without merit.

Argument III - Progressive Was Not "the Insurer" of Shaina Groulx

At the heart of the case is Plaintiff's and Intervening Plaintiff's contention that, under §3114(4) of the No-Fault Act, Childers is permitted to claim benefits from "the insurer" of Shaina Groulx, the owner/operator of the motor vehicle in which he was an occupant when he was injured. Progressive has addressed this contention and shown that, despite Shaina's status as Matthew Groulx's resident relative,[3] Progressive was *not* her "insurer" under the circumstances in this case. The fact that a resident relative might under certain circumstances be able to claim benefits from another policy issued in the household, §3114(1), does not render the issuer of that policy "the insurer" of that person. *See*, Progressive's Motion for Summary Disposition, Argument I, pp. 6-13; *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App at 532; *Stone*, 307 Mich App at 177-178.

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[3] Such status would potentially allow her, under different circumstances, to claim benefits from his policy. For instance, if she were injured as a passenger in Matthew's car, or even if she were a pedestrian and was struck by another car, she would qualify under MCL 500.3114(1) and MCL 500.3115(1) for benefits under her brother's policy.

In their cross-motions, Plaintiff and Intervening Plaintiff nevertheless assert that Progressive *was* Shaina Groulx's insurer because, under the terms of the policy, she would qualify as an "**eligible injured person**." What both plaintiffs fail to recognize or acknowledge, however, is that qualifying as an "**eligible injured person**" under the PIP section of the policy (Michigan Auto Policy, pp. 7-8) is *not* the end of the inquiry to determine whether a person is entitled to recover PIP benefits. The pertinent question, in other words, is *not* whether Shaina Groulx was an "**eligible injured person**," but whether Progressive is an insurer who agreed, by contract, to assume the risk of Shaina's loss and to compensate her for that loss. *Coleman*, 274 Mich App at 435 (for purposes of §3114(4) of the No-Fault Act, an "insurer" is "'[o]ne who agrees, by contract, to assume the risk of another's loss and to compensate for that loss.'").

In this case Progressive extended no coverage whatsoever to Shaina Groulx; it did not, by contract, agree to assume any risk of loss on the part of Shaina and it did not agree to compensate her for any such loss. This is true both with respect to any injuries *she* sustained in the subject accident, and with respect to any liability she might have incurred for negligently causing Justin Childers' injuries.

With regard to her own injuries, Shaina never had a valid claim under the Progressive policy (even if she was an "**eligible injured person**" under the policy definition) because her injuries were sustained while operating *her own car*, which was not listed as a covered vehicle on the Progressive policy. This fact alone removed Shaina from protection under the Progressive policy, regardless of whether she had maintained her own insurance. (*See*, Progressive's Michigan Auto Policy, PIP "EXCLUSIONS" Nos. 11 and 12.) Yet the fact that Shaina was operating her own vehicle *without* any insurance disqualified her altogether from entitlement to

recover PIP benefits -- under the express terms of the Progressive policy (*id.*, PIP "EXCLUSIONS" No. 8) and the No-Fault Act itself, MCL 500.3113(b). (*See*, Progressive's Motion for Summary Disposition, pp. 12-13.)

Even under the "Part I -- Liability to Others" section of the policy, while not at issue in this case, any claim for protection from Progressive would be denied Shaina Groulx, again, because she was operating a vehicle she owned but had not insured on the Progressive policy. Progressive's Michigan Auto Policy, Part I -- Exclusions, No. 14, provides that liability coverage does not apply to any person for "14. bodily injury ... arising out of the ... use of any vehicle owned by a relative [i.e., Shaina] ... other than a **covered vehicle** for which this coverage has been purchased." In other words, unless the vehicle is listed for insurance coverage on the policy, and premiums paid for such coverage, a resident relative of the named insured will not have liability insurance protection for any injury caused by the relative's use of her own car.

In short, despite her potential status as an "**eligible injured person**" under the definition in the Progressive policy, Progressive in fact assumed no risk of loss on the part of Shaina Groulx in this matter. Progressive was not, and cannot be regarded as, her "insurer" for purposes of applying §3114(4) of the No-Fault Act. Childers himself was not an "eligible injured person" under the Progressive policy, and he likewise has no claim under the "contractual insured" argument based on §3114(4). Plaintiffs' arguments are without merit, and their motions for summary disposition must be denied.

Relief

For all the reasons previously stated in Defendant PROGRESSIVE's motion for summary disposition, and for all the additional reasons stated here, Defendant respectfully requests that

the Court deny Plaintiff's and Intervening Plaintiff's motions for summary disposition, and grant summary disposition in favor of Defendant on all claims asserted by entry of a final order dismissing this matter with prejudice.

Respectfully submitted,

GARAN LUCOW MILLER, P.C.

By: _____
DANIEL S. SAYLOR (P37942)
MICHAEL J. DePOLO (P35733)
Attorneys for Defendant Progressive
1155 Brewery Park Boulevard, Ste. 200
Detroit, Michigan 48207-2641
(313) 446-5520

October 8, 2015

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EXHIBIT 9

Defendant Progressive's Reply
to the Responses of Childers and the
MPCGA to Defendant's Motion for
Summary Disposition,
10/28/2015

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

SUSAN CHILDERS,
Conservator for JUSTIN S. CHILDERS, LIP,

Plaintiff,

and

MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION,

Intervening Plaintiff,

v.

PROGRESSIVE MARATHON INSURANCE COMPANY,

Defendant.

Case No. 13-101626-NF

Hon. Richard B. Yuille

Richard F. Burns, Jr. (P26189)
Law Offices of Richard F. Burns Jr. P.C.
Attorney for Plaintiff Childers
31780 Telegraph Rd., Ste. 130
Bingham Farms, MI 48205
(248) 530-5540

Ronald M. Sangster, Jr. (P39253)
Law Offices of Ronald M. Sangster PLLC
Attorney for Int. Plaintiff MPCGA
901 Wilshire Drive, Ste. 230
Troy, MI 48084
(248) 269-7040

Michael J. DePolo (P35733)
Daniel S. Saylor (P37942)
Garan Lucow Miller, P.C.
Attorneys for Defendant PMIC
8332 Office Park Drive
Grand Blanc, MI 48439
(810) 695-3700

DEFENDANT PROGRESSIVE'S REPLY TO THE RESPONSES OF CHILDERS AND THE MPCGA TO DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

PROOF OF SERVICE

DEFENDANT PROGRESSIVE'S REPLY TO THE RESPONSES OF CHILDERS AND THE MPCGA TO DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

NOW COMES Defendant, Progressive Marathon Insurance Company, and hereby replies to the principal points asserted by Childers and the MPCGA in their response briefs as follows:

I. Progressive Was Not the Insurer of Shaina Groulx

The determination of whether Progressive must be deemed "the insurer" of Shaina Groulx for purposes of applying MCL 500.3114(4) to the circumstances of this case is governed by the two *published* Court of Appeals cases most directly on point -- *Amerisure Ins Co v Coleman*; 274 Mich App 432 (2007), and *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527 (2007). Both plaintiffs now rely on an *unpublished* opinion, *Sours v Titan Ins Co*, unpublished COA opinion (No. 301328, December 27, 2011), for the proposition that Progressive should be regarded as Shaina Groulx's insurer.

The conclusion reached in *Sours*, however, directly conflicts with the binding authority of *Coleman* and *Dobbelaere*, as the following will show. An unpublished Court of Appeals opinion has no precedential force under the rule of stare decisis, MCR 7.215(C)(1), thus the Court would be free to reject *Sours* even if it were not in conflict with binding precedent. On the other hand, published opinions of the Court of Appeals -- particularly those issued after 1990, not only are precedential under the rule of stare decisis but are *binding*. MCR 7.215(C)(2) and (J)(1).

In *Sours*, whose facts admittedly are equivalent to those in the case at bar, Westfield Insurance Company had issued a no-fault auto insurance policy to Daniel Vond. His daughter

was driving *her own* car, which was not insured by Westfield and, in fact, was uninsured altogether, when an accident occurred in which a passenger, Sours, was injured. The Court of Appeals regarded Westfield's potential coverage of the daughter, as a resident relative of its policyholder, as sufficient to render Westfield her "insurer" for purposes of extending PIP coverage to Sours under §3114(4). The Court regarded applicable exclusions with respect to the daughter as insignificant, and instead concluded that the facts in *Amerisure Ins Co v Coleman*, *supra*, "are very similar" to those presented in *Sours* and that it dictated the holding against Westfield.

In fact, *Coleman* directly dictates the opposite holding as was reached in *Sours*. Contrary to the analysis asserted both in *Sours* and by the plaintiffs in the case at bar, the inquiry is *not* simply to see whether a resident relative is listed as an "insured" [or an "eligible injured person"] under the terms of the policy.[1] Rather, according to *Coleman*, the test is more substantive:

> The term "insurer" is not defined in the no-fault act. Black's Law Dictionary (7th ed.) defines "insurer" as "[o]ne who agrees, by contract, **to assume the risk of another's loss and to compensate for that loss**." Accordingly, we must determine whether, **under the terms of the Titan insurance policy**, Titan was the insurer of Bernard, who was the operator of the vehicle **at the time of the accident**.

Coleman, 274 Mich App at 435-436 (emphasis added). By examining "the terms of the [Progressive] policy" in this case -- which necessarily includes the terms of coverage *and* the

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[1] The test is not that superficial. It can be said with 100% certainty that the resident relative in *Dobbelaere* also was listed in the no-fault policy as an "insured" (or "eligible injured person" or some equivalent), since Michigan law *requires* no-fault coverage potentially to extend to resident relatives, MCL 500.3114(1); yet *Dobbelaere* -- a *published* Court of Appeals opinion -- held that this potential resident-relative coverage does *not* render an insurance company "the insurer" of the resident relative for purposes of §3114(4).

exceptions and exclusions[2] -- it is clear that Progressive was *not* an "insurer" of Shaina Groulx in this case, as it assumed *no risk* of loss on the part of Ms. Groulx and would not compensate her for any loss -- whether for her own injuries (PIP) or her liability for someone else's injuries.

Had Shaina Groulx insured her own car as she was required to under the law, MCL 500.3101(1), *that* insurer would have been "the insurer of the owner [and] operator" of the vehicle occupied by Childers, and he would look to that insurer for his benefits under §3114(4). But where Ms. Groulx did *not* maintain any such insurance, there is no rational basis for concluding that Progressive was her insurer when it neither insured her car nor Ms. Groulx herself with respect her use of that car. This was *not* a "risk" "assume[d]" by Progressive.

The exact opposite was true in *Coleman*, which is why the *Sours* court clearly erred in regarding the facts in *Coleman* as equivalent. The husband in *Coleman* (Bernard) was the operator of the uninsured car occupied by the injured claimant. Bernard's wife was a named insured on a policy issued by Titan. Even though Bernard was not expressly listed as a named insured on the policy, Titan was *properly* regarded as Bernard's "insurer" at the time of the accident because he *was* insured to recover PIP benefits. The vehicle he was operating, while uninsured, was *not* owned by him; he was not disqualified from entitlement to coverage. Manifestly, Titan *had* assumed a risk of loss with respect to Bernard's operation of the vehicle.

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[2] An insurance policy "is an agreement between the parties in which a court will determine what the agreement was and effectuate the intent of the parties. [] Accordingly, the court must look at the contract as a whole and give meaning to all terms." *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566 (1992).

In the case at bar, however, Shaina Groulx *had no coverage* with Progressive at the time of the accident. Progressive, therefore, was not her "insurer."

The Court should reject the non-precedential and likewise unpersuasive opinion issued in *Sours*, and instead apply the analysis dictated by the binding cases of *Coleman* and *Dobbelaere*, as fully detailed in Progressive's briefs.

II. Independent of the Coverage Issue, this Action is Time-Barred

Under MCL 500.3145(1), subject to two listed exceptions that do not apply, an action against a no-fault insurer for recovery of PIP benefits cannot be commenced more than 1 year after the accident. Childers filed the instant lawsuit against Progressive well after the applicable statute of limitations had run; and the MPCGA joined as intervening plaintiff even later. Both plaintiffs contend that the Court should disregard the clear terms of the statute of limitations, while offering no legal support for the proposition other than MCL 500.7911(3), which merely assures that the MPCGA, which is not an insurer but an association, is "not subject to the other chapters of this act [i.e., the insurance code]."

Plaintiffs' latest suggestion that their position is supported by *Felsner v McDonald Rent-A-Car*, 173 Mich App 518 (1989), is without merit. Plaintiffs must acknowledge, preliminarily, that *Felsner* does not even address how the no-fault act's provisions are relevant to claims assumed by the MPCGA, let alone the impact of §3145(1) in particular. *Felsner* merely held that the MPCGA can enjoy the "*benefits*" accorded insurance companies by the insurance code (in that case, MCL 500.3030–the right not to be sued directly by a tort plaintiff). The plaintiff had opposed that view, asserting §7911(3) (the MPCGA is "not subject to the other chapters of this act"), and the court rejected it as inapplicable. It said §7011(3) was

intended only to relieve the Association from complying with *burdens* imposed on insurance companies by the insurance code. 173 Mich App at 522-523. Thus a fatal defect in the MPCGA's and Childers' argument here is that MCL 500.3145(1), by its terms, *imposes no burden on insurance companies* at all. Accordingly, even as construed in *Felsner*, §7011(3) simply does not apply to the issue presented.

Ultimately, whether or not the insurance code burdens or imposes any obligations on the MPCGA is not at issue. As Progressive has detailed, the MPCGA's rights of recovery against another insurance company are expressly defined -- *by its own statutes*[3] -- as consisting of those rights possessed by the injured claimant. Thereunder, the MPCGA has a credit only "*if* damages or benefits *are recoverable* ... by *the claimant*." MCL 500.7931(3) (emphasis added). And here, since §3145(1) applies to bar Childers' claim, benefits are simply ***not*** recoverable.

The Court, therefore, is respectfully requested to grant summary disposition in favor of Defendant on all claims asserted and enter a final order dismissing this matter with prejudice.

Respectfully submitted,

GARAN LUCOW MILLER, P.C.

By: _____

DANIEL S. SAYLOR (P37942)
MICHAEL J. DePOLO (P35733)
Attorneys for Defendant Progressive
1155 Brewery Park Boulevard, Ste. 200
Detroit, Michigan 48207-2641
(313) 446-5520

October 28, 2015

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[3] *See*, MCL 500.7931(3) and MCL 500.7935(2), quoted and discussed in Progressive's Motion for Summary Disposition, pp. 15-16.

EXHIBIT 10

Defendant Progressive's Supplemental Outline Brief in Support of Its Motion for Summary Disposition, 11/16/2016

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GENESEE

SUSAN CHILDERS,
Conservator for JUSTIN S. CHILDERS, LIP,

Plaintiff,

and

MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION,

Intervening Plaintiff,

v.

PROGRESSIVE MARATHON INSURANCE COMPANY,

Defendant.

Case No. 13-101626-NF

Hon. Richard B. Yuille

DEFENDANT PROGRESSIVE'S SUPPLEMENTAL OUTLINE BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

The Court requested that each party provide a supplemental outline of argument points and principal authorities relied upon to assist the Court in its preparation of an opinion in this matter. Pursuant to the Court's request, Defendant, Progressive Marathon Insurance Company, submits the following in support of its contention that summary disposition should be granted in favor of Progressive.

GARAN LUCOW MILLER, P.C.
DANIEL S. SAYLOR (P37942)
MICHAEL J. DePOLO (P35733)
Attorneys for Defendant Progressive
1155 Brewery Park Boulevard, Ste. 200
Detroit, Michigan 48207-2641
(313) 446-5520

I. IS CHILDERS ENTITLED TO CLAIM NO-FAULT BENEFITS FROM PROGRESSIVE?

NO - because he is not a Progressive policyholder, he is not a resident relative of a Progressive policy holder,[1] and, fatal to plaintiffs' claim, §3114(4)[2] does not apply.

A. Progressive is the insurer of Matthew Groulx (Stipulated Fact No. 11).

- If Childers was injured while occupying a car owned by Matthew Groulx, he could claim benefits under §3114(4)(a) from Progressive, the insurer of the owner of the car.
- If Childers was injured in a car being operated by Matthew Groulx, he could claim benefits under §3114(4)(b) from Progressive, the insurer of the operator of the car.

But Childers was not occupying a car owned or being operated by Progressive's insured, Matthew Groulx. (He was occupying a car owned and operated by Shaina Groulx.)

B. Was Progressive *also* "the insurer of" Shaina Groulx?

NO - because she was not covered by Progressive in any way–*it had assumed no risk of loss*–in connection with the subject accident or her use of her own uninsured car.

The controlling authorities are *Amerisure Ins Co v Coleman*; 274 Mich App 432 (2007), and *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527 (2007). The governing test is set by *Coleman* and limited by *Dobbelaere*.

> 1. Under *Coleman*, an insurance company is one's "insurer" under circumstances in which, by its contract, it *assumes the risk of the person's loss and of compensating them for the loss*. 274 Mich App at 435.
>
> (In *Coleman*, "Bernard" was not Titan's named insured, but as the spouse of Titan's policyholder he was covered while driving his mother-in-law's uninsured car. He could, and for all we know did, receive no-fault benefits from Titan for his injuries in the accident.)

But just as "Bernard" was the spouse of Titan's policyholder and thus had coverage for his accident, such that Titan, therefore, was his "insurer," should not Progressive, likewise, be regarded as Shaina Groulx's "insurer" where Shaina Groulx was a resident relative of Progressive's policyholder (Matthew Groulx)?

NO - *Dobbelaere* directly rejects this broad reading of *Coleman*:

> 2. "[T]he fact that an individual might derivatively claim PIP benefits through a named insured under MCL 500.3114(1) *does not render the policy issuer the 'insurer' of that individual* for purposes of MCL 500.3114(4)." *Dobbelaere*, 275 Mich App at 532 (emphasis added).
>
> 3. The fact that Shaina Groulx, as a resident relative of Matthew Groulx, might be able to claim benefits or seek coverage from Progressive *in other circumstances* does not render Progressive her "insurer". While driving Matthew's car, she would have the protection of Progressive's BI liability coverage - Progressive would bear risk. If

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[1] Childers *was* a resident relative of an American Fellowship policyholder, which is why his no-fault benefits were properly paid by American Fellowship and now are properly paid by the MPCGA, which assumed responsibility for the insolvent insurer's covered claims under MCL 500.7925.

[2] "... a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim [PIP] benefits from insurers in the following order or priority: (a) **The insurer of the owner** or registrant of the vehicle occupied. (b) **The insurer of the operator** of the vehicle occupied." MCL 500.3114(4) (emphasis added).

she were injured as a pedestrian, or as a passenger in another vehicle, she could claim no-fault benefits from Progressive - Progressive would bear risk.

But under the circumstance of this case, in which she was driving her own (uninsured) car, Shaina Groulx *had no coverage whatsoever* under the Progressive policy–*Progressive assumed no risk with respect to Shaina Groulx* (the operative test -- *Coleman*, 274 Mich App at 435). Thus Progressive was not her "insurer".

C. *Sours* (an unpublished opinion) is contrary to the *Coleman* test and must be rejected.

Plaintiffs rely on *Sours v Titan Ins Co*, unpublished opinion (No. 301328, 12/27/11), which erroneously equates its facts with *Coleman*. In *Coleman*, "Bernard" qualified for coverage under his wife's Titan policy, so Titan was regarded as his "insurer." But in *Sours* (as is the case with Shaina Groulx) the operator of the car would *not* qualify for coverage under the circumstances of the accident. Under the terms of the policy contract, no risk of loss was assumed by the insurer, which is the governing test (*Coleman, supra*). The court should reject *Sours* as a non-binding, and erroneous, decision. *See*, Progressive's Reply Brief, 10/28/15, pp. 1-4.

Progressive, therefore, does not qualify as "the insurer of" Shaina Groulx (she *had* no insurer in this case). Accordingly, §3114(4) does not apply; Childers has no claim against Progressive; and the MPCGA remains responsible for providing all no-fault benefits owed to Childers.

II. IS THE CLAIM AGAINST PROGRESSIVE BARRED BY §3145(1) IN ANY EVENT?

YES - because this is "[a]n action for recovery of [PIP] benefits" and it "may not be commenced more than 1 year after the date of the accident..." MCL 500.3145(1).

A. There are only two exceptions to the rule (notice and prior payment and neither apply.

B. The statute of limitations clearly applies to Childers, and by the MPCGA's own statutory provisions, the MPCGA stands in the injured person's shoes -- its right of recovery is no greater than the right possessed by that person.

- Reliance on MCL 500.7011(3) is misplaced -- this statute merely relieves the MPCGA from complying with *burdens* imposed on insurers by the insurance code. *Felsner v McDonald Rent-A-Car*, 173 Mich App 518, 522-523 (1989). By its terms, §3145(1) imposes no burdens on insurers.

- Besides, the MPCGA's rights of recovery against other entities (including insurers) are expressly defined (by its *own* statutes) as consisting of those rights possessed by the injured claimant. MCL 500.7931(3) (allowing the MPCGA to proceed "*if* damages or benefits *are recoverable* ... by *the claimant*"; MCL 500.7935(2) (the MPCGA's rights are those deemed to have been *assigned* by the injured claimant).

- Any vague claim of unfairness by the MPCGA is more than offset by the inequity it would impose on insurers like Progressive to be compelled to respond to potentially decades old claims of which they never had notice. And Childers has no viable claim of unfairness at all, as his benefits will continue to be paid by the MPCGA, in substitution for the ultimately responsible insurer that became insolvent.

GARAN LUCOW MILLER, P.C.

By: _____
DANIEL S. SAYLOR (P37942)
Attorneys for Defendant Progressive

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