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STATE OF MICHIGAN

IN THE SUPREME COURT

SUSAN CHILDERS, as Conservator for JUSTIN CHILDERS, a legally incapacitated person,

Plaintiff-Appellee,

and

MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION,

Intervening Plaintiff-Appellee,

v.

PROGRESSIVE MARATHON INSURANCE COMPANY,

Defendant- Appellant.

Supreme Court No. 164953

Court of Appeals No: 356914 and 356915

Genesee County Circuit Court No: 13-101626-NF

INTERVENING PLAINTIFF-APPELLEE MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION'S SUPPLEMENTAL BRIEF PURSUANT TO THIS COURT'S ORDER DATE MAY 26, 2023

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

I. Should the Court affirm the decision of the Court of Appeals with respect to the issue of accrual generally, and more specifically, hold that the MPCGA's rights under the MPCGA Act are operative upon the date of the final order of insolvency and that a claim under the credit provision in the MPCGA accrues when the other insurer rejects a demand to step in and provide coverage?

Defendant-Appellant PMIC says "No"

Intervening Plaintiff-Appellee MPCGA says "Yes"

II. Should the Court affirm the decision of the Court of Appeals that the MPCGA had six years to pursue a claim arising under the credit provision of the MPCGA Act?

Defendant-Appellant PMIC says "No"

Intervening Plaintiff-Appellee MPCGA says "Yes"

III. Should the Court affirm the decision of the Court of Appeals that Progressive is a source of other insurance pursuant to the MPCGA Act?

Defendant-Appellant PMIC says "No"

Intervening Plaintiff-Appellee MPCGA says "Yes"

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INTRODUCTION

The Michigan Property and Casualty Guaranty Association ("MPCGA") appreciates the opportunity to supplement its briefing pursuant to this Court's Order dated May 26, 2023.[1] The Court proffered three questions, set forth below:

> The parties shall file supplemental briefs in accordance with MCR 7.312(E), addressing: (1) at what point does a claim for recovery of personal protection insurance benefits payable under the no-fault act accrue when an insurer providing those benefits is declared insolvent and another insurer is identified by the Michigan Property and Casualty Guaranty Association, see generally MCL 600.5827; *Frank v Linkner,* 500 Mich 133 (2017); *Titan Ins Co v North Point Ins Co*, 270 Mich App 339 (2006); (2) what statute-of-limitations period would apply to such a claim, see MCL 500.3145(1); MCL 600.5813; and (3) whether the appellant is an insurer in the chain of priority insurers, see former MCL 500.3114(4), as amended by 2002 PA 38; *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527 (2007); *Amerisure Ins Co v Coleman*, 274 Mich App 432 (2007).

To address these questions, the MPCGA initially highlights additional foundational points concerning the MPCGA's rights and responsibilities under the MPCGA Act, MCL §500.7901 *et seq*. (A copy of the entire MPCGA Act is attached as Exhibit A.) These points are central to the analysis of the Court's first two questions. Then, in specific detail, we address the question about accrual in Section A, the question about the statute of limitations in Section B, and the question about the "insureds" under Progressive Marathon Insurance Company's ("PMIC") policy in Section C. Finally, in the last section of this brief, we list the specific holdings that MPCGA contends appropriately follow.

SUPPLEMENTAL FOUNDATIONAL POINTS

The MPCGA is not a reinsurer that steps-in for an insolvent insurer under the No-Fault Act. Rather it is a limited safety net that was created by, and operates pursuant to, the MPCGA

[1] The MPCGA continues to rely on the points and authorities set forth in its previous Answer in Opposition to Defendant-Appellant's Application for Leave to Appeal, date November 28, 2022.

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Act. *See Mathis v Auto-Owners Ins Co*, 339 Mich App 471, 475; 983 NW2d 447 (2021) ("[W]hen the MPCGA satisfies 'covered claim' obligations of the insolvent insurers, it does so pursuant to the Guaranty Act, not the Worker's Disability Compensation Act or the No-Fault Act"). Its purpose "is to protect the public against financial losses to either policyholders or claimants due to the insolvency of insurers." *Yetzke v Fausak*, 194 Mich App 414, 418-19; 488 NW2d 222 (1992) "The act accomplishes this purpose by imposing a statutory duty on the MPCGA to pay *certain* obligations of insolvent insurers that constitute 'covered claims' as defined by MCL §500.7925." *Id*. In this sense, MPCGA's role "'is that of an insurer of last resort,' which persons can look to for coverage 'only if there is no other insurance company to turn to for coverage.'" *Mathis*, 339 Mich App at 477. In this respect, the MPCGA does not "step into the shoes of insolvent insurers." *Id*. at 477.

At issue in this case is MCL §500.7931(3), the MPCGA Act's "credit provision," which reduces the MPCGA's obligations in the event that there is other insurance to cover the insured or claimant (the "Credit Provision"). The Credit Provision provides in part that "[a]n amount paid to a claimant in excess of the amount authorized by this section may be recovered by an action brought by the [MPCGA]." MCL §500.7931(3). Thus, even if a claim is a "covered claim" under the MPCGA Act, and would otherwise be payable, the MPCGA is not obligated to pay it if there is another source of insurance to cover the claimant or insured. *Id.*; *Yetzke*, 194 Mich App at 422. The Credit Provision alters the ordinary order of priority among insurers, causing a secondary carrier to become primary if the primary becomes insolvent. For the MPCGA, the effect of this provision means that if any other insurance policy exists to cover a loss, that insurance pays first and the MPCGA only pays to the extent there are excess, unpaid benefits not covered by the other insurance policy.

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In addition to taking a credit, the MPCGA affirmatively may enforce its statutory rights in situations where it already has paid benefits that should have been paid by another insurer. Section 7918(2) provides that the MPCGA may "sue and be sued," and "**may use the courts to assert or defend any rights the association may have under this chapter**, to the extent necessary to fully exercise its right and perform its duties under, and to implement, this chapter." MCL §500.7918(2) (emphasis added). Additionally, the Credit Provision itself states that "[a]n amount paid to a claimant in excess of the amount authorized by this section may be recovered by an action brought by the association." MCL §500.7931(2). Thus, when the MPCGA pays benefits and subsequently learns that other insurance is available to the insured, it may seek to recoup those amounts from the other insurer, along with a judicial determination of priority going forward.

The MPCGA Act clearly creates a framework whereby the MPCGA has different obligations than would be the case if it simply "stood in the shoes" of the insolvent insurer. MCL §500.7931(3) (recognizing that the MPCGA's obligations may be "reduced" by this section). Merely because the MPCGA assumes ***rights*** of the insolvent insurer (Section 7931(2)), as well as certain rights of the insured (Section 7935)),[2] it does not follow that the MPCGA's overall role is the same or that its aggregate bundle of rights is coextensive. *Mathis*, 339 Mich App at 477 (MPCGA does not "step into the shoes of insolvent insurers").

Indeed, the plain language of the MPCGA Act makes clear that it creates *additional* rights

[2] Section 7931(2) of the MPCGA confirms that the MPCGA shall be a party in interest in all proceedings involving a cover claim, and that it "shall have the same rights as the insolvent insurer would have had if not in receivership." MCL §500.7931(2). Section 7935(2) states that an insured or claimant entitled to benefits shall be considered to have assigned to the MPCGA, "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, and any other rights the insured or claimant may have against another person for payment of the covered claim. MCL §500.7935(2).

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for the MPCGA that would never apply to the insolvent insurer in the first place. Further, the MPCGA Act limits the MPCGA's payment obligations to "covered claims," which is narrower than the scope of a claim that the insolvent insurer might have had to pay. *Metry v MPCGA*, 403 Mich 117, 119; 267 NW2d 695 (1978) (MPCGA's obligation is only to pay "covered claims"). "Covered claims" only apply to residents of this State, are those presented within the time frame set in the insolvent proceedings, were incurred before or within 30 days after a receiver is appointed, and arise from a policy on the last date on which the insolvent insurer was a member insurer in MPCGA. MCL §500.7925(1). "Covered claims" do not include payment of reimbursement or subrogation amounts due other insurers, claims to any person or entity with a net worth in excess of $25 million, payment of attorney fees or adjustment fees, or payments of more than $5 million. MCL §500.7925(2)-(7). Clearly, the scope of the MPCGA's obligations are more limited than those of the insolvent insurer, whereas it likewise has rights that the insolvent insurer would not.

Three important, foundational points are clear from the foregoing. First, the MPCGA's rights arise from the MPCGA Act, not the No-Fault Act. Second, the MPCGA Act changes the typical priority paradigm and *status quo* – for insureds, claimants, and other insurers alike. And third, the MPCGA's rights and obligations are not synonymous with those of the insolvent insurer.

With this supplemental background in mind, we turn to the Court's specific questions.

SUPPLEMENTAL ARGUMENT

A. Accrual: All claims arising out of the MPCGA Act logically may accrue no earlier than the date of a final order of insolvency and, in any given case, from the specific date when another available insurer rejects a demand to assume priority and payments to the underlying claimant or insured.

The first question posed by this Court concerns when a claim for recovery of benefits

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accrues once the MPCGA identifies another source of insurance to cover a claim.[3]

The accrual statute generally applicable to most actions states that ". . . the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL §600.5827. This Court recently stated in *Sunrise Resort Ass'n v Cheboygan County Road Comm'n*, ___ Mich ___; 2023 WL 4713823, *6 (July 24, 2023), that a claim accrues under Section 5827 when all of the elements of the cause of action have occurred and can be alleged in a proper complaint. *Id*. (citations omitted).

1. As a threshold matter, this Court should confirm that as to any given insolvency, no rights and obligations arising out the MPCGA Act accrue before the date of a final order of insolvency.

The accrual statute presupposes the existence of a "claim," which in turn presupposes that a party has rights in the first place that may be enforced by pursuing that claim in an appropriate forum.[4] Put simply, there can be no claim – let alone one that accrues – unless and until a party

[3] The Court phrased the question as follows: "[A]t what point does a claim for recovery of personal protection insurance benefits payable under the no-fault act accrue when an insurer providing those benefits is declared insolvent and another insurer is identified by the [MPCGA]." *Childers v MPCGA*, Order, May 26, 2023, p. 2. We understand the crux of the Court's question, of course, and have addressed it herein, but nonetheless state that, the MPCGA pursues claims pursuant to its authority under the *MPCGA Act*, not the No-Fault Act. See Section (B)(2), *infra*, Here, in its Complaint against Progressive as an "Intervening" Plaintiff, MPCGA cited and relied on the MPCGA Act as the source of its claim, and requested as relief: (a) an order declaring that Progressive was the highest order of priority to payment of Childers' claims going forward, and (b) an order requiring Progressive to reimburse the MPCGA monies it paid to or on behalf of the primary plaintiff.

[4] The term "claim" is not defined in the general accrual statute. Where a term is not defined by statute, courts "presume that the Legislature intended for the words to have their ordinary meaning." See, e.g., *Ford Motor Co v Treasury Dep't*, 496 Mich 382, 391; 852 NW2d 786 (2014) (citing MCL 8.3a; *Klooster v City of Charlevoix*, 488 Mich 289, 304; 795 NW2d 578 (2011). *See US Framing Int'l, LLC v Cont'l Real Est Cos*, No 356163, 2022 WL 4587375, at *4 (Mich App Sept. 29, 2022) (quoting *Merriam-Webster Collegiate Dictionary* (11th ed.); *Black's Law Dictionary* (11th ed.)) (where the parties' contract did not define "claim," **the term was construed to mean "a demand for something due or believed to be due" and/or "[t]he assertion of an existing right**; any right to payment or to an equitable remedy, even if contingent or provisional"). Also, all actions "must be prosecuted in the name of the real party in interest . . ." MCR 2.201(B)

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has rights in the first place that may be enforced via a judicial process.

Here, the MPCGA's rights and responsibilities with respect to a given matter do not exist until the MPCGA Act is triggered upon the insolvency of a member insured. It cannot, therefore, have *any* claim, related to *any* section of the MPCGA Act, at least until this point. This is a seemingly straightforward proposition, but PMIC's position has been that the MPCGA (and Childers) had one (1) year from the Childers accident to lodge a claim against PMIC, which would mean that the MPCGA's rights against PMIC accrued and expired before it even had them.

To resolve this case and potentially other similar disputes that could arise involving the MPCGA,[5] this Court should confirm as a threshold matter that, as to any given insolvency, no rights and obligations arising out of the MPCGA Act are operative before the date of a final order of insolvency.

In support of this point, the Court need look no further than the text of the MPCGA Act. It is framed entirely around articulating MPCGA's role in relation to that of an "Insolvent Insurer," which is expressly defined to mean an insurer "against whom a final order of liquidation has been entered with findings of insolvency by a court of competent jurisdiction." MCL §500.7921(a). It is at that moment that the MPCGA has rights and obligations, including that MPCGA "shall become a party in interest in all proceedings involving a covered claim." §500.7931(2). Thus, the date of a final order of insolvency is the very earliest date upon which the MPCGA has any rights

(excluding exceptions not relevant here). It is elemental that a "real party in interest" is the one who is vested with the right of action on a given claim. See, e.g., *Barclae v Zarb*, 300 Mich App 455, 483; 834 NW2d 100 (2013).

[5] As this Court is aware, PMIC has made similar arguments in a case called *Vann v MPCGA and PMIC*, which is pending in this Court pursuant to an application for leave to appeal. This Court has ordered that the *Vann* appeal be held in abeyance pending the out of the *Childers* case. See *Vann v MPCGA*, SC No. 164276, 990 NW2d 874 (June 9, 2023).

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whatsoever, let alone that could form the basis for a "claim" for the MPCGA to pursue if and when insurers like PMIC decline coverage post-insolvency. See generally *Young v Shull*, 149 Mich App 367, 373; 385 NW2d 789 (1986) (finding that MPCGA was responsible for the insolvent insurer's obligations on the date the order of insolvency became final). As explained in MPCGA's Answer in Opposition to PMIC's Application for Leave to Appeal, dated November 28, 2022, courts recognize that claims that arise by virtue of an insolvency do not accrue until the insolvent event itself occurs. *See* MPCGA's Answer, pp. 22-23 (citing cases in the uninsured motorist context from Michigan, Minnesota, Ohio, and Alabama).

For all of these reasons, the Court should hold as a threshold matter that any potential statutory claim arising out of the MPCGA Act accrues, at the earliest, as of the date a final order of liquidation is entered as to any given insolvent insurer.

2. Claims against other insurers based on rights and obligations created by the Credit Provision should not accrue until the other insurer has received and rejected a demand to assume coverage or, in the alternative, six months from the date of a final order of insolvency.

Turning to the Court's specific question about the type of claim at issue in our case, the answer is that a claim arising out of the Credit Provision should accrue at the point when "other insurance" is identified, the insurer is put on notice, and the insurer rejects a demand to step in and provide coverage. This is the logical point where all stakeholders are aware of the issue and, with respect to MPCGA or claimant, the "wrong upon which the claim is based" per MCL §600.5827 has occurred. It is at that point that the elements of a claim by the MPCGA "could be properly alleged in a complaint." *Sunrise Resort Ass'n*, 2023 WL 4713823, at *6.

This is what occurred in our case. As set forth in the list of Stipulated Facts for this dispute,[6]

[6] The Stipulated Facts are listed in the Court of Appeals' Decision. See *Childers and MPCGA v PMIC*, 2022 WL 4281572, *2-3 (Sept 15, 2022).

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American Fellowship was declared insolvent on June 12, 2013. PMIC was then notified of the insolvency in September 2013, PMIC denied coverage in October 2013, and Childers initially filed suit in November 2013. The MPCGA itself filed its Complaint as an Intervening Plaintiff on June 9, 2014. All stakeholders were put on notice and their rights and defenses were crystalized when PMIC denied the demand for coverage.

Like any person or entity, MPCGA may not sit on rights indefinitely and should act in a reasonable and prudent manner, consistent with the provisions and purpose of the MPCGA Act. The proffered accrual date above is consistent with this premise because the MPCGA has every incentive to pursue rights under the Credit Provision without delay in order to ensure that it is preserving its limited assets to handle other claims for which there is no other insurance.

Nonetheless, should the Court conclude that an accrual date factually linked to the insurer's denial is too imprecise, then, as an alternative, the Court should hold that such a claim accrues six (6) months from the date of a final order of insolvency. This deadline flows from a related time period established within a different provision in the MPCGA Act. MCL §500.7945. Specifically, Section 7945 states that pending lawsuits involving the insolvent insurer, to which the MPCGA may become a party in interest, are automatically stayed for six (6) months from the date of the order of insolvency. MCL §500.7945. The stay gives the MPCGA time to get organized and to address its substantive duties and rights. As noted by the Court of Appeals in *Young*, *supra*, "the purpose of §7945 is to provide the [MPCGA], not the insurer, with sufficient time to prepare a proper defense" in cases to which the MPCGA will be stepping in. *Young*, 149 Mich App at 373.

The procedural focus of Section 7945 reflects common sense in relation to what happens when an insolvency occurs. Upon an insurer's insolvency, the MPCGA needs time to coordinate with the respective officials (*i.e.*, the receiver) from a given state's Insurance Department, obtain

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files from the insurer or the receiver, gather information to assess the status of any individual claim files, pursue any statutory rights, and begin to pay and adjust underlying claims.[7] This is a significant undertaking that can be, despite everyone's best efforts, a disruptive and even chaotic period of time. This is why, for example, the Legislature granted the MPCGA the right to seek emergency judicial relief to secure the insolvent insurer's claims files, which MPCGA obviously needs to adjust and pay claims. MCL §500.7918(4). If the MPCGA has six months to prepare itself to become a "party in interest" in pending litigation involving the insolvent insurer, common sense extends that same period of time to assess its rights before they begin to accrue.

The same is true of an insured's claim against an insurer who, for the first time, assumes the higher level of priority because it is a source of "other insurance" under the Credit Provision. By way of example, prior to American Fellowship's insolvency, Childers arguably would not have had a claim against PMIC because it would not have had the underlying rights to pursue one. That changed when American Fellowship became insolvent; the MPCGA Act alters the rights and obligations of ***insureds*** as well as vests the MPCGA with rights as a party in interest. The insured assumes a new, statutory obligation under the Credit Provision to pursue and exhaust other available insurance; this is the flip side of MPCGA's right to rely on and pursue the existence of other insurance. MCL §500.7931(3). This is all part of a framework whereby insureds are protected

[7] Notably, the MPCGA is not unique in regard to this. The MPCGA is one association among a nationwide system of 50 state-based guaranty associations with similar missions. (Attached as Exhibit B is a chart with the name of the funds and cites to their enabling statutes, denoting the funds with "other insurance" clause). It is common that insolvent insurers will have written policies in numerous states, and so guaranty associations in all the impacted states will be triggered just like the MPCGA. The entirety of the guaranty association "system" is based on statutes similar to the MPCGA Act.

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by the MPCGA Act from the effects of an insurance company insolvency.[8]

Put simply, because the MPCGA is a creature of statute, any claims to enforce rights and responsibilities that arise under the MPCGA Act logically cannot accrue until after the MPCGA is involved pursuant to a final order of insolvency. The most apt accrual date for claims of the type at issue here is the date the "other insurer" declined coverage or, in the alternative, six months after the date of a final order of insolvency.

B. Statute of Limitations: The default six-year statute of limitations under MCL §600.5813 applies to the claims at issue in this case.

The Court's second question concerns the appropriate limitations period for claims brought against insurers like PMIC who are potential sources of "other insurance" due to an insolvency and pursuant to the Credit Provision of the MPCGA Act. This limitations period would begin to run from the date held by this Court to be the date of accrual. *See supra* Section A. The Court's May 26, 2023, Order cited the one-year period in the No-Fault Act, MCL §500.3145(1) and the default six-year period in MCL § 600.5813. There are three steps to analyze which should apply.

The **first** step is to review the text and plain meaning of MCL §500.3145(1). This provision does not refer to the MPCGA or address the type of recoupment action the MPCGA may bring when its statutory rights and obligations are triggered. It states as follows:

> Sec. 3145. (1) An action for recovery of personal protection insurance benefits payable under this chapter 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

[8] Of note, in cases where the Credit Provision applies, the insured is protected from the prospect of dueling rights by MPCGA and another insurer. MCL §500.7931(2) provides in part: "To the extent that the association's obligation is reduced by this section, the liability of the person insured by the insolvent insurer's policy shall be reduced in the same amount. An insurer . . shall not maintain an action against an insured of the insolvent insurer to recover an amount that constitutes a credit against a covered claim under this section." These provisions prevent a potentially circular result whereby (i) the MPCGA recoups payments from another insurer and/or takes a credit but then (ii) that other insurer (who steps in) itself seeks recovery of that same amount from the insured.

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> notice of injury as provided in subsection (4) 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.

See MCL §500.3145(1). On its face, Section 3145 is therefore not "directly applicable" to the MPCGA's claim for recoupment of amounts it has paid, let alone for a request for a judicial order determining priority going forward. *Titan Ins Co v Farmers Ins Exchange*, 241 Mich App 258, 263; 615 NW2d 774 (2000) (rejecting application of Section 3145 in a case where it was not "directly applicable" to the claim of one insurer against another). Section 3145 clearly applies to claims that exist pursuant to, and are brought under, the No-Fault Act. But claims based on different sources are not subject to this Section. This is true even if the claim *factually* relates to a PIP claim or an accident giving rise to one. *See, e.g.*, *Cooper v Auto Club Ins Ass'n*, 481 Mich 399; 751 NW2d 443 (2008) (rejecting argument that a fraud claim brought in relation to a dispute over PIP benefits was subject to one-year statute because the fraud claim was "conceptually distinct from a no-fault action").

Because the MPCGA derives its rights from the MPCGA Act, the **second** step is to review that statute. The MPCGA Act does not provide for any specific limitations period. See MCL §500.7901 *et seq.* This leaves the default duration of six (6) years pursuant to MCL §500.5813, which this Court has described as the statute of limitations application to actions "not otherwise provide[d] for." *Detroit v Walker*, 445 Mich 682, 705; 520 NW2d 135 (1994); *see also Titan*, 241 Mich App at 263. This statute reads in full:

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

MCL §600.5813.

The **third** and final step, therefore, is to determine that a "different period" for the MPCGA's claim is not provided for by any other statute. That is certainly the case.

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In sum, the respective statutes themselves confirm that Section 3145 of the No-Fault Act is not directly applicable, there is no other limitations period otherwise provided for, and the default six-year period is controlling.

1. Analogous case law supports MPCGA's position.

Courts have adhered to this textual and logical path in other instances involving statutory claims outside of the No-Fault Act. The legal framework concerning the Michigan Assigned Claims Facility is instructive. The Legislature created the "Assigned Claims Facility" as another statutory safety net for claimants seeking benefits in specific situations where "no personal protection insurance applicable" to a plaintiff's injury exists or can be ascertained. MCL §500.3301, *et seq*. (insurers writing business in Michigan must participate in the "Michigan automobile insurance placement facility"); *Spencer v Citizens Ins Co*, 239 Mich App 291, 119; 608 NW2d 113 (2000). Section 3172 of the No-Fault Act describes those situations where claimants may receive assigned-claims benefits from an insurer operating as an assignee pursuant to the Facility's authority. MCL §500.3172.

An assigned insurer that has paid benefits may seek reimbursement from another insurer upon discovery that the other insurer has coverage obligations and is higher in priority. *Allen v Farm Bureau Ins Co*, 210 Mich App 591; 534 NW2d 177 (1995). This implicates statute of limitations issues, akin to the dispute in our case. Indeed, the issue in *Allen* was whether a claim by the assigned claims insurer (Farm Bureau) against another insurer (Farmers) was barred by the one-year limitations period in Section 3145(1) of the No-Fault Act when Farm Bureau brought its third-party claim more than a year after the underlying accident. *Id*. Farmers argued that the one-year period applied because Farm Bureau sought recoupment of PIP benefits and that its rights essentially followed those of the underlying claimant. The court in *Allen* rejected this argument, holding that Farm Bureau's "**statutorily created right to reimbursement is independent of the**

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party to whom is paid benefits, here, plaintiff." *Id*. at 179 (emphasis added). The court then relied on another provision in the No-Fault Act regarding the Assigned Claims Facility to hold that a two-year statute of limitations applied to Farm Bureau's claim. *Id*. (referring to MCL 500.3175(3)).

Even though the MPCGA Act does not itself contain an express statute of limitations period for the MPCGA to enforce its rights, *Allen* is nonetheless instructive for three reasons. It further illustrates that the rights of statutorily created insurance organizations are independent of the rights of the claimants and/or insured to whom they protect. Additionally, it confirms that if the one-year period in Section 3145(1) applied, then the organization (or assigned insurer) seeking to enforce these statutory rights could be without a remedy against another insurer given the time lags and unique fact patterns that exist in the instances where a safety net such as the MPCGA or Assigned Claims Facility is needed. Finally, although courts must try to reconcile statutory provisions, where two statutes conflict and "one is specific to the subject matter while the other is only generally applicable, the specific statute prevails." *Allen*, 210 Mich App at 179. These points, and the logic underpinning *Allen*, apply with equal force in our case.

In addition to this case law concerning other statutorily-created funds, our situation is also analogous to cases concerning recoupment claims between insurers of equal priority. It is well settled that when an insurer has a claim arising out of the No-Fault Act and seeks reimbursement pursuant to it, it is not necessarily the case that the "claim automatically falls within the period of limitations provided for in subsection 3145(2)." *Titan Ins Co v Farmers Ins Exchange*, 241 Mich App at 262-63. Rather, in *Titan Ins Co v Farmers Ins Exchange*, the Court of Appeals held that Section 3154 was inapplicable to an action by one insurer against the other for reimbursement of PIP benefits paid to the claimant when they are equal in priority because such a claim arises out

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of separate, statutory rights and hence is not the type of claim covered by the one-year rule. Then, "[b]ecause there [was] no period of limitations directly applicable" to such a claim, the default six-year statute in MCL §600.5813 applied. *Id*. at 263. The court also noted that the purpose of the no-fault insurance system was to protect insureds and victims of accidents, and that recognizing a six-year statute of limitations is not at odds with the objective. *Id*. at 262; *see also Auto Club Ins Ass'n v Farm Bureau*, 2021 WL 4395283 (Mich App Sept 23, 2021) (statutory claims between insurers of equal priority are not subject to the one-year limitations period). This is a point with which PMIC itself has litigated and agreed. *Coleman v Progressive Mich Ins Co*, 2020 WL 4724611 (Mich App, Aug 13, 2020) (agreeing with PMIC that it had six (6) years to bring its recoupment claim against another insurer).

As the Court of Appeals below acknowledged, the rule is different when an insurer is seeking recoupment under a subrogation model, *i.e*., merely standing in the shoes of an insured and seeking subrogation from another higher priority insurer. *Childers*, 2022 WL 4281572, *6 (Mich App Sept 15, 2022). The Court of Appeals cited (and distinguished) the rule discussed in *Titan Ins Co v North Pointe Ins Co*, 270 Mich App 339, 343-44; 715 NW2d 324 (2006), and obviously found it inapplicable for all the reasons stated above. This Court likewise referenced *Titan v North Point Ins Co*, in its May 26, 2023, Order. The *Titan v North Point Ins Co* decision did not concern the MPCGA Act, the enforcement of statutory rights outside of the No-Fault Act, and was primarily focused on arguments concerning equitable tolling. It has no meaningful bearing on the fact pattern and legal paradigm presented in our case.

In sum, the statutes and analogous case law confirm that the MPCGA's rights exist – and may be enforced – pursuant to the MPCGA Act, *not* the No-Fault Act. Because the one-year period in Section 3145 does not apply and there is no express statute of limitations in the MPCGA Act,

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then the default six-year statute of limitations under MCL §600.5813 governs.

2. The Court should reject arguments predicated on the incorrect premise that MPCGA's claim is a subrogation action and/or that it merely stands in the shoes of the insolvent insurer.

PMIC's response to the foregoing has been to try and reframe the issues and the nature of MPCGA's claim. PMIC's position essentially presupposes that this is a basic subrogation action under the No-Fault Act and that because MPCGA obtains rights of the insolvent carrier to process claims, it also acquires **all** of the insolvent carrier's obligations, which PMIC argues includes the "obligation" to seek judicial relief within one (1) year pursuant to Section 3145 of the No-Fault Act.

This argument fails first and foremost due to the plain language of the respective statutes. Clearly, as noted above in the section with Supplemental Foundational Points, the MPCGA is a creature of statute and derives its rights and responsibilities from the MPCGA Act, not the No-Fault Act. Indeed, MPCGA is not standing in the shoes of American Fellowship, which itself would have been higher in priority had it remained solvent and arguably not had a recoupment claim against PMIC. Nor is MPCGA merely asserting the rights of the insured, as its subrogee. In our case, the MPCGA is pursuing rights vested with it *directly* under the Credit Provision, not the rights of others. The same is true of Childers given that the Credit Provision vests rights and responsibilities with him. The Court of Appeals below clearly understood this concept, and correctly determined that the "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." *Childers*, 2022 WL 4281572, *6 (Mich App Sept 15, 2022) ("MPCGA's right to proceed against PMIC flows from its authority to file a claim for reimbursement from another insurer in the chain of designated priority insurers"). A contrary argument is not supported by the text of the MPCGA Act and, at best, conflates the notion of the

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MPCGA acquiring the **rights** of the insolvent carrier with the notion that it has inherited ***all*** **of its obligations**. This Court may not do so because, as explained throughout this Brief, the latter is simply not true. Accepting PMIC's position, therefore, would require the Court to ignore the text of the MPCGA Act and the limited role the MPCGA has within the insurance framework.[9]

Next, PMIC's argument leads to an absurd result, in that it would mean that the MPCGA is no different than an insurer and indeed, one that is *higher* in priority than PMIC. The MPCGA Act provides that the opposite is true. Certainly, the MPCGA may avail itself of all an insolvent insurer's defenses, but the MPCGA may simultaneously rely on additional statutory limits created by the MPCGA Act as well. That is precisely its role in the statutory framework. *See also Mathis*, 339 Mich App at 478-79 (noting conflict between the MPCGA Act and the No-Fault Act as to MPCGA's right to rely on the Credit Provision and resolving conflict in favor of the MPCGA Act).

All of this is why the MPCGA's role has been described as "an insurer of last resort." *ACIA v Meridian Mut Ins Co*, 207 Mich App 37, 41; 523 NW2d 821 (1994). Indeed, the Court in *Meridian* expressly considered the question of whether the MPCGA was "little more than a reinsurer who assumes all the obligations of an insolvent insurer or an insurer of last resort who assumes the obligations of an insolvent insurer only when the insured has nowhere else to turn." *Id.* at 40. The Court of Appeals in *Meridian* accurately explained the MPCGA's relation to the Credit Provision as follows:

> This statutory provision, in our opinion, reflects a statutory intent that an insured must first look to other possible insurance coverage before looking to the MPCGA for payment of the obligations of an insolvent insurer. **That is, this statutory**

[9] "[T]he purpose of statutory construction is to discern and give effect to the intent of the Legislature." *Adanalic v Harco National Ins Co*, 309 Mich App 173, 179; 870 NW2d 731 (2015). The Court should first look to the language of the statute in a manner consistent with the intent of the Legislature. *Id*.

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> **provision reflects an intent by the Legislature to make the MPCGA an insurer of last resort rather than merely a reinsurer who simply assumes the obligations of an insolvent insurance company**.

Id. Another instructive case is *Felsner v McDonald Rent-A-Car*, 173 Mich App 518; 434 NW2d 178 (1988), in which the Court of Appeals held that Section 7931(2) "imposes no burden on the association, but rather, gives it the right" to rely upon the same defenses the insolvent insurer could have relied upon when handling a claim or defending litigation. *Id*. at 522-23. The Court should reject PMIC's effort to render large swaths of the MPCGA Act nugatory by making the MPCGA little more than a reinsurer or subrogee.

MPCGA's position is not only legally accurate, but also grounded in the real world of how insolvencies work. The MPCGA needs time following an insolvency to obtain claim files, send information requests to claimants, assess data, and pursue its statutory rights. An insolvency may be an unforeseen and chaotic event. Unlike many bankruptcies, where a debtor might have a relatively limited and defined number of creditors, an insurance company insolvency potentially implicates the rights and claims of thousands upon thousands of individual policyholders. Enforcing a one-year statute of limitations via the No-Fault Act is inconsistent with this challenging reality. Again, this is a reason why the MPCGA Act expressly states that the MPCGA is not subject to other chapters of the insurance code to the extent there is a conflict. MCL §500.7911(3); *Mathis,* 339 Mich App at 475-76. Thus, the "subrogation" concept ignores the Legislature's intent to empower the MPCGA to provide a basic safety net for Michigan insureds, while doing so under significant practical constraints and with limited resources. In this respect, and as noted above, it is noteworthy that the MPCGA is among a nationwide system of state-based guaranty funds and associations, which of whom has a similar mission to the MPCGA for the insured residents in their given states. See Exhibit B (Chart). To suggest that the claim against PMIC simply represents a routine insurer-subrogation paradigm subject to the one-year rule in the

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No-Fault Act turns a blind eye to the entirety of a unique and decades-old statutory safety net.

3. The Court should likewise reject PMIC's circular argument as to whether other insurance is "available" given that the Childers' accident occurred more than a year prior to the claims at issue.

Related to both the accrual and the statute of limitations questions, PMIC has argued that the Credit Provision cannot apply because benefits in this case are not "recoverable." MCL §500.7931(3). Its argument is that benefits are not recoverable *to Childers* because PMIC received notice of the claim more than one year after the accident occurred. But obviously this is wrong, as well as circular, for all of the reasons stated above. If accepted, this argument would lead to an absurd result. Consider that absent the insolvency, Childers would have had no reason to pursue other potential insurers for coverage. PMIC's position on the one-year rule would require a claimant, like Childers, to put every possible insurer, no matter how remote, on notice within that first year just in case his primary insurer ever was declared insolvent. This makes little sense and was not intended by the Legislature when contemplating a post-insolvency paradigm under the MPCGA Act.

C. PMIC Insureds: The *Coleman* and *Dobbeleare* cases support MPCGA's argument that PMIC is a source of "other available" insurance.

The Court's last question concerns whether PMIC is another source of available insurance given the particular facts at issue in this case. Specifically, the parties disagree on whether Shaina Groulx is deemed a contractual "insured" under the PMIC policy at issue due to her status as a "resident relative" of Matthew Groulx at the time of the accident and that she suffered "bodily injuries in the accident." In relation to this question, the Court referred the parties to the cases of *Amerisure Ins Co v Coleman,* 274 Mich App 432; 733 NW2d 432 (2007) and *Dobbelaere II v Auto-Owners Ins Co*, 275 Mich App 527; 740 NW2d 503 (2007) in its May 26, 2023, Order.

PMIC characterizes the holdings in these cases as supporting a proposition that insurers

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must have agreed to "assume the risk" of covering a given individual. While accurate to a point, PMIC misses the more fundamental aspect of this holding, which is that the risks an insurer "assumes" are *based on what its policy provides*. In other words, *Coleman* and *Dobbelaere* ultimately just underscore the principle that whether the issuer of a policy is the insurer for a household family member depends on the language of the relevant policy. *Coleman* at 436, n 1; *Dobbelaere* at 532-34. As the Court of Appeals noted below, "because *Coleman* and *Dobbelaere* clarify that whether MCL 500.3114(4) applies to an insurer depends on how the insurer's policy defines the terms 'insured,' we must examine the relevant policy language to determine if Shaina is an insured person." *See Childers and MPCGA v PMIC*, 2022 WL 4281572, *8-9 (Sept 15, 2022) (relying on *Coleman* and *Dobbelaere*). Moreover, these cases did not alter the well-settled rules that insurance covers individuals, not vehicles, and that an individual who is a vehicle owner might be otherwise uninsured, but still qualify as a contractual insured person for purposes of the priority statute in MCL §500.3114(4). *Id*.

Thus, far from setting forth some amorphous rule that insurers only cover those "risks" they assume, the courts in *Coleman* and *Dobbelaere* focused their analysis on the words and plain meaning of the underlying policies. In *Coleman*, for example, the court noted that the policy defined "insured" as including "you or any family member[,]" so the plaintiff's uncle, who resided with the policyholder was a contractual insured for purposes of the priority statute. The court in *Dobbelaere* noted that the underlying policy did not define who was an insured for purposes of the no-fault endorsement. As a result, the court declined to hold that the individual at issue was a contractual insured.

In both instances the policy language drove the result. This is the very point the MPCGA and Childers have made throughout this litigation. In short, these two cases support the MPCGA's

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argument that Ms. Groulx is a contractual "insured" given her status as a resident relevant of the policyholder. The Court of Appeals below clearly considered these two cases carefully and agreed. Because we addressed the specific policy language at issue in PMIC's policy in considerable detail in MPCGA's initial Answer to PMIC's Application for Leave to Appeal, we do not do so again here. In short, however, the language in PMIC's policy is similar to that at issue in *Coleman* and is different from the fact-pattern in *Dobbelaere*. The Court should therefore affirm the decision of the Court of Appeals in this regard.

REQUESTED RELIEF AND HOLDINGS

The Court should hold as follows:

1. The MPCGA's rights and duties arise out of the MPCGA Act and MPCGA's claims in relation to the Credit Provision accrue on the date another insurer denies a demand for coverage or, in the alternative, six months after the date of a final order of insolvency;
2. The six-year statute of limitations under MCL §600.5813 applies to claims arising out of the Credit Provision in the MPCGA Act; and
3. PMIC's policy covers Shaina Groulx as a contractual insured and hence, PMIC is another source of "other insurance" for purposes of the claims against it in this case.

The MPCGA believes that each holding is accurate and such that the Court of Appeals' decision should be affirmed.

It is logically possible, however, that this Court could rule in MPCGA's favor on points 1 and 2, but nonetheless rule against it on point 3 based on this Court's own analysis of the PMIC policy. If that were the case, the MPCGA nevertheless requests that the Court articulate the holdings in points 1 and 2 in order to clarify the law and principles that apply to the MPCGA following the insolvency of a member insurer.

Dated: August 24, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to MCR 7.312(A) and MCR 7.212(B), I hereby certify that Intervening Plaintiff-Appellee Michigan Property & Casualty Guaranty Association's Supplemental Brief In Opposition To Defendant-Appellant's Application For Leave To Appeal contains 7,237 countable words, including headings, footnotes, and quotations, and excluding the caption, tables, and signature blocks. These counts were prepared with reliance on the word-count function of the Microsoft Word processing system used to prepare the brief.

Dated: August 24, 2023

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STATE OF MICHIGAN

IN THE SUPREME COURT

SUSAN CHILDERS, as Conservator for JUSTIN CHILDERS, a legally incapacitated person,

Plaintiff-Appellee,

and

MICHIGAN PROPERTY & CASUALTY GUARANTY ASSOCIATION,

Intervening Plaintiff-Appellee,

v.

PROGRESSIVE MARATHON INSURANCE COMPANY,

Defendant- Appellant.

Supreme Court No. 164953

Court of Appeals No: 356914 and 356915

Genesee County Circuit Court No: 13-101626-NF

CERTIFICATE OF SERVICE

I hereby certify that August 24, 2023, my assistant served the foregoing document upon counsel via the Court's MiFile e-filing system, which will send notice to all counsel of record.

Dated: August 24, 2023

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