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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

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BRIEF AMICUS CURIAE FOR THE COALITION PROTECTING AUTO NO-FAULT (CPAN)

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

More commonly known as CPAN, the Coalition Protecting Auto No-Fault was founded in 2003 by 26 professional associations to: (1) advance their strongly held belief that it was in the public interest to preserve Michigan's model No-Fault insurance system; and (2) ensure that the auto insurance industry kept the promise made to Michigan citizens when the No-Fault Act was passed.

Originally, CPAN membership consisted of 11 consumer groups and 15 major medical groups, representing constituencies with widely divergent political views. Despite their differences, these associations united behind the common objective of protecting the rights of no-fault patients and providers. In 2009, CPAN opened membership to the general public and now includes consumers, individual professionals, and private businesses, as well as professional organizations.

The members of CPAN now number over 1,000 and include the Michigan Association for Justice, Michigan State Medical Society, Michigan Osteopathic Association, Michigan Association of Chiropractors, Eisenhower Center, Michigan Brain Injury Provider Council, Michigan Dental Association, Michigan Home Care and Hospice Association, Michigan Rehabilitation Association, Spectrum Health System, Michigan Assisted Living Association, Michigan Orthotics and Prosthetics Association, Brain Injury Association of Michigan, Mary Free Bed Rehabilitation Hospital, ATPA

[1] Pursuant to MCR 7.212(H)(4), no counsel for any party in this case authored this brief in whole or in part or contributed money to fund the preparation or submission of this brief.

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Michigan, Michigan Protection and Advocacy, Michigan Paralyzed Veterans of America, Michigan Disability Rights Coalition, Peckham, NeuroRestorative of Michigan, Special Tree, Origami Rehabilitation, PharmaScript, Hope Network Neuro Rehabilitation, Lighthouse Neuro Rehabilitation, Rehab Without Walls, Siporin & Associates, The Recovery Project, and other stakeholders, individuals, accident survivors, family members, and care providers. CPAN pursues its mission on all fronts, including public education (town halls, roundtable events, seminars, and information resources), working with the Legislature, monitoring regulatory activity, and advocating the views of its members in our appellate courts. CPAN has appeared as amicus curiae in approximately 40 appellate cases addressing a variety of No-Fault issues vital to its members. See https://protectnofault.org/legal-efforts.

The accrual issue raised in this appeal is of great importance to CPAN because it creates a need to re-affirm the distinction between when the right to no-fault benefits "*vests*" versus when a claim for no-fault benefits "*accrues*." CPAN's position on this issue is that the two are separate events. A *right* to benefits ***vests*** when the accident occurs. Whereas, a benefit *claim* ***accrues*** when an allowable expense is incurred. Once a right to claim lifetime benefits under a no-fault policy vests, it must be considered forever vested—***regardless of whether the obligation to pay those benefits shifts to another entity due to the subsequent insolvency of the insurer.*** Therefore, a legacy claimant's vested right to unlimited lifetime PIP benefits under a pre-PA 21/22 no-fault policy should be forever vested, regardless of any subsequent insolvency of the no-fault insurer that issued that policy.

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INTRODUCTION

This Brief is being filed on behalf of the **Coalition Protecting Auto No-Fault (CPAN)** pursuant to this Court's May 26, 2023 Order, in which this Court directed that supplemental briefing be filed that addresses:

> *(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 I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court. May 26, 2023 t0523 2 Clerk the Michigan Property and Casualty Guaranty Association, see generally MCL 600.5827; Frank v Linkner, 500 Mich 133 (2017); Titan Ins Co v North Pointe 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).*

In issuing the foregoing Order, this Court further invited various organizations, including CPAN, to file briefs amicus curiae. This brief is being filed pursuant to that invitation and addresses the first of these three issues.

With regard to that issue, it is CPAN's view that when deciding the question of when a claim accrues in cases where an insurer has become insolvent, it is of great importance that this Court does so in a way that (1) reaffirms the longstanding recognition that the concept of when a *claim* for allowable expense benefits "*accrues*" is critically distinct from the concept of when the *right* to receive those benefits originally "*vests*"; and (2) clearly establishes that the insolvency of an insurer does not in any way affect the vested right of entitlement to lifetime unlimited PIP benefits for legacy claimants drawing benefits under a no-fault policy issued before the passage of PA 21/22.

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As will be discussed in **Argument I** of this brief, it has long been recognized that a person's right to receive no-fault PIP benefits "*vests*" at the time of the accident. Whereas a claim for no-fault PIP benefits does not "*accrue*" until an allowable expense is incurred by the claimant. This clear distinction should be reaffirmed by this Court when rendering its holding on the accrual question at issue in the case at bar.

As will be discussed in **Argument II,** once the right to receive lifetime no-fault PIP benefits under a no-fault policy "*vests*" it is forever vested. It therefore must follow that in situations where the insurer responsible for paying unlimited lifetime benefits becomes insolvent, the claimant entitled to those benefits must still be entitled to claim full lifetime unlimited PIP benefits from the Michigan Property & Casualty Guarantee Association (MPCGA) or from a lower or equal priority insurer following the insolvency.

As will be discussed in **Argument III,** should the Court render a decision on the accrual issue in this case without recognizing the critical distinction between when the right to claim benefits initially "*vests*" and when a subsequent claim for an allowable expense benefits is considered to have "*accrued,*" it could result in these concepts being conflated by the bench and bar in cases involving insolvent insurers. Should these concepts become improperly conflated, it could lead to situations where legacy claimants are improperly refused payment of lifetime legacy benefits under policies issued before the passage of PA 21/22.

WHEREFORE, for the foregoing reasons as more fully discussed herein, CPAN hereby requests that in rendering its decision on the accrual issue raised in this appeal, this Court does so in a way that also (1) reaffirms the distinction between when the right

to claim PIP benefits initially "*vests*" and when a claim for benefits later "accrues"; and (2) confirms that the vested right of legacy claimants to receive lifetime unlimited benefits is not extinguished by the subsequent insolvency of the insurer who was originally responsible for paying those benefits under a policy issued before the passage of PA 21/22

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LAW AND ARGUMENT

I. In rendering its decision on the accrual issue raised in this appeal, this Court should make it clear in its decision that the question of when a claim "*accrues*" is separate and distinct from the question of when the right of entitlement to benefits originally "*vests*."

A. The right to receive no-fault PIP benefits "*vests*" at the time of the accident, whereas a claim for a particular benefit does not "*accrue*" until an expense is incurred for that benefit.

It has long been understood that the right of entitlement to personal protection insurance benefits becomes fully vested as soon as the claimant is injured in an accident. This longstanding recognition was recently reaffirmed in this Court's landmark decision of *Andary v USAA Cas Ins Co*, __ Mich __ (2023)(July 31, 2023; Docket No. 164772). Specifically, in *Andary,* this Court reiterated that the right to receive no-fault PIP benefits vests at the time of the accident. In this regard, this Court clearly recognized on page 15 of its Opinion that:

> *It has long been the rule in Michigan that for insurance purposes "[t]he rights and obligations of the parties vest[ ] at the time of the accident." Clevenger v Allstate Ins Co, 443 Mich. 646, 656, 505 N.W.2d 553 (1993), citing Cason v Auto Owners Ins Co, 181 Mich App 600, 609, 450 N.W.2d 6 (1989); Madar v League Gen Ins Co, 152 Mich App 734, 742, 394 N.W.2d 90 (1986); see also Detroit Auto Inter-Ins Exch. v Ayvazian, 62 Mich App 94, 233 N.W.2d 200 (1975). For purposes of a no-fault policy of insurance, this clear statement of law means that neither the insured nor the insurer can unilaterally change the terms of a policy after a covered accident occurs. This rule is based on a longstanding principle of insurance law that the "'liability of the insurer with respect to insurance ... becomes absolute whenever injury or damage covered by such policy occurs.' "17 Madar, 152 Mich App at 742, 394 N.W.2d 90, quoting 1 Long, The Law of Liability Insurance, § 3.25, pp. 3-83-84.*

On this basis, this Court held in *Andary* that the claimants' right to claim benefits in that case *"vested, at the latest, when their injuries occurred and they first became eligible for*

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PIP benefits. This is also when the insurers' legal obligation to pay PIP benefits for all reasonable and necessary medical expenses at the statutorily mandated minimum level, as incorporated into the insurance contract, was triggered." Id. at *15.

Importantly, the concept of when the right to receive PIP benefits "*vests*" is altogether different than the concept of when a particular claim for an allowable expense accrues. In that regard, Michigan cases have long recognized that *"[u]nder the no-fault act, PIP benefits accrue not when the injury occurs but as the allowable expense . . . is incurred." Karmol v. Encompass Prop. & Cas Co.,* 293 Mich. App. 382, 389; 809 N.W.2d 631 (2011), quoting MCL 500.3110(4). Cases further recognize that *"a claimant 'incurs' an expense when he or she becomes 'liable' for the cost." Id.* at 390. On this basis, it has been held that *"[u]ntil the expense is incurred, the insured's entitlement to benefits does not accrue and the insurer's liability to pay the claim does not attach." Allard v. State Farm Ins. Co.,* 271 Mich. App. 394, 400; 722 N.W.2d 268 (2006)

Accordingly, because the question of when a claim for benefits "*accrues*" narrowly focuses on when a particular allowable expense benefit may be claimed from a no-fault insurer, it is a question that is wholly distinct from the question of when a claimant's original right to receive benefits initially vested.

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II. Once the right to receive no-fault PIP benefits initially "*vests*," it is forever vested; therefore, in situations where the insurer responsible for paying lifetime unlimited benefits becomes insolvent, the claimant entitled to those benefits must still be entitled to claim lifetime PIP benefits from the Michigan Property & Casualty Guarantee Association (MPCGA) or from a lower priority insurer.

A. Once the right to receive no-fault PIP benefits initially "*vests*," it must be viewed as being forever vested.

A legacy claimant's right to draw unlimited lifetime PIP benefits ultimately arises under an insurance policy issued to the claimant directly, or issued to another person under terms that require payment of benefits to someone else under the priority provisions of MCL 500.3114. In all such cases, that policy was issued in exchange for a premium—the amount of which was based on the calculated risk of paying benefits to a person named in the policy, as well as to persons entitled to benefits under the policy pursuant to the priority provisions of MCL 500.3114. Thus, an insurer's obligation to pay lifetime PIP benefits is always contractual in nature.

The contractual nature of these rights was made clear by this Court in the case of *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520; 502 NW2d 310 (1993). There, this Court noted:

> *The policy and the statutes relating thereto must be read and construed together* ***as though the statutes were a part of the contract,*** *for it is to be presumed that the parties contracted with the intention of executing a policy satisfying the statutory requirements, and intended to make the contract to carry out its purpose.*

Rohlman, supra at 525, n. 3

Accordingly, under *Rohlman,* there is no meaningful difference between the rights claimants have under the no-fault act and rights that arise under the no-fault policy under

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which they are drawing benefits. Rather, any rights they may have under the act "were a part of the contract." *Rohlman, supra* at 525, n. 3. This view was also expressed by this Court in the case of *Bazzi v Sentinel Ins Co,* 502 Mich 390, 919 NW2d 399 (2018). In *Bazzi,* this Court clearly recognized that where a policy provision is required by statute, "*the policy and the statute must be construed together as though the statute were part of the policy.*" *Id.* at 99.). See also *Yang v Everest Nat Ins Co*, 507 Mich 314, 321; 968 NW2d 390 (2021).

When it is properly understood that a legacy claimant's rights arise under a contract for insurance, Michigan appellate cases interpreting those rights unavoidably confirm that once those rights became vested (i.e., at the time of the accident) they became forever vested.

Indeed, this Court held in *Campbell v Judges' Retirement Board*, 378 Mich 169, 180; 143 NW2d 755 (1966), "*vested rights acquired under contract may not be destroyed by subsequent State legislation or even by amendment of the State Constitution.*" Consistent with this rule, Court of Appeals cases have also recognized repeatedly that, "*[r]ights created under an insurance policy become fixed as of the date of the accident.*" *Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 729; 635 NW2d 52 (2001); see also *Hobby v Farmers Ins Exchange*, 212 Mich App 100, 184; 537 NW2d 229 (1995); *Cason v Auto Owners Ins Co*, 181 Mich App 600, 609; 450 NW2d 6 (1989); *Madar v League Gen Ins Co,* 152 Mich App 734, 742; 394 NW2d 90 (1986).

When it is properly understood that once a legacy claimant's right to lifetime benefits becomes forever vested at the time of the accident, it then must follow for the reasons set forth in Argument II-B below that when the insurer responsible for paying

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those lifetime PIP benefits becomes insolvent, legacy claimants drawing benefits from that insurer must still be able to claim lifetime benefits from the MPCGA or a lower priority insurer.

B. In the event that the insurer responsible for paying PIP benefits becomes insolvent, legacy claimants drawing benefits from that insurer must still be able to claim unlimited lifetime benefits from the MPCGA or a lower-priority insurer.

When a no-fault insurance company becomes insolvent, the responsibility for paying benefits owed under policies issued by that insolvent insurer is transferred to the Michigan Property & Casualty Guarantee Association (MPCGA), or to the insurer that is next in the order of priority under MCL 500.3114. As was recognized by the Court of Appeals in the case at bar, the transfer of these obligations is governed by statute. As was explained on pages 8-9 of the Court of Appeals' September 15, 2022 Opinion and Order below:

> *[The] 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 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*

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reinsurer, and the guaranty act "is not designed for the purpose of the MPCGA to step into the shoes of insolvent insurers." Id.

Accordingly, the statutory schemata establishing the MPCGA operates in a way that ensures the continued payment of all insurance benefits that a claimant is entitled to under a policy of insurance issued by an insurer that subsequently becomes insolvent. Once the original insurer responsible for paying benefits becomes insolvent, it must be determined whether the benefits at issue are payable by lower lower-priority insurer under MCL 500.3114. If a lower priority insurer is responsible for paying those benefits under some other policy of insurance, then the obligation to pay the benefits that the claimant has a vested right to receive transfers to that insurer. If there is no lower-priority insurer that is responsible for assuming that obligation, then the obligation to pay benefits is assumed by the MPCGA.

Importantly, in all such cases where a person is drawing benefits from a no-fault insurer that becomes insolvent, the claimant's right to those benefits became vested long before the insurer became insolvent (i.e., at the time of the accident). The mere fact that the insurer became insolvent after that right vested in no way extinguishes that right. To the contrary, the Guaranty Act of MCL 500.7901 *et seq.* effectively provides for the continuation of that right by transferring the obligation to honor that right to either the insurer of lower priority or to the MPCGA.

Accordingly, in the event that the insurer responsible for paying lifetime PIP benefits becomes insolvent, legacy claimants drawing benefits from that insurer must still be able to claim lifetime benefits from the MPCGA or a lower-priority insurer.

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III. It is of great importance that when this Court issues its decision on the accrual issue, it should do so in a manner that (1) reaffirms the distinction between when the right of entitlement to PIP benefits initially "*vests*" and when a claim for benefits "*accrues*"; and (2) confirms that the insolvency of an insurer does not extinguish a legacy claimant's already-vested right to lifetime unlimited PIP benefits.

While the accrual issue here narrowly relates to the question of when a claim against the MPCGA accrues, it is nevertheless important for this Court to render a holding on that question in a manner that reaffirms the distinction between when a claimant's right to claim benefits originally "*vests*" (i.e., at the time of the accident), and when a subsequent claim for an allowable expense benefit later "*accrues*" (i.e., when that expense is incurred). Reaffirming that distinction in the instant context will ensure that the accrual holding rendered here cannot be misconstrued in a way that is used to terminate the vested rights of legacy claimants who drew benefits under a pre–PA 21/22 policy issued by an insurer who became insolvent.

While a holding on the accrual question raised here should reasonably not be expected to be misconstrued in such a way, the fact that those accrued benefits will no longer be drawn from the original pre-PA21/22 policy could give rise to the possibility that it will. This possibility can be eliminated, however, by the rendering of a holding that: (1) reaffirms the distinction between when the right to claim PIP benefits initially "*vests*" and when a claim for benefits later "*accrues*"; and (2) confirms that the vested right of legacy claimants to receive lifetime unlimited benefits is not extinguished by the

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subsequent insolvency of the insurer who was originally responsible for paying those benefits under a policy issued before the passage of PA 21/22.

CONCLUSION AND REQUEST FOR RELIEF

WHEREFORE, for the foregoing reasons, CPAN hereby requests that in rendering its decision on the accrual issue raised in this appeal, this Court does so in a way that also (1) reaffirms the **distinction between when** the **right to claim** PIP **benefits** initially "***vests***" **and when a claim for benefits later** "***accrues***"; and (2) confirms that the vested right of legacy claimants to receive lifetime unlimited benefits is not extinguished by the subsequent insolvency of the insurer who was originally responsible for paying those benefits under a policy issued before the passage of PA 21/22.

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