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STATE OF MICHIGAN
IN THE SUPREME COURT

WILLIE GRIFFIN, Plaintiff/Appellant v TRUMBULL INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, MICHIGAN ASSIGNED CLAIMS PLAN, Defendants/Appellees.	Supreme Court Case No. 162419 Court of Appeals Case No. 344272 Wayne County Circuit Court Case No. 17-006082-NF Hon. Susan L. Hubbard

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DEFENDANT-APPELLEE MICHIGAN ASSIGNED CLAIMS PLAN'S RESPONSE TO PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF BASIS OF JURISDICTION

Defendant-Appellee Michigan Assigned Claims Plan ("MACP")[1] agrees that Plaintiff-Appellant Willie Griffin's Application for Leave to Appeal the September 24, 2020 Court of Appeals opinion was timely filed pursuant to MCR 7.305.

[1] The MACP is not an entity that can be sued, as it is a plan. The Michigan Automobile Insurance Placement Facility ("MAIPF") as the administrator of the MACP can be sued. Thus, the MACP was improperly named in this suit.

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether a lower-priority insurer, who was provided timely notice under MCL 500.3145(1), can be held liable for personal protection insurance benefits under the no-fault act if the higher-priority insurer was not identified until after the one-year statutory notice period under MCL 500.3145(1) expired.

Plaintiff-Appellant would answer:	Yes
Trumbull Insurance Company answers:	No
The Michigan Assigned Claims Plan answers:	Yes
The Circuit Court would answer:	No
The Court of Appeals would answer:	No
This Court should answer:	Yes

II. Whether the insured must prove that he or she exercised reasonable, due, or some other degree of, diligence in searching for the higher-priority insurer.

Plaintiff-Appellant would answer:	No
Trumbull Insurance Company answers:	Yes
The Michigan Assigned Claims Plan answers:	Yes
The Circuit Court would answer:	Yes
The Court of Appeals would answer:	Yes
This Court should answer:	Yes

III. Whether the Appellant exercised the requisite degree of diligence in searching for the higher-priority insurer.

The MACP has not addressed this issue as Plaintiff did not appeal the Court of Appeals' ruling with respect to his claim against the MACP. Accordingly, the specific facts of this case are inconsequential as it pertains to the MACP.

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INTRODUCTION

Because Plaintiff has not appealed the Court of Appeals ruling as to his claim against the Michigan Assigned Claims Plan ("MACP"), Plaintiff's Supplemental Brief analyzes the issues set forth by this Court for supplemental briefing divorced from the MACP context. However, these issues, if considered by this Court, must bear in mind the effect of any ruling on the MACP and its administrator, the Michigan Automobile Insurance Placement Facility ("MAIPF"). This Court should deny Plaintiff's Application for Leave to Appeal because the issues do not meet the requirements of MCR 7.305(B) for the following reasons: ***First***, Michigan's jurisprudence demonstrates a long history of requiring lower-priority insurers to cover claims where a higher-priority insurer is either not identified or where there is a priority dispute. Thus, there is no important unresolved issue for this Court to review.

Second, all plaintiffs, whether a No-Fault claimant or otherwise, have an implicit duty to protect their own rights with respect to their claim. Whether a claimant must perform due diligence in a medical malpractice case or merely identify an insurer timely to avoid the running of a limitations period, it axiomatic that all litigants must take steps to ensure their interests are protected. The policy considerations of the Legislature in enacting the No-Fault Act is no justification for failing to do so. Thus, the Court of Appeals ruling was not erroneous and there is no need for this Court to consider crafting any new rule.

Third, and for the same reason, there is no need to fashion a rule that is any different from the implicit duty of a claimant to protect his or her own interests. However, if this Court were to consider doing so, it should consider the significant consequences that would result in the MACP context. Any rule relieving No-Fault claimants of the duty to diligently pursue their claims would provide a license to fail to put forth any effort to identify insurers responsible for paying benefits and the MAIPF would surely become the default defendant in every case where an insurer was not readily known, placing

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the burden of being Michigan's insurer-identification service on the MAIPF. This would conflict with the purposes and obligations of the MAIPF under the No-Fault Act and would be a poor public policy decision, as the burden to finance such investigations would fall on the shoulders of the driving public who ultimately fund the MAIPF. The interests of claimants, who very well may be covered by private insurance, but fail to put forth efforts to identify applicable insurers should not be placed above the interests of the public.

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

I. The Michigan Assigned Claims Plan and the Michigan Automobile Insurance Placement Facility

The No-Fault Act, MCL 500.3101 *et seq.* (the "Act"), provides a priority scheme to identify the insurer responsible to provide No-Fault benefits to a particular individual under MCL 500.3114 and MCL 500.3115 and, applicable to this case, the former MCL 500.3114 and 500.3115.[2] Where an injured person does not have No-Fault coverage and is not otherwise entitled to claim benefits from another insurer in the order of priority, the Act allows that person to collect personal protection insurance ("PIP") benefits "through" the Michigan Assigned Claims Plan ("MACP"). MCL 500.3172(1).

The MACP is administered by the MAIPF. See MCL 500.3171. The Act unambiguously defines the MAIPF's role in the No-Fault scheme as an organization comprised of "[e]very insurer authorized to write automobile insurance in this state." MCL 500.3301. See also MCL 500.134(6) (acknowledging that the MAIPF is "an association of insurers" that constitutes "a nonprofit organization of insurer members").[3] The MAIPF is funded through assessments to each Michigan

[2] The No-Fault act was amended by 2019 PA 21 and 22, each effective June 11, 2019. The accident and commencement of the lawsuit in this case all occurred before the amendment.

[3] While the MAIPF was originally created for purposes of (1) providing the guarantee that automobile insurance coverage will be available to any person who is unable to procure that

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automobile insurer and self-insurer, according to its market share, and include an amount necessary to fund No-Fault benefits paid under the MACP. See MCL 500.3171(1). See MCL 500.3171(2) ("Costs incurred in the administration of the assigned claims plan shall be allocated fairly among insurers and self-insurers."). These costs are ultimately borne from the driving public. See MCL 500.3176 ("Reasonable costs incurred in the handling and disposition of assigned claims, including amounts paid pursuant to assessments under section 3171, shall be taken into account in making and regulating rates for automobile liability and personal protection insurance."). For that reason, "the Michigan Assigned Claims Plan (MACP) is the insurer of last resort." *Bazzi v Sentinel Ins Co*, 502 Mich 390, 419; 919 NW2d 20 (2018) (McCormack, J. dissenting) (citing MCL 500.3171).

Specific obligations are imposed on the MAIPF by the Legislature via statute. "A person claiming through the assigned claims plan shall notify the Michigan automobile insurance placement facility of his or her claim within 1 year after the date of the accident."[4] MCL 500.3174. Once a notice of a claim is received, the MAIPF makes an initial determination whether the claimant is eligible for benefits through the MACP. MCL 500.3173a. A person is entitled to receive personal protection insurance ("PIP") benefits through the MACP in four situations as follows:

> (a) No personal protection insurance is applicable to the injury.

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insurance through ordinary methods, and (2) preserving the benefits of price competition by encouraging maximum use of the normal private insurance system, MCL 500.3301, the majority of the MAIPF's operations are now dedicated to administering the MACP because of the reduced volume of individuals seeking business through the MAIPF.

[4] The former MCL 500.3174, which was in effect at the time of the accident in this case stated "A person claiming through the assigned claims plan shall notify the Michigan automobile insurance placement facility of his or her claim within the time that would have been allowed for filing an action for personal protection insurance benefits if identifiable coverage applicable to the claim had been in effect." Former MCL 500.3174.

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> (b) No personal protection insurance applicable to the injury can be identified.
>
> (c) No personal protection insurance applicable to the injury can be ascertained because of a dispute between 2 or more automobile insurers concerning their obligation to provide coverage or the equitable distribution of the loss.
>
> (d) The only identifiable personal protection insurance applicable to the injury is, because of financial inability of 1 or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed.

MCL 500.3172(1).[5] If an applicant is eligible, the MAIPF "shall promptly assign the claim in accordance with the plan and notify the claimant of the identity and address of the insurer to which the claim is assigned." MCL 500.3174. Once the claim is assigned, the Act provides that "[a]n insurer to whom claims have been assigned shall make prompt payment of loss in accordance with this act." MCL 500.3175.

II. Facts Of The Underlying Case

This case arises out of an accident that occurred on May 6, 2016 when Plaintiff-Appellant Willie Griffin ("Plaintiff") lost control of his motorcycle when a truck, driven by Gilbert Gonzalez ("Gonzalez"), entered his lane, requiring him to swerve to avoid the truck. Gonzalez, his address, and telephone number were listed on the police report. (Pl. Appx, **Ex. 4**.)

The motorcycle Plaintiff was operating at the time of the accident was owned by him and Margaret Daniels[6] ("Daniels"). Plaintiff carried a liability-only policy on the motorcycle with Allstate Insurance Company ("Allstate"). (MACP Appx., **Ex. A;** Pl. Appx., **Ex. 5**, pp. 10-11, 62.) Daniels

[5] At the time Plaintiff made a claim to the MAIPF in this case, the pre-amendment MCL 500.3172 applied, which contained substantively similar categories as set forth under MCL 500.3172 above, which was amended by 2019 PA 21.

[6] The motorcycle was garaged with Daniels and Daniels and Plaintiff both had permission to use the motorcycle at will. (Pl. Appx., **Ex. 5**, pp. 27-28, 30-31.)

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carried a policy on the motorcycle that did include coverage for PIP benefits through Esurance. (MACP Appx., **Ex. B;** Trumb. Appx., **Ex. G**.) Moreover, at the time of the accident, Griffin had a personal automobile insurance policy with Defendant/Appellee, Trumbull Insurance Company ("Trumbull"). (Pl. Appx., **Ex. 5**, pp. 10-11, 63; **Ex. 10**.)

Almost immediately after the accident, on May 9, 2016, Trumbull was informed of the accident. (Pl. Appx., **Ex. 11**, p. 18.) Griffin promptly hired counsel after the accident and, on May 11, 2016, only five days after the accident, Plaintiff's counsel sent Gonzalez a letter notifying Gonzalez that counsel was representing Plaintiff and "suggested" Gonzalez forward the letter to his liability insurer. (Pl. Appx., **Ex. 6**.) On July 7, 2016, Plaintiff filed a claim with Trumbull. (MACP Appx., **Ex. C;** Pl. Appx., **Ex. 12**.)

While there is no question the motorcycle and Plaintiff were insured, under the former MCL 500.3114, the highest priority insurer would have been the insurer of the truck that Gonzalez was operating when the accident occurred. Former MCL 500.3114(5).[7] During 2016, Trumbull made efforts to identify the insurer of the truck by Trumbull's adjuster calling Gonzalez three times and having the SIU investigator stop by Gonzalez's home twice in an attempt to contact him, call him another three times (during which time there was a busy signal), and running a search for insurance held by Gonzalez. Trumbull's efforts were unsuccessful and it made no further efforts to identify the insurer of the truck.

On December 26, 2016, nearly eight months after the accident, Plaintiff's counsel sent Trumbull a letter inquiring whether they intended to pay Plaintiff's benefits and asking for an update on the results of Trumbull's investigation into the matter. (Pl. Appx., **Ex. 13**.)

[7] Because this accident occurred in 2016, prior to the 2019 amendments to the No-Fault Act, the former priority statutes apply.

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Four days later, on December 30, 2016, Plaintiff filed an Application for Benefits with the MAIPF for benefits through the MACP and attached the Traffic Crash Report. The Application indicated that Gonzalez was operating the truck and his contact information was provided.

On April 2, 2017, nearly eleven months after the accident, in an effort to identify the truck's insurer, Plaintiff's counsel hired MEA Research Services, Inc., Ltd. ("MEA") to search for Gilbert Gonzalez's auto insurer. (Trumb. Appx., **Ex. D**, Request Form.) It is unclear what efforts MEA made except that they issued a report to Plaintiff's counsel stating it was unable to locate any insurance in response to Plaintiff's counsel's request. *Id.*

Plaintiff did not file suit seeking No-Fault benefits until April 21, 2017, nearly one year after the accident. Plaintiff named "John Doe Insurance Company", Trumbull, Esurance, Allstate, and the MACP as defendants.

Trumbull did not provide Plaintiff or his counsel any response regarding whether PIP benefits would be paid until May 10, 2017 – over one year after the accident – when they denied the claim "due to lack of information." (Pl. Appx., **Ex. 14**.)

Nearly six months after suit was filed, Trumbull subpoenaed Gonzalez and he appeared for his deposition on October 23, 2017. During his deposition, he revealed that at the time of the motor vehicle accident, he was operating a truck owned by his employer, Pavex. (Pl. Appx., **Ex. 7**, pp. 8, 10.) It determined that Pavex was insured with Harleysville Insurance Company (hereinafter "Harleysville"). (MACP Appx., **Ex. D.)** Thereafter, Plaintiff neither filed a claim with Harleysville, nor amended his Complaint to name Harleysville as a defendant.

III. Procedural History

After learning the identity of the higher-priority insurer, Trumbull moved for summary disposition, arguing it was not required to pay Plaintiff PIP benefits because it was not the highest-

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priority insurer.[8] The MACP also filed a motion for summary disposition, arguing that because a higher-priority insurer could be identified, Plaintiff was not entitled to benefits through the MACP. The trial court found the issue was whether Harleysville was identifiable using reasonable diligence within one year of the accident. (MACP Appx., **Ex. E.)** The trial court reasoned that the only efforts made on Plaintiff's part to identify the truck's insurer was when Plaintiff's counsel hired MEA in April, 2017. (*Id.*) The trial court did not believe Plaintiff's counsel's May 11, 2016 letter to Gonzalez was any attempt to identify the truck's insurer because it did not request such information, or any information and merely suggested Gonzalez notify his insurer of the letter. (*Id.*) The trial court held that Trumbull was entitled to dismissal because it was not the highest-priority insurer and that the MACP was entitled to dismissal because there was no basis under MCL 500.3172 for maintaining an action for benefits against the MACP. (*Id.*) Plaintiff filed a motion for reconsideration, arguing there was no evidence that Harleysville was identifiable until one year after the accident. The motion was denied.

On June 15, 2018, Plaintiff filed his claim of appeal in the Court of Appeals. On appeal, Plaintiff ***first*** argued, that where a higher-priority insurer is not identifiable, the lower-priority insurer must cover the claim. ***Second***, Plaintiff argued the MACP was required to cover his claim where higher-priority insurers refused. ***Finally***, Plaintiff argued that the Trial court erred in not granting Plaintiff's motion for sanctions against Trumbull because Trumbull's counsel did not disclose to the Trial court that Trumbull also investigated and failed to identify higher-priority coverage.

In response to Plaintiff's arguments on appeal, Trumbull, ***first***, argued that Plaintiff's lack of diligence and failure to use reasonable efforts did not change the order of priority. Thus, merely because Plaintiff failed to identify Harleysville within one year, did not automatically make Trumbull liable to

[8] Allstate and Esurance were dismissed from suit because Allstate's policy did not offer coverage for PIP benefits and Esurance was lower in priority than Trumbull.

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pay Plaintiff's claim. ***Second***, Trumbull argued the issue for sanctions was not properly before the Court of Appeals because it was never decided by the trial court. Because the trial court found Trumbull was entitled to summary disposition, it did not consider the request for sanctions.

The MACP responded to Plaintiff's arguments on appeal by, ***first***, arguing that where a higher-priority insurer cannot be identified, a lower-priority insurer must pay the claim. ***Second***, the MACP argued that the trial court correctly held that there was no basis under MCL 500.3172 to maintain a claim against the MACP because there was no priority dispute between two or more insurers, as Harleysville never was given notice of Plaintiff's claim, never denied Plaintiff's claim, and never argued it was not the highest-priority insurer.[9]

The Court of Appeals held that where a higher-priority insurer cannot be identified, the lower-priority insurer is obligated to pay No-Fault benefits. (Pl. Appx., **Ex. 1**, pp. 4-5.) However, the Court rejected the argument that any case law set forth a rule that a "reasonable diligence" standard exists with respect to one's efforts to identify a higher-priority insurer. Instead, the Court simply held that Harleysville could have been, and was in fact, identified. (*Id.* at p. 5.) Next, the Court rejected Plaintiff's argument that MCL 500.3172(3) applied because there was no "dispute" between two or more insurers. While Trumbull claimed Harleysville was the highest-priority insurer, Harleysville took no position on the issue because it was not a party to the case. (*Id.* at pp. 6-7.) Finally, the Court found that it could address the issue of sanctions despite the fact that the trial court passed on the issue. However, the Court held Plaintiff was not entitled to sanctions because Trumbull never argued that it did not conduct an investigation – it argued that it wasn't the highest-priority insurer. (*Id.* at p. 8.) The Court found that it was inconsequential that Trumbull argued that Plaintiff did not demonstrate "reasonable diligence" in

[9] The MACP also argued that, pursuant to the plain language of the No-Fault Act, the MACP is not required to pay benefits as it is not an insurer. Instead, benefits through the MACP are paid by assigned insurers after the MAIPF assigns the claim to an insurer.

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identifying Harleysville because that was not the applicable legal standard. (*Id.*) Plaintiff filed a motion for reconsideration, which was denied on November 19, 2020.

This appeal ensued. Plaintiff filed his application for leave on January 4, 2021 appealing only the Court of Appeals' decision with respect to Trumbull. Plaintiff has apparently dropped his claim against the MACP at the Supreme Court level. Trumbull filed its brief in response to Plaintiff's application on February 1, 2021. On September 27, 2021, this Court issued an order for supplemental briefing and directed the clerk to schedule oral argument on the application for leave.

COUNTER-STATEMENT OF STANDARD OF REVIEW

A party seeking leave to appeal to this Court – a rare remedy – must show that the case meets one of the criteria in MCR 7.305(B)[10]:

> (B) **Grounds**. The application must show that …
>
> (3) the issue involves a legal principle of major significance to the state's jurisprudence;
>
> (5) in an appeal of a decision of the Court of Appeals,
> (a) the decision is clearly erroneous and will cause material injustice;…

MCR 7.305(B). Plaintiff fails to make a showing of any of these grounds. It is well-settled that a lower-priority insurer must pay a claim and then seek subrogation from the higher-priority insurer. Whether or not the limitations period under MCL 500.3145 has run is irrelevant to a lower-priority insurer's obligation. Likewise, while no case law expressly states that the claimant must use reasonable diligence to identify a higher-priority insurer, it is implicit in the fact that the claimant owns the claim and must protect his or her own interests. To the extent that the former MCL 500.3145 is relevant, it merely imposes a strict limitations period and strongly encourages a

[10] Here, MCL 7.305(B)(1), (2), (4), (5)(b), and (6) plainly do not apply, leaving only MCL 7.305(B)(3) and (5)(a) at issue.

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claimant to take the steps necessary to protect his or her rights before the period expires – as do all statutes of limitation. Any rule to the contrary would have dire consequences. Accordingly, this Court should deny Plaintiff's application for leave.

ARGUMENT

I. A Lower-Priority Insurer, Who Was Provided Timely Notice Under MCL 500.3145(1), Is Liable For Personal Protection Insurance Benefits Under The No-Fault Act If The Higher-Priority Insurer Was Not Identified.

In Michigan, where a higher-priority insurer is not identified, the lower-priority insurer must pay the plaintiff's claim. ***First***, it is well settled that priority is not a sufficient defense for an insurer with coverage in the order of priority to avoid paying a claim. *Darnell v Auto-Owners Ins Co*, 142 Mich App 1, 13; 369 NW2d 243 (1985).[11]

Where insurers with policies offering coverage fall somewhere in line under the order of priority, those insurers may not raise priority as a defense to paying a claim. *Id.* See also *Borgess Med Ctr v Resto*, 273 Mich App 558, 574; 730 NW2d 738 (2007) vacated on other grounds 482 Mich 946; 754 NW2d 321 (2008); *Allstate Ins Co v Citizens Ins Co of America*, 118 Mich App 594, 603-604; 325 NW2d 505 (1982). This is because a "[p]laintiff's right to recover is dependent only on whether the injury arises out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle" and nothing more. *Borgess Med Ctr*, 273 Mich App at 572. Problems of priority among insurers should not cause delay in payment of benefits to which the claimant is entitled. See *Allstate Ins Co*, 118 Mich App at 603-604; *Kalin v Detroit Automobile Inter-Insurance Exch*, 112 Mich App 497, 509-10; 316 NW2d 467 (1982). In the circumstance where two insurers fall under the order of priority and there is a dispute as to who is higher, the insurance

[11] However, that rules does not apply equally to the MAIPF. *Id.* To be eligible for benefits through the MACP, a claim must be eligible under the Act. See MCL 500.3172.

companies should cover the claim and thereafter seek subrogation to resolve their dispute as to liabilities between them. *Allstate*, 118 Mich App at 603-604; *Federal Kemper Ins Co v The Western Ins Co*, 97 Mich App 204, 208; 293 NW2d 765 (1980); *Farmers Ins Group v Progressive Casualty Ins Co*, 84 Mich App 474, 484; 269 NW2d 647 (1978) lv denied 405 Mich 832 (1979). Thus, where at least one insurer in the order of priority is identified, that insurer must pay benefits. See *Kalin*, 112 Mich App at, 510 (explaining it is not the job of the insured to sort out a priority dispute among insurers).

The same rule is supported by the No-Fault Act, under the statute governing eligibility to make a claim through the MACP. See MCL 500.3172. A claim is not eligible where **one** insurer in the order of priority is identifiable, regardless whether it is the highest in priority. See MCL 500.3172(1)(b) (a claim is eligible only where "no" applicable PIP coverage is identifiable). If two or more insurers are identified, the claim is eligible but, the MACP must be reimbursed by the responsible insurer. See MCL 500.3172(6). Thus, where only one insurer is identifiable, a claimant is not entitled to benefits through the MACP because that insurer must pay, regardless of its position in the order of priority.

For example, in *Frierson*, the Court of Appeals held that "when an insurer that would be liable under one of the exceptions in MCL 500.3114(1) cannot be identified, the general rule applies and the injured party must look to her own insurer for personal protection insurance benefits." *Frierson v West American Ins Co*, 261 Mich App 732, 738; 683 NW2d 695 (2004). In that case, a motorcycle was forced off the road by a truck, whose insurer was never identified but would have fallen first in priority to pay the claim. "[T]he insurers listed in (a) - (d) of MCL 500.3114(5) either [did] not exist or **[could not] be identified**. . . because the police were unable to locate the motor vehicle and there [was] no information regarding that vehicle, its driver, or the

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driver's insurance carrier."[12] *Id.* at 737 (emphasis added). This left a priority dispute between the plaintiff's own insurer, West American, and the MACF.[13] The Court relied on the rule from *Parks v Detroit Automobile Inter-Insurance Exch*, 426 Mich 191; 393 NW2d 833 (1986):

> The Legislature, in its broader purpose, intended to provide benefits whenever, as a general proposition, an insured is injured in a motor vehicle accident, whether or not a registered or covered motor vehicle is involved; and in its narrower purpose intended that an injured person's personal insurer stand primarily liable for such benefits whether or not its policy covers the motor vehicle involved and even if the involved vehicle is covered by a policy issued by another no-fault insurer.

Frierson, 261 Mich App at 737-38 (quoting *Parks*, 426 Mich at 204 (quoting *Lee v Detroit Automobile Inter-Insurance Exch*, 412 Mich 505, 515; 315 NW2d 413 (1982))). The Court found *Parks* applicable because in *Parks*, "other than the employee's insurer and the MACF, there was

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[12] The version of MCL 500.3114(5) in effect at the time stated as follows:

> A person suffering accidental bodily injury arising from a motor vehicle accident which 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.
>
> (b) The insurer of the operator of the motor vehicle involved in the accident.
>
> (c) The motor vehicle insurer of the operator of the motorcycle involved in the accident.
>
> (d) The motor vehicle insurer of the owner or registrant of the motorcycle involved in the accident.

Frierson, 261 Mich App at 735-36.

[13] The opinion states the priority dispute was between the "MACF" and the insurer. The "MACF" was the Michigan Assigned Claims Facility, which is now known as the Michigan Assigned Claims Plan administered by the MAIPF.

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no other identifiable no-fault insurer[.]" *Id.* at 738. Thus, the Court correctly held that the plaintiff's insurer was responsible to pay benefits.[14]

This rule aligns with the purposes of the No-Fault Act. The No-Fault Act was enacted in 1972, when the Legislature "eliminated the old automobile tort reparations system" and replaced it with a system of compulsory No-Fault insurance under which "an injured insured was guaranteed what the Legislature considered to be a sufficient and expeditious recovery from his or her own insurer for all expenses for reasonably necessary medical care, recovery, and rehabilitation, as well as some incidental expenses." *Spectrum Health Hosps v Farm Bureau Mut Ins Co*, 333 Mich App 457, ___; 960 NW2d 186 (2020) (quoting *Muci v State Farm Mut Auto Ins Co*, 478 Mich 178, 187; 732 NW2d 88 (2007)). The Legislature sought to "provide individuals injured in motor vehicle accidents assured, adequate and prompt reparation for certain economic losses[.]" *Id.* Thus, where a claimant is unquestionably entitled to No-Fault benefits and one insurer is identified in the order of priority, the claimant must be paid promptly by that insurer.

In *Levander*, an unpublished opinion of the Court of Appeals, issued June 18, 2015 (No. 320101)[15] (Pl. Appx, **Ex. 15**), a motorcycle was allegedly forced off the road by another vehicle. The plaintiff's insurer, Home Owners, denied the claim[16]. Plaintiff filed suit only a few days before the one-year deadline under MCL 500.3145. During the course of litigation, 21 months after the accident, the vehicle's insurer, Progressive, was identified and added as a defendant to

[14] The Court's ruling was correct for the additional reason that the claimant was not eligible for benefits under any subsection of MCL 500.3172(1).

[15] This unpublished opinion is cited because it is heavily relied on by Plaintiff and has facts similar to this case but its holding is contrary to Michigan jurisprudence.

[16] The plaintiff's insurer denied the claim on the basis that it contended a vehicle was not involved in the accident.

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the action. However, Progressive was dismissed because the plaintiff's claims against Progressive were barred under the limitations period in MCL 500.3145. The issue was whether Home Owners was liable to pay PIP benefits despite not being the highest order of priority. The Court held Home Owners was liable under *Frierson, supra* **if Progressive could not have been identified before the one-year limitations period expired**. *Levander*, at *10. The case was remanded back to the trial court for consideration of whether Progressive was identifiable within that time period. *Id.*

However, neither *Parks* nor *Frierson* said anything about the limitations period under MCL 500.3145 having any effect on a lower-priority insurer's obligation to pay benefits. Indeed, nothing in the No-Fault Act indicates that an insurer's obligations under MCL 500.3105[17] and MCL 500.3114 are somehow conditioned on the operation of the limitations period under MCL 500.3145. To the contrary, the Act provides no exceptions to the time limitations in MCL 500.3145.[18] See *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 586; 702 NW2d 539 (2005) (overruling case law that allowed judicial tolling of MCL 500.3145 and stating, "[t]he one-year-back rule of MCL 500.3145(1) must be enforced by the courts of this state as our Legislature has written it, not as the judiciary would have had it written.").

[17] Under MCL 500.3105,

> (1)Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter.
>
> (2) Personal protection insurance benefits are due under this chapter without regard to fault.

[18] Assigned insurers' claims for reimbursement are subject only to the statute of limitations under MCL 500.3175(3). *Citizens Ins Co of America v Univ Physician Group*, 319 Mich App 642, 652 (2017).

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Indeed, no exception to the statute of limitations in MCL 500.3145 has been carved out for actions between insurers based on when the higher-priority insurer was identified. A lower-priority insurer who pays benefits may file a subrogation action against a higher-priority insurer, but, that action is subject to the time limitations in MCL 500.3145. *Titan Ins Co v North Pointe Ins Co*, 270 Mich App 339, 347; 715 NW2d 324 (2006) lv denied 477 Mich 907; 722 NW2d 815 (2006) (citing *Amerisure Cos v State Farm Mut Automobile Ins Co*, 222 Mich App 97, 102; 564 NW2d 65 (1997)). "[E]quitable subrogation 'is a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other.' The doctrine has two prongs: 'the subrogee acquires no greater rights than those possessed by the subrogor, and . . . the subrogee may not be a 'mere volunteer.'" *Esurance Prop & Cas Ins Co v Mich Assigned Claims Plan*, ___NW3d___, ___ (Mich Sup Ct, July 26, 2021) (quoting *Auto-Owners Ins Co v Amoco Prod Co*, 468 Mich 53, 59; 658 NW2d 460 (2003)). See also *Fed Kemper Ins Co*, 97 Mich App at 208 (lower-priority insurer acquires no greater rights than insured in a subrogation action). Thus, in an equitable subrogation action, the lower-priority insurer is subject to MCL 500.3145, regardless of whether or when a higher-priority insurer was identified. For purposes of illustration, if a plaintiff files suit on the 364th day after the accident against a lower-priority insurer and during the course of discovery, the higher-priority insurer is identified, the lower-priority insurer will not be able to recover under an equitable subrogation theory due to the running of the limitations period under MCL 500.3145. Fair or unfair, the Act must be applied as written. *Devillers*, 473 Mich at 582 ("Statutory-or contractual-language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing policy whims of members of this Court."). Courts may not use their equitable power as "an omnipresent and unassailable judicial trump card that can be used to rewrite

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a constitutionally valid statute simply because a particular judge considers the statute to be 'unfair.'" *Id.* at 588.

Accordingly, to the extent that the unpublished case, *Levander*, stands for the proposition that an insurer's obligations are altered depending on the application of MCL 500.3145, it is wrong. Such a holding is inconsistent with Michigan's jurisprudence strictly applying the limitations period in MCL 500.3145, even with respect to a lower-priority insurer's right to subrogation where a higher-priority insurer is identified and sued after the limitations period. A lower-priority insurer's obligation to pay under MCL 500.3105, MCL 500.3115 and MCL 500.3115 is entirely separate and distinct from the operation of the limitations period in MCL 500.3145.

II. The Burden To Identify The Insurer or Insurers With An Obligation To Pay Pursuant MCL 500.3114 Or MCL 500.3115 Rests With The Claimant.

A claimant is charged with a duty to identify the insurer or insurers responsible for paying his or her claim for the following reasons: ***First***, a claimant is responsible for protecting his or her own interests, including identifying an applicable insurer before the limitations period under MCL 500.3145 runs. A No-Fault claimant, like any other litigant, must take steps to protect his or her own claim. There is simply no justification for placing that burden on any other party. ***Second***, if the Court were to fashion a different rule, relieving claimants of the burden to protect their own interests, the burden to identify higher-priority insurers would fall on the MAIPF as the last-resort option for making a claim for PIP benefits. The MAIPF must not be put in a position of being the default defendant in virtually every No-Fault action where identifying an insurer may be an issue, thus, being the sole entity responsible for matching claims to Michigan No-Fault insurers. ***Third***, requiring the MAIPF to be responsible for identifying insurers for claimants is against the plain language of the No-Fault Act and not in the public interest.

A. A Claimant Must Protect Its Own Interests.

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It is axiomatic that the claimant has the responsibility to identify the insurer responsible for paying benefits under MCL 500.3114. ***First***, the claimant is the best equipped party to identify insurers. The claimant has an entire year after the accident to conduct any necessary investigation before the limitations period under MCL 500.3145 runs and the claim is barred. It is generally the claimant who first has notice of the accident and its circumstances, including which vehicle they were operating or occupying, whether they were on a motorcycle, or whether they were a pedestrian. The claimant is also the person most likely to know who was the owner or registrant of the vehicle involved in the accident. In the event a claim is filed under MCL 500.3112, as amended by 2019 PA 21, by a medical-care provider[19], the provider is still in a better position to identify any higher-priority insurer over another third party. The provider had the opportunity to collect insurance information prior to rendering treatment and inquire into whether the treatment was for a motor-vehicle accident and the circumstances of same.

Second, it is axiomatic that claimants, including providers, must take steps to protect their own interests, whether it be within the context of this case – exercising responsibility for identifying the highest-priority insurer – or in another context, such as submitting reasonable proofs to an insurer. Indeed the No-Fault Act is complex and includes procedures that, if not followed, could render a claimant unable to recover. But, the Act's complexity is not an excuse to simply fail to follow procedures or diligently pursue a claim.

While Plaintiff vehemently argues that claimants should not have to "immediately retain lawyers, investigators, and process servers" or file lawsuits "so that witnesses with information critical to determining if higher-priority coverage existed can be subpoenaed", those steps may be

[19] 2019 PA 21 amended MCL 500.3112 to provide a cause of action to providers. While providers now have their own cause of action, the claim is still derivative of the insured's claim.

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necessary in identifying a higher-priority or applicable insurer. Pl. Supp. Brief, p. 1. Plaintiff offers no reason why another party should be burdened with such tasks when it is the claimant's ability to recover No-Fault benefits at risk. Plaintiff's only reasoning is that claimants are entitled to prompt payment of claims. *Id.* But, if claimants want prompt payment, the best way to accomplish such is by identifying the insurer or insurers responsible for paying benefits under MCL 500.3114 or MCL 500.3115. The policies underlying the enactment of the No-Fault Act are no excuse to slumber on one's own rights.

While plaintiffs have a right to wait until the 364th day after an accident before filing suit, that may not always be the best strategy to protect their interests. See e.g. *Devillers*, 473 Mich at 584 (finding a plaintiff had reason to file suit "[a]s soon as PIP payments stopped" because that gave her "the surest notice" that her claim was no longer being paid by the insurer). Waiting to file suit does not come without risk. While the MAIPF offers no opinion as to whether Plaintiff in this case employed reasonable diligence, the facts of this case illustrate how waiting until nearly one year before filing suit carries risk. Here, even assuming Plaintiff had notice of Trumbull's efforts to contact Gonzalez, it was evident Gonzalez was not going to willingly cooperate. Meanwhile, Trumbull was not paying Plaintiff benefits. While hindsight is always 20/20, on those facts alone, it may have been wise to file suit with enough time to identify the highest-priority insurer before the limitations period ran to avoid the exact situation that ensued – Harleysville being identified only after it had a defense under MCL 500.3145 and allowing Trumbull to escape liability because it was identified. Put simply, numerous instances will arise where a claimant (often in conjunction with his or her attorney) will have to decide whether it is more advantageous to the claimant to wait to file suit in an effort to increase damages or file suit earlier to identify the insurer obligated to pay benefits.

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While the No-Fault Act was enacted in part to provide an assured recovery for injured persons, it does not protect a claim from expiring where a claimant fails to diligently identify the insurer obligated to pay benefits. See MCL 500.3145. The purpose of statutes of limitation, including MCL 500.3145, is "1) **to encourage plaintiffs to pursue claims diligently**," and "to afford security against fraudulent or stale claims that become difficult to defend because of the loss of evidence[.]" *Bates v Mercier*, 224 Mich App 122, 128; 568 NW2d 362 (1997) (emphasis added); *Puetz v Spectrum Health Hosps & Kevin Splaine*, 324 Mich App 51, 67; 919 NW2d 439 (2018). For example, where subpoenaing a witness may lead to identifying a higher-priority insurer, if a claimant does not act promptly to do so, the witness' address may change or the witness may become deceased.

While the former MCL 500.3145[20], in effect at the time Plaintiff filed suit in this case, was unforgiving, it was nonetheless, an unambiguous statute that must be applied as written. *McCormick v Carrier*, 487 Mich 180, 208; 795 NW2d 517 (2010) (courts' "role is to apply the unambiguous statutory language, not improve it"). See also *Linden v Citizens Ins Co of America*,

[20] The version of MCL 500.3145 in effect at the time Plaintiff filed suit stated as follows:

> 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 survivors 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.

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308 Mich App 89, 101; 862 NW2d 438 (2014) lv denied 498 Mich 880; 869 NW2d 275 (2015) ("this Court is bound to enforce the one-year-back rule as the Legislature has written it").

The amended MCL 500.3145 now contains a relaxed limitations period that is tolled until a claim is formerly denied but, the tolling provision does not apply "if the person claiming the benefits fails to pursue the claim with **reasonable diligence**." MCL 500.3145(3) (emphasis added). "[C]ourts must pay particular attention to statutory amendments, because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute." *AG v Bd of State Canvassers*, 500 Mich 907, 908-09; 887 NW2d 786 (2016) (quoting *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009)). Thus, this Court may look at the amendment for guidance. While tolling of the former statute has been unquestionably rejected, see *Devillers*, 473 Mich 562, the amendment provides some guidance on the issue of **who** has the burden to pursue a No-Fault claim – the claimant does and by employing reasonable diligence in his or her pursuit of the claim.

Put simply, with every statute of limitations, there is an implied duty on the part of the claimant to act diligently. Because a claim for benefits is the claimant's, it is only logical that the claimant must take steps to protect his or her ability to pursue the claim. Parties who sit on their rights do so at their own peril.

B. The MAIPF Is Not Intended To Be A Default Defendant In PIP Actions With The Responsibility To Identify Insurers.

In answering the question of whether a plaintiff has any duty to use reasonable diligence to identify an insurer, the Michigan Supreme Court should not overlook the potentially disastrous effects a ruling that no such duty exists could have on the MAIPF. If this Court were to find a claimant has no duty to identify an insurer in the order of priority, it is virtually guaranteed that plaintiffs, including medical-care providers, will make no effort to identify an insurer in the order

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of priority and the MAIPF will become the default defendant in virtually every action for No-Fault benefits where there is even the slightest question as to the identity of an insurer. This will have dire financial consequences for the MAIPF. The MAIPF was not intended to serve as an insurance-identification service, is not funded appropriately to take on that role, and is not funded to defend the amount of litigation that would be filed against it as a result of such a ruling.

The No-Fault Act does not contemplate the MAIPF or the funds it collects to be used to identify higher-priority insurers for claimants and, instead, *inter alia*, unambiguously sets forth that such funds are to be used only for funding the MACP and the administration of MACP claims. The primary rule of statutory interpretation is that courts are to give effect to the intent of the Legislature. *Stanton v City of Battle Creek*, 466 Mich 611, 615; 647 NW2d 508 (2002). The words of the statute provide the best evidence of legislative intent and the policy choices made by the Legislature. See *White v City of Ann Arbor*, 406 Mich 554, 562; 281 NW2d 283 (1979). The courts' judicial role in interpreting statutes "'precludes imposing different policy choices than those selected by the Legislature . . .'" [.]" *Johnson v Recca*, 492 Mich 169, 187; 821 NW2d 520 (2012) (quoting *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 759; 641 NW2d 567 (2002)).

> Whether or not a statute is productive of injustice, inconvenience, is unnecessary, or otherwise, are questions with which courts . . . have no concern. It is to be assumed that the legislature . . . had full knowledge of the provisions . . . and we have no right to enter the legislative field and, upon assumption of unintentional omission . . . , supply what we may think might well have been incorporated.

Id. (quotations and citations omitted). "Simply stated, the judicial branch cannot amend the no-fault act to make it 'better.' That is an authority reserved solely to the Legislature." *Id.*

Here, the No-Fault Act sets forth the role of the MAIPF as a gatekeeper for servicing insurers by making an initial determination of eligibility to receive benefits through the MACP and then assigning eligible claims to a servicing insurer. See MCL 500.3173a(1); MCL 500.3174.

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The servicing insurer then processes the claim like any other claim for benefits.[21] See MCL 500.3175(1). After a servicing insurer pays No-Fault benefits, the MAIPF uses the funds paid into the plan to reimburse the servicing insurer for the benefits paid, loss adjustment costs, and interest. MCL 500.3175. "[T]he words mean what they say[.]" *Recca*, 492 Mich at 193 (rejecting the argument that the No-Fault Act should not be interpreted as written). Thus, the No-Fault act unambiguously sets forth a specific purpose for which the funds collected by the MAIPF are to be used.

The MAIPF exercises oversight to ensure the funds are being responsibly managed, as they are ultimately borne from the driving public. (MACP Appx., **Ex. F**, MACP.) The MAIPF must provide the Department of Insurance and Financial Services ("DIFS") with data regarding premiums and market shares that form the basis for the assessments by the MAIPF on its members. (See Pl. Appx., MACP, p. 110.) Likewise, the MAIPF reports annually to DIFS. MCL 500.3178. Thus, the Act contemplates regulatory oversight of the use of the funds to ensure it is consistent with the stated purposes under the Act.

Simply put, the MAIPF is statutorily-obligated to use the funds it collects to fund the payment of benefits under the MACP and the administration of the MACP. It would be contrary to the plain language of the No-Fault Act to require the MAIPF to use those funds to finance an insurance-identification service for claimants and medical-care providers.

Likewise, the MAIPF was not designed to be a "catch-all" defendant for claimants and medical-care providers who do not readily know the identity of the highest-priority insurer.

[21] "The assignment of a claim by the Michigan automobile insurance placement facility to an insurer is not a determination of eligibility under this chapter or the assigned claims plan, and a claim assigned to an insurer by the Michigan automobile insurance placement facility may later be denied if the claim is not eligible under this chapter or the assigned claims plan." MCL 500.3173a.

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Michigan's Insurance Code unambiguously sets forth the Legislature's intent for the MAIPF as follows:

> (a) Providing the guarantee that automobile insurance coverage will be available to any person **who is unable to procure that insurance through ordinary methods**.
>
> (b) Preserving to the public the benefits of price competition by **encouraging maximum use of the normal private insurance system**.

MCL 500.3301 (emphasis added). Notably, neither purpose stated in any way suggests the MAIPF should be a named defendant in an action where a claimant fails, or makes no to little effort, to identify a higher-priority insurer. Courts may not read into a statute a requirement that the Legislature has seen fit to omit. *Book-Gilbert v Greenleaf*, 302 Mich App 538, 542; 840 NW2d 743 (2013).

The purpose under subsection (a) indicates that the MAIPF is not intended to provide benefits for those who are able to and have procured insurance through the ordinary insurance system – obtaining coverage through a private insurer. But if the MAIPF is placed in a position where it can be sued as a default defendant with the claimant having no responsibility to identify a higher-priority insurer, the MAIPF would be placed in a position to protect the interest of numerous claimants ineligible for benefits through the MACP. This is directly contrary to the purpose of the MAIPF.

Likewise, subsection (b) indicates that the MAIPF is to preserve the benefits of price competition by encouraging the use of the private insurance system. But, allowing a claimant to avoid taking action to identify the private insurer liable to pay benefits under MCL 500.3114 or MCL 500.3115 and, instead, suing the MAIPF does nothing to encourage the maximum use of the private insurance system. To the contrary, it would reward claimants who fail to use the private insurance system and, instead, make claims to the MAIPF. Thus, any such rule would be in direct

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contrast to the purposes of the MAIPF set forth under the Insurance Code. Courts "may not read into the statute what is not within the Legislature's intent as derived from the language of the statute." *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010) (quotation marks and citation omitted) (emphasis added).

The MAIPF is a last-resort – not a default option to be used instead of private applicable insurance. See MCL 500.3172. "Under the no-fault act, the Assigned Claims Facility is essentially an insurer of last priority." *Hunt v Citizens Ins Co*, 183 Mich App 660, 665; 455 NW2d 384 (1990). See also *Cason v Auto Owners Ins Co*, 181 Mich App 600, 610; 450 NW2d 6 (1989) (same); *Gutierrez v Dairyland Ins Co*, 110 Mich App 126, 132; 312 NW2d 181 (1981) rev'd in part on other grounds 414 Mich 956; 327 NW2d 253 (1982) (where insurance coverage exists by a higher-priority insurer, a claimant is not eligible for benefits through the MACP).

Accordingly, it would be directly contrary to statute and the purposes of the MAIPF to be placed in a position to be a default defendant charged with the task of identifying higher-priority insurers for claimants and medical-care providers, which is precisely what would occur if plaintiffs were expressly told that they have no duty to make reasonable efforts to identify the highest priority insurers to pay their claims. The MAIPF was neither designed nor funded to be placed in such a role.

C. It Is Not In The Public Interest To Require the MAIPF To Serve As An Insurer-Identification Service.

Under MCL 500.3172(1)(b), a claim is eligible for benefits through the MACP if "[n]o personal protection insurance applicable to the injury can be identified." MCL 500.3172. If this duty is placed exclusively on the MAIPF, it is highly unlikely that it will be reimbursed for the costs of doing so. Indeed, assigned insurers rarely recover the full amount of reimbursement to which they or the MAIPF are entitled from third parties, such as a higher-priority insurers. A

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reimbursement claim under MCL 500.3172 is not a derivative claim, thus, not dependent on whether the claimant is ultimately entitled to benefits. *Williams v Enjoi Transp Solutions*, 307 Mich App 182, 188; 858 NW2d 530 (2014) (claim under MCL 500.3172 is a statutorily-created claim for reimbursement and is independent of the claimant and not a subrogation action). Despite this, higher-priority insurers often attempt to raise such defenses against the reimbursement claim, requiring the assigned insurer to litigate the case, incurring costs and attorney's fees. Like any other litigation, it is not uncommon for these actions to be settled at a compromised amount to avoid the necessity of further litigation, trial, and appeals. Because an assigned insurer is always reimbursed in full by the MAIPF for the amount paid on the claims and the adjustment costs, MCL 500.3175(1), what an assigned insurer does not collect from a responsible third party is paid by the MAIPF from amounts ultimately assessed on the driving public.

Accordingly, it is the driving public that will likely shoulder the majority of the burden of paying for the MAIPF or its assigned insurers to conduct investigations into whether a higher-priority insurer can be identified if this Court finds that plaintiffs are not responsible to protect their own interests. If this Court declines to place any responsibility on claimants to investigate their own claims and protect their own interests, it will open the flood gates to claimants and medical-care providers filing suits against the MAIPF as the lowest-priority option and then letting the MAIPF identify any higher-priority insurers. Unlike lower-priority insurers who collect a premium in exchange for No-Fault coverage, the MAIPF collects no such premium for MACP claims and promises no such coverage. A rule relieving claimants of any responsibility for identifying applicable insurers would place the interests of claimants who fail to take action to protect their rights (and who may very well be covered by private insurers) over the interests of the driving public.

CONCLUSION

For all of the above reasons, this Court should deny the Application for Leave to Appeal.

Respectfully submitted,

Dated: October 18, 2021

DYKEMA GOSSETT PLLC

By: */s/ Lori McAllister*

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