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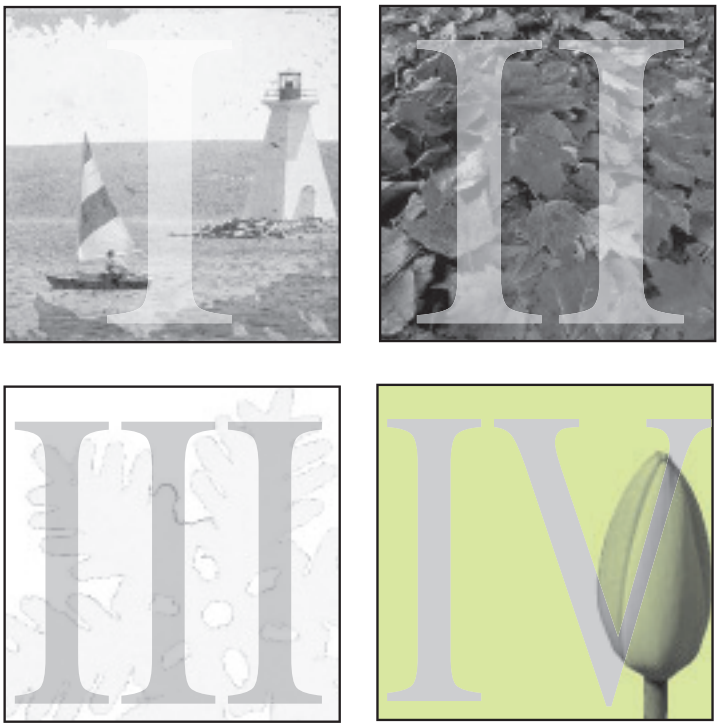


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# DON'T CLOSE THAT FILE:

## Three Ways for PIP Insurers to Get their Money Back

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**Executive Summary**

Unlike other no-fault states, it is a foregone conclusion that in Michigan payments made for wage loss and medical expenses arising from car accidents cannot be recovered in subrogation. Upon conclusion of PIP claims, accordingly, the vast majority of Michigan insurers close their files without consideration of recouping all or a portion of the indemnification. There are now three sources of potential recovery of payments made for personal injury protection, two of which are longstanding but worthy of review. The most recent addition to the PIP insurer's arsenal for recovery is actually common law subrogation—against out-of-state tortfeasors. As recognized by the Michigan Court of Appeals in June of 2005, this right exists even if the out-of-state tortfeasor is properly insured in his or her state, and even though he or she is not required to obtain Michigan no-fault security.

The second and third avenues for recovery are provided within the no-fault act itself. First, anyone who is required to have Michigan no-fault insurance but does not is liable for re-payment to the PIP insurer without regard to fault. Second, there is a potential for either a reduction of PIP benefits payable or reimbursement for benefits paid if the insured recovers (1) in a third-party action arising from an out-of-state accident, (2) from an uninsured Michigan owner or operator, or (3) from an action in Michigan based on intentionally caused personal injury or property damage.

The ability of PIP insurers to obtain reimbursement of PIP indemnification is more important than simply the insurer's bottom line, or even the coffers of the counsel who represent them. There has historically been a class of owners and operators who, without contributing financially to Michigan's admittedly expensive no-fault system, have nonetheless enjoyed its benefits. Uninsured drivers, and out-of-state owners and drivers who do not obtain security for no-fault benefits, are often invoking no-fault tort immunity, or simply contributing to losses indemnified by Michigan PIP insurers by default. The result on premiums alone justifies a renewed effort by insurers to collect reimbursement where available.

### Traditional Subrogation

The belief that subrogation exists only against the uninsured has cost Michigan insurers, and correspondingly their insureds, hundreds of thousands of dollars. Fortunately, the Michigan Court of Appeals erased this long-held misperception in *State Auto Ins Co v Velazquez*.[1] The Court clarified that a Michigan insurer may recover benefits it paid on behalf of its insured from a negligent out-of-state motor vehicle owner and operator. It is irrelevant to the subrogation right that the out-of-state owner and operator were properly insured in their state, and that they did not violate Michigan's registration or insurance requirements. The Court also held that the insurer's right of subrogation accrued upon payment of those benefits to the insured. Therefore, once benefits are paid, the insured is incapable of extinguishing the insurer's subrogation rights which vested upon payment.

*A statutory provision in the Act permits an insurer to recover (in a direct action) PIP benefits paid from owners or registrants of uninsured motor vehicles.*

Jose Flores Velazquez, an employee of Poly Trucking, Inc., was operating a motor vehicle in Michigan when he collided with a vehicle being driven by Lonnie Czinder. The vehicle Mr. Velazquez was driving was registered in Texas and owned or leased by Poly-Trucking, a Texas corporation. Although self insured, Poly Trucking did not have Michigan no-fault insurance, or its equivalent, and did not voluntarily file certification in the State of Michigan pursuant to MCL 500.3163.

Mr. Czinder asserted a traditional negligence claim against Mr. Velazquez and Poly Trucking. The parties to the negligence action eventually entered into a settlement agreement, and as part of their settlement, Mr. Czinder signed a release on September 18, 2003.

State Auto Insurance paid personal injury protection benefits to and on behalf of Mr. Czinder and then filed suit against Defendants Velazquez and Poly Trucking to recover the no-fault automobile insurance benefits

paid. State Auto's suit included both a direct action against Defendants under MCL 500.3177, and a subrogation action by State Auto as subrogee of Lonnie Czinder. The trial court granted the defendants' motion for summary disposition with regard to both the direct and subrogation actions.

On appeal, the Michigan Court of Appeals reversed the trial court's order granting summary disposition of the subrogation action and remanded the matter to the trial court for further proceedings. The Court of Appeals held that an out-of-state, self-insured vehicle owner not required to maintain no-fault insurance who chooses not to participate in the Michigan no-fault system will not enjoy the tort immunity granted by the Act. The Court of Appeals held that the release did not extinguish State Auto's subrogation claim. The Court also held that the out-of-state owner may be liable for the same economic damages addressed by PIP:

> While an out-of-state, self-insured vehicle owner who has not operated his motor vehicle in Michigan for more than thirty days in the calendar year is not required to maintain no-fault insurance and can avoid the statutory obligation of paying PIP benefits by choosing not to participate in the system, the owner will not enjoy the tort immunity granted in the act.
>
> Therefore, although defendants are not liable under the no-fault act for payment of PIP benefits to plaintiff's insured, this does not automatically mean that they are not liable for the same economic damages redressed by PIP benefits based on fault.[2]

The Court of Appeals further stated:

> PIP benefits include payment for economic losses including "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a). Generally a negligent defendant is liable for all injuries resulting directly from his wrongful act, whether foreseeable or not, if the damages were the legal and natural consequences of his conduct and might reasonably have been anticipated. Such damages would include plaintiff's insured's medical expenses and lost wages, which are also covered by PIP benefits. As such, defendants' assertion that plaintiff's insured had no right against them for PIP benefits means little where the insured possessed the right to recover the same type of damages from defendants in his tort negligence suit.[3]

The lesson of *Velazquez* to those who travel to Michigan is simple: while they are not always required to have Michigan no-fault insurance to drive in Michigan, forgoing the right to obtain such security exposes owners and operators to liability for all damages they may cause by their negligence. For Michigan insurers, *Velazquez* represents a potential for recoupment of PIP indemnification.

## Direct Recovery from the Uninsured

The *Velazquez* opinion is also a useful reminder of those situations where the no-fault law itself allows PIP insurers to recover benefits already paid to an insured. A statutory provision in the Act permits an insurer to recover (in a direct action) PIP benefits paid from owners or registrants of uninsured motor vehicles.[4] Section 3177 of the Act,[5] which has often been referred to as a "subrogation provision," specifically allows recovery not only of benefits paid by a PIP insurer but also appropriate loss adjustment costs, including attorney fees.[6]

Section 3177 provides in pertinent part:

> (1) An insurer obligated to pay

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> personal protection insurance benefits for accidental bodily injury to a person arising out of the ownership, maintenance, or use of an uninsured motor vehicle as a motor vehicle may recover such benefits paid and appropriate loss adjustment costs incurred from the owner or registrant of the uninsured motor vehicle or from his or her estate.

It should be noted this statute actually provides the right of a direct action in the name of the insurer rather than under principles of subrogation. The action does not need to be styled as a subrogation action and does not require the insured's cooperation.

The policy reason behind section 3177 was to ensure that owners and registrants of vehicles required to be registered in Michigan obtain the requisite security. In *Belcher v Aetna Casualty & Surety Co*,[7] the Michigan Supreme Court explained:

> Owners and registrants of motor vehicles required to be registered in Michigan must maintain security for payment of benefits under personal protection insurance, property protection insurance and residual liability insurance. MCL 500.3101(1); MSA 24.13101(1). The Legislature has thus designated owners and registrants of such vehicles as the group responsible for contributing to the insurance scheme from which no-fault benefits are payable. To ensure that this segment of the driving public obtain the requisite security the Legislature enacted the following measures:
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> (4) An insurer who is obliged to pay personal protection insurance benefits may be able to recover the amounts paid from owners and registrants of uninsured motor vehicles or from their estates. MCL 500.3177; MSA 24.13177.[8]

Unlike traditional subrogation, section 3177 appears to allow recovery without regard to the fault of the owner or registrant. In *Auto Owners Ins Co v Biddis*,[9] the Michigan Court of Appeals construed the substantially similar predecessor language of section 3177 in determining whether the plaintiff insurer could recover benefits extended to a passenger under an assigned claim from Michael Biddis, the owner and operator of the uninsured vehicle. In *Biddis*, the court noted that the statute made no reference to fault and held as a matter of law that a no-fault insurer could recover from the defendant owner of the uninsured vehicle the money it had paid, plus costs in handling the assigned claim, without regard to fault.[10]

*A statutory provision in the Act permits an insurer to recover (in a direct action) PIP benefits paid from owners or registrants of uninsured motor vehicles.*[4]

There is a limitation on this recovery under certain circumstances. Although section 3177 appears to allow recovery without regard to the fault of the owner or registrant, an insurer may not recover money it has paid from a person statutorily exempted from purchasing no-fault insurance. In *Morris v Allstate Ins Co*,[11] for example, the Court of Appeals sanctioned the denial of the insurer's attempt to recover from the owners of an uninsured off-road vehicle. Because ORV owners are not required to obtain security for no-fault benefits under the Act, they are not exposed to an insurer's direct action under section 3177.

## Recovery Under Section 3116 of the No-Fault Act

Section 3116[12] of the Act provides the statutory prohibition against double recoveries by insureds. Although double recovery is possible under certain circumstances,[13] the Act contemplates instances where the insured who collected PIP benefits also recovered duplicative damages in a third-party action. Although a subtraction from PIP benefits cannot be made because of the value of a claim in tort based on the same accidental bodily injury, a subtraction from (or reimbursement for) PIP benefits paid or payable is permitted if the claimant actually realizes a recovery based upon a tort claim under very narrow circumstances. In other words, section 3116 allows a no-fault carrier to obtain reimbursement from an insured if the insured actually recovers damages for wage loss, medical expenses or replacement services under the circumstances set forth in the statute. The corollary is that no subtraction may be made for any portion of the tort recovery which represents noneconomic loss, or economic loss in excess of the allowable no-fault benefits.[14]

The first limiting factor of section 3116 is that the insured must actually realize a recovery in a tort action; a prospect, however good, is not sufficient to implicate the insurer's right of subtraction. The right of subtraction or reimbursement is also subject to reasonable attorneys' fees and "other expenses incurred in effecting the recovery."[15] The statute does not further define either the fee or expenses to be set off from the reimbursement. One equitable approach, however, applies the ratio of duplication to the total tort recovery (amount

of tort recovery representing duplication to the total recovery) to the total fee and expenses incurred in obtaining the tort recovery.

The three tort recoveries subject to subtraction from PIP benefits are from: (1) tort claims arising from accidents outside Michigan, (2) tort claims in Michigan against uninsured owners or operators, and (3) tort claims in Michigan based on intentionally caused personal injury or property damage. Critical to protection of this right of subtraction is the insurer's obligation to provide notice to both the insured and the tort defendant (including counsel and insurers). If the insurer is unable to recover reimbursement from the insured, the Act grants the right of indemnification from the person who made payment (with notice from the PIP insurer) to the insured without making the PIP insurer a joint payee on the draft.[16]

The reality of providing notice, however, is that far too often the resulting settlements cover only noneconomic loss. In order to avoid this result, the insurer is encouraged to join, where applicable, the tort litigation as a subrogee of the insured for those amounts to which the insurer became vested at the time of payment.[17] Keep in mind, however, that a tort settlement which is silent on the allocation of damages does not permit the PIP insurer to designate any portion of that settlement as duplicative of PIP benefits paid.[18] Nor are courts particularly receptive to arguments of collusion when the tort settlement actually excludes damages recoverable under personal injury protection.[19]

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## Endnotes

1. 266 Mich App 726; 703 NW2d 223 (2005).
2. *Velazquez*, 266 Mich App at 730.
3. *Velazquez*, 266 Mich App at 730-31.
4. *Citizens Ins Co of America v Buck*, 216 Mich App 217, 223; 548 NW2d 680 (1996). An insurer who has paid uninsured motorist benefits, which are not required by the No-Fault Act, may recover such benefits paid from the uninsured motorist in an action based not on any statutory provision, but rather on principles of equitable subrogation. *Buck, supra* at 224-28.
5. MCL 500.3177.
6. *Id.; Buck, supra; Auto Owners Ins Co v Biddis*, 123 Mich App 232, 234-36; 333 NW2d 232 (1983). *See also Auto-Owners Ins Co v Lombardi Food Svc, Inc*, 137 Mich App 695, 699; 358 NW2d 923 (1984) (§ 3177 not limited to assigned claims).
7. 409 Mich 231, 240-41; 293 NW2d 594 (1980).
8. *Belcher, supra* (footnotes omitted).
9. 107 Mich App 173, 176-77; 309 NW2d 192 (1981).
10. *Biddis*, 107 Mich App at 176-77.
11. *Morris v Allstate Ins Co*, 230 Mich App 361; 584 NW2d 340 (1998).
12. MCL 500.3116.
13. See *Shanafelt v Allstate Ins Co*, 217 Mich App 625; 552 NW2d 671 (1997).
14. MCL 500.3116(4).
15. MCL 500.3116(2).
16. MCL 500.3116(3)
17. *Velazquez*, 266 Mich App at 729: "Plaintiff's right of subrogation as to the PIP benefits accrued upon payment of PIP benefits to the insured." (citing *Citizens Ins Co v American Community Mut Ins Co*, 197 Mich All 707, 709; 495 NW2d 798 (1992)).
18. *Keys v Travelers Ins Co*, 124 Mich App 602; 335 NW2d 100 (1983).
19. *Bonsall v American Motorists Ins*, 109 Mich App 674; 311 NW2d 824 (1981).