COALITION PROTECTING AUTO NO-FAULT

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BACKGROUND INFORMATION REGARDING *CPAN V THE MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION (MCCA) "THE TRANSPARENCY LAWSUIT"*

February 26, 2016

I. BACKGROUND INFORMATION

The MCCA is a non-profit, unincorporated Association created by the Michigan Legislature in a 1978 amendment to the No-Fault Act. The MCCA is funded through statutory authority that requires all Michigan insurance companies to become members of the MCCA as a condition to doing business in Michigan. The MCCA charges its member companies an annual assessment that is ultimately paid out of premiums collected by those insurance companies from their policyholders. Currently, the MCCA assessment is $186 per vehicle, which is a line item on most insurance policy premium billings sent to Michigan policyholders. On July 1, 2015, the assessment will fall to $150 per vehicle. In 1978, when the MCCA was first established, the annual assessment was $3 per vehicle. In July 2013, the annual assessment reached a high of $186 per vehicle. The MCCA uses the funding it receives from these annual assessments to pay no-fault PIP benefits for medical and rehabilitation expenses after the patient has incurred such expenses in excess of $530,000. Once a claim exceeds that amount, the MCCA reimburses the accident victim's insurer for ongoing expenses and continues to do so for as long as the patient is alive.

II. THE ISSUE OF TRANSPARENCY

Several years ago, the Michigan auto insurance industry, supported by the MCCA, asked the Michigan Legislature to pass major reforms to the Michigan No-Fault Act that would drastically limit medical and rehabilitation expense coverage for catastrophically injured victims. The insurance industry and the MCCA contended that such legislation was needed because the Michigan no-fault system, and the MCCA in particular, were no longer *"financially sustainable."* It was alleged that the MCCA was facing a financial deficit situation that required a drastic reduction in medical and rehabilitation benefits. In spite of these protestations of financial woe by the MCCA, its 2014 Annual Statement reveals it has over $17 billion in assets!

In order to obtain reliable information regarding the validity of such predictions and to further determine the truth regarding the financial viability of the MCCA, CPAN sent a request to the MCCA under the Michigan *"Freedom of Information Act"* (FOIA), seeking important demographic and financial data regarding open and closed MCCA claims. CPAN believed that this information would be very useful in helping Michigan citizens and their legislators to get to the truth regarding the financial condition of the Michigan auto no-fault insurance system and the fairness of auto insurance premiums charged to Michigan citizens. Even though the MCCA is properly considered a *"public body"* created by the Legislature and, thus, included within the entities that are subject to the FOIA, the MCCA denied CPAN's request. In support of its denial, the MCCA argued that it was not subject to FOIA because of a little known amendment passed by the Legislature in 1988 that allegedly exempts the MCCA from FOIA, even though that statutory amendment (MCL 500.134) was never made a part of the Freedom of Information Act. As a result of the MCCA's refusal to comply with FOIA, CPAN filed a lawsuit on January 23, 2012 in the Ingham County Circuit Court against the MCCA seeking compliance.

III. THE CIRCUIT COURT

Shortly after CPAN filed its lawsuit, the Brain Injury Association of Michigan (BIAMI) brought its own independent lawsuit against the MCCA based upon the principles of Michigan common law allowing Michigan citizens who have a *"demonstrable interest"* to access certain records having a public nature. Moreover, the BIAMI lawsuit alleged that the vast financial holdings of the MCCA subject it to a *"resulting public trust,"* which requires that the MCCA act in a fiduciary capacity to protect the beneficiary interests of Michigan auto policyholders and MCCA patients. Shortly thereafter, the CPAN and BIAMI lawsuits were joined. The CPAN and BIAMI legal team consisted of George Sinas of the Sinas Dramis Law Firm, Joanne Swanson of Kerr, Russell & Weber, and former Circuit Court Judge James Giddings.

These cases were assigned to Ingham County Circuit Court Judge Clinton Canady III. During the course of the litigation, CPAN submitted additional information requests to the MCCA seeking production of certain *"rate-making data"* (RMD). RMD is the information that is relied upon by the MCCA and its actuaries and consultants to determine the amount of the annual assessment that it ultimately charges its members. RMD includes projections, forecasts, predictions, and assumptions that are critical to determining how much the MCCA should charge on an annual basis. Without obtaining and analyzing the RMD, it is impossible for anyone to determine whether the financial projections of the MCCA are accurate and whether the assessments it has levied in the past have been fair and reasonable. In spite of the great relevance of RMD, the MCCA refused to produce any of its RMD information.

After the issues were extensively briefed and the Court heard argument of counsel at a formal hearing, the Court released a written Opinion dated December 26, 2012, wherein the

Court found that the MCCA was, in fact, subject to the Michigan Freedom of Information Act and, as such, was required to produce all information that was relevant to the formulation of its annual assessments. In this regard, Judge Canady ruled:

> *The Court agrees with CPAN's argument that, because the MCA was created entirely by statute, it comes within the definition of "public body" under FOIA. In addition, the Court agrees with CPAN's argument regarding the decision in Shavers v Kelley, that Michigan citizens have a right to know how the insurance premium they pay is calculated to ensure that no-fault insurance is provided on a fair and equitable basis. This concept intertwines with the theories asserted by BIAMI regarding the common law right to information and resulting trusts. Because the MCCA rate charged to insurers is passed on to the insured individuals as part of the premium they pay, it is reasonable to conclude that citizens essentially fund the MCCA reserves by paying that premium; thus, individual citizens have a financial interest in the rate calculation process and how it is conducted. . . . following the rationale articulated in Shavers v Kelley, Michigan citizens have a right to know how the MCCA rate charged to insurers is calculated, because citizens ultimately end up paying that rate as part of the premium charged by the insurers. Specifically, pursuant to the constitutional principles articulated in Shavers, the MCCA must disclose general rate calculation information such as amount of funds contained in MCCA reserves, number of claimants, administrative costs, nature and type of investments of the reserves, amount currently paid by insurers and specific accounting as to increase/decrease in yearly rate calculated, etc. . . . The Court will grant Plaintiffs' Cross Motion for Summary Judgment in part for disclosure of general rate calculation components and information. . . ."*

IV. THE COURT OF APPEALS

Obviously dissatisfied with the Ingham County Circuit Court's ruling, the MCCA filed an appeal with the Michigan Court of Appeals. The case was assigned to Court of Appeals Judges Stephen L. Borrello, Donald S. Owens, and Elizabeth L. Gleicher. The case was argued before the Court on January 8, 2014. On May 20, 2014, the Court of Appeals issued its decision reversing the Ingham County Circuit Court and ruling in favor of the MCCA. In its Opinion, the Court of Appeals held that the MCCA is not subject to FOIA because of the obscure amendment that was passed by the Legislature in 1988 (MCL 500.134) exempting the MCCA from FOIA, even though that statutory enactment was never inserted into the Freedom of Information Act itself. CPAN and BIAMI filed a Motion for Reconsideration which was also denied.

V. THE SUPREME COURT

Following the Court of Appeals reversal of the Ingham County Circuit Court decision, CPAN and BIAMI filed an appeal with the Michigan Supreme Court. On February 4, 2015, the Michigan Supreme Court issued an Order requesting that the parties file supplemental briefs addressing the question of whether the 1988 amendment (MCL 500.134) allegedly exempting the MCCA from FOIA, violated the provisions of the Michigan Constitution regulating the procedures that must be followed regarding the enactment of legislation that amends existing laws. Those Briefs were filed in March 2015. The Supreme Court heard mini oral argument on October 13, 2015. On October 16, 2015, the Supreme Court issued an Order vacating the Court of Appeals decision and remanding the case to the Court of Appeals, instructing that the Court of Appeals specifically address the issues of whether the MCCA is a "*public body*" under State law and, if so, whether the statute passed by the Legislature many years ago, purporting to exempt the MCCA from the reach of FOIA, was constitutionally enacted.

VI. REMANDED BACK TO THE COURT OF APPEALS

The transparency case is now back before the Court of Appeals, pursuant to the Supreme Court Remand Order. The parties filed their Post-Remand Briefs on January 11, 2016 and Post-Remand Reply Briefs on February 1, 2016, with the Court. The Court will schedule oral arguments, which will likely take place later this year. A decision will be issued sometime thereafter. It is likely that the party who loses will file an appeal with the Michigan Supreme Court, which will require additional briefing and litigation, most likely pushing the matter into 2017.

VI. FOR MORE INFORMATION

Additional information will be posted from time-to-time on the CPAN website, ProtectNoFault.org and the CPAN Facebook page: Facebook.com:/ProtectNoFault.