STATE OF MICHIGAN

COURT OF APPEALS

THE TRAVELERS INSURANCE COMPANY,

Petitioner-Appellant,

v

MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION,

Defendant-Appellee.

UNPUBLISHED
June 13, 1995

No. 156716
LC No. 91-405809-CK

Before: Gribbs, P.J., and White and J.F. Foley* JJ.

PER CURIAM.

The Travelers Insurance Company ("Travelers") appeals by right the circuit court's order granting summary disposition to defendant Michigan Catastrophic Claims Association (MCCA).

Travelers paid personal injury protection (PIP) benefits under the Michigan No-Fault Automobile Insurance Act, MCL 500.2101 et seq.; MSA 24.13101 et seq, to a passenger of its insured involved in a single-vehicle accident in Michigan. Claiming under MCL 500.3104(2); MSA 24.13104(2), Travelers sought indemnification from the MCCA for amounts paid in excess of $250,000. The MCCA denied such indemnification. Travelers then filed this action under the statute. The parties filed cross-motions for summary disposition pursuant to MCR 2.116(C)(10). The trial court granted the MCCA's motion. We affirm.

In June 1988, Stewart Case was a resident of Michigan. Around that time he was sent by his employer to work temporarily in Pennsylvania. Ultimately, Case's employer asked him to stay on the project approximately 18 months. Although Case never intended to become a Pennsylvania resident, he obtained a Pennsylvania driver's license when a police officer stopped him after he had lived there about six months. In July 1989, Case purchased a 1989 Ford Ranger truck in Pennsylvania. He registered the truck in Pennsylvania. He titled the truck in his girlfriend's name in an attempt to obtain lower insurance rates. Apparently, this was not successful. Case obtained a six-month insurance policy in his name issued by Travelers in Pennsylvania. The policy was effective from July 27, 1989 to January 27, 1990. There is no dispute that this policy was not a Michigan no-fault policy.

Approximately October 1, 1989, Case returned to Michigan with the truck. He resided with his sister during the week and his parents on weekends. He was in Michigan with the truck for more than 30 days before December 9, 1989. He did not advise Travelers of his change of address, intending to do so when the policy renewal date came up. He did not obtain a Michigan driver's license or register the truck in Michigan.

On December 9, 1989, Case was involved in a one-vehicle accident with the truck, injuring his passenger, Francis Schultz. Travelers paid Schultz's PIP benefits since he did not have his own no-fault policy and apparently did not reside with a family member who had such a policy. The MCCA denied Travelers' claim for indemnification with respect to amounts paid to Shultz in excess of $250,000.

*Circuit judge, sitting on the Court of Appeals by assignment.

Deposition testimony focused on the effect of Case's move to Michigan on Travelers' "total earned car years" figure reported to the MCCA pursuant to MCL 500.3104(7)(d); MSA 24.13104(7)(d). For 1989, it reported and paid a premium for 2,713 "total earned car years." Mark Allaben, responsible for Travelers' statistical reporting, including the "total earned car years" figure, explained that each policy Travelers issues is "coded" to a single state, at least for a given time period. When an insured moves from another state to Michigan, Travelers cancels the old policy and issues a new policy for Michigan. For the time period that a policy is "coded" to Michigan, Travelers adds that number of days to its aggregate "earned car days" figure from which it ultimately calculates "total earned car years" that it reports to the MCCA. None of the time for which a policy is coded to another state is included in this figure.

In its computer system, Travelers tracks all the rating criteria for each policy, including the insured's name, address and age. Travelers updates this information when it discovers a change. The insured may advise Travelers of a change, or Travelers' claim adjustors might discover changed information. If a discrepancy is found (such as in an insured's state of residence), then the "normal policy" is to adjust the insurance policy retroactive to the effective date of the change. Given that there was a discrepancy in Case's address between the claim information and the underwriting information, Travelers' normal procedure would have been to adjust Case's policy retroactive to the date his residence changed to Michigan. However, Allaben said that Travelers "[didn't] have any specific records that says that that procedure was followed."

The process of correcting information generates an "offset," a record containing the corrected information. Another record containing the original information is created called an "onset." A third record is also generated which contains the correct information. To save space and money, the computer system periodically deletes "opposite" onset and offset records leaving only the new policy, that is, the one with the corrected information. Thus, Allaben testified "if there was a correction done on Stewart Case's policy, the old policy with the wrong address is gone, but the new policy is there with the Michigan address". However, he also contended that Travelers did not have the records to answer the question whether Case's policy was in fact changed from Pennsylvania to Michigan.

Allaben testified that if a correction was made in this case then the time that Case's policy was coded to Michigan would have been automatically included in the earned car years figure reported to defendant. The number of days would be calculated based on the effective date of the change, not the date the change was entered. The pricing of the policy would also have been changed, retroactive to the effective date of the change. Allaben testified that Travelers could not go back and determine whether an offset was ever generated for Case's policy based on his move to Michigan.

The parties filed cross-motions for summary disposition pursuant to MCR 2.116(C)(10), claiming there was no issue of fact as to whether the MCCA was required to indemnify Travelers for this claim. The trial court granted the MCCA's motion and denied Travelers', ruling that Travelers had not satisfied the criteria necessary for indemnification. The court ruled that, at the time of the accident, Case was still covered under the original Pennsylvania-issued policy.

II

The Supreme Court reviewed the relationship between insurers and the MCCA in In re Certified Question (Preferred Risk Mutual Ins Co v Michigan Catastrophic Claims Ass'n), 433 Mich 710; 449 NW2d 660 (1989). The MCCA was created to alleviate the financial risk of PIP benefits payable under Michigan's no-fault law.

MCL 500.3104(1); MSA 24.13104(1) provides:

> ....Each insurer engaged in writing insurance coverages which provide the security required by [MCL 500.3101(1); MSA 24.13101(1)] within this state, as a condition of its authority to transact insurance in this state, shall be a member of the association and shall be bound by the plan of operation of the association. ...

The MCCA is required to indemnify its members for PIP benefits they pay in excess of $250,000. MCL 500.3104(2); MSA 24.13104(2). Thus, the Supreme Court characterized the MCCA as a "kind of 'reinsurer' for its member insurers." Preferred Risk, supra, at 715.

Each member pays the MCCA an "assessment" based on its proportion of the "total earned car years" of insurance "providing the security required by section 3101(1) or 3103(1), or both, written in this state during the period to which the premium applies." MCL 500.3104(7)(d); MSA 24.13104(7)(d).

Not every insurer who pays PIP benefits in excess of $250,000 under the no-fault law is entitled to indemnification. The MCCA's obligation to indemnify is limited to those insurers who provide the coverage required by MCL 500.3101(1); MSA 24.13101(1). Under certain circumstances, insurers can be required to pay PIP benefits pursuant to MCL 500.3163(1); MSA 24.13163(1) on policies issued to "out-of-state resident[s]." Such insurers are not entitled to indemnification from the MCCA with respect to payments made under those policies because those policies do not provide the security required by §3101(1), and the insurers have not paid an assessment to the MCCA with respect to such policies. Preferred Risk, supra, at 726-727.

Travelers argues that it is entitled to indemnification for amounts paid under Case's policy of insurance because Case was a resident of Michigan and the MCCA provides indemnification for losses sustained by members "under policies of insurance issued to residents of the State of Michigan," citing the MCCA's plan of operations. Travelers further argues that the statute likewise refers only to "residents." Travelers contends that the MCCA is attempting to impose a new requirement not found in the statute, namely, that the insured be a resident at the time the policy was issued. Travelers argues that since Case became a "resident" while the policy was in effect, it has satisfied the criteria to be entitled to indemnification from the MCCA.

However, as the Supreme Court ruled in Preferred Risk, the focus is on the coverage provided. The term "resident," as used in the MCCA's plan of operation, merely means those required to obtain the security required by §3101(1). Id. at 723 and n 12. Under this definition, Case was, indeed, a "resident"; however, it does not follow that he actually secured the required coverage.

Travelers argues that the plan language is ambiguous and the MCCA could have clearly limited its liability to policies issued to people who were residents at the time of issuance. This is incorrect. Id. at 720 ("[T]he Legislature did not leave it up to the MCCA to decide who will receive indemnification."). The statute defines the MCCA's obligation and the issue is one of statutory interpretation.

Travelers also argues that the circuit court failed to recognize that the MCCA has historically been concerned only with an insured's residency at the time of the accident. Travelers claims that the MCCA neither makes refunds for persons moving out of Michigan before their policies expire nor requires midterm assessments for persons moving into Michigan before the expiration of their out-of-state insurance policies. However, given Travelers' own method of calculating the "earned car years" it reports to the MCCA, this argument is unpersuasive. For a given year, Travelers aggregates the total earned car days of insurance it wrote providing §3101(1) coverage. Travelers only includes the actual days that a policy was "Michigan-coded," that is, that it provided the security required by §3101(1). Thus, there is no need for the MCCA to make a refund or midterm assessment where Travelers does not over- or underreport the earned car years.

Travelers also argues that there is no statutory requirement that the policy must have been "written in Michigan" We do not disagree. However, the question remains whether PIP benefits were paid by virtue of §3163(1) or by virtue of a policy providing the security required by §3101(1).

Travelers argues that it must have paid PIP benefits pursuant to §3101(1). It claims that it could not have paid these benefits pursuant to §3163(1) because that provision speaks regarding "out-of-state resident[s]." Since Case was a Michigan resident, he could not also be an "out-of-state resident." Therefore, the only conclusion is that Travelers reformed the policy to provide the coverage required of a Michigan resident and paid benefits pursuant to §3101(1).

We believe this argument begs the question. To be sure, payments were not literally required under §6163 because at the time of the accident, Case was not an out-of-state resident. But, Travelers was not literally required to make payments under §3101 either, because while Case was a resident at the time of the accident, he did not have a policy that provided the coverages required by the act, except as provided by §3163. In other words, because Case had become a Michigan resident but had not obtained the coverages required by the act, he did not fall into either category and three possibilities emerged: 1) Case could be regarded as uninsured and disqualified from benefits, §3113, and his passenger could be required to obtain benefits from the assigned claims facility, §3172; 2) Travelers could be required to pay under §3163 since it filed a certification that it would pay PIP benefits arising from its out-of-state resident insured's operation of a motor vehicle and Case was insured as a Pennsylvania resident; or 3) the policy could be reformed to provide the coverage required of a Michigan resident and payments would be made as if a Michigan policy had been issued.

The fact that Travelers paid PIP benefits merely means that the first possibility has been rejected. It does not distinguish between the second and third possibilites. In fact, it would seem that the only fact scenario that would distinguish between the second and third possibilities would be if Case had been involved in an accident in a third state. The question would then be whether Travelers would provide the coverage required by the Pennsylvania policy actually issued, or the coverage required under the Michigan No Fault statute on the theory that although Case had not notified Travelers of his change of address and there had been no premium adjustment, he was nevertheless insured under a Michigan No-Fault policy because he was actually a resident at the time he was injured. See §3111.

In all events, §3163 makes the insurer liable for PIP benefits with respect to bodily injury "arising from the . . . use of a motor vehicle . . . by an out-of-state resident who is insured under its automobile liability insurance policies." As with §§ 3101 and 3104, the focus is on the policy that is issued. One could argue that if an insurer issues a policy that does not provide the security required by §3101(1) and the insurer otherwise transacts insurance in this state, then it must be liable under that policy pursuant to §3163(1). The reference to "out-of-state resident" means those persons who are not required to obtain a policy under §3101(1). It is a method of defining the types of policies. There is no question that had Case not returned to Michigan for more than 30 days, but still been involved in the December 9, 1989 accident, Travelers would have been liable for PIP benefits under §3163(1).

We conclude that the operative factor is whether PIP benefits are paid pursuant to a policy providing coverage under §3101, or pursuant to the insurer's obligations under §3163(1). Whether the policy was written in Michigan is irrelevant. Also irrelevant, except as it bears on the question whether benefits are paid persuant to §3101 or §3163, is the residence of the insured at the time of the accident. If Travelers had, indeed, changed the policy to a Michigan policy and made the appropriate adjustments to the premium and the amounts paid to the MCCA, the MCCA would be liable to indemnify Travelers under §3104. However, Travelers did not establish that this is the case.

Travelers argues that its witness conclusively established that it retroactively changed the Pennsylvania policy into a Michigan policy required by §3101 and paid an assessment to the MCCA for that policy. The circuit court disagreed.

Mark Allaben testified that Travelers' normal procedure, upon seeing that Case's address in the notice of loss differed from that of his policy, would be to "code" the policy to Michigan retroactive to the date Case returned to Michigan, October 1, 1989. This would have had the effect of automatically including the timeframe after October 1, 1989 in the earned car days total from which Travelers calculated the "total earned car years" figure it reported to the MCCA. Thus, Travelers would have paid an assessment on that policy and would be entitled to indemnification.

However, Allaben could produce no evidence directly showing that this in fact had been done. More significant was Allaben's testimony that had such a change been made, Travelers would have issued a new Michigan policy with an effective date of October 1, 1989. Travelers did not produce any such policy.

Allaben's testimony that Travelers' "normal procedure" was to make the change would generally be sufficient to circumstantially raise a question of fact as to whether the procedure was followed. However, Allaben testified that Travelers would also have issued a new Michigan coded policy pursuant to that same "normal procedure." That Travelers is unable to produce such a policy undermines its claim that there is a question of fact about whether it followed that procedure.

Travelers attempts to explain away the failure to produce the new policy because the vehicle was "totalled," and thus, no new policy would have been issued. However, Allaben did not identify any exception to the "normal procedure" that a new policy would be issued. Further, Travelers' assertion as to why a policy was not issued in this case is not supported by affidavit.

Moreover, the parties submitted the matter to the court on cross-motions for summary disposition seeking a ruling as a matter of law based on the discovery and arguments presented to the court. The parties were apparently content to let the court make a factual determination to the extent of drawing factual conclusions from Allaben's testimony. To the extent such conclusions were drawn, they were supported by the discovery presented to the court.

Finally, Travelers argues that even if it did not "directly" pay the assessment then it "almost assuredly" paid the assessment for Case's vehicle (approximately one-quarter of a year) because its procedure was to report only whole numbers of earned car years to the MCCA. Therefore, it argues, it must have "rounded up" the number of years and paid an assessment on Case's vehicle "indirectly."

First, an actual assessment must have been paid for the policy under which PIP benefits are paid. Travelers' argument, if accepted, would theoretically entitle it to be indemnified with respect to any number of policies on which it did not actually pay an assessment merely because it "almost assuredly" paid some extra amount which would conceivably satisfy the assessment for a given policy. Travelers fails to acknowledge that there may be more than one policy like Case's for which it would later be entitled to indemnification. Second, that Travelers "almost assuredly" over-reported its assessment is not supported by the record. The MCCA points out that Travelers' policy in calculating its final total earned car years reported to MCCA is to round up if the fractional year is 0.5 or greater and round down otherwise. Statistically, it is just as likely that Travelers rounded up as down. Even if Travelers somehow established that it more likely rounded up, there is no guarantee that it rounded up by at least one-quarter year.

Thus, we conclude that the dispositive question is not where the policy was issued, or the insured's residence at the time of the accident, but whether the benefits were paid under a Michigan No

Fault policy or an out-of-state policy by an insurer registered under §6163. In the instant case, where the parties agreed to resolution by cross-motions for summary disposition, consideration of the undisputed facts and the discovery submitted to the court leads us to conclude that the court's grant of summary disposition to the MCCA should not be disturbed.

Affirmed.

/s/ Roman S. Gribbs
/s/ Helene N. White
/s/ John F. Foley