UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NANCY A. BAKHUYZEN, Personal Representative of the Estate of Nicholas A. Bakhuyzen,

Plaintiff,

v.

NATIONAL RAIL PASSENGER CORPORATION, et al.,

Defendants.

File No. 1:94-CV-264

HON. ROBERT HOLMES BELL

MAMIE DAVIS,

Plaintiff,

v.

NATIONAL RAILROAD PASSENGER CORPORATION, et al.,

Defendants.

File No. 1:94-CV-281

JAMES W. CHILES,

Plaintiff,

v.

NATIONAL RAILROAD PASSENGER CORPORATION, et al.,

Defendants.

File No. 1:94-CV-607

NATIONAL RAILROAD PASSENGER CORPORATION,

Plaintiff,

v.

VAN ANDEL, INC., et al.,

Defendants.

File No. 1:95-CV-106

HON. ROBERT HOLMES BELL

OPINION ON CROSS-MOTIONS FILED BY AMTRAK AND HOMESTEAD

MICHIGAN TRIAL LAWYERS ASSOCIATION
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These four consolidated lawsuits arise out of a collision on March 10, 1993, between a propane truck and a train. The propane truck was driven by Nicholas Bakhuyzen, was owned by his employer, Van Andel LP Gas, and was insured by Homestead Insurance Company ("Homestead"). The train was owned by National Railroad Passenger Corporation ("Amtrak").

Amtrak has sued Homestead for no-fault property protection benefits. This matter is currently before the Court on cross-motions for summary judgment filed by Amtrak and Homestead. Amtrak contends Homestead is liable for property protection benefits pursuant to Michigan's no-fault act because it insured the truck Bakhuyzen was driving. Homestead contends it is not liable for no-fault property protection benefits because Bakhuyzen was not an approved/insured driver of the truck under Homestead's "named operator" insurance policy.

I.

The facts essential to this motion are generally undisputed except where noted. The various Van Andel business entities are owned and operated by Lambert J. Van Andel. Van Andel is in the business of selling and transporting propane gas. The Van Andel trucks are registered in Michigan.

At the time of the accident Van Andel was a member of a propane dealer and distributor organization, The Garage Services and Equipment Dealers Liability Association of America, Inc. ("GasEdla"). GasEdla's home office and principle place of business is located in Utah and it is a Utah corporation. GasEdla acts on behalf of the propane gas industry to obtain insurance alternatives for GasEdla's participating members. It

is a Risk Retention Purchasing Group created pursuant to the Federal Risk Retention Act of 1986, Public Law 97-45.

As of March 10, 1993, Homestead insured GasEdla under Homestead's Master Policy No. PCA-0504 ("the Master Policy") issued to GasEdla in the State of Utah. The policy was issued under the authority of the Risk Retention Act of 1986. Van Andel was an additional named insured under the Master Policy pursuant to a Coverage Contract which was issued by GasEdla to Van Andel, effective on or about December 28, 1992.

The policy provides that if it is "to be construed in accordance with the laws of the State of Utah" and that any declaratory judgment actions brought to clear up disagreements about the policy are to be brought in the State of Utah.

The policy contains a Scheduled Driver Endorsement which provides that "no benefits are afforded while any covered auto is being operated by anyone other than the driver(s) or operator(s) named below." Prior to receiving coverage, Van Andel was required to send to GasEdla a "Group Liability Questionnaire," an "Auto Liability Questionnaire," and a "Named Driver Questionnaire" for each prospective Named Insured driver.

Bakhuyzen was hired by Van Andel in September 1992 as a full-time employee. Bakhuyzen's job duties included driving a propane truck. There is a question of fact as to whether Van Andel submitted Bakhuyzen's name to Homestead for coverage. Homestead contends that prior to the accident Van Andel had not named Bakhuyzen as a driver on the Discovery Questionnaire, had not turned in a Named Driver Questionnaire as to Bakhuyzen, and had not added Bakhuyzen's name through the Supplemental Driver

Procedure. Amtrak contends, however, that Van Andel did in fact send in the information on Bakhuyzen and that he did not receive any notification that Bakhuyzen had been rejected for coverage.

There is no dispute that Van Andel had obtained insurance from Homestead for the 1983 Mack truck involved in the accident and that the policy was in force at the time of the accident. Van Andel received a proof of insurance from Homestead and relied on this proof of insurance when he registered the vehicle with the Michigan Secretary of State. The accident occurred in Michigan.

II.

Homestead contends that pursuant to the express terms of its policy, the policy's terms and provisions are subject to interpretation under Utah law. Under Utah law, parties to an insurance policy "are free to define the exact scope of the policy's coverage and may specify the losses or incumbrances the policy is intended to encompass." Village Inn Apartments v. State Farm Fire & Cas. Co., 790 P.2d 581, 583 (Utah App. 1990). Homestead contends that under Utah law there is no coverage for this accident because although it issued an insurance policy which provided coverage to the truck involved in the accident, the insurance on the truck did not apply because the driver, Bakhuyzen, was not an approved/insured driver of the truck at the time of the accident.

Van Andel contends that this action is governed by the Michigan no-fault act, and that under the no-fault act Homestead's "named operator" coverage is void as against public policy.

The cross-motions for summary judgment filed by Amtrak and Homestead raise a choice of law issue: should the Court apply the no-fault law of the place where the truck was owned and registered and where the accident occurred, or should the Court apply the choice of law provision contained in the insurance contract?

A federal court sitting in a diversity action applies the choice of law rules of the forum state in which it sits. Klaxon v. Stenton Electric Infaction Co., 313 U.S. 487, 496-97 (1941); Security Ins. Co. v. Kevin Tucker & Assoc., Inc., 64 F.3d 1001, 1005 (6th Cir. 1995). In contract actions Michigan courts are moving away from the traditional view that a contract is to be construed according to the law of the place where the contract was entered into to a more policy-centered approach. Chrysler Corp. v. Skyline Industrial Serv., Inc., 448 Mich. 113, 122, 528 N.W.2d 698 (1995). The Michigan Supreme Court has recently expressed its opinion that §§ 187 and 188 of 1 Restatement Conflict of Laws, 2d, "with their emphasis on examining the relevant contacts and policies of the interested states, provide a sound basis for moving beyond formalism to an approach more in line with modern-day contracting realities." Chrysler, 448 Mich. at 124.

Section 187 of the Restatement Second generally permits application of the parties' choice of law, subject to certain exceptions. One exception to this general rule is where application of the chosen state's law "would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the

particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties." 1 Restatement Conflict of Laws, 2d § 187(2)(b). See Chrysler, 448 Mich. at 126.

In Michigan parties are not free to define the scope of vehicle liability coverage. The Michigan no-fault act contains mandatory coverage requirements. Michigan has a strong public policy requiring application of the no-fault act. "The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses." Shavers v. Attorney General, 402 Mich. 554, 578-79, 267 N.W.2d 72 (1978), cert. denied, 442 U.S. 934 (1979)(quoted in Turner v. Auto Club Ins. Ass'n, 448 Mich. 22, 41, 528 N.W.2d 681 (1995)). In interpreting the no-fault act, the Court must remember that "the act is remedial in nature and must be liberally construed in favor of the persons intended to benefit from it." Turner v. Auto Club Ins. Ass'n, 448 Mich. 22, 28, 528 N.W.2d 681 (1995)(citing Gobler v. Auto-Owners Ins. Co., 428 Mich. 51, 61, 404 N.W.2d 199 (1987)).

When an accident occurs in Michigan, the scope of liability coverage is determined by the Financial Responsibility Act, M.C.L. § 257.501 et seq.; M.S.A. § 9.2201 et seq. Farmers Ins. Exchange v. Anderson, 206 Mich.App. 214, 217, 520 N.W.2d 686 (1994). Under this Act an owner's policy of insurance is required to insure the owner and any permitted drivers:

Such owner's policy of liability insurance:

. . .

> Shall insure the person named therein **and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured**, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle.

M.C.L. § 257.520(b); M.S.A. § 9.2220(b) (emphasis added).

Under the Michigan no-fault act the owner of a vehicle is required to obtain insurance as follows:

> The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, **property protection insurance**, and residual liability insurance.

M.C.L. § 500.3101(1); M.S.A. § 24.13101 (emphasis added).

> Under property protection insurance an insurer is liable to pay benefits for accidental damage to tangible property arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle subject to the provisions of this section and sections 3123, 3125 and 3127.

M.C.L. § 500.3121(1); M.S.A. § 24.13121. Under the priority scheme for property protection insurance benefits, a person suffering accidental property damage shall claim property protection insurance benefits first from the insurers of owners or registrants of vehicles involved in the accident. M.C.L. § 500.3125; M.S.A. § 24.13125.

An insurer's liability for property protection benefits turns on the involvement of the insured's vehicle in the accident. Turner v. Auto Club Ins. Ass'n, 448 Mich. 22, 45 (1995). Because property protection benefits provide third-party protection, liability does not depend on who is driving the vehicle. Id. at 30, 43-45. In Turner, the Michigan Supreme Court held that the insurer of the owner of a vehicle was liable

for property damage even when the car was being driven by a thief. Id. at 43.

There is no provision within the Michigan no-fault act for limiting coverage to named drivers only. The only related provision is the Named Driver Exclusion provision which states that "motor vehicle liability coverage may be excluded when a vehicle is operated by a named person." M.C.L. § 500.3009(2); M.S.A. § 24.13009(2). The provision requires the naming of the excluded person rather than the naming of those who are covered:

> The Insurance Code requires that a motor vehicle insurer provide its insured with minimum liability coverage for bodily injury, death, and property damage. This coverage must extend to all permissive drivers unless the person is expressly excluded on the face of the policy or the declaration page or certification of insurance.

Clevenger v. Allstate Ins.Co., 443 Mich. 646, 652, 505 N.W.2d 553 (1993)(emphasis added). Bakhuyzen was not named as an excluded driver on the Homestead policy, and the Homestead provision limiting coverage only to named drivers does not meet the requirements of Michigan's named driver exclusion provision.

When an exclusionary clause in an motor vehicle liability policy conflicts with the liability coverage required by the no-fault act, "the language of the statute must prevail with the result that the attempted exclusion is invalidated and the policy must be read so as to provide the required coverage." State Farm Ins. Co. v. Ruuska, 412 Mich. 321, 336, 314 N.W.2d 184 (1982). In Citizens Ins. Co. v. Federated Mutual Ins. Co., 448 Mich. 225, 227, 531 N.W.2d 138 (1995), the Michigan Supreme Court held invalid a vehicle owner's policy of liability insurance that denied coverage to any permissive user who was otherwise insured

for an amount equal to that specified by the no-fault act. Where a vehicle owner's policy denies coverage for liability arising from use of an insured vehicle in contravention of the no-fault act, "the policy will be deemed to provide primary coverage in an amount equal to that required by the no-fault act." Id. (emphasis added).

As Homestead has noted, Michigan courts have upheld policy restrictions which are not specifically sanctioned by the legislature. In Husted v. Dobbs, 213 Mich.App. 547, 550-51, 540 N.W.2d 743 (1995), the court held that an exclusion denying coverage when insured drives a non-owned, non-passenger vehicle for business purposes did not violate the no-fault residual liability requirements. Exclusions that are not specifically sanctioned by the no-fault act have only been approved, however, where the courts have been satisfied that the exclusions fit within Michigan's no-fault statutory scheme. See State Farm Mutual Auto Ins. Co. v. Snappy Car Rental, Inc., 196 Mich.App. 143, 147-50, 492 N.W.2d 500 (1992), and cases cited therein.

Limiting liability for property protection benefits only to named drivers does not fit within Michigan's statutory scheme because it would potentially leave third parties without any remedy for their property losses.

If this Court were to adopt Homestead's position that the policy should be analyzed under Utah law, then any insurer of a vehicle registered in Michigan would be able to add a "choice of law" clause to elude the requirements of Michigan's No-fault act. This would be in direct conflict with the purpose and intent of the no-fault act. The insurance companies and insureds would pay

less for coverage while innocent third parties who suffer property damage would have no recovery.

The Homestead policy states that it was issued under the authority of the federal Risk Retention Act. This Act supports application of the Michigan no-fault act. The Risk Retention Act, codified at 15 U.S.C. § 3901 et seq., "authorizes persons or businesses with similar or related liability exposure to form 'purchasing groups' for the purpose of purchasing liability insurance on a group basis and 'risk retention groups' for the purpose of self-insuring." Insurance Co. of the State of Pennsylvania v. Corcoran, 850 F.2d 88, 89 (2d Cir. 1988). Although there are express preemption provisions in the Act, not all state regulation of such purchasing groups is preempted. Id.

The interaction of risk retention group policies and state no-fault acts is expressly addressed by the statute:

> Nothing in this chapter shall be construed to exempt a risk retention group or purchasing group authorized under this chapter from the policy form or coverage requirements of any State motor vehicle no-fault or motor vehicle financial responsibility insurance law.

15 U.S.C. § 3905(a).

The legislative history indicates that through the 1986 amendments Congress intended to "augment[] the authority of non-chartering states to regulate solvency, trade practices and other matters" and "contemplated that States may enact statutes and issue regulations to protect the public to the extent such action is not exempt by th[e] Act." Mears Transp. Group v. State, 34 F.3d 1013, 1017 (11th Cir. 1994)(quoting H.R.Rep. No. 865, 99th Cong., 2d Sess. 7, 18 (1986), reprinted in 1986 U.S.C.C.A.N. 5303, 5304, 5315), cert. denied, 115 S. Ct. 1960 (U.S. 1995).

Homestead has come forward with no basis for finding that it is exempt from the operation of the Michigan no-fault act. In fact, an endorsement to the Homestead policy for vehicles principally garaged in Michigan specifically incorporates by reference Chapter 31 of the Michigan Insurance Code, i.e., the no-fault automobile provisions.

The Court is satisfied that application of Utah law would be contrary to a fundamental policy of the State of Michigan. The Court is also satisfied that Michigan has a materially greater interest in this coverage issue than does the State of Utah. The Court concludes that the Homestead policy must be analyzed under Michigan law, and that under the Michigan no-fault act the policy's limitation of coverage to named drivers is invalid.

III.

Homestead argues in the alternative that even if Michigan law controls, there were material misrepresentations made in the application for the policy which entitles Homestead to void or cancel the policy. Specifically, Homestead claims that Van Andel's failure to identify Bakhuyzen as a driver was a material misrepresentation because Homestead contends it would not have insured Bakhuyzen as a driver because of his poor driving record.

Whether Van Andel made material misrepresentations is a question of fact. This question of fact, however, is not material to the issue of voiding the coverage.

As a general rule a material misrepresentation made in an application for no-fault insurance entitles the insurer to void or cancel the policy. "However, this right to rescind a policy altogether ceases to exist once there is a claim involving an

innocent third party." Farmers Ins. Exchange v. Anderson, 206 Mich.App. 214, 218, 520 N.W.2d 686 (1994). "When an insured is involved in an accident, the rights created under the insurance policy become fixed on the date of the accident, and the parties may not retroactively cancel the coverage." Hobby v. Farmers Ins. Exchange, 212 Mich.App. 100, 104, 537 N.W.2d 229 (1995)(citing Madar v. League Gen. Ins. Co., 152 Mich.App. 734, 741-742, 394 N.W.2d 90 (1986)); Clevenger v. Allstate Ins. Co., 443 Mich. 646, 656, 505 N.W.2d 553 (1993).

Accordingly, even if Homestead had a right to rescind the policy on the basis of material misrepresentations, that right ceased once Van Andel's truck was involved in the accident and Amtrak, an innocent third party, filed a claim against Homestead for property protection benefits.

IV.

Amtrak has requested the award of attorney fees pursuant to M.C.L. § 500.3148(1); M.S.A. § 24.13148(1), which provides:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

The Court has not received briefing from Homestead on this issue and accordingly will reserve decision on this issue for 14 days to enable Homestead to file a response.

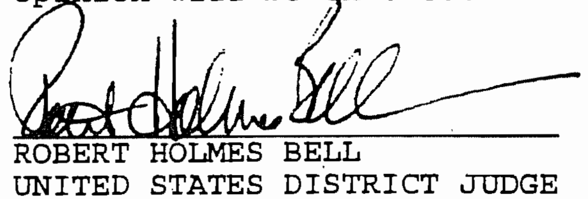
V.

The Court finds as a matter of law that the coverage issue between Amtrak and Homestead is governed by the Michigan no-fault

act. The Court further finds, as a matter of law, that Homestead may be held liable for property protection benefits pursuant to the Michigan no-fault act. Accordingly, Amtrak's motion for summary judgment will be granted and Homestead's motion for summary judgment will be denied.

An order consistent with this opinion will be entered.

Date: February 15, 1996



ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NANCY A. BAKHUYZEN, Personal Representative of the Estate of Nicholas A. Bakhuyzen,

Plaintiff,

v.

NATIONAL RAIL PASSENGER CORPORATION, et al.,

Defendants.

File No. 1:94-CV-264

HON. ROBERT HOLMES BELL

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MAMIE DAVIS,

Plaintiff,

v.

NATIONAL RAILROAD PASSENGER CORPORATION, et al.,

Defendants.

File No. 1:94-CV-281

HON. ROBERT HOLMES BELL

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JAMES W. CHILES,

Plaintiff,

v.

NATIONAL RAILROAD PASSENGER CORPORATION, et al.,

Defendants.

File No. 1:94-CV-607

HON. ROBERT HOLMES BELL

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NATIONAL RAILROAD PASSENGER CORPORATION,

Plaintiff,

v.

VAN ANDEL, INC., et al.,

Defendants.

File No. 1:95-CV-106

HON. ROBERT HOLMES BELL

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ORDER DENYING CROSS-MOTIONS

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that the motion for summary judgment as to Homestead Insurance Company filed by National Railroad Passenger Corporation (Docket # 175) is **GRANTED**.

IT IS FURTHER ORDERED that the motion for summary judgment filed by Homestead Insurance Company (Docket # 197) is **DENIED**.

Date: Feb 15, 1996

ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

STATE OF MICHIGAN

COURT OF APPEALS

CARLA ASPER and JOHN ASPER,

Plaintiffs-Appellees,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellant,

and

GROUP HEALTH PLAN OF MICHIGAN, d/b/a SELECTCARE,

Defendant.

UNPUBLISHED
July 28, 1995

No. 172599
LC No. 93-310582 CK

Before: Murphy, P.J., and O'Connell and R.R. Cashen,* JJ.

PER CURIAM.

Defendant Auto Club Insurance Association appeals as of right the order of the circuit court granting plaintiffs' motion for summary disposition pursuant to MCR 2.116(C)(10) and awarding plaintiffs attorney fees pursuant to MCL 500.3148(1); MSA 24.13148(1). We reverse.

The facts in this case are not in dispute. Plaintiff Carla Asper was insured with Auto Club Insurance Association (hereinafter ACIA) under a policy of no-fault insurance that provided for uncoordinated personal protection insurance medical coverage. Through her employer, Ms. Asper also enjoyed health care coverage through Group Health Plan of Michigan, Inc., d/b/a Selectcare (hereinafter Selectcare). The parties do not contest that, because Ms. Asper's policy with ACIA was uncoordinated, she was entitled to "double-dip" -- she would be compensated twice, once by each insurer, for any medical expenses incurred that fell within the coverage of both policies.

Ms. Asper was treated at Heritage Hospital (hereinafter Heritage) following an automobile accident. Heritage's "customary" charges for Ms. Asper's treatment would have been approximately $29,000. However, Heritage was a participating provider in Selectcare's medical plan. Pursuant to the reimbursement schedule previously negotiated between Heritage and Selectcare, Selectcare paid and Heritage accepted $17,304 in full satisfaction of plaintiff Carla Asper's hospital bill. ACIA then paid plaintiffs $17,304 pursuant to the uncoordinated no-fault provisions of its policy.

Plaintiffs brought suit seeking the difference between Heritage's customary charges and the $17,304 received from ACIA. ACIA moved for summary disposition pursuant to MCR 2.116(C)(10). The circuit court denied the motion, remarking that it saw no reason why plaintiffs were not entitled to summary disposition. Plaintiffs then moved for summary disposition, which the trial court granted. The trial court also granted plaintiffs attorney fees pursuant to MCL 500.3148(1); MSA 24.13148(1). ACIA now appeals.

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

At issue is MCL 500.1307(1); MSA 24.13107(1), which provides in relevant part as follows:

> Except as provided in subsection (2) personal protection insurance benefits are payable for the following:
>
> (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an insured person's care, recovery or rehabilitation.

Neither party disputes that the medical expenses at issue were "reasonable charges" for products, services and accommodations that were "reasonably necessary." Rather, ACIA contends that it was not required to reimburse plaintiffs $29,000 where the actual expenses "incurred" were only $17,000.[1] Plaintiffs argue, and the trial court ruled, that because Ms. Asper would have been liable to Heritage for $29,000 in the absence of Selectcare's reimbursement schedule with Heritage, ACIA is liable to plaintiffs for the greater amount.

This Court reviews both issues of statutory interpretation and grants of summary disposition pursuant to MCR 2.116(C)(10) de novo. Folands Jewelry Brokers, Inc v City of Warren, 210 Mich App 304, 307; ___ NW2d ___ (1995); Borman v State Farm Fire & Casualty Co, 198 Mich App 675, 678; 499 NW2d 419 (1993), aff'd 446 Mich 482 (1994).

In Dean v Auto Club Ins Ass'n, 139 Mich App 266; 362 NW2d 247 (1984), two licensed chiropractors who were participating health care providers in a Blue Cross & Blue Shield of Michigan (hereinafter BCBSM) health care plan brought an action against the insured party's no-fault carrier seeking the difference between the amount they customarily charged for their services, and the amount they accepted as payment in full from BCBSM. This Court held that to require insurers to compensate health care providers for the difference between the BCBSM reimbursement rate and the health care provider's customary fee would contravene public policy in that it would contribute to "skyrocketing" health care costs. Id., p 273, quoting Analysis Section of the House Insurance Committee report, as quoted in LeBlanc v State Farm Mutual Automobile Ins Co, 410 Mich 173, 196-197; 301 NW2d 775 (1981), overruled in part on other grounds Jarosz v DAIIE, 418 Mich 565; 345 NW2d 563 (1984). Specifically, we stated that for a health care provider "[t]o seek remuneration in excess of the prescribed reimbursement rate for services rendered to 'no-fault' patients collides directly with § 3157" of the no-fault act. Dean, supra, p 274.

Dean is not precisely on point. Dean stands for the proposition that, in the instant case, Heritage may not be reimbursed by ACIA for the difference between its customary charge of $29,000 and the amount Heritage accepted from Selectcare as payment in full for the hospital care provided Ms. Asper. Contrastingly, in the case at bar, the insureds seek reimbursement from a secondary insurer for the difference between the customary charges and the actual charges incurred

Nevertheless, we see no reason why the reasoning set forth in Dean should not be extended to the present situation. Premiums were paid either by Ms. Asper or on behalf of Ms. Asper to two insurance carriers. Since the ACIA policy was uncoordinated, and this lack of coordination was presumably reflected in the premiums, Ms. Asper was fully entitled to "double-dip." However, just as a health care provider is not entitled to reimbursement for the difference between its customary and actual charges from a second insurer, Dean, supra, neither is an insured so entitled. Where one insurer fully compensates a health care provider participating in its medical plan pursuant to an agreed upon reimbursement schedule, the only charges "incurred" within the meaning of MCL 500.3107; MSA 24.13107, is "the actual cost expended." Moghis v Citizens Ins Co of America, 187 Mich App 245, 247; 466 NW2d 290 (1991).

Accordingly, we hold that the trial court erred as a matter of law in concluding that the plaintiffs "incurred" expenses equal to Heritage's customary charges of $29,000 where, because of the reimbursement agreement entered into by Selectcare and Heritage, the actual cost expended was $17,304. We therefore reverse the order granting summary disposition in favor of plaintiffs.

In light of our interpretation of MCL 500.3107; MSA 24.13107, we also reverse the trial court's award of attorney fees pursuant to MCL 500.3148(1); MSA 24.13148(1). That statute provides that "[a]n attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue." Since no benefits were due, much less overdue, the award of attorney fees was inappropriate.

Reversed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Raymond R. Cashen

[1] Contrary to plaintiffs' contention on appeal, ACIA raised this issue before the circuit court, thereby preserving the issue for review. See Kratze v Independent Order of Oddfellows, Garden City Lodge No. 11, 190 Mich App 38, 42; 475 NW2d 505 (1991), modified on other grounds 442 Mich 136 (1993).