



Issued by the Litigation and Transportation Practice Groups

April 16, 2007

## INSURER MAY SUSPEND PIP BENEFITS UNTIL INSURED ATTENDS INDEPENDENT MEDICAL EXAMINATIONS

Author:

Edward J. Higgins

Direct: (313) 983-4919

[ehiggins@plunkettcooney.com](mailto:ehiggins@plunkettcooney.com)

In a recent published opinion, *Roberts v Farmers Insurance Exchange*, the Michigan Court of Appeals held that when an insured repeatedly fails to appear at statutorily required Independent Medical Examinations (IMEs), it is reasonable for an insurance company to suspend payment of first-party no-fault personal protection insurance (PIP) benefits pending completion of such an examination. Furthermore, the court held that the insured was obligated to repay the insurance company the cancellation fee it was charged by the doctor scheduled to perform the IME.

In *Roberts*, the plaintiff insured and her 12-year-old daughter were involved in an automobile accident. The insured's daughter was covered under a no-fault policy issued to her mother by Farmers Insurance Exchange. Following the accident, the daughter was examined by a physician who noted that the girl complained of pressure-tension headaches. Subsequent to this exam, the insured's daughter repeatedly failed to appear for, or cancelled, IMEs scheduled by the insurance company.

The physician scheduled to perform the IME informed the insurance company that if the insured's daughter cancelled or failed to appear again, the physician would charge the insurer a \$1,000 cancellation fee. The insurer notified the insured that should the appointment be broken, the insured would be responsible for the fee. Subsequently, the insured's daughter failed to appear and the physician assessed the insurance company the cancellation fee. The insurance company then terminated the first-party no-fault benefits and informed the insured that the IME would only be rescheduled upon receipt of the cancellation fee amount.

The insured commenced a lawsuit claiming that the insurer had unreasonably refused the payment of benefits under MCLA 500.3142 and MCLA 500.3148 for the closed-head injury allegedly suffered by the insured's daughter in the automobile accident. The insurer counter-claimed for breach of contract and demanded payment of the cancellation fee. The trial court ruled in favor of the insured on the issue of the payment of benefits and granted sanctions in the form of attorney fees. The court held that the insured was, however, required to repay the cancellation fee to the insurer.

The Michigan Court of Appeals reversed the trial court, holding that it clearly erred in the awarding of attorney fees. The court noted that attorney fees are recoverable when it is proven that the insurer has unreasonably failed to pay overdue benefits. Under MCL 500.3142, benefits are considered overdue if not made within 30 days after the insurer has received reasonable proof of the fact and amount of the loss sustained.

Turning to the facts of the case, the appellate court stated that, according to the records submitted by the insured daughter's medical provider, the insurer denied payment of benefits in early February 2005. The lawsuit was filed in August 2004 and the motion for sanctions was filed on January 26, 2005. Therefore, the court held that there was no evidence that any payment of benefits was overdue at the time the suit or motion was filed.

Furthermore, under MCL 500.3148, a denial of benefits will not be held to be unreasonable if the insurer has a legitimate question of statutory construction, constitutional law or a bona fide factual uncertainty. The appellate court held that the insurer's suspension of benefits was reasonable because the insurer had both a legitimate question of statutory construction as to the penalty for the claimants failure to submit to an IME and a bona fide factual uncertainty as to the alleged injury. The court held that an insurer's denial of benefits pending completion of an IME is reasonable when a claimant repeatedly breaches its statutory duty to submit to an IME.

The appellate court held that the insurer had a bona fide factual uncertainty as to whether a closed head injury was sustained because the claimant was wearing a seatbelt at the time of the accident, suffered no loss of consciousness and her complaints of pain were not supported by objective findings.

The Michigan Court of Appeals also upheld the trial court's judgment that the insured was liable for payment of the IME cancellation fee. The court rejected the insured's argument that it was excused from performance by reason of impossibility, holding that there was no evidence that it would have been impossible or even extremely difficult for the insured's daughter to attend the IME for which the cancellation fee was assessed.

For a complete copy of the Michigan Court of Appeal's order in *Roberts v Farmers Insurance Exchange*, --- N.W.2d ---, 2006 WL 3883464 (Mich.), click [here](#).