MICHIGAN Lawyers Weekly

Absent election, insurer must pay statutory minimum

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By Correy E. Stephenson

Unless an insured properly exercised the option to select lower liability insurance coverage pursuant to MCL 500.3009, an insurer may not assert the noncooperation of its insured as a defense to a claim by a third-party victim to thwart the statutory minimums, the Michigan Court of Appeals has ruled.

The defendant claimed MCL 500.3009(1) plainly imposed a minimum coverage amount of $250,000 and that MCL 500.3009(5) did not apply because coverage for a lower amount is only available when an insured affirmatively chooses it.

Judge Stephen L. Borrello agreed.

"[T]he statutorily required minimum residual liability insurance for policies issued after July 1, 2020, is $250,000 per person and $500,000 per accident, pursuant to MCL 500.3009(1)(a) and (b), unless the proper steps are followed to exercise the option of selecting a lower coverage amount under MCL 500.3009(5)," he wrote. "[A]n insurer may not assert the noncooperation of its insured as a defense to a claim by a third party

noncooperation of its insured as a defense to a claim by a third-party victim to thwart the minimums set forth in MCL 500.3009(1) unless the insured properly exercised the option to select lower coverage, in which case the insurer is only liable to the extent of the insured's selected lower coverage amount."

The published decision is *Progressive Marathon Insurance Company v. Espinoza-Solis* (MiLW 07-108121, 9 pages). Judges Christopher P. Yates and Kristina Robinson Garrett joined Borrello's decision.

Adam Kutinsky, of KUTINSKY in Birmingham, who represented the third party, said the court made the right decision.

"This was a straightforward issue with respect to statutory interpretation," he told Michigan Lawyers Weekly.

Detroit attorney Timothy A. Diemer of Jacobs and Diemer represented the insurer; a representative from the company referred comment to Erin McDonough, executive director of the Insurance Alliance of Michigan.

"Court decisions like that in *Espinoza* make it more difficult for the consumer to purchase more affordable limits that may better reflect their needs and budgets," she said in a statement.

Statutory minimum disputed

Juan-Carlos Espinoza-Solis was insured by a policy of Michigan no-fault insurance issued by Progressive Marathon Insurance Company when he was involved in a motor vehicle accident with Gjovalin Shkreli.

Shkreli filed a negligence action against Espinoza-Solis and Progressive retained counsel to defend the insured.

The trial court entered a default judgment against Espinoza-Solis in Shkreli's favor for $250,000 as a discovery sanction.

In response, Progressive filed a declaratory judgment action against Espinoza-Solis and Shkreli. The insurer argued that Espinoza-Solis "utterly failed to cooperate" in the negligence action and argued it had no duty to defend and indemnify him.

Progressive moved for summary judgment, claiming the statutory minimum coverage for which it was liable to Shkreli was $20,000, pursuant to *Coburn v. Fox*, a 1986 decision from the Michigan Supreme Court.

Shkreli countered that MCL 500.3009(1) plainly imposes a minimum coverage amount of $250,000, and Espinoza-Solis did not exercise the option pursuant to MCL 500.3009(5) to opt for a lower coverage amount.

The Oakland County Circuit Court denied Progressive's motion and granted summary disposition in favor of Shkreli.

Progressive appealed.

Absent election, statutory minimums apply

"Michigan's recent no-fault insurance reform introduced in 2019 and implemented after July 1, 2020, can impact a no-fault insurer's financial liability in a couple of ways when the insured fails to cooperate with the insurer in a negligence lawsuit with a third party," Borrello wrote. "Succinctly stated, we conclude that Michigan's no-fault reform can financially penalize the insured for non-cooperation with Personal Injury Protection (PIP) benefits, but the insurer's obligation to defend the lawsuit and pay bodily injury liability damages remains intact."

The judge noted that, before recent changes in Michigan's no-fault law, the answer was well-settled by *Coburn*, where the Supreme Court held that "[b]ecause of the compulsory nature of the liability insurance, the noncooperation of the insured is not a good defense in an action between a third-party victim and an insurer to the extent of the statutorily required

minimum residual liability insurance."

MCL 500.3009 was amended in June 2019, but *Coburn* was not overruled.

"[I]ts holding that an insurer cannot assert its insured's noncooperation as a defense to liability to an injured third party 'to the extent of the statutorily required minimum residual liability insurance,' is still controlling in the present case, which involves a factual scenario virtually identical to that in *Coburn*," Borrello wrote.

The question before the court was simply the extent of the insurer's liability in light of the amendments to MCL 500.3009, which, as amended, requires minimum coverage limits for bodily injury or death of $250,000 per person and $500,000 per accident in policies issued after July 1, 2020.

Under the current version of MCL 500.3009(5), however, insureds may elect to purchase lower limits than required, but not lower than $50,000.

While the parties disputed the correct amount, Borrello applied the basic principles of statutory construction to conclude that the $250,000 per person and $500,000 per accident limits "apply by default and are mandatory for all no-fault policies issued after July 1, 2020."

Subsection (5) of the statute provides an option to obtain an exception to the mandatory minimums if certain conditions are met,
but *Coburn* commands the statutorily required minimum residual liability insurance under the current version of MCL 500.3009 of $250,000 and $500,000, the judge said.

Progressive's argument to the contrary "ignores the fact that compulsory insurance coverage under the no-fault act — and specifically, compulsory residual liability insurance under the no-fault act — exists for the protection of injured third parties and the public at large," Borrello wrote.

The decision did not leave Progressive without a remedy, the judge added.

“[I]t may still sue Espinoza-Solis for breach of contract and enforce its noncooperation clause against him as its insured,” Borrello pointed out. “Consequently, an insured has an incentive to comply with a contractual provision requiring cooperation with the insurer.”

As the record reflected that Espinoza-Solis’s policy limits were $250,000 per person and $500,000 per accident in accordance with the mandatory limits set forth in MCL 500.3009(1) — and that he did not exercise the option under MCL 500.3009(5) to select a lower limit — the trial court correctly concluded that Progressive was liable for the entire $250,000 judgment, Borrello said, affirming summary disposition for Shkreli.