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September 27, 2006

State of Michigan
Office of Financial & Insurance Services
P.O. Box 30220
Lansing, MI 48909

Attn: Insurance Commissioner Linda A. Watters

Dear Commissioner Watters:

My name is Steven Gursten and I am the attorney for Amie Carducci. Amie is a twenty-eight year old school teacher who suffered life threatening injuries when she was struck nearly head on by an uninsured driver in 2005. She underwent 13 surgeries, including an emergency six level fusion surgery to her lumbar spine immediately following the accident. She spent nearly a month in the hospital and has no memory of the accident due to her traumatic brain injury. I am writing this letter to inform you of a terrible miscarriage of justice that has occurred in her case.

Amie had a \$100,000 uninsured motorist policy with Progressive Insurance Company at the time of her accident. As you know, uninsured motorist policies are meant to protect people if they are involved in a car accident with an uninsured driver. In theory, because the uninsured driver has no insurance the injured person would turn to their own insurance company who would then pay them the money for their injuries from the uninsured motorist protection coverage that they paid additional premiums for. Michigan drivers are advised by their insurance agents to carry this supposedly valuable uninsured motorist protection and these policies are continuing to be sold every day across this state.

However, recent changes in Michigan law have turned these uninsured motorist policies into essentially meaningless coverages. The insurance companies that are selling these coverages are still collecting valuable insurance premiums to sell them when in most instances they know they will never have to pay out benefits. How can this be?

In Amie's case, Progressive had a "set off provision" (see attached) that purportedly allows the insurance company to set off medical payments for her medical treatment and

benefits. **This means that the insurance company can "set off" benefits that Amie cannot even claim under Michigan law.** Although these set off provisions have been found illusory, unconscionable, and against public policy in almost every other state in the country, these policy provisions have been upheld in Michigan. Recent case law (please see defendant Progressive's attached motion and brief for summary disposition) have abolished the doctrine of reasonable expectations of consumers when they buy these insurance policies.

Judge Edward Servitto in Macomb County Circuit Court granted defendant Progressive's motion for summary disposition (please see attached Opinion by Judge Servitto).

This means that my client, Amie Carducci, who was completely innocent and who suffered nearly fatal injuries that required 13 surgeries to date, and remains completely disabled, will receive nothing in her lawsuit against Progressive. Amie had a \$100,000 Progressive uninsured motorist policy to protect if she was hit by an uninsured motorist. However, somehow Michigan law now allows Progressive to set off the medical costs that are paid by a completely different insurer, that Amie cannot even claim in her lawsuit against Progressive, from the \$100,000 uninsured motorist policy that was meant to protect her for her non-economic losses (pain and suffering) if she was injured by an uninsured driver.

The question becomes, when will Progressive or any of the insurance companies that have put identical set-off provisions in their uninsured motorist policies, ever have to pay on these uninsured motorist policies? Setting aside the unconsciounability of setting off medical bills that cannot even be claimed by the plaintiff from pain and suffering policies, this absurdity is highlighted by the fact that Michigan law now gives these uninsured motorist carriers greater rights to defend themselves by claiming set offs that any other defendant in an auto negligence lawsuit cannot claim.

When will Progressive or any insurance company selling uninsured motorist policies now have to pay off on these coverages that they are continuing to sell to the public every day? Simply put, it is hard to envision any instance. Michigan law denies compensation to innocent victims of accidents who do not pass the threshold test of serious impairment of body function. *Kreiner v. Fisher*, 471 Mich 109 (2004). This means if your injuries are not "serious", you cannot recover for your injuries.

On the other hand if your injuries are serious, the uninsured motorist carrier can now set-off the costs of medical treatment and other benefits that cannot even be claimed by the plaintiff. Again, the result is the person gets nothing.

It should be noted that one very troubling affect of the *Kreiner* decision has been the startling rise of "threshold creep" by more conservative judges that have continued to elevate the bar on what is considered serious far beyond what the Michigan legislature intended in 1995. The clear legislative history was to weed out clearly frivolous or "de

minimus" injuries, yet after *Kreiner*, there have been some startling decisions that have

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dismissed very serious cases that far exceed the original legislative intent. (See *Gagne v. Schulte*, No. 264788, 2006 WL 475277 (Mich. App. Feb. 28, 2006), *Swick v. Okorn*, No. 263478, 2005 WL 2862041 (Mich. App. Nov. 1, 2005) and *Conklin v. Shack*, No. 268316, WL 2089178 (Mich. App. July 27, 2006). While the purpose of this letter is to alert you to these uninsured motorist insurance policies that are being sold to the public everyday by insurance companies without any expectation of ever having to pay out on them, and not to dwell on troubling judicial extension and threshold creep, which was characterized by the dissent in *Kreiner* as a rewriting by the four Republican Supreme Court justices as simply a rewriting by the majority of "this unambiguous statute to comport to [its] own preference on how the statute should be written and applied," it further highlights the illusory nature of uninsured motorist coverage in Michigan: If the uninsured motorist policies that they bought with additional premium dollars can use the threshold defense on the one hand to avoid payment, and yet in clearly horrific injury cases, such as of my client, Amie Carducci, set off medical bills from tort recoveries, when exactly will the insurance companies ever have to pay out on these uninsured motorist policies?

Very truly yours,

Steven M. Gursten

SMG/evs

Enclosures