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MSC considers limiting no-fault fees

By Carol Lundberg

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Michigan's no-fault attorneys might be steered away from taking smaller cases, if the Michigan Supreme Court approves an amendment to Michigan Court Rules.

The amendment to MCR 8.121 would limit no-fault attorney contingency fees to one-third of recoveries, which is fine in many cases, but makes it nearly impossible for lawyers to take cases where a plaintiff is being denied a small amount of money.

"Up until this point, fees in no-fault auto cases are basically unregulated except for the prohibition of unreasonable fees," said Wayne J. Miller of Southfield-based Miller & Tischler PC. "Up until this point, we could have charged 40 or 50 percent. We generally don't, but we could have."

Because most no-fault plaintiffs' attorneys work for the same one-third contingency fee that personal injury and wrongful death attorneys do, the impact of the amendment could be minimal. Unless, Miller added, it affects no-fault penalty fees that are payable under No Fault Act section 3148.

"If the plaintiff takes a small case on a contingency limited to one-third, this rule appears to preclude the ability of the plaintiff to obtain the penalty beyond the small one-third," he said. "That's a very troubling result."

David E. Christensen, of Farmington Hills-based Michigan Auto Law, agrees.

"It would make it impossible for insured people, medical providers or hospitals who have been improperly denied payment by no-fault insurers to bring suit against the insurers in the vast majority of instances," he said.

"Most improper denials are for relatively small sums, probably under $7,500, and the penalty attorney fees allowed by [No-Fault Act] Section 3148 make it possible to hire an attorney to force the insurers to properly pay those smaller claims. If the proposed rule overrides the Statute, then the insurers get a free pass on the smaller claims. No attorney can afford to handle lawsuits for one-third of $7,500."

The idea behind the proposal came from a 2007 letter from Wayne County Circuit Court Judge Robert J. Colombo Jr., who, according to Michigan Supreme Court Chief Justice Marilyn Kelly, noticed instances where no-fault attorneys were charging more than one-third of recoveries, she said at the Court's October public administrative conference.

“Judge Colombo’s position was that if you have a contingency based on a contract that it’s somehow not subject to the one-third fee,” said Anne M. Boomer, Michigan Supreme Court administrative counsel. But the judge thought it should be, she added. “He thought that no-fault ought to be like personal injury.”

Justice Robert P. Young Jr. asked Boomer about the outer limits of contingency percentages, if they are not governed by rule 8.121. Boomer replied that she believes they are only governed by the reasonableness requirement.

That led Justice Stephen J. Markman to ask, “Is the upshot that he says that greater than one-third is always unreasonable?”

The Court voted 6-1 to publish the amendment and invite comments. Comments will be taken until Feb. 1, 2011. A public hearing will be scheduled.

Justice Maura D. Corrigan voted against publishing the amendment in order to gather input from stakeholders before publication.

The proposed amendment would change Rule 8.121 (A) to read:

In any claim or action for personal injury or wrongful death based upon the alleged conduct of another, or for no-fault benefits, in which an attorney enters into an agreement, expressed or implied, whereby the attorney’s compensation is dependent or contingent in whole or in part upon successful prosecution or settlement or upon the amount of recovery, the receipt, retention, or sharing by such attorney, pursuant to agreement or otherwise, of compensation, which is equal to or less than the fee stated in subrule (B) is deemed to be fair and reasonable. The receipt, retention, or sharing of compensation which is in excess of such a fee shall be deemed to be the charging of a “clearly excessive fee” in violation of MRPC 1.5 (a).