

STATE OF MICHIGAN

IN THE CIRCUIT COURT OF COUNTY OF INGHAM

**BRAIN INJURY ASSOCIATION
OF MICHIGAN (BIAMI), RICHARD K. &
ILENE IKENS, DR. KENNETH & SUSAN WISSER,
GREGORY A. & KAREN M. WOLFE, AND
OTHER SIMILARLY SITUATED MICHIGAN
AUTOMOBILE POLICY HOLDERS**

Plaintiffs,

v

Case No. 12-_____ -CZ

**THE MICHIGAN CATASTROPHIC
CLAIMS ASSOCIATION (MCCA),**

Defendant.

James R. Giddings (P13960),
Attorney for Plaintiff
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COMPLAINT

A CIVIL ACTION BETWEEN THESE PARTIES OR OTHER PARTIES ARISING OUT OF THE TRANSACTION OR OCCURRENCE WHICH IS THE SUBJECT MATTER OF THIS COMPLAINT, *COALITION PROTECTING AUTO NO-FAULT V MCCA*, DOCKET NO. 12-68-CZ, WAS PREVIOUSLY FILED IN THIS COURT, AND ASSIGNED TO THE HONORABLE CLINTON CANADY III. THAT ACTION REMAINS PENDING.

**NOW COMES Plaintiffs, Brain Injury Association of Michigan (BIAMI),
Richard K. & Ilene Ikens, Dr Kenneth & Susan Wisser, and Gregory A. & Karen M.**

Wolfe, by and through their attorney, James R. Giddings, and by way of its Complaint against the above-named Defendant, says unto this Honorable Court as follows:

1) Plaintiff, Brain Injury Association of Michigan, hereinafter referred to as “BIAMI”, is a Michigan non-profit, non-stock corporation, organized on a membership basis in accordance with § 304 of the Michigan Nonprofit Corporation Act (MCL 450.2304). BIAMI has its principal office located at 7305 Grand River, Ste. 100, in the city of Brighton, Livingston County, Ingham County, Michigan.

2) The mission of BIAMI is to enhance the lives of those affected by brain injury through education, advocacy, research and local support groups and to reduce the incidence of brain injury through prevention.

3) The members of BIAMI consist of interested persons supportive of the organization’s stated mission and its principal officer is its President, Michael F. Dabbs.

4) Plaintiffs Richard K. & Ilene Ikens are residents of Osceola County, Michigan; Plaintiffs, Dr. Kenneth & Susan Wisser, are residents of Ingham County, Michigan; and Plaintiffs, Gregory & Karen Wolfe, residents of McComb County, Michigan.

5) Defendant, Michigan Catastrophic Claims Association, hereinafter referred to as MCCA, was created by the Michigan Legislature in a 1978 amendment to the No-Fault Act which added § 3104, being MCL 500.3104. This amendment also established the statutory obligations of the MCCA.

6) Defendant, MCCA, regularly and systematically conducts business in Ingham County, Michigan.

7) Plaintiffs, Richard K. & Ilene Ikens and Gregory & Karen M. Wolfe, are Michigan automobile policy holders who for many years have paid, and are currently being assessed, the annual per vehicle premium for catastrophic coverage as mandated by Michigan's No-Fault Act.

8) In 1972, the Michigan Legislature enacted the Michigan No-Fault Auto Insurance Act, being chapter 31 of the Michigan Insurance Code, MCL 500.3101, *et seq*, hereinafter referred to as No-Fault Act. This statute established a comprehensive insurance reparations system for the care and treatment of persons injured in motor vehicle accidents. This system incorporates many features such as:

- (a) A compulsory insurance system, requiring the owners or registrants of motor vehicles that must be registered in Michigan to purchase no-fault insurance for the payment of personal protection insurance (PIP) benefits, property protection insurance (PPI) benefits, and residual liability insurance [MCL 500.3101].
- (b) A system that requires the payment of PIP benefits which under the No-Fault Act includes "allowable expenses," currently defined by statute as "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." [MCL 500.3107(1)(a)] Currently, these benefits are payable for the life of the injured person and are not subject to any monetary cap.

9) Under Michigan's No-fault Act, those who fail to carry this required insurance are subject to criminal prosecution exposing the violator to monetary fines and imprisonment for up to one year. MCL 500.3102.

10) The principal statutory duty of Defendant, MCCA, is to reimburse Michigan insurance companies for allowable expense PIP benefits which insurers pay on behalf of catastrophically injured persons, in excess of the prescribed statutory retention amount, currently \$500,000 per claim, which amount is adjusted prospectively as provided for in § 3104.

11) Under the mechanisms established by § 3104 of the No-Fault Act, the reimbursement of excess PIP benefits paid by Defendant, MCCA, to its members and 3103 members, since its inception has been entirely funded by the insurance premiums imposed upon Michigan automobile policy holders under the compulsory insurance provisions of the No-Fault Act.

12) Upon information and belief, Defendant MCCA's administrative expenses are paid in total by the compulsory insurances premiums imposed on Michigan auto policy holders pursuant to the No-fault Act.

13) Although section 3104(7)(d) of the No-fault Act speaks in terms of a charge to MCCA "members" of a premium sufficient to cover the losses and expenses of MCCA, in fact, the member companies simply pass through to Michigan auto policy holders, including Plaintiffs here, 100 percent of the per vehicle premium charges set by the MCCA. Some member companies add a surcharge to the per vehicle premium charge in passing it on to Michigan auto policy holders

14) While Michigan auto policy holders represent the ultimate funding source for the cost of treatment and rehabilitation of individuals sustaining catastrophic injury

in motor vehicular accidents, under section 3104 of the No-fault Act, Defendant, MCCA, controls, operates and is responsible for the mechanism which facilitates the payment of excess expenses for catastrophically injured victims.

15) Defendant MCCA gathers data and other important information that reflects the amount of allowable expense PIP benefits that have been paid on behalf of catastrophically injured victims, the nature of the injuries requiring the payment of those benefits, the age of the injured victims, the duration of the claim, as well as pertinent actuarial standards.

16) Because of its compulsory nature and its substantial impact on the lives, health, and welfare of Michigan citizens, the Michigan Supreme Court has held that the No-Fault Act is implicated by the due process and equal protection provisions of the Michigan and United States Constitutions. *Shavers v Attorney General*, 402 Mich 554; 267 NW2d 72 (1978).

17) As a result of the *Shavers* ruling, Plaintiffs here are entitled to access information so as to enable Plaintiffs here, and all Michigan automobile policy holders, to protect their economic interests by being able to know what factors go into MCCA's rate setting, how the MCCA rates are calculated and also to enable the victims, such as those represented by the BIAMI, to be assured that their future care and treatment will not be adversely affected either because of inaccurate or incomplete information employed by or disseminated by MCCA, or by unsound actuarial practices.

18) Thus, the factual details regarding how Defendant, MCCA, discharges its statutory obligations must be made available to Plaintiffs so that their statutory and constitutional rights are adequately protected.

19) At the present time, the Michigan Legislature is considering legislation that would alter, and in some ways terminate, the Michigan auto no-fault insurance system as presently constituted. These proposals include, but are not limited to, HB 4936 and SB 649. In part, these proposals would eliminate the lifetime, uncapped allowable expense PIP benefits payable under § 3107(1)(a) of the No-Fault Act for medical and rehabilitation expenses incurred by catastrophically injured victims.

20) Plaintiffs have submitted a request to Defendant, MCCA, seeking to obtain certain records from MCCA regarding the payment of allowable expense PIP benefits on behalf of catastrophically injured victims. This request was made in a letter to Defendant MCCA, dated May 18, 2012 , a copy of which is attached hereto as Exhibit A. That letter requested legible copies of all records and documents which would provide the following information:

- (1) As to all claims, open and closed, BIAMI seeks the rationale, historical or otherwise, to use of the 25% factor in setting Incurred But Not Reported (IBNR) claim reserves.
- (2) As to all closed claims previously serviced by the Michigan Catastrophic Claims Association (MCCA):
 - (a) The age of the claimant as of the date of injury;
 - (b) The age of the claimant as of the date the claim was closed;

- (c) The total amount paid as of the date the claim was closed; and
 - (d) The actuarial standards employed to establish reserves sufficient to secure payment of all such claims.
- (3) As to all open claims presently being serviced by the Michigan Catastrophic Claims Association (MCCA):
- (a) The age of the claimant as of the date of injury;
 - (b) The current age of the claimant;
 - (c) The total amount paid to date for each claim; and
 - (d) the actuarial standards employed to establish reserves sufficient to secure payment of all such claims.

21) Defendant MCCA has refused Plaintiff BIAMI's request in a letter dated May 29, 2012, a copy of which is attached hereto as Exhibit B.

22) Although Plaintiffs believe that Defendant MCCA is subject to the Michigan Freedom of Information Act, MCL 15.231, *et seq*, that is not a claim which Plaintiffs are asserting here. Rather, Plaintiffs assert a right to the requested information under *Shavers v Attorney General, supra*, and pursuant to the common law, as preserved under Art III, sec. 7 of the Michigan Constitution.

COUNT I

COMMON LAW CLAIM FOR MCCA RECORDS

23) Plaintiffs, BIAMI, Richard K. & Ilene Ikens, Dr. Kenneth & Susan Wisser, and Gregory A. & Karen M. Wolfe, incorporate by reference into this Count I, each and every one of the foregoing paragraphs of the Complaint, and in addition thereto state as follows:

24) The Michigan Supreme Court has declared unequivocally that under Michigan's no fault system, due process requires that automobile insurance rates may not be "excessive, inadequate or unfairly discriminatory." *Shavers v Attorney general*, 402 Mich 554, 601; 267 NW2d 72 (1978). That is reflected as well in MCL 500.2403.

25) Under Michigan's compulsory system, policy holders are entitled to information sufficient to enable them to challenge the rates imposed upon them. sIn *Shavers*, the Supreme Court ruled that Michigan persons under the Michigan no-fault system are entitled to "have notice as to how their rates are determined." *Id.* p 601.

26) Plaintiffs, Richard K. & Ilene Ikens, Dr. Kenneth & Susan Wisser, and Gregory A. & Karen M. Wolfe, have a direct and special interest in the subject matter of their letter request, Exhibit A. The reason is that Michigan automobile policy holders such as the Ikens', the Wissers' and the Wolfes' pay the entire cost of the care and treatment of catastrophically injured victims in excess of the statutory amounts prescribed in Section 3104 of the No-Fault Act.

27) These amounts are set by Defendant, MCCA, essentially without oversight by the Michigan Insurance Commissioner, in part because MCCA does not file the rate setting information with the commissioner, which information is statutorily required of all Michigan insurance companies, as provided in MCL 500.2406.

28) MCCA also sets the catastrophic coverage rate without providing any meaningful notice to Plaintiffs and other Michigan policy holders of what rate affecting factors and criteria have been employed, especially actuarial standards.

29) As a result, Michigan auto policy holders, the ultimate underwriters of the cost of catastrophic care and treatment, currently have no way of knowing whether their catastrophic coverage rates are excessive or unreasonable because they have been denied the “notice” commanded by *Shavers* and the constitution.

30) It is not now the claim of Plaintiffs that the rates as currently set by MCCA are excessive, unfairly discriminatory, or unreasonable. Rather, Plaintiffs claim the right to have sufficient information to be able to determine whether the rates are fair and reasonable and whether MCCA’s rate setting process itself is unreasonable and unlawful, or may become so in the future.

31) In MCCA’s current Plan of Operation, section 16.03 of Article XVI expressly provides that its “books of account” and “records” and MCCA’s other documents are open to inspection “only” by its members and 3103 members.

32) Such a restriction has not been authorized by the Michigan Legislature in the MCCA enabling legislation, MCL 500.3104. More importantly, it contravenes the *Shavers* holding.

33) It is and has been the common law of this, and nearly every other state that those who have an identifiable special interest in the subject matter of information, are entitled to access that information contained in public records. *Nowack v Auditor General*, 243 Mich 200; 219 NW2d 749 (1928).

34) Here, the Plaintiffs, the Ikens', the Wissers' and the Wolfes' and every other Michigan auto policy holder, have such a special economic interest as the rate payers who pay the entire cost of catastrophic care under the No-fault Act.

35) The *Nowack* holding expressly applies to public records. In fact, the records at issue here are public records because the system of catastrophic coverage and the MCCA itself were created by the Michigan Legislature, as reflected in section 3104 of the No-fault Act, because the per vehicle charge is imposed by statute on millions of Michigan auto policy holders and the rate setting acts of the MCCA are of constitutional magnitude, and finally, because of the public interest in the transparency of MCCA operations which is of paramount import to preserving the fiscal integrity and viability of the no fault system.

36) Even if the records in the hands of MCCA are somehow considered to be private records, Plaintiffs' right of access thereto remains unencumbered. Michigan common law makes clear that the right to records hinges on the nature of the interest,

not the nature of the record. For example, numerous cases, in Michigan and elsewhere, have held that a shareholder in a private corporation is entitled to examine the books and records of the private corporation because the shareholder's economic interest may be affected by the financial standing of the private corporation.

37) Here, the financial interests of millions of Michigan auto policy holders as well as that of catastrophically injured victims are directly impacted by the financial soundness of the MCCA. The rates charged policy holders are adjusted annually at the direction of MCCA and the future coverage for brain injured victims may be seriously and negatively impacted by decisions and financial practices undertaken in secret by the MCCA.

38) The only justification MCCA offers for its claim of confidentiality is its stated concern for the privacy rights of the claimants. Plaintiffs acknowledge and have the utmost respect for the privacy rights of the claimants, and that is why Plaintiffs have tailored their information request as they did. The claimants' privacy rights are not compromised in the slightest by providing the requested information. Plaintiffs' interest in transparency trumps any claim by MCCA that these records are private.

39) Defendants refusal of Plaintiff's common law request is wrongful and unlawful, and entitles Plaintiffs to immediate relief, including but not limited to copies of all documents and information referenced in Plaintiff's attached request; entry of judgment establishing that Defendant's, MCCA's records are accessible by Plaintiffs or their representatives; and such other relief as this Court may deem appropriate.

COUNT II

COMMON LAW CLAIM OF RESULTING TRUST

40) Plaintiffs, BIAMI, Richard K. & Ilene Ikens, Dr. Kenneth & Susan Wisser, and Gregory A. & Karen M. Wolfe, incorporate by reference into this Count II, each and every one of the foregoing paragraphs of the complaint, and in addition thereto state as follows:

41) The premiums in the hands of MCCA are by law subject to a resulting trust.

42) This resulting trust arose by operation of law when in the course of transferring property, here premium dollars, the legal and beneficial interests in the property became separated.

43) Resulting trusts have long been recognized under the common law, and have been specifically recognized and reaffirmed in Michigan jurisprudence. *Alpert Industries v Oakland Metal Stamping Co*, 3 Mich App 101, 111; 141 NW2d 671 (1966)

44) While the legal title to the premiums dollars in the hands of MCCA may belong to the Association, MCCA enjoys no beneficial interest whatsoever in these funds.

45) These funds may not be used for the benefit of MCCA, as they are a not-for-profit association. They are not in business to make a profit, they do not have competitors, they do not advertise, they take no risks to expand into new area of enterprise, and have no trade secrets. Their sole purpose is to calculate in accordance with sound actuarial standards, assess, and collect from Michigan insurance carriers and their auto policy holders, the premiums necessary to assure payment of the excess catastrophic cost of care and treatment.

46) Under MCL 555.3104, assets in the hands of MCCA are being held for the benefit of others. Those include the automobile insurance carriers who of course, enjoy a nominal beneficial interest in these funds. But the real beneficiaries are the catastrophically injured victims of automobile accidents coming within the purview of the Michigan No-fault Act.

47) This separation of legal ownership from the beneficial interest in real or personal property is a classic feature of a resulting trust,

48) Another classic feature of all trusts, including resulting trusts, is that interested persons, for example those who fund the trusts, or the beneficiaries thereof, are entitled to access to books and records of the trust. *Long v Earle*, 277 Mich 505; 269 NW2d 577 (1936).

49) It is basic hornbook law that persons with an interest in a trust, such as the holder of the beneficial interest, or the originator of the trust are entitled to an accounting, or in an appropriate case, access to books and records, insofar as those

books and records contain pertinent information revealing the status and operation of the trust and the handling of trust assets.

50) BIAMI represents some of those who are the ultimate beneficiaries of these trust proceeds and Plaintiffs, the Ikens', the Wissers' and the Wolfes', have provided, along with millions of other Michigan policy holders, 100 percent of the funds which are available to MCCA to discharge its statutory duty.

51) These respective interests, in addition to the due process rights articulated in *Shavers*, entitle Plaintiffs to access the books and records of MCCA, or at least, to complete and accurate responses to the information requested in the letter dated May 18, 2012.

52) Defendant's refusal of Plaintiffs' above-referenced common law request is wrongful and unlawful, and entitles Plaintiffs to immediate relief, including but not limited to copies of all documents and information referenced in Plaintiff's request; entry of judgment establishing that all the operations of Defendant, MCCA, are subject to a common law resulting trust and that their records are subject to access by the Plaintiffs or their representatives; and such other relief as this Court may deem appropriate.

COUNT III

COMMON LAW CLAIM FOR CONSTRUCTIVE TRUST

53) Plaintiffs, BIAMI, Richard K. & Ilene Ikens, Dr. Kenneth & Susan Wisser, and Gregory A & Karen M. Wolfe, incorporate by reference into this Count III, each and

every one of the foregoing paragraphs of the complaint, and in addition thereto state as follows:

54) The funds held by MCCA must be administered strictly in conformity with the No-Fault Act and consistent with the mandates of the Michigan Supreme Court, and in particular the holding of *Shavers v Attorney General, supra*.

55) That charge includes rate setting and properly managing the vast sums under its control.

56) The ultimate ratepayers, Michigan's policy holders and catastrophically injured victims are entitled under Michigan law, especially *Shavers*, to fair auto insurances rates and sufficient information to enable them to determine if the rates they are compelled under criminal sanction to pay are in fact fair, and not excessive.

57) That is not possible for Michigan auto policy holders without accurate and complete information regarding the rate setting process, the criteria, and the actuarial standards employed by MCCA in discharging its statutory responsibilities.

58) MCCA has refused to provide even the most basic information necessary for Michigan's auto rate payers to inform themselves of what factors impact their rates and the rationale underlying the rate setting process.

59) It is also the function of MCCA to wisely and prudently invest and protect the vast sums which have been entrusted to them.

60) Plaintiffs here do not claim any misuse of funds, any fraud, or similar wrongdoing on the part of MCCA. None is required, as Plaintiffs' right to the remedy of a constructive trust under Michigan law is not conditioned on any such showing.

61) In Michigan, a constructive trust will be imposed under appropriate conditions and in an array of situations when necessary to "prevent a failure of Justice." *Kent v Klein*, 52 Mich 652, 658; 91 NW2d 11,14 (1958), as was stated long ago by the Michigan Supreme Court. That holding is a vital today as it was over a half century ago. *United States of America v Currency \$11,331*, 482 F Supp 2d 873 (E. D. Mich 2007)

62) Defendant has been treating the vast sums to which it holds mere legal title, as if no other entities had any arguable interest, and in the process, hidden its rate setting and actuarial practices from the prying eyes of those most directly impacted thereby, in clear contravention of *Shavers*.

63) Plaintiffs request this important information so they the victims and the ratepayers can claim that which the Michigan Supreme Court has held they are entitled. The refusal of MCCA is in conflict with the holding in *Shavers* and the No-Fault Act and therefore, is unlawful.

64) Justice can only be achieved here by the court declaring the operation of the MCCA is subject to a constructive trust in favor of the policy holders and the victims, and directing that MCCA promptly make available to Plaintiffs copies of all documents and information referenced in Plaintiffs' request; enter a judicial declaration or judgment establishing that the operations of Defendant, MCCA are subject to a

constructive trust subject to access by Plaintiffs and/or their representatives; and grant such other relief as this Court may deem proper.

WHEREFORE, Plaintiffs request that this Honorable Court issue Judgment in their favor and against Defendant MCCA granting full and complete relief including, but not limited to the following:

- (a) copies of all documents and information requested by Plaintiff in its request of May 18, 2012, attached as Exhibit A;
- (b) such other declaratory, equitable, and injunctive relief as is necessary to grant full and complete relief to Plaintiffs on their Complaint; and
- (c) any and all other remedies proper under statutory law, the Michigan Court Rules, the common law, and the Michigan and United States Constitutions.

Respectfully submitted,

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Dated: June 19, 2012