MICHIGAN LAWYERS WEEKLY
www.milawyersweekly.com

MCCA subject to FOIA, judge rules

Experts say opening books could help in no-fault reform

January 14, 2013
BY: Douglas Levy

The Michigan Catastrophic Claims Association is subject to the Freedom of Information Act, ruled an Ingham County judge.

An Ingham County judge has ruled that the Michigan Catastrophic Claims Association is subject to the Freedom of Information Act and that the MCCA must explain how it comes up with its $175 annual fee per auto.

Judge Clinton Canady III said that the MCCA must open up records related to its financial standing, in two lawsuits filed by the Coalition Protecting Auto No-Fault and the Brain Injury Association of Michigan.

The MCCA argued that it was not subject to FOIA, but Canady disagreed, saying that "Michigan citizens have a right to know how the MCCA rate is charged to insurers is calculated, because citizens ultimately end up paying that rate as part of the premium charged by the insurers."

Plaintiff's attorneys and advocacy groups are hopeful that there will be greater transparency in how the organization does business.

Farmington Hills no-fault plaintiffs' attorney Steve Gursten said that the ruling was the right one.

"I'm not saying [consumers are] overpaying or underpaying; we just have a right to know," he said. "If we're required to fund this, there should not be a total information blackout. It's not the CIA. … We have every right to at least have public disclosure of their finances to see where the money's going."

A 'phantom panel'

The groups sought records of claims and policyholders who filed them, and financial records, including its reserves, after state lawmakers in 2011 wanted to establish a four-tier personal injury protection system from which motorists could choose.

In its fall 2011 testimony before the House Insurance Committee, the MCCA indicated there was genuine concern of long-term financial viability. However, CPAN and BIAMi noted that the MCCA was sitting on $13 billion in assets, with a net income showing it was not going broke.

The MCCA, a private, nonprofit association made up of a five-person board from the auto insurance companies, manages the fund that compensates insurers when a no-fault claim exceeds $500,000. In 2011, it reimbursed insurers $927 million for such claims.

The two groups said that opening the MCCA's books would "help lawmakers analyze the necessity of insurance industry-proposed changes to Michigan's no-fault system."

Gursten said the decision is significant, as the MCCA in March 2012 raised its fee to $175 — a 21 percent increase over 2011's fee (see box "What the MCCA has charged annually"). It also happened at a time when insurance companies made a strong push for no-fault reform by way of caps.

"You don't have to be a conspiracy theorist to wonder if there are political motivations behind" those factors, he said. "The problem is, we have no idea because the five members that sit on the MCCA are all from the insurance industry. … You don't have an insurance rights advocate sitting on this board."

Gursten said it raises a "Are the foxes guarding the henhouse?" situation, adding that no one outside of the panel has any knowledge of the factual basis behind each decision. Its meetings are closed to the public.

"Because Michigan doesn't have any bad faith law or punitive damages, you can never get to that next level, because a lot of these cases do raise bad faith implications," he said. "And you have this body that's beyond legal reproach."

Gursten said that Canady's decision doesn't get to that level yet, but he's hoping it's a start. He added that Gov. Rick Snyder has indicated he wants to tackle no-fault reform in 2013, so rulings like this will help make better decisions on what kinds of changes should be made.

Seeking the details

Ann Arbor attorney Joseph Erhardt, who represents the MCCA, said that the organization "respectfully disagrees" with Canady's analysis and intends to appeal his ruling.

He noted that in the opinion, Canady writes that the MCCA "must disclose general rate calculation information such as amount of funds contained in MCCA reserves, number of claimants, administrative costs, nature and type of investments of the reserves, amount currently paid by insurers and specific accounting as to increase/decrease in yearly rate calculated, etc."

"It's a little unclear what the court is ordering us to produce … but a lot of the stuff that is listed there, as you can easily find out by going onto the [MCCA] website, is already available publicly," Erhardt said.

Grand Rapids attorney David Campos, who handles catastrophic claims defense, agreed with Erhardt in that such information is on the website, and that both CPAN and BIAMi had known about this for many years. Campos said he even uses the website info himself in his cases to make his points.

But Nicholas Andrews, a Bloomfield Hills-based attorney who specializes in plaintiff's side attendant care and catastrophic claims matters, said there are specific details MCCA is holding back that are essential for his practice.

"My concern is there may be information the MCCA possesses … [that] may assist in showing that over time, there's an increase potentially in the value of care in attendant care cases because of cost-of-living increases," he said. "So if the MCCA believes there's a cost-of-living increase, that's potentially evidence in a case."

He said he believes the MCCA should be treated like any other non-party, in that if it has information deemed to be potentially protected or of a confidential proprietary nature, "they can raise that objection and seek an appropriate order, but they can't simply not produce the documents."

Question of security

Campos said the big issue was over fee schedules, something that CPAN, BIAMi and medical providers wanted to quash as lawmakers considered no-fault reform.

He said that CPAN's membership consists of many hospitals and providers, and that a fee schedule would have meant a massive decrease in their revenues, much like there is with workers' compensation.

Medicare and Medicaid haven't done much to offset the decreasing revenue.

"So originally I think it was intended to show, 'Look the rates that are going up were not necessary; it was a political ploy by the MCCA to also seek some changes and to bolster the idea and get the community to be on board with no-fault reform.'"

Michael Dabbs, president of the Brighton-based BIAMi, said there is willingness to discuss a fee schedule, "but it has to be done in a well more thought out way, because we're talking about lifetime injuries here that require care, unlike workers' comp, which is generally for a limited duration, and soft tissue injuries, not brain and spinal injuries."

Ultimately, Dabbs said, the point of the suits was to determine how valid the claim by the MCCA, that they may not be financially viable in years to come, may be.

"If you're going to make that claim, how did you get to that decision? What causes you to say that?" he said.

Bloomfield Hills-based Arthur Liss, who does plaintiff's side attendant care and catastrophic claims matters, says the people he represents "have a right to know that the fund that is reimbursing them for their medical expenses is solvent. That would give them a sense of security rather than not being able to check into the solvency and having no idea whether the MCCA's claims of it being in trouble economically are true.

"… People who have suffered catastrophic injuries, the last thing they need is to be insecure."

If you would like to comment on this story, please contact Douglas Levy at (248) 865-3107 or douglas.levy@mi.lawyersweekly.com.

What the MCCA has charged annually

- 2008: $104
- 2009: $125
- 2010: $143
- 2011: $145
- 2012: $175