

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

**FARMERS INSURANCE  
EXCHANGE,**

Plaintiff/Appellee,

v

**FARM BUREAU GENERAL INSURANCE  
COMPANY OF MICHIGAN,**

Defendant/Appellant.

Supreme Court File No. 132179

Court of Appeals File No. 259763

Lower Court File No. 03-21922-CK

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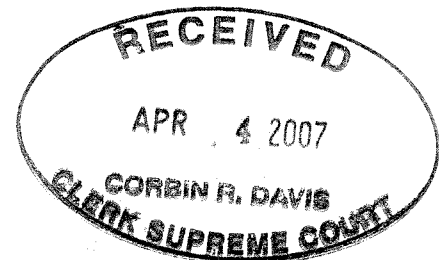
**SUPPLEMENTAL BRIEF OF DEFENDANT-APPELLANT IN RESPONSE TO  
INSURANCE INSTITUTE OF MICHIGAN'S BRIEF AMICUS CURIAE**

*132179  
Supplement to Supplemental Brief*

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## INTRODUCTION

The *amicus curiae* brief filed by the Insurance Institute of Michigan (“IIM”), contains two fundamental flaws. First, it exaggerates the extent of insurance industry consensus, which bears on the jurisprudential significance of the Application for Leave to Appeal. There is no uniformity of position within IIM, since Farm Bureau is itself a member and Titan, another IIM member, has in the past taken a position consistent with Farm Bureau’s that the contract controls<sup>1</sup> but most recently has not.<sup>2</sup> Nor is IIM’s position always taken by insurers who are not members of IIM but write a significant portion of insurance business in Michigan and are involved in litigating similar issues, such as Auto-Owners and Amerisure<sup>3</sup>. The latter are also parties to recent and pending litigation over the same or similar priority issues presented here. Second, IIM’s position that the determination of whether an insurance company is the “insurer of the owner” should be made solely under the No-fault Act and without regard to whether the contract of insurance provides coverage, is self-defeating in light of the logic applied to the “insurer of the operator” conundrum posed by IIM. This Court has squarely held that coverage of an insurer of an operator is determined solely by contract. There is no statutory requirement of operator coverage.

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<sup>1</sup>See *Everhart v Farmers Ins Exch*, unpublished *per curiam* opinion of the Court of Appeals, issued March 21, 2006 (Docket No. 266024) (Exhibit B) (coverage resolved based on contract of insurance and whether insurance contract conferred insured status)

<sup>2</sup>See *Amerisure v Coleman*, \_\_\_ Mich App \_\_\_ n1; \_\_\_ NW2d\_\_\_ (No. 270948, February 27, 2007) (Exhibit C) (Court rejected Titan argument that the provisions of the contract were irrelevant in determining priorities).

<sup>3</sup>See, eg, *Amerisure v Auto-Owners*, 262 Mich App 10; 684 NW2d 391, *lv den*, 471 Mich 892; 687 NW2d 298 (2004).

The rule that should emerge is a simple one: an insurer of an owner is determined by the contract. If a no-fault certificate has been issued it will answer this question and concurrently present a contract that provides the insurance for the owner of the motor vehicle involved in the accident. In the other cases such as a garage policy or a rental car situation where there is blanket coverage of vehicles without individual certificates, the contract of insurance will determine if there is or is not an insurer of the owner. Otherwise, if there is no valid No-Fault Certificate and the contract of insurance provides no insured coverage for the owner for the accident, there is no "insurer of the owner" and the claimant should make recovery under the Assigned Claims Facility plan. Doing so fosters the goal of cost containment since an assigned claim is subject to automatic coordination setoffs that do not apply to a normal policy. This also leaves the uninsured owner clearly subject to liability for reimbursement whereas the IIM position leaves this in doubt.

## ARGUMENT

### I. IIM EXAGGERATES THE EXTENT OF INDUSTRY CONSENSUS IF SUGGESTING THAT LEAVE TO APPEAL IS UNNECESSARY.

Certainly there is a consensus position of insurers but it is not presented by IIM. There is no reported or unreported decision where any insurer who had issued a no-fault certificate to an owner of a motor vehicle, per MCL 500.3101a, has ever disputed that under the accompanying contract of insurance it was the insurer of the owner for priorities of Section 3114 or 3115. This Court should wonder why, if IIM is right, a No-Fault Certificate specifies vehicle identification numbers, per MCL 500.3101a(2), instead of just identifying the name of the policyholder and saying there is coverage for all vehicles owned by the certificate holder? It makes no sense to say the legislative intent was to broadly make a carrier an insurer of all an owner's vehicles without regard to the contract of insurance when the bedrock of the system, a certificate of insurance, is limited to a specific vehicle.

Still, in its brief, IIM suggests that "most" insurers accede to the position of IIM, (and tacitly, that this means that leave to appeal is not needed). IIM also indicates that it is a trade organization with 95 members. What it does not point out is that Farm Bureau Insurance is one of them, and it disagrees with the IIM Brief. At least one other IIM member, Titan, has taken Farm Bureau's position (successfully) that the contract defines the extent of insurer status (see footnote 1, *supra*), although it appears that Titan has most recently taken the opposite position, albeit unsuccessfully, when the Court of Appeals recently ruled in *Amerisure v Coleman* that the contract was controlling. See footnote 2, *supra*.

Also, there are significant insurers that are not IIM members, notably Auto-Owners and Amerisure<sup>4</sup>, that have recently been involved in litigating the same or similar issues. See *Amerisure v Auto-Owners*, cited in footnote 3, *supra*. Thus, even though Farm Bureau's position within IIM is a minority position, it is a deeply held position also held by non-IIM members. This Court need only look at the pending and decided cases to see that this is a matter of continuing division within the insurance industry, principally by participants in the nine Assigned Claims Facility handling insurers versus other insurers that are not<sup>5</sup>.

Thus, while IIM suggests this has become a settled issue, it is noteworthy that the issue is one that continues to foster litigation. There are conflicting decisions of the Court of Appeals, in not only published opinions now (comparing the logic of the instant case to the more recently rendered *Amerisure Insurance Co v Coleman*, Court of Appeals Docket No. 270948, decided February 27, 2007, Exhibit C).

Moreover, there are recent and continuing unpublished decisions that reflect continued litigation over the basic question presented in this appeal: does a court disregard the contract when it provides no insurance coverage to the owner for the accident, and instead look only to the fact that a policyholder has coverage on other vehicles (or a home

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<sup>4</sup>A copy of IIM's membership list, obtained from its Website, is attached as Exhibit A. It states that its members write 80 percent of the state's property/casualty insurance. Absent from its membership list are Auto-Owners, Amerisure, and Citizens, who are also auto insurers in Michigan. It is believed that some of them are members of a different trade group, the Michigan Insurance Coalition, which was not invited to participate as a party *amicus*.

<sup>5</sup>Farm Bureau is one of the participating Assigned Claim insurers and thus is pointedly aware of the dilemma posed by this case. When an assigned claim insurer, it, too, feels obligated to advocate as the ACF's surrogate.

or boat or life insurance). See *Everhart v Farmers Ins Exch*, unpublished *per curiam* opinion of the Court of Appeals, issued March 21, 2006 (Docket No. 266024) (Exhibit B) (coverage resolved based on contract of insurance and whether insurance contract conferred insured status); *Frankenmuth Mut Ins Co v Titan Ins Co*, unpublished *per curiam* opinion of the Court of Appeals, issued October 25, 2005 (Docket No. 262345) (Exhibit D) (“Obviously if defendant does not cover the accident at issue, it is no more an “insurer” for purposes of MCL 500.3114(2) than the insurer of Larry Furtick’s life, home or boat.”); *Mager v Lloyd-Lee*, unpublished *per curiam* opinion of the Court of Appeals, issued November 2, 2006 (Docket No. 264796) (Exhibit E).

*Frankenmuth v Titan* identifies the logical flaw in IIM’s position. If correct that one ignores the contract terms for whether there is insurance that really applies to the accident, and instead one looks to see if there is a policy that nominally names the policyholder but contractually provides the owner with no coverage for the accident, then logically any policy on the life, home or boat would be implicated because those, too, would name the policyholder as an insured.

Moreover, the next round of ill logic that is on the horizon but could be stopped by granting leave here, is illustrated by *Everhart v Farmers, supra*. There the assigned claim insurer presented a leap frog priorities case. The argument by Farmers as the Assigned Claim insurer was that if an operator who is not a contractual insured in any way (not a named insured nor an insured by definition) is nonetheless a potential benefit recipient as a spouse under one priority (MCL 500.3114(1)), that makes the carrier potentially obliged to pay the benefits under that first priority then the “insurer” of the possible benefit recipient spouse under that first priority: Then, it was argued that since an “insurer” of the spouse-

operator under the first priority, the same “insurer” had to provide benefits to a different claimant under a lower priority as the “insurer” of the operator under MCL 500.3114(4)(b).

Thus, the argument goes, one priority can trigger another priority, even without insurer-insured status by contract. The Court of Appeals rejected that, and rightly so, because the contract did not create insured status. But it did so in an unpublished opinion. Litigation persists, since even though the position was rejected when advanced by Farmers Insurance as an assigned claim insurer, still, Auto Club, as another assigned claim insurer, is now pushing the same position in a dispute with Auto-Owners. *Dobbelaere v Auto-Owners Ins Co*, Docket Nos 270200, 270275<sup>6</sup>. Thus, Auto-Owners and Auto Club are currently litigating a closely related issue that presents the next round of novelty by an assigned claim insurer<sup>7</sup>, built on the foundation presented here that a court can disregard the contract that provides the owner with no coverage for the accident or accident vehicle.

In short, the suggestion by IIM that most insurers follow the position it advocates and suggesting there is a settled question within the industry, is belied by the continuing litigation over the priority issue presented here. It certainly merits granting leave to appeal.

## **II. IIM FAILS TO ADDRESS THE PUBLIC INTEREST AND JURISPRUDENTIAL SIGNIFICANCE.**

Ultimately, the question presented is whether the statutes require that the risk of uninsured losses should be assigned to the insurance industry generally through the

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<sup>6</sup>Oral arguments on these combined appeals are scheduled in the Court of Appeals for April 5, 2007. Auto Club has not relented, even after the published decision in *Amerisure v Coleman*.

<sup>7</sup>If this were correct, then every new benefit entitlement to a non-insured by contract would instantly create a new “insurer” status, thus triggering a further round of uninsured priorities.

assigned claims plan, or, meted out randomly. Besides the continuing litigation that is of interest to the jurisprudence insofar as resolving a matter of continuing conflicts, there are also basic public policy issues that IIM does not address.

First, IIM's position would expand coverage under the Act. While there is no question that a motorcyclist will receive benefits from either an auto insurer or through the Assigned Claims Facility's assigned carrier, there is a difference. Assigned Claims Facility payments are automatically reduced by other "benefits covering the same loss. . . , regardless of the nature or number of benefit sources available and regardless of the nature or form of the benefits". MCL 500.3172(2). By contrast, there is no coordination universally applicable under a normal auto policy under MCL 500.3109a, since the coordination there applies only to "the person named in the policy, the spouse of the insured, and any relative of either domiciled in the same household". Since that is already ruled out, this means that a claimant can get a "double dip" of medical bills and wage loss benefits if IIM is right.

Thus, IIM's position is not a position that favors the public because it adds costs to claims that the Legislature has made clear should not be recovered under the back-up plan for uninsured claimants. Cost containment is and should be a consideration in construing the No-Fault Act. *See, eg, Cameron v Auto Club Ins Assn*, 476 Mich 55, 80; 718 NW2d 784 (2006) (Markman, J, concurring); *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 539 & n 15; 697 NW2d 895 (2005); *O'Donnell v State Farm Mut Ins Co*, 404 Mich 524, 546-547; 273 NW2d 829 (1979) (Reducing the amount of payouts where there are redundant benefits promotes the legislative objective of reducing or containing costs: "Because the first-party insurance proposed by the act was to be compulsory, it was

important that the premiums to be charged by the insurance companies be maintained as low as possible. Otherwise, the poor and disadvantaged people of the state might not be able to obtain the necessary insurance.”)

Secondly, IIM’s position complicates the claim handling process. It does so because it requires searching for multiple remote insurers whose policies are not apparent since not the insurer on a no-fault certificate issued pursuant to MCL 500.3101a. Simplifying insurer involvement by reducing the number of insurers involved is itself a cost-containment benefit. *Celina Mut Ins Co v Lake States Ins Co*, 452 Mich 84, 89; 549 NW2d 834 (1996).

Third, underwriting is complicated. Since insurers do not underwrite for uninsured vehicles, nor provide No-Fault certificates for uninsured vehicles, they have to either add a factor for the uninsured vehicle exposure or, actually start underwriting for uninsured vehicles. If uninsured vehicles are now to be a material risk, the failure to disclose them will be a basis for rescission like any other misrepresentation.

Noteworthy, until this recent line of cases started raising this issue as to who is the insurer of the owner, there was a simple answer. Where there was a contract of insurance insuring the owner, the vehicles that might be involved in the accident were simply identified by “explicit description” in the contract of insurance, per the Financial Responsibility Act, MCL 257.520(b)(1), and, by VIN for the accompanying no-fault certificate, per MCL 500.3101a(2).

Indeed, these two statutes are the only two statutes in either the Motor Vehicle Code or the Insurance Code that give a specific indication of the vehicles for which a carrier is an insurer of the owner. Thus, with no straining of any statute or contract, where there is

a No-Fault certificate issued, there will be a policy that contractually and clearly identifies the insurer of the owner of the motor vehicle involved in the accident. Equally clearly, the certificate will not certify that the owner has insurance coverage for uninsured vehicles.

Notable by its absence is any statutory requirement that a no-fault certificate that identifies the VIN for a vehicle also insure that owner for all vehicles. Had the legislature so provided, IIM's position would make sense. It would then impose universal owner's policies. But it has not.

**III. IIM'S OPERATOR ARGUMENT REVEALS THE CENTRAL ERROR OF ITS POSITION, BECAUSE AN INSURER OF AN OPERATOR IS ALWAYS DEFINED BY CONTRACT. LIKewise, AN INSURER OF AN OWNER IS DETERMINED BY THE CONTRACT OF INSURANCE.**

Attempting to pose an insoluble conundrum, IIM argues that if Farm Bureau is saying the insurer of the owner for Section 3114(5)(a) means insurance on the vehicle, then there would be an impossible parallel construction for the insurer of the operator under Section 3114(5)(b) because the insurer of an operator will never insure the vehicle operated. As a result, IIM says that determining "insurer" status must be made solely based on the statute and without any reference to a contract of insurance. The flaws in this are three-fold.

First, the simple answer to the semantic game is that while there are shorthand references to insuring vehicles for coverages such as liability and no-fault, actually vehicles are generally not insured, per MCL 500.3123. And, cars don't get sued. People get sued. So the real issue is whether there is liability insurance applicable to the owner or operator for the use of the vehicle involved in an accident. Similarly for PIP, MCL 500.3113(b) doesn't say uninsured vehicle, but speaks to disqualification of an owner "of a motor

vehicle ... involved in an accident ... with respect to which the security required by section 3101 ... was not in effect.”

However, where an owner has a valid certificate with the VIN of the accident vehicle in it, per MCL 500.3101a(2), there will always be an accompanying contract of insurance that indeed reflects the insurer of the owner of the vehicle involved in the accident, for purposes of liability coverage. And it will also make the policy applicable to the accident under the motorcycle priority of MCL 500.3114(5)(a).

Still, it is the resulting contract that creates insurer-insured status for the accident, not a statutory mandate that an owner’s policy insure for use of all vehicles, insured or not. (There are also a few other unusual situations, such as a garage policy that provides blanket coverage for demonstrator and loaner vehicles and rented cars, which will provide contractual coverage. Also there may be newly acquired car coverage for a short time.

Second, IIM’s parallel construction argument is self-defeating. If determining “insurer of the owner” status must be made by solely statute, under IIM’s logic then likewise “insurer of the operator” must be determined by statute and without reference to a contract of insurance. That, however, is refuted by the holding and logic of this Court in *Husted v Auto-Owners Insurance Co*, 459 Mich 500; 591 NW2d 642 (1999), and reaffirmed in *Cohen v Auto Club Ins Assn*, 463 Mich 525, 531; 620 NW2d 840 (2001) (“[T]he language of the no-fault act indicates that it does not require residual liability insurance to cover an insured’s operation of any vehicle.”). In *Husted*, an employee was an operator driving an uninsured truck in the course of his employment. The employee had a personal auto policy, but it had a business use exclusion. The claimants and policyholder argued that there was statutory operator coverage that superseded the business use exclusion. This

Court made clear that operator coverage was purely contractual, quoting an earlier case for exactly the opposite of the position IIM says:

“Because such coverage is optional, the extent of Citizens’ and State Farm’s insurance obligations is governed by the terms of their respective policies.”

“Finally, the Citizens<sup>8</sup> Court reiterated the *Ruuska*<sup>9</sup> Court’s conclusion that: “[a]n insurer is not required by the no-fault act to provide portable coverage when the owner drives another insured vehicle.” 459 Mich 500, 515.

Additionally this Court in *Husted* addressed whether, since the owner who should have had coverage was nonetheless uninsured, that fact would change the result and trigger a requirement that the operator’s policy on his personal vehicles then had to provide coverage to the operator. This Court’s answer was clearly no.

“Accordingly, the fact that a vehicle owner fails to maintain required residual liability coverage would not transform the operator of the vehicle into a party required to provide such coverage.” 459 Mich 500, 512.

Thus, the central premise of IIM, that for purposes of determining “insurer of the owner” and “insurer of the operator,” one does not consider the contract of insurance, is flatly wrong because this Court has squarely held that determining whether there is an insurer of an operator always requires reference to the contract of insurance. There is no statutory operator coverage in the No-fault Act. *Husted, supra; Cohen, supra*.

Likewise, IIM’s attempt to find a statutory definition of insurer of an owner in the No-fault Act ignores the fact that there is no such defined term in the definitions section.

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<sup>8</sup>*Citizens Insurance Co v Federated Mutual Insurance Co*, 448 Mich 225; 531 NW2d 138 (1995).

<sup>9</sup>*State Farm Mutual Automobile Insurance Co v Ruuska*, 412 Mich 321; 314 NW2d 184 (1982).

Please see MCL 500.3101(2). Its final suggestion that “insurer” status should be defined by the entitlement to benefits, and hence the Court of Appeals was incorrect in the recent *Amerisure v Coleman* decision in looking to the contract for whether insured, is again a self-defeating argument. If “insurer of owner” status is defined by benefit entitlement, as IIM suggests, the disqualification of the owner for PIP under MCL 500.3113(b) means that Farm Bureau is correct and IIM is not. If injured in the accident at issue, the owner would not be entitled to any benefits.

Farm Bureau submits that the term “insurer” of the owner is, therefore, either governed by statute in the Financial Responsibility Act as confirmed by the specified vehicle No-Fault Certificate requirement of MCL 500.3101a, or, is an undefined term requiring a common meaning of “insurer”, which requires reference to the contract of insurance.

Certainly there is a statutory indication of the extent of coverage of an owner’s policy of insurance, both because MCL 257.520(b)(1) so specifies, as well as the fact that a no-fault certificate of insurance is issued to a “policyholder” (MCL 500.3101a(1)), and it refers to a vehicle by vehicle identification number, MCL 500.3101a(2).

In the most common situation, looking at the no-fault certificate of insurance or absence of such a certificate will tell if there is indeed an insurer of the owner of the motor vehicle involved in the accident. There may be other rare situations such as is reflected in *Citizens Insurance Co v Federated Mutual Insurance Co, supra*, where there is a garage liability policy extending owner coverage on a blanket basis, or, a rental car situation, as reflected in *State Farm Mutual Automobile Insurance Company v Enterprise Leasing Co*, 452 Mich 25; 549 NW2d 345 (1996). Also, it is believed that most insurers contractually

(and not pursuant to statute) extend owners policy coverage for newly acquired vehicles for a short time.

Still, the contract of insurance determines whether there is actually an insurer providing coverage for the owner of the motor vehicle involved in the accident. While contractual insurance on the owner for the accident vehicle will always be present if there is a valid No-Fault certificate, there may be other situations where by contract insurer-insured status is conferred. Likewise, one looks to the contract of insurance if there is an issue of whether an operator has insurance for the operator's use of the "vehicle involved in the accident", since operator coverage is optional under an owner's policy. *Husted, supra*.

#### **CONCLUSION AND RELIEF REQUESTED**

Farm Bureau issued no No-Fault Certificate for the accident vehicle. There is no dispute by Farmers or IIM that contractually the Farm Bureau policy on the non-accident vehicle does not cover this accident nor insure Mr. Petiprin for his owner liability for the use of the accident vehicle. There is no more basis to say that Farm Bureau is an "insurer" for priorities than a possible insurer of the life, home or boat, that might nominally name Mr. Petiprin as a policyholder under a contract, but provide him with no coverage for this accident. Farm Bureau insures the owner for nothing at issue here by contract.

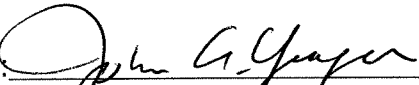
The Court of Appeals should be peremptorily reversed or leave granted. The issue will continue to plague the jurisdiction with continued disputes by insurers, particularly in light of the latest wrinkle whereby misguided assigned claim insurers are promoting leap frog priorities. This Court can put a simple stop to this entire unnecessary litigation by adopting the approach of *Amerisure v Coleman*, disavowing the Court of Appeals decision

in the instant case, and ruling that: an insurer of an owner is determined by either the policy accompanying a no-fault certificate on the accident vehicle, or, other contractual coverage imposing insurer-insured status on the owner and insuring for the accident in question.

Respectfully submitted,

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