MICHIGAN LAWYERS WEEKLY
www.milawyersweekly.com

Reaction to the 'McCormick' decision

August 6, 2010
BY: Douglas J. Levy

"It will have a dramatic effect on the insurance industry, and it wouldn't surprise me if some of the smaller carriers doing business in Michigan decide to leave the state.

"And it may become an issue in the Supreme Court election this year … such as in ads, where someone could attack Justice [Elizabeth A.] Weaver for siding with the 'trial lawyers' in this decision and in [the recently released Supreme Court decision] *University of Michigan Regents v. Titan Insurance Co.* …

"These decisions, where you're overruling a case decided four or five years ago by a former majority, occurring solely because of a switch of one justice and one political party's control over the Supreme Court, certainly do not do much to stabilize this area of the law, because with the next election, and maybe the election in 2012 and in 2014, who's to say we may not see another shift in the majority? If there's no predictability in the law …"

Insurance defense practitioner Ronald M. Sangster Jr., Law Office of Ronald M. Sangster PLLC, Troy

"If [*McCormick*] had not been overturned, we would have had a law in Michigan that would essentially wipe out 99 percent of the cases where people are completely innocent and hurt in car accidents. … That is not what the No-Fault Act was intended to achieve.

"[*Kreiner*] went so beyond what the Legislature ever intended when it enacted a clear, simple, short and unambiguous definition of 'serious impairment' in 1995. It's tragic that four judges could, on their own, make incredible changes … that could be used to essentially dismiss almost any case except the most catastrophic.

"But *McCormick* is such a modest case because it doesn't create any new law; it just returns us back to a definition that a Republican Legislature already enacted 15 years ago and, at the time, was considered a huge win for the insurance industry. And Michigan still has a very tough law.

But at least we were able to remove a lot of that extra, judge-made legislation from the bench and return to a more fair, sane law."

Steven M. Gursten, Michigan Auto Law (Gursten, Koltonow, Gursten, Christensen & Raitt, PC), Farmington Hills

"It entirely disregards the compromise that made auto no-fault possible. In 1973, the Legislature set the law up in such a way that, in return for first-party benefits, it would be very difficult to get third-party benefits. The trial lawyers spent many, many years attempting to wreck that bargain by getting, effectively, tort liability re-established while still having first-party benefits. I think they've done it, and I think what the Court's majority has done is simply thumbed their nose at the grand bargain.

"My expectation is, this is going to cause a significant problem in this state, because it'll make insurance entirely unaffordable. Estimates are that half the people in Detroit drive uninsured despite mandatory coverage, and that number will go up. I suspect there will probably be a special session of the Legislature or some other emergency handling needed to make it possible for this decision to not completely destroy insurance coverage in this state."

Clifford W. Taylor, former Michigan Supreme Court Chief Justice and author of *Kreiner v. Fischer*

"When *Kreiner* came down, my reaction was - and has been ever since - they picked the most extreme possible interpretations of the various terms in question in [MCL 500.3135(7)]. The result is a standard that very few people can meet; it's almost a catastrophic standard. To me, there's nothing about the history of the No-Fault law that would support such an extreme reading. It was very troubling for all these years, and there was need for rebalance, and that's just what has happened with this decision. But what will *McCormick* do on the *Kreiner* facts? That'll be interesting to see what happens as we have new cases that explore this recalibration.

"In the wake of *Kreiner*, plaintiff's attorneys were instructed to enhance the work-ups of their cases more stringently so as to survive the scrutiny that was to come. I don't think that's going to change. … There's no reason to believe there's going to be an abandonment of the threshold of [MCL 500.3135(7)]."

Wayne J. Miller, no-fault plaintiff's attorney, Miller & Tischler, P.C., Southfield

“This is an awful decision, [and] because of the way it was written, is going to be an absolute opening of floodgates of litigation in Michigan. That’s not good for taxpayers or the no-fault policy holders. It’s going to necessarily increase the cost of litigation, and that cost is going to be filtered down somewhere - and that’s going to be to taxpayers and to policy holders, who already pay a high cost because of the nature of no-fault insurance and the benefits that are derived from it.

“There’s a reason the Michigan Attorney General filed an amicus brief against overruling *Kreiner*, because this idea of opening the floodgates of liability applies equally to the State of Michigan. They have vehicles and are self-insured for no-fault. So now you have all these minor claims being filed against them as well that they have to address. Who pays for the Attorney General’s Office? We do as taxpayers. When people looked at *McCormick* and *Kreiner*, what they saw was insurance companies and policy money. But it goes so far beyond that.”

Lori A. Ittner, insurance defense attorney with Garan Lucow Miller P.C., Grand Rapids; president, Michigan Defense Trial Counsel

“The [*McCormick*] opinion is all about how we should interpret the Legislature’s line. Both sides agree that it is the Legislature’s line to draw. … Both sides also agree that in the common-law world, precedent matters. In the perfect common-law world, the Court would have found a way to accommodate something of *Kreiner* rather than outright overrule it. Both sides also took basically the same plain-meaning approach, consulting dictionaries. We should be heartened over this agreement, shouldn’t we?

“The critical holding has to do with eliminating the course-or-trajectory and entire-life conditions that *Kreiner* imposed. Time will tell, but the opinion could become a classic in plain-meaning statutory interpretation. I hope so. It is anyone’s guess whether it will make litigating these cases any easier. Probably not. There will always be difficulty in line-drawing, which is the great challenge of any no-fault system.”

Nelson P. Miller, associate dean and professor, The Thomas M. Cooley Law School, Grand Rapids