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Penalty Interest Is Owed On First Party Claims Paid Late Even Where The Claim Is Reasonably In Dispute

By Timothy Bahorski

In *Griswold Properties, LLC v Lexington Ins Co*, ___ Mich App ___, decided September 6, 2007, the full bench of the Michigan Court of Appeals held that an insured is entitled to 12% penalty interest under the Uniform Trade Practices Act for any claim not timely paid, irrespective of whether the claim is reasonably in dispute. Overruling *Arco Industries Corp v American Motorist Ins Co (On Second Remand, On Rehearing)*, 233 Mich App 143; 594 NW2d 74 (1998), the Court held the “reasonably in dispute” exception applies only to third party claimants.

The special panel of the Court was convened to resolve conflict between the opinions in the three cases that were consolidated with *Griswold*. At issue in *Griswold* was property damage caused when a water main broke and flooded the basement and sub-basement and damaged the electrical system. In *Gainors Meat Packing v Home-Owners Ins Co*, the insured building was destroyed by fire. In *Gardner v Harleysville Lake States Ins Co*, the insured commercial office building sustained water damage. The common question among *Griswold*, *Gainors*, and *Gardner* is whether the plaintiffs in each case were entitled to penalty interest pursuant to MCL § 500.2006(4). Specifically at issue was the application of the first two sentences of MCLA § 500.2006(4) that read:

If benefits are not paid on a timely basis the benefits paid shall bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum, if the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance. If the claimant is a third party tort claimant, then the benefits paid shall bear interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum if the liability of the insurer for the claim is not reasonably in dispute, the insurer has refused payment in bad faith and the bad faith was determined by a court of law.

SECRET WARDLE NOTES:

It is imperative that insurers promptly (within 30 days) advise their insureds, in writing, what will constitute a satisfactory proof of loss and, when that proof of loss is submitted, take care to make payment within 60 days of its receipt. Otherwise, the claim will be subject to 12% penalty interest notwithstanding any reasonable dispute regarding the amount owed.

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In *Yaldo v North Pointe Ins Co*, 457 Mich 341; 578 NW2d 274 (1998), the insurer was sued when it refused to pay benefits under a lender's loss payable clause after a land contract vendee defaulted on a land contract and the insured's property was damaged by fire. The trial court found in the insured's favor and awarded the insured judgment interest under MCL 600.6013(5) (providing for 12% on judgments based upon contract where the contract is silent as to interest). Both the Court of Appeals and Supreme Court affirmed the trial court. Noting that the Court of Appeals held in the alternative that the trial court could have awarded the plaintiff 12 percent interest as a penalty for the insurer's untimely payment under MCL 500.2006(4), the Supreme Court rejected the argument that imposition of interest under MCL 500.2006(4) would have been improper because the insured's claim was reasonably in dispute, writing, "[i]ts express terms indicate that the language applies only to third-party tort claimants. Where the action is based solely on contract, the insurance company can be penalized with twelve percent interest, even if the claim is reasonably in dispute." *Yaldo*, supra at 348 n 4.

Arco found that this statement in *Yaldo* was *dictum* and, relying on *Siller v Employers Ins of Wausau*, 123 Mich App 140; 333 NW2d 197 (1983), held that interest is not owed on first party claims that are "reasonably in dispute."

After weighing the decisions in *Yaldo*, *Arco*, and *Siller*, the *Griswold* court concludes that *Arco's* rejection of *Yaldo* was both error and a misconstruction of the statute. The Court of Appeals writes:

"The first sentence concerns first-party insureds, and provides that a first-party insured is entitled to interest if benefits are not paid within 60 days after satisfactory proof of loss is provided. This sentence does not specify that a first-party insured is entitled to interest only if the liability of the insurer is not 'reasonably in dispute.' The 'reasonably in dispute' language is found only in the second sentence, that expressly applies to third-party tort claimants. * * * The first sentence of MCL 500.2006(4) speaks specifically to claims filed by first-party insureds, and the Legislature's omission of the 'reasonably in dispute' language from that sentence must be construed as intentional. [Citation omitted.] Therefore, we decline to read the 'reasonably in dispute' language into the first sentence of MCL 500.2006(4). [Citation omitted.] Further, we will not speculate that the Legislature probably intended that the language apply to first-party insureds, notwithstanding its absence from the first sentence."

Thus, first-party claims not paid on a timely basis will be subject to penalty interest of 12% interest, regardless of whether the claim is reasonably in dispute.

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