STATE OF MICHIGAN

COURT OF APPEALS

AMERISURE INSURANCE COMPANY,

Plaintiff-Appellant,

v

PROGRESSIVE MICHIGAN INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
November 29, 2011

No. 299754
Oakland Circuit Court
LC No. 2009-104038-CK

Before: M. J. KELLY, P.J., and SAAD and O'CONNELL, JJ.

M. J. KELLY, J. (*dissenting*).

It is clear that defendant Progressive Michigan Insurance Company sold a policy in violation of the Michigan no-fault act because it did not provide first-party PIP coverage. See MCL 500.3105; see also *Auto-Owners Ins Co v Martin*, 284 Mich App 427, 434; 773 NW2d 29 (2009) (noting that insurance policies that conflict with statutory provisions are invalid and that courts will read mandatory provisions into the policies). This fact cannot be over-emphasized and yet the majority simply ignores it. Nevertheless, Progressive insists, and the majority agrees, that despite being first in priority under the act, they owe no benefits under the policy because plaintiff Amerisure Insurance Company did not notify them in writing within one year of the accident, as required under MCL 500.3145(1). The most immediate question posed in this case is how can one be faulted for failing to notify an insurer—in writing or otherwise—concerning a benefit or right that is not provided in the policy? It was only after some time that it became clear that Progressive's policy improperly excluded PIP benefits and that, as a result, those benefits must be read into the policy. Complicating the matter even more is that there is evidence in the record that Progressive's claims adjustors affirmatively represented that the policy and its declaration sheet were accurate and that no first-party PIP benefits were available under the policy. Under these facts, I would hold that Progressive is equitably estopped from asserting the notice defense through its own fraud or negligence. See *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270; 562 NW2d 648 (1997).

Alternatively, I would conclude that Progressive contractually waived its right to written notice by twice indicating in its policy that written notice was not necessary. The policy provided that notice could be made by telephone: "If an insured or insured auto is involved in an accident or loss for which this insurance may apply, the accident or loss may be reported to us as

soon as practical by calling . . . even if the insured is not at fault." In addition, the policy contained an endorsement that provided:

> YOUR DUTIES IN THE EVENT OF AN ACCIDENT, CLAIM, LOSS OR SUIT
>
> The following is added to this section:
>
> Notification of an accident or loss to our authorized agent with particulars sufficient to identify you, shall be deemed to be notice to us. Coverage will not be denied due to lack of timely notice to us or the police if:
>
> you or any other person or organization claiming coverage as an insured can show that it was not reasonably possible to provide notice within the required time; and
>
> Notice is provided as soon as reasonably possible.

Michigan courts have long safe-guarded the rights of parties to contractually arrange their affairs as long as the provisions are not clearly contrary to public policy. *Rory v Continental Ins Co*, 473 Mich 457, 468-470; 703 NW2d 23 (2005). Progressive argues—somewhat ironically—that, because PIP benefits are mandatory, the statute is the "rule book" for deciding the issues involved in questions regarding the award of benefits and the contract may not be read to "relax" the notice requirements applicable to the mandatory provision that it did not provide in its policy. See *Rohlman v Hawkeye-Security Ins*, 442 Mich 520, 524-525, 525 n 3; 502 NW2d 310 (1993) (characterizing the no-fault act as the rule book for deciding issues involving mandatory benefits, but stating that the policy and statutes must be read together because it is presumed that the parties contracted with the intention of satisfying the statutory provisions). I cannot agree. While it is true that some rights cannot be waived, this Court has recognized that many statutory rights can be waived by agreement or otherwise. See, e.g., *Lothian v Detroit*, 414 Mich 160, 167; 324 NW2d 9 (1982) (noting that a party may, by contractual agreement, waive the right to assert a defense premised on the running of a period of limitations); *Staple v Staple*, 241 Mich App 562; 616 NW2d 219 (2000) (holding that the parties to an agreement concerning the payment of alimony may agree that they will not assert their statutory right to seek modification of the amount); see also *Dozier v State Farm Mut Auto Ins Co*, 95 Mich App 121, 130; 290 NW2d 408 (1980) ("Since the notice provision is for the protection of the insurer, it follows that the insurer can waive the adequacy of the notice." (citation omitted)). Because the contractual provision at issue makes the notice requirement less onerous and more convenient for both parties, I would conclude that it is not contrary to public policy and, therefore, should be enforced as written. *Rory*, 473 Mich at 470. Here, the only notice provision contained within the policy indicates that a loss—any loss—may be reported by telephone. By failing to include PIP coverage in its policy and then stating that a loss may be reported by telephone, Progressive contractually waived the written notice requirement stated under MCL 500.3145(1).

For these reasons, I would reverse.

/s/ Michael J. Kelly