



## Big Change in Michigan Third-Party Motor Vehicle Accident (No-Fault) Law: More Cases and Higher Exposure Will Result

On July 31, 2010, the Michigan Supreme Court in the case of *McCormick v Carrier* overruled its prior decision in *Kreiner v Fischer*, 471 Mich 109 (2004), interpreting the key provision of Michigan's No-Fault statute that governs most third-party motor vehicle accident claims. *McCormick* states a new - easier to establish - standard for a claimant to establish a No-Fault threshold injury of a "serious impairment of body function," in order to recover damages against a third-party in a negligence action.

### BACKGROUND

Under the Michigan No-Fault Automobile Insurance Act (MCL 500.3101, et seq), every motor vehicle accident that occurs in Michigan resulting in personal injury or death creates two separate and distinct potential claims. The first claim is for *no-fault personal protection insurance (PIP) benefits* (a/k/a the PIP claim; the first party claim). The second claim is the *third party tort liability claim* (a/k/a the third party claim, the driving negligence claim) for recovery of noneconomic damages and excess economic damages.

In a third party claim, the plaintiff makes a tort liability claim against the allegedly at-fault driver (as well as that vehicle's owner and/or the vehicle driver's employer) for noneconomic losses and excess economic losses. Noneconomic damages typically relate to the alleged diminished quality of life and consist of pain and suffering, disability, incapacity, loss of function, deprivation of social pleasure and enjoyment, mental anguish and distress, etc. With respect to the recovery of noneconomic damages, a plaintiff must establish that he/she sustained what is commonly referred to as a "threshold injury." There are three categories of threshold injury under the *Act*: *death*, *permanent serious disfigurement*, and *serious impairment of body function*. The vast majority of third party claims concern the "serious impairment" injury threshold, which is defined in MCL 500.3135(7) as comprised of a three-pronged test. Under the No-Fault statute a "serious impairment of body function" is:

- an objectively manifested impairment
- of an important body function
- that affects the person's general ability to lead his or her normal life

The interpretation of that statutory language by Michigan courts has changed over the years, depending largely upon the composition of the Michigan appellate courts and the Michigan Legislature. Most recently (before *McCormick*) the statutory definition of serious impairment of body function was guided by the Michigan Supreme Court opinion in *Kreiner v Fischer*, 471 Mich 109 (2004). In *Kreiner*, the Court set forth a threshold injury test for "serious impairment" that was relatively stringent. As a result, some weaker cases were dismissed as a matter of law at the summary disposition stage, on the basis of a so-called *Kreiner* motion, and defendants enjoyed a fair amount of leverage in settlement negotiations in marginal cases where the threat of a *Kreiner* motion was and even as an appellate risk where the trial court did not dismiss the case. *Kreiner* led to generally lower settlement values for marginal cases and many weaker injury claims were not made, and certainly did not ripen into filed lawsuits, because of the *Kreiner* standard for "serious impairment."

### THE NEW "McCORMICK" TEST

The Michigan Supreme Court changed the rules with *McCormick v Carrier*. The Court's 4-3 majority opinion held that *Kreiner* was wrongly decided because it departed from the plain language of MCL 500.3135. The Court established in place of the former *Kreiner* test a new - easier to establish but still very ambiguous - test for the determination of whether a plaintiff has sustained a serious impairment of body function.

### ***Prong 1: Objectively Manifested Impairment***

The *McCormick* Court held that **the common meaning of this phrase is "an impairment that is evidenced by actual symptoms or conditions that someone other than the injured person would observe or perceive as impairing a body function."** slip op. at 14. In other words, an 'objectively manifested' impairment is commonly understood as one observable or perceivable from actual symptoms or conditions. The Court further explained that **"the proper inquiry is whether the impairment is objectively manifested, not the injury or its symptoms,"** and that "when considering an 'impairment,' the focus 'is not on the injuries themselves, but how the injuries affected a particular body function.'" *Id.* at 14-15. Thus, **a plaintiff does not absolutely require objective medical documentation to establish an impairment under *McCormick*.** *Id.*

### ***Prong 2: Of An Important Body Function***

The next question is whether the impaired body function is "important." The Court determined **a body function is important if it is "marked by or having great value, significance, or consequence."** *Id.* at 16. Because the issue of whether a body function has great "value," "significance," or "consequence" varies depending on the person and because what may seem to be a trivial body function for most people may be subjectively important to some, depending on the relationship of that function to the person's life, the Court held that **this inherently subjective inquiry must be decided on a case-by-case basis.** *Id.* at 16-17.

The Court also stated that **an "important" body function is not any body function but also does not refer to the entire body function.** *Id.* at 17.

### ***Prong 3: Which Affects a Person's General Ability to Lead His/Her Normal Life***

If the plaintiff has suffered an objectively manifested impairment of body function, and that body function is important to that plaintiff, then the court must determine whether the impairment "affects the person's general ability to lead his or her normal life." The Court held that **to "affect the person's ability to lead his or her normal life" is to have an influence on some of the person's capacity to live in his or her normal manner of living.** *Id.* at 20. The Court indicated that this is a subjective, person- and fact-specific inquiry to be decided on a case-by-case basis in which the determination must focus on a comparison of the plaintiff's life before and after the incident. *Id.*

The Court made three additional, critical points about this prong:

1. **A person's general ability to lead his or her normal life must only have been affected, not destroyed.** *Id.* Courts should consider not only whether the impairment has led the person to completely cease a pre-incident activity or lifestyle element, but also whether, although able to lead his or her pre-incident normal life, the person's general ability to do so was nonetheless affected. *Id.*;
2. "General" modifies "ability," not "affect" or "normal life," so **the plain statutory language only requires that some of the person's ability to live in his or her normal manner of living has been affected, not that some of the person's normal manner of living has itself been affected** (i.e., there is no quantitative minimum as to the percentage of a person's normal manner of living that must be affected.). *Id.*; and
3. There is **no temporal requirement as to how long an impairment must last** in order to have an effect on "the person's general ability to live his or her normal life." *Id.* at 21.

***The flow chart below graphically illustrates the new "McCormick" Test.***

### **GOING FORWARD POST-McCORMICK**

**What about retroactivity to pending cases and claims?** Although *McCormick* did not directly address whether its interpretation of the Michigan No-Fault statute should be applied retroactively, the general rule is that such decisions are given full retroactive effect. There are narrow exceptions to the rule, including where a holding overrules settled precedent and justice suggests prospective application only. Although an argument can be made that *McCormick* should be applied prospectively only - and not to pending cases - we believe it likely that Michigan trial courts will immediately apply *McCormick* retroactively to all pending cases until that is challenged on an appellate basis, if ever.

**What about the volume of third-party cases in the future?** Most of us practicing in the third-party claim field believe that the former *Kreiner* standard kept the weakest injury claims from being filed and that the new *McCormick* test will lead to an increase in third party claims and lawsuits over the coming months and years as a result of the easier-to-satisfy "serious impairment" threshold.

**What about changes in case handling and defense strategy?** Third-party cases will require the same thorough assessment and aggressive discovery and we see no fundamental change in philosophy or aggressiveness in defending claims. However, under the *McCormick* test it is now likely that it will be Plaintiffs, and not Defendants, who will seek partial summary disposition on the serious impairment issue, in order to establish a threshold injury as a matter of law, leaving only proximate cause and damages issue for trial. Defeating those motions will obviously be important for Defendants. In order to do that under the new *McCormick* test it will be especially critical for defendants to establish substantial, credible evidence supporting the existence of a material factual dispute regarding the nature and the extent of the plaintiff's injuries. Developing that evidence will require some modifications to written discovery focused on the serious impairment claim, in some instances more depositions of fact witnesses concerning a Plaintiff's general ability to live his/her life, continued aggressive use of IMEs with some modifications of IME reports to even more clearly articulate any medical expert's disputes with the plaintiff's injury claims, and even greater use of surveillance as a tool in marginal cases.

If you have any questions about Michigan No-Fault law, the *McCormick* decision, or its application to pending or future cases, please feel free to contact Ron Wernette or Nicholas Even.



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# THE *McCORMICK* TEST FOR ESTABLISHING SERIOUS IMPAIRMENT OF BODY FUNCTION

