

**STATE OF MICHIGAN  
DEPARTMENT OF INSURANCE AND FINANCIAL SERVICES**

**Before the Director of Insurance and Financial Services**

**USA Underwriters,  
Petitioner**

**v**

**Case No. 20-1053-M  
Docket No. 20-007854**

**Department of Insurance and Financial  
Services,  
Respondent.**

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**For the Petitioner:**

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**Issued and entered  
this 19<sup>th</sup> day of April 2021  
by Anita G. Fox  
Director**

**FINAL DECISION**

**I. INTRODUCTION**

On November 20, 2020, Administrative Law Judge Stephen B. Goldstein (Judge Goldstein) issued an Opinion and Proposed Order granting Respondent's Motion for Summary Disposition (Proposed Order). Judge Goldstein recommended that the Director issue a Final Decision consistent with the Findings of Fact and Conclusions of Law as outlined in the Proposed Order.

In the underlying Complaint, Petitioner seeks to appeal Respondent's disapproval of Petitioner's February 4, 2020 "Economy Program" form filing as duplicative of Petitioner's prior 2013 and 2015 filings, which were subject to Respondent's September 11, 2019 Notice of Withdrawal of Approval on the basis that Petitioner's Economy Program does not comply with MCL 500.3101(2), as amended by 2019 PA 21. Petitioner also asserts that the September 11, 2019 Notice of Withdrawal of Approval and subsequent disapproval of the February 4, 2020 Economy Program form filing violated its constitutional rights to due process and equal protection.

## **II. EXCEPTIONS**

On December 11, 2020, Petitioner submitted Exceptions to the Proposed Order. In Petitioner's Exceptions, Petitioner argues that the Proposed Order is in error on several grounds, summarized as follows: (1) the February 4, 2020 Economy Program form filing is not duplicative of Petitioner's prior filings; (2) Petitioner's February 4, 2020 Economy Program complies with MCL 500.3101(2) because in order for the Economy Program to be sold, the insured must purchase a policy containing all of the mandatory coverages or provide valid proof of insurance demonstrating that the insured's current policy contains the mandatory coverages; and (3) Petitioner was not provided with an opportunity to obtain all relevant evidence to support its constitutional claims. On December 22, 2020, Respondent submitted a Response to Petitioner's Exceptions requesting that a Final Decision is entered consistent with the Proposed Order.

## **III. FINDINGS OF FACT**

The Findings of Fact in the Proposed Order are in accordance with the preponderance of the evidence and are adopted and made part of this Final Decision, modified as follows:

1. Under "Applicable Law and Analysis," page 4, the Proposed Order's quotation of MCL 500.3101(2) contains typographical errors that do not impact the analysis. Accordingly, the quotation should be struck and replaced with the following accurate quotation of MCL 500.3101(2):

Except as provided in section 3107d, all automobile insurance policies offered in this state must include benefits under personal protection insurance, and property protection insurance as provided in this chapter, and residual liability insurance. Notwithstanding any other provision in this act, an insurer that has issued an automobile insurance policy may only delete portions of the coverages under the policy and maintain the comprehensive coverage portion on a motor vehicle that is not driven or moved on a highway in accordance with section 3009(4).

2. Under “Applicable Law and Analysis,” page 4, paragraph 2, the Proposed Order references “Petitioner’s motion for dismissal.” The reference to “Petitioner’s” should be struck and replaced with “Respondent’s.”

3. Under “Applicable Law and Analysis,” the first sentence of the fourth paragraph on page 5 of the Proposed Order references “Respondent’s February 4, 2020, rejection” of Petitioner’s proposed Economy Program “filing.” To clarify that February 4, 2020, reflects the date Petitioner submitted its Economy Program filing and to correct the typographical error, this sentence should be struck and replaced with the following: “Petitioner argues that the Economy Program complies with the amendments to the Code, and that Respondent’s disapproval of Petitioner’s February 4, 2020 proposed Economy Program filing as duplicative of the Petitioner’s previous policy was improper and a violation of its constitutional rights to due process and equal protection.”

4. Under “Applicable Law and Analysis,” the first sentence of the first paragraph on page 6 of the Proposed Order references Respondent’s disapproval of Petitioner’s “proposed amendments to the policy in February 2020.” To clarify that Respondent’s disapproval occurred in March 2020, “February” should be struck and replaced with “March.”

5. Under “Applicable Law and Analysis,” the first paragraph of page 7 of the Proposed Order addresses whether Petitioner’s Economy Program is a “forced-based” policy. The references to “force-based” should be struck and replaced with “force-placed.” See, generally, MCL 500.1605(g) (defining the term “creditor-placed insurance” for the purposes of Chapter 16 of the Insurance Code of 1956).

#### IV. CONCLUSIONS OF LAW

With the above modifications to the Findings of Fact, the Conclusions of Law are adopted and made part of this Final Decision, as follows:

1. Petitioner's claim that Respondent violated Petitioner's constitutional rights to due process and equal protection when Respondent issued its September 11, 2019 Notice of Withdrawal of Approval with respect to Petitioner's 2013 and 2015 Economy Program form filings was previously litigated in the Oakland County Circuit Court, which granted summary disposition to Respondent. Petitioner's constitutional challenges to Respondent's issuance of the September 11, 2019 Notice of Withdrawal of Approval and disapproval of Petitioner's February 4, 2020 Economy Program form filing are substantively identical to those addressed by the Oakland County Circuit Court. Accordingly, Petitioner is precluded from relitigating these issues in a subsequent action or proceeding. See *City of Detroit v Qualls*, 434 Mich 340 (1990); *Amalgamated Transit Union v Southeastern Michigan Transp Auth*, 437 Mich 441 (1991).

2. Petitioner's February 4, 2020 Economy Program form filing, like Petitioner's prior filings, does not include the benefits required in all automobile insurance policies offered in this state under MCL 500.3101(2). Petitioner's February 4, 2020 Economy Program form filing was properly rejected by Respondent as duplicative of Petitioner's prior filings subject to the September 11, 2019 Notice of Withdrawal of Approval with regard to the coverages offered and Petitioner's compliance with MCL 500.3101(2). To the extent Petitioner challenges Respondent's rejection of its February 4, 2020 Economy Program form filing on grounds independent of Petitioner's claims that were fully litigated by the Oakland County Circuit Court, Petitioner's interpretation of MCL 500.3101(2) is rejected because it is contrary to the statute's plain language.

3. Respondent is entitled to summary disposition under R 792.10129 because there is no genuine issue of material fact that Petitioner's February 4, 2020 Economy Program form filing is duplicative

of its prior filings subject to the September 11, 2019 Notice of Withdrawal of Approval, and Petitioner is precluded from relitigating the issues previously ruled on by the Oakland County Circuit Court.

**V. ORDER**

Therefore, it is ORDERED that:

1. The Proposed Order, with corrections as noted herein, is adopted and made part of this Final Decision.
2. Respondent's Motion for Summary Disposition is granted, and Petitioner's appeal of Respondent's disapproval of its February 4, 2020 Economy Program form filing is dismissed with prejudice.

  
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Anita G. Fox  
Director



**STATE OF MICHIGAN  
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES**

**IN THE MATTER OF:**

**Docket No.: 20-007854**

**USA Underwriters,  
Petitioner**

**Case No.: 20-1053-M**

**v**

**Agency: Department of Insurance  
and Financial Services**

**Department of Insurance and  
Financial Services,  
Respondent**

**Case Type: DIFS-Insurance**

**Filing Type: Rates and Forms**

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**Issued and entered  
this 20<sup>th</sup> day of November 2020  
by: Stephen B. Goldstein  
Administrative Law Judge**

**OPINION AND PROPOSED ORDER REGARDING RESPONDENT'S MOTION FOR  
SUMMARY DISPOSITION UNDER MICH ADMIN CODE, R 792.10129 AND MCR  
2.116(C)(10)**

**Procedural History**

This proceeding is held under the authority of the Michigan Insurance Code of 1956, being 1956 PA 218, as amended, MCL 500.100 *et seq.* (hereafter 'Code').

On or about April 28, 2020, Respondent issued an Order Referring Complaint for Hearing and Order to Respond. In the Complaint, the Petitioner seeks to appeal Respondent's rejection of Petitioner's resubmitted Economy Program form filing as being duplicative of Petitioner's previous Economy Program automobile insurance filing which were subject to Respondent's September 11, 2019, Notice of Withdrawal of Approval. Petitioner's appeal is provided for by MCL 500.2236(6).

On April 28, 2020, this matter was referred to the Michigan Office of Administrative Hearings and Rules (MOAHR) to schedule a contested case hearing on Petitioner's appeal. The same day, a Notice of Hearing was issued scheduling a hearing for June 18, 2020, at 9:00 a.m.

On June 8, 2020, the parties filed a stipulated order to adjourn the June 18, 2020, hearing. By Order dated June 16, 2020, the contested case hearing was adjourned to August 17, 2020.

On July 27, 2020, Respondent filed a Motion for Summary Disposition under Mich Admin Code, R 792.10129 and MCR 2.116(C)(10). The motion asserts there exist no genuine issues of material fact, and thus, Petitioner's appeal must be dismissed.

On August 12, 2020, the Tribunal issued an Order Adjourning and Rescheduling the August 17, 2020, Contested Case Hearing, and an Order Scheduling Filing Dates Regarding Respondent's Motion for Summary Disposition. This order rescheduled the contested case hearing to September 30, 2020.

On August 21, 2020, Petitioner filed a written response to Respondent's motion.

On August 25, 2020, Respondent filed its Reply to Petitioner's August 21, 2020, Response to the motion.

On September 2, 2020, the Tribunal issued an Order Cancelling the September 30, 2020, Hearing on Merits and Scheduling Oral Argument on Respondent's Motion for Summary Disposition. Oral argument was scheduled for September 30, 2020.

Oral argument convened as scheduled on September 30, 2020. Respondent was represented by James E. Long and Randall S. Gregg, Office of General Counsel. Petitioner was represented by David H. Fink and Darryl Bressack, Attorneys at Law.

### **Factual Background**

Petitioner is an automobile insurance company licensed to conduct business in Michigan and is therefore subject to relevant statutes governing automobile insurance companies under the Code. Respondent is the state agency responsible for, among other things, enforcing the Code. Enforcement embodies reviewing and approving or rejecting automobile insurance policies submitted by automobile insurance carriers for review and approval under MCL 500.2236 and ensuring that approved policies otherwise comply with the Code.

In 2013, Petitioner submitted to Respondent for its review and approval, a proposed new automobile policy, referred to as the "Economy Program." As proposed, the Economy Program provided physical damage automobile coverage only. Respondent approved Petitioner's 2013 request to offer the Economy Program for sale in Michigan

because at the time it complied with MCL 500.2236. Respondent also approved Petitioner's 2015 revisions to the Economy Program because the revisions did not alter the coverages provided.

On June 11, 2019, the Code was amended to require that all automobile insurance policies offered in Michigan must include personal protection insurance (PIP), property damage (PD), and residual liability (BI) insurance coverages.<sup>1</sup>

On September 11, 2019, Respondent notified Petitioner that, because of amendments to the Code, its Economy Program policy forms no longer complied with the law and, as such, Respondent withdrew its approval of the policy forms related to the Economy Program.

Petitioner sought an extension of time within which to comply with the Code, which Respondent denied on October 16, 2019. Thereafter, Petitioner filed a lawsuit against Respondent in the Michigan Court of Claims. In that action, Petitioner alleged that Respondent violated its equal protection and substantive and procedural due process rights by withdrawing approval of its Economy Program policy forms. The Court of Claims dismissed USAU's lawsuit on February 14, 2020, in an unpublished Opinion and Order.

Following the Court of Claims dismissal, Petitioner filed an action in the Oakland County Circuit Court, again challenging Respondent's decision to withdraw its approval of the Economy Program policy forms. The Oakland County Circuit Court bifurcated USAU's filing into an administrative appeal (Case No. 2020-180051-AA) and a separate civil suit (Case No. 2020-180050-CZ), where Petitioner again alleged, as it did in the dismissed Court of Claims case, that Respondent violated its constitutional rights when it withdrew its approval of the Economy Program policy forms.

On May 18, 2020, the Oakland County Circuit Court dismissed Petitioner's administrative appeal, and on July 1, 2020, dismissed the civil lawsuit against Respondent as well.

On February 4, 2020, Petitioner submitted to Respondent, for its review and approval, proposed amendments to the then-rejected Economy Program policy forms. After examining the Economy Program Manual that Petitioner submitted with its request for approval, Respondent determined that the proposed policy continued to offer auto physical damage coverage only and, as such, did not comply with the amendments to the Code.

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<sup>1</sup> MCL 500.3101(2)



### APPLICABLE LAW AND ANALYSIS

MCL 500.3101(2) provides, in relevant part:

Except as provided in sections 3107d, all automobile policies offered in this state must include benefits under the personal protection insurance, and property insurance as provided in this chapter, and residual liability insurance. Notwithstanding any other provision in this act, an insurer that has issued an automobile insurance policy may only delete portions of the coverage under the policy and maintain the comprehensive coverage portion on a motor vehicle that is not driven or moved on a highway in accordance with section 3009(4).

Petitioner's motion for dismissal under 2015 AACR R 792.10129 is akin to motions brought under Michigan Court Rule (MCR) 2.116(C)(10). A motion filed under MCR 2.116(C)(10) tests the factual support for an opposing party's claim.<sup>2</sup> Summary disposition under MCR 2.116(C)(10) is available when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law."<sup>3</sup>

In reviewing a motion brought under [MCR 2.116\(C\)\(10\)](#), the court must consider the pleadings, affidavits, depositions, admissions, and any other admissible evidence in favor of the nonmoving party.<sup>4</sup> Affidavits or other documentation submitted in support of or in opposition to a motion for summary disposition under [MCR 2.116\(C\)\(10\)](#) must contain admissible evidence.<sup>5</sup> "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ."<sup>6</sup>

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<sup>2</sup> *Skinner v Square D Co*, 445 Mich 153, 161, 516 NW2d 475 (1994); *Babula v Robertson*, 212 Mich App 45, 48, 536 NW2d 834 (1995).

<sup>3</sup> MCR 2.116(C)(10); see also *Coblentz v City of Novi*, [475 Mich 558](#), 719 NW2d 73 (2006); *Haliw v City of Sterling Heights*, [464 Mich 297](#), 627 NW2d 581 (2001); *Veenstra v Washtenaw Country Club*, [466 Mich 155](#), 645 NW2d 643 (2000).

<sup>4</sup> [MCR 2.116\(G\)\(5\)](#); *Maiden v Rozwood*, [461 Mich 109](#), 120, 597 NW2d 817 (1999); *Radtke v Everett*, [442 Mich 368](#), 374, 501 NW2d 155 (1993); *Miller v Farm Bureau Mut Ins Co*, [218 Mich App 221](#), 233, 553 NW2d 371 (1996).

<sup>5</sup> [MCR 2.116\(G\)\(6\)](#); *Maiden*, 461 Mich at 121.

<sup>6</sup> *Attorney Gen v Power Pick Players' Club of Michigan, LLC*, [287 Mich App 13](#), 26–27, 783 NW2d 515 (2010) (quoting *West v GMC*, [469 Mich 177](#), 183, 665 NW2d 468 (2003)).

In opposing a summary disposition motion brought under MCR 2.116(C)(10), a party must proffer evidence whose content or substance is admissible in evidence.<sup>7</sup> “Opinions, conclusionary denials, unsworn averments, and inadmissible hearsay do not satisfy [the evidentiary requirements of MCR 2.116 because the existence of a disputed fact] must be established by admissible evidence.”<sup>8</sup> Mere allegations unsupported by evidence of specific facts are insufficient to create a genuine issue of material fact.<sup>9</sup>

When faced with a properly supported motion for summary disposition under MCR 2.116(C)(10), a party may not rest on mere allegations or denials in his or her pleadings but instead must, by affidavit or other documentary evidence, “set forth specific facts showing that there is a genuine issue for trial.”<sup>10</sup>

Respondent asserts there is no genuine issue of material fact that it notified Petitioner it was withdrawing approval of its Economy Program insurance forms because they did not comply with the Code. Respondent further asserts there is no genuine issue of material fact that Petitioner’s February 4, 2020, resubmission of the Economy Program policy forms for review and approval continued to only offer auto physical damage coverage and, therefore still did not comply with MCL 500.3101(2).

Petitioner argues that the Economy Program complies with the amendments to the Code, and that Respondent’s February 4, 2020, rejection of its proposed Economy Program filing as duplicative of its previous policy was improper and a violation of its constitutional rights to due process and equal protection. Petitioner asserts that the unambiguous language of MCL 500.3101(2), read in conjunction with the Code in general, and specifically the definition of “insurance”, means that the Economy Program form filing satisfies MCL 500.3101(2) by ensuring that clients purchasing its property damage coverage-only policy already purchased or intend to purchase one or more other policies containing the required personal protection and residual liability coverage.

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<sup>7</sup> *Maiden v Rozwood*, 461 Mich at 109

<sup>8</sup> *Marlo Beauty Supply v Farmers Ins Grp of Cos*, 227 Mich App 309, 321, 575 NW2d 324 (1998); *Marsh v Department of Civil Serv (After Remand)*, 173 Mich App 72, 77–78, 433 NW2d 820 (1988); see also *Ottaco, Inc v Gauze*, 226 Mich App 646, 650, 574 NW2d 393 (1997) (court considers “admissible evidence” when deciding motion for summary disposition brought under MCR 2.116(C)(10)); *McCallum v Department of Corr*, 197 Mich App 589, 603, 496 NW2d 361 (1992).

<sup>9</sup> *Glazer v Lamkin*, 201 Mich App 432, 437–438, 506 NW2d 570 (1993).

<sup>10</sup> MCR 2.116(G)(4); *McCart v J Walter Thompson, Inc*, 437 Mich 109, 120, 469 NW2d 284 (1991); *Innovative Adult Foster Care*, 285 Mich App at 475; *Richardson v Michigan Humane Soc’y*, 221 Mich App 526, 527, 561 NW2d 873 (1997).

The parties' submissions reflect that, in the Court of Claims and Circuit Court actions, as well as the case under review, Petitioner has alleged essentially the same thing – that Respondent violated its constitutional rights to due process and equal protection by withdrawing approval for its 2013 and 2015 Economy Program form filings in September 2019, and then rejecting approval for its proposed amendments to the policy in February 2020. Petitioner's response to Respondent's July 27, 2020, motion for dismissal relies on the same arguments already raised before the Court of Claims and Oakland County Circuit Court. While the Court of Claims dismissal appears to have been entirely on jurisdictional grounds and does not address the merits of Petitioner's arguments, the Oakland County Circuit Court issued a ruling on the record following oral argument on June 24 2020. That ruling directly addressed each of Petitioner's arguments in that action.<sup>11</sup>

Petitioner's inclusion of these same issues as a defense to Respondent's motion for dismissal does not create genuine issues of material fact sufficient to survive dismissal. The Tribunal is bound by the Oakland Circuit Court's ruling regarding the constitutionality of Respondent's September 11, 2019, Economy Program Notice of Withdrawal of Approval and its affirmation of Respondent's interpretation of MCL 500.3101(2). As such, these issues cannot be re-litigated in this forum and cannot form the basis for defeating Respondent's motion.

Petitioner's contention about how MCL 500.3101(2) should be interpreted is also suspect. Petitioner acknowledges the Economy Program is the only automobile policy it offers to consumers and asserts that "bundling" of policies is allowed under the Code. Yet, it produced no admissible evidence, in the form of affidavits or otherwise, to suggest that it offers the required coverages in any other products it may ultimately sell to consumers. In fact, Petitioner acknowledges its customers would need to demonstrate evidence they have purchased required coverages *through other insurers*.

The clear and unambiguous language of MCL 500.3101(2) provides that all automobile policies offered in this state must include benefits under the personal protection insurance, and property insurance as provided in this chapter, and residual liability insurance. If the June 2019 amendment to MCL 500.3101(2) is interpreted how Petitioner thinks it should be, then Petitioner complies with the statute simply by ensuring that an insured has purchased the personal protection and residual liability coverages *from other insurers*. This interpretation effectively allows Petitioner to completely avoid the cost and risks associated with underwriting the personal protection and residual liability components of every policy it issues. This interpretation works to Petitioner's advantage, which is unlikely what the legislature intended when it amended the Code to require that *all insurers* offer automobile policies which include the coverages required under MCL 500.3101(2).

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<sup>11</sup> June 24, 2020, Oakland County Circuit Court Transcript, pp. 69-76

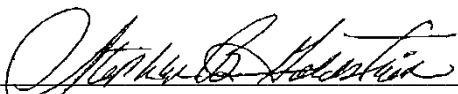
Petitioner argues that force-based insurers are permitted to sell automobile policies without the required coverages under MCL 500.3101(2). This argument must also fail. Clearly, Petitioner's Economy Program is not a force-based policy. Its February 4, 2020, resubmission of the Economy Program policy forms did not comply with MCL 500.3101(2) because the policy continues to offer property damage coverage only and excludes personal injury protection (PIP) and bodily injury (BI) coverages.

Applying MCL 500.3101(2)'s plain meaning, Petitioner's February 4, 2020, resubmission is, in fact, duplicative of its 2013 and 2015 form filings, which were the subject of the September 11, 2019, Notice of Withdrawal of Approval. The February 2020 Economy Program continues to offer coverage for property damage only, contrary to MCL 500.3101(2). That Petitioner's eligibility provisions now require a process for ensuring the insured already has or will purchase the required coverages from other insurers is only relevant if Petitioner's interpretation is adopted, which it is not. Petitioner's attempt to interpret MCL 500.3101(2) in a manner that allows it to avoid providing the required coverages in each policy it issues and sells is unsupported by the unambiguous language of the June 19, 2019, amendment to MCL 500.3101(2).

Because there is no genuine issue of material fact that the February 4, 2020, Economy Program policy form submission was duplicative of the previous Economy Program, for which Respondent withdrew its approval on September 11, 2019, Respondent is entitled to summary disposition under Mich Admin Code, R 792.10129 and MCR 2.116(C)(10).

### **PROPOSED ORDER**

1. The Tribunal proposes that the Director of the Department of Insurance and Financial Services issue a Final Order granting Respondent's Motion for Summary Disposition under Mich Admin Code, R 792.10129 and MCR 2.116(C)(10).
2. Issue a Final Order determining that Respondent properly rejected Petitioner's resubmitted Economy Program form filing as being duplicative of its previous Economy Program insurance form filing which was subject to Respondent's September 11, 2019, Notice of Withdrawal of Approval.

  
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**Stephen B. Goldstein**  
**Administrative Law Judge**