STATE OF MICHIGAN
IN THE COURT OF APPEALS

COALITION PROTECTING AUTO NO-FAULT (CPAN), MARTHA E. LEVANDOWSKI, GERALD E. & MARY ELLEN CLARK, A. MICHAEL AND PAULINA M. DELLER, and M. THOMAS DELLER,	Court of Appeals Case No. 314310
Plaintiffs-Appellees/Cross-Appellants, v.	Ingham County Circuit Court Case Nos. 12-68-CZ, 12-659-CZ (Consolidated)
THE MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION (MCCA),	Honorable Clinton Canady III
Defendant-Appellant/Cross-Appellee	

and

BRAIN INJURY ASSOCIATION OF MICHIGAN (BIAMI), RICHARD K. & ILENE IKENS, DR. KENNETH & SUSAN WISSER, GREGORY A. & KAREN M. WOLFE, AND OTHER SIMILARLY SITUATED MICHIGAN AUTOMOBILE POLICY HOLDERS

Plaintiffs-Appellees/Cross-Appellants,

v.

THE MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION (MCCA),

Defendant-Appellant/Cross-Appellee.

BRIEF OF AMICI CURIAE MICHIGAN STATE MEDICAL SOCIETY, MICHIGAN OSTEOPATHIC ASSOCIATION, MICHIGAN ASSOCIATION OF CHIROPRACTORS AND MICHIGAN ORTHOPAEDIC SOCIETY IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS' BRIEF ON APPEAL AND CROSS-APPEAL

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STATEMENT REGARDING BASIS FOR JURISDICTION

Amici Curiae Michigan State Medical Society, Michigan Osteopathic Association, Michigan Association of Chiropractors, and Michigan Orthopaedic Society rely upon the Statement Regarding Basis for Jurisdiction contained in the Brief on Appeal and Cross-Appeal filed by Plaintiffs-Appellees/Cross-Appellants.

STATEMENT OF QUESTIONS PRESENTED

1. Did the trial court properly hold that under MCL 15.231(d), MCCA is a public body subject to the disclosure requirements of FOIA because it is an entity created by state authority and funded through state authority, and its permitted nondisclosure of records and information is limited to the exemptions specified in MCL 15.243?

MCCA says "no."
CPAN, BIAMI and the Individual Plaintiffs say "yes."
Amici Curiae say "yes."
The Trial Court said "yes."

2. Did the trial court properly conclude that MCCA is obligated to produce its records under the common law right to access information and the doctrine of constructive or resulting trust?

MCCA says "no."
CPAN, BIAMI and the Individual Plaintiffs say "yes."
Amici Curiae say "yes."
The Trial Court said "yes."

3. Is MCL 500.134 unconstitutional because it purports to amend FOIA without reenacting or republishing FOIA and fails to give fair notice of its intent to alter FOIA?

MCCA says "no."
CPAN, BIAMI and the Individual Plaintiffs say "yes."
Amici Curiae say "yes."
The Trial Court did not decide this issue.

STATEMENT OF INTEREST OF AMICI CURIAE

Amici Curiae Michigan State Medical Society (MSMS), Michigan Osteopathic Association (MOA), Michigan Association of Chiropractors (MAC), and Michigan Orthopaedic Society (MOS), (collectively referred to as "Amici Curiae"), file this brief to address the important issues pending before this Court with respect to the public's right to information. The Freedom of Information Act (FOIA) was enacted to enable an informed and active citizenry to exercise its democratic rights. Michigan has a strong public policy favoring public access to government information. Citizens have a right to be informed as they exercise their role in a democracy and to hold public officials accountable for the actions they take in the discharge of their duties.

The backdrop for the present action involves the financial viability of the Michigan Catastrophic Claims Association (MCCA), which is statutorily required to reimburse Michigan insurance companies for allowable expense benefits paid on behalf of catastrophically injured persons in excess of the statutory retention amount, which is currently $500,000. Each insurer is required to fund MCCA through the payment of annually-adjusted assessments that are based upon the number of vehicles the insurer covers in any given year. The per-vehicle assessments are determined by MCCA and passed on to the policyholders as a line item on their insurance premium invoices. Policyholders must pay these charges in order to operate a vehicle in this state.

Proposals to reduce benefits currently required by the Michigan No-Fault Automobile Insurance Act, MCL 500.3101 *et seq*. (the No-Fault Act) are presently pending in the Michigan Legislature. The Governor's spokesperson recognized that proposed changes "will have implications for the MCCA." *Insurance Commissioner Points to System Flaws As Reason to Reform No-Fault*, Gongwer News Service (February 4, 2013). Kevin Clinton, director of the

newly constituted Department of Insurance and Financial Services, has said he would like to "do away with the MCCA." Clinton, *Kill the MCCA*, MIRS News (January 31, 2013).

Members of Amici Curiae routinely treat patients whose medical expenses are paid through the personal injury protection (PIP) benefits which No-Fault insurers are required to include in their automobile insurance policies. Amici Curiae therefore have an interest in, and will be significantly affected by, decisions rendered in this action.

Michigan State Medical Society – MSMS is a professional association that represents the interests of over 14,000 Michigan physicians. Organized to protect the public health and to preserve the interests of its members, the mission of MSMS "is to promote a health care environment that supports physicians in caring for and enhancing the health of Michigan citizens through science, quality, and ethics in the practice of medicine." MSMS has a continuing interest in issues which affect the medical profession and the patients it serves and is an active advocate in the educational, judicial and legislative arenas.

Michigan Osteopathic Association – As the voice of over 8,000 Michigan osteopathic physicians and students, MOA likewise has a vital interest in promoting the availability of quality patient care. MOA represents the interests of its members through legislative and judicial advocacy, and contributes to the ongoing education of its members and the public through information programs, publications and the sponsorship of educational conferences.

Michigan Association of Chiropractors – The mission of MAC is to protect and enhance the chiropractic profession through leadership, education, and the promotion of discipline and practice. MAC advocates on behalf of its members, their patients, and the profession to the public, business, third-party payor and legal communities.

Michigan Orthopaedic Society – MOS represents over 600 Michigan orthopedic surgeons. MOS routinely participates in the legislative process and sponsors educational activities designed to promote the availability of high quality care for patients.

Through the grant of leave over the course of many years, Amici Curiae have expressed their views regarding a wide array of medico-legal issues pending before Michigan's state and federal appellate courts. On occasion, one or more have likewise appeared as amicus curiae in state circuit court and federal district court matters. Amici Curiae appreciate the opportunity to address the important issues pending before this Court through the filing of this amici curiae brief.

INTRODUCTION

Michigan's No-Fault Act guarantees that victims of catastrophic injuries will receive all allowable expense benefits for their care, rehabilitation and recovery for life. These benefits are not subject to any monetary cap, but No-Fault insurers are protected from unlimited liability by the No-Fault Act's retention provision. When benefits paid by a No-Fault insurer on behalf of a catastrophically injured person exceed a $500,000 retention amount, MCCA reimburses the insurer for the excess amount from a fund financed by compulsory assessments paid by MCCA's insurer-members. The insurers recoup these funds by charging their Michigan automobile policyholders a per vehicle fee as part of the No-Fault insurance policy premiums. Every Michigan motorist is required to purchase No-Fault insurance to operate a motor vehicle legally in this state.

The Michigan Legislature is currently considering legislation that would eliminate the lifetime, uncapped benefits presently payable for the care, recovery and rehabilitation of catastrophically injured persons. The basis for these legislative proposals is the alleged financial unsustainability of the present system. Any such limitation on lifetime benefits will negatively impact the ability of catastrophically injured persons to obtain the medical care and rehabilitative services they need, and will likewise impede the medical providers' ability to provide and be compensated for those services. It is unlikely that catastrophically injured persons who exhaust their capped benefits will be employed or the beneficiaries of any health insurance policies. In most cases, Medicaid is likely to be the only source of payment to providers. Medicaid rates for physician reimbursement do not even cover the cost of providing the services in most physician practices. Physicians can only provide care to Medicaid patients if the loss can be spread among patients whose care is reimbursed at higher rates.

The economic viability of treating Medicaid patients will become far more difficult to maintain as catastrophically injured patients max out of their benefits. As more patients are pushed out of No-Fault and placed onto the Medicaid rolls, it is less likely that the cost of their care can be offset by the decreasing number of higher paying patients. Providers, including members of MSMS, MOA, MAC and MOS, will be forced to subsidize the care of these catastrophically injured patients and will be less financially able to do so. Providers may be forced to decline to treat such patients. Ultimately, the availability of health care may be jeopardized for those who need it the most.

MCCA has refused to provide the information Michigan citizens need to adequately assess the financial sustainability of the MCCA and the present No-Fault system. The requested information includes the process, assumptions and economic projections MCCA's actuaries use to determine rates. This information is not published on MCCA's website. It is not contained in MCCA's annual report and is not otherwise publicly available. The secrecy of this information makes Michigan an anomaly among all other states, as the National Association of Insurance Commissioners (NAIC) has recognized in its annual report on the profitability of each line of insurance in each state. See Exhibit A, Excerpt of NAIC Report on Profitability by Line by State in 2011 (NAIC Report). The NAIC Report explains:

> The profit reported for Michigan auto liability is not meaningful because of data reporting anomalies arising from the data related to the Michigan Catastrophic Claims Association.

MCCA asserts that it is not a public body obligated to disclose records and information under FOIA, that producing the requested records would be inconvenient, that it provides sufficient financial data on its website, and that Michigan motorists should simply trust its actuaries. MCCA has revealed that its primary reason for withholding the information is that it does not want to defend its rate-making process and actuarial assumptions. Such reasoning is

completely contrary to the purpose of FOIA to provide all persons with full and complete information regarding the affairs of public bodies so they may fully participate in the democratic process.

There would be something terribly wrong with a system of laws that allows increases in compulsory policy premium assessments by astronomical percentages each year but permits no one outside of a handful of No-Fault insurance representatives and the Insurance Commissioner to know how those increased rates were calculated. Fortunately, Michigan law is not of that ilk. Michigan is a "sunshine state." Its statutes do not give the MCCA a "free pass" from FOIA. Nor can the MCCA evade the centuries-old common law rule which recognizes that persons who possess a special interest have a right to access information. Without the requested information, one cannot determine whether the MCCA assessments have been fairly and equitably determined, and whether MCCA is, or is not, financially sustainable

CONCISE STATEMENT OF FACTS

Amici Curiae rely upon the Counter-Statement of Facts and Proceedings recited in the Brief on Appeal and Cross-Appeal filed by Plaintiffs-Appellees/Cross-Appellants Coalition Protecting Auto No-Fault (CPAN), Brain Injury Association of Michigan (BIAMI), and named individuals (collectively referred to as "Plaintiffs").

ARGUMENT

I. As a Public Body Within the Meaning of FOIA, MCCA Is Subject to FOIA's Disclosure Requirements, and the Purported Statutory Exemption in the Insurance Code is Limited to Records and Information Enumerated in MCL 15.243(1).

Much has been written about the goals and intent of the Michigan No-Fault Act but nothing describes them better than the Michigan Supreme Court's opinion in *Shavers v Attorney General*, 402 Mich 554; 267 NW2d 72 (1978). Reflecting upon No-Fault a mere five years after its enactment, the Supreme Court explained the exigencies that compelled the Michigan

Legislature to eliminate a tort remedy for *all* but the most seriously injured motor vehicle accident victims in exchange for the guarantee that *all* reasonably necessary expenses for the injured victim's care, rehabilitation and recovery would be promptly paid regardless of fault. *Id.* at 579.

Describing the Act as "an innovative social and legal response to the long payment delays, inequitable payment structure and high legal costs inherent in the tort (or 'fault') liability system," the Supreme Court observed that the goal "was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses." *Shavers*, 402 Mich 578-579. The Legislature believed that this goal "could be most effectively achieved through a system of compulsory insurance, whereby every Michigan motorist would be required to purchase no-fault insurance or be unable to operate a motor vehicle legally in this state" and where "victims of motor vehicle accidents would receive insurance benefits for their injuries as a substitute for their common-law remedy in tort." *Id.* at 579. Sustaining the constitutionality of these provisions against due process challenge, this Court observed that the benefits provided by the Legislature "reasonably relate[] to the purpose of correcting these evils." *Id.* at 622. The Court found, however, that the Act as originally conceived did not include sufficient safeguards to ensure that the required insurance would be available at "fair and equitable rates." *Id.* at 581. The Court explained:

> [T]he No-Fault Act, which has substantially affected every Michigan motorist, every insurance company underwriting motor vehicle insurance in Michigan, and our entire system of civil justice for nearly five years, is constitutional in its general thrust but unconstitutionally deficient in its mechanisms for assuring that compulsory no-fault insurance is available to Michigan motorists at fair and equitable rates. . . .
>
> In choosing to make no-fault insurance compulsory for all motorists, the Legislature has made the registration and operation of a motor vehicle inexorably dependent on whether no-fault insurance is available at fair and equitable rates.

> Consequently due process protections under the Michigan and United States Constitutions are operative. [*Id.* at 581, 599.]

To protect against the arbitrary and erroneous decision-making that due process abhors, the Court explained that individuals must be able to review the rate-making filings and supporting documentation before the rates become effective:

> [D]ue process, at a minimum, requires that rates are not, in fact, "excessive, inadequate or unfairly discriminatory" and, further, that persons affected have notice as to how their rates are determined and an adequate remedy regarding that determination. . . . Absent administrative rules or legislative definition giving substance to the statutory language, there are inadequate safeguards against arbitrary action or invidious discrimination. . . .[T]he present system of rate regulation denies due process to the motorist attacking the validity of a rate. Filings and supporting information submitted by insurers are open to public inspection only after the filing becomes effective. This certainly is questionable due process.
>
> . . .
>
> Individuals must have the knowledge necessary to protect themselves against erroneous or discriminatory underwriting and rate-making decisions. There must be available adequate means of redress for such errors and discrimination. [*Shavers*, 402 Mich 601-606 (citations omitted).[1]]

Information of another, but equally important, sort is at issue in the present case. MCL 500.3107(1)(a), the centerpiece of the No-Fault Act, requires insurers to provide PIP benefits covering *all* "allowable expenses" which include "*all* reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." (Emphasis added). These benefits are payable for life, if necessary, and are not subject to any monetary cap. No-Fault insurers are protected from unlimited liability by the No-Fault Act's retention provision. MCL 500.3104(2)(k) provides that when PIP benefits paid by a No-Fault insurer on behalf of a catastrophically injured person exceed a $500,000 retention

[1] To rectify the deficiencies identified in *Shavers*, the Legislature enacted the Essential Insurance Act (1979 PA 145 and 1979 PA 147).

amount, the MCCA will reimburse the insurer for the excess amount from a fund financed by compulsory contributions by MCCA's insurer-members. The insurers recoup these funds through premium assessments charged to Michigan citizens as part of their No-Fault insurance policies. The charge was $145 per vehicle through June 30, 2012, and increased to $175 on July 1, 2012. See MCCA Annual Report for Fiscal Year Ended June 30, 2012.

Pursuant to FOIA, the *Shavers* due process imperative, the common law right to information, and the resulting and constructive trust doctrines, the trial court properly ordered the MCCA to disclose "general rate calculation information such as amount of funds contained in MCCA reserves, number of claimants, administrative costs, nature and type of investments of the reserves, amount currently paid by insurers and specific accounting as to increase/decrease in yearly rate calculated, etc." The requested information is not publicly available but is routinely maintained by MCCA in the course of performing its statutory duties. MCCA's assertion that it is wholly exempt from FOIA under Section 134(4) and (6)(c) of the No Fault Act is misplaced. MCL 500.134(4) and (6)(c). The trial court properly held that these Sections do not carve out a wholesale exemption of all of MCCA's records, and for any of its records to be exempt from FOIA, they must meet one of the specified exemptions in MCL 15.243.

A. The Purpose of FOIA is to Fully Inform Persons Regarding the Affairs of Public Bodies to Allow Them to Fully Participate in the Democratic Process.

The public policy furthered by enactment of the FOIA, MCL 15.231 *et seq*., is to provide all persons "full and complete information regarding the affairs of government and the official acts of those who represent them" so they may "fully participate in the democratic process." MCL 15.231. Section 3(1) of the Act in pertinent part provides:

> Except as expressly provided in section 13, upon providing a public body's FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record, a person has a right to inspect, copy, or receive copies of the requested public record of the public body.

MCL 15.233(1).[2] This purpose of enabling an informed and active citizenry to exercise their democratic rights has been repeatedly reiterated by the Courts of this state. In *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 641; 591 NW2d 393 (1998), the Court of Appeals explained:

> The FOIA is a mechanism through which the citizenry may examine and review the workings of government and its executive officials. The statute has in common with the state's liberal discovery rules that it came into existence as a manifestation of the trend to disclose information that previously had generally been kept secret. The FOIA embodies this state's strong public policy favoring public access to government information, recognizing the need that citizens be informed as they exercise their role in a democracy, and the need to hold public officials accountable for the manner in which they discharge their duties. MCL 15.231(2); MSA 4.1801(1)(2).

Likewise, in *Booth Newspapers v Univ of Michigan Bd of Regents*, 444 Mich 211, 231; 507 NW2d 422 (1993), the Michigan Supreme Court remarked:

> The Freedom of Information Act, MCL 15.231 et seq.; MSA 4.1801(1) et seq., protects a citizen's right to examine and to participate in the political process. It requires public disclosure of information regarding the formal acts of public officials and employees. This Court has stated that the act mandates "[a] policy of full disclosure . . . ." *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 543; 475 NW2d 304 (1991).

See, also, *Sclafani v Domestic Violence Escape,* 255 Mich App 260, 263-264; 660 NW2d 97 (2003) ("In enacting FOIA, the Legislature made it public policy that citizens are entitled to complete information concerning the affairs of their government so that they can fully participate in the democratic process").

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[2] "Public record" is defined as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function," and is separated into two classes:

> (i) Those that are exempt from disclosure under section 13.
>
> (ii) All public records that are not exempt from disclosure under section 13 and which are subject to disclosure under this act. [MCL 15.232(e).]

MCCA has completely stymied this worthy goal. MCCA makes certain financial information public, as shown in its annual report, but it does not make its rate-making information public. Indeed, MCCA has gone to great lengths to keep its rate-making information secret. Without this information, one cannot determine whether the MCCA assessments have been fairly and equitably determined, and whether MCCA is, or is not, financially sustainable.

For example, MCCA's Annual Statement filed with the Department of Insurance and Financial Services (DIFS) includes a table that enables the reader to determine how accurate the company's estimates of its claims payments have been in the past. Exhibit B, Schedule P to MCCA Annual Statement for the Fiscal Year Ending June 30, 2012. Part 2B sets forth the amount MCCA estimates in the year it collects the premium that it will ultimately pay out for all claims that arise in that year, and then also sets out revised estimates, made in each of the next nine years, of its ultimate payments for claims arising in the initial year. Schedule P thus allows the reader to determine how accurate the insurer's estimates have been in the past. As time goes on, the estimates get increasingly accurate since more has actually been paid out and more information about each claim has come in.

The first number to the right of each year listed in the left-hand column, "Prior" through "2012," is the amount MCCA estimated, in that year, that it would ultimately pay out for all claims arising in that year. In 2003, for example, MCCA estimated that it would ultimately pay out $3.443 billion for all claims arising in 2003. In each year, as more information came in about the claims arising in 2003, MCCA revised its initial estimate. As of 2012, its estimate of the amount it would ultimately pay out on claims arising in 2003 was $2.968 billion, 13.8 percent less than its initial estimate.

To take another example, the amount MCCA estimated in 2011 that it would ultimately pay out for claims arising in 2011 was $5.873 billion. Just one year later, however, in 2012, it revised that estimate down to $4.841 billion, a difference of $1.032 billion, or 17.6 percent. As another example, the top line of Schedule P shows the amount MCCA initially estimated in all years prior to 2003 the amount it would ultimately pay out for all claims arising prior to 2003, and then revised estimates for each of the next nine years with regard to the amounts it would ultimately pay out for all claims arising in all those years. Its 2012 estimate was $35.116 billion, 14.4 percent less than its original estimate of $41.011 billion.

Finally, the two right-hand columns of Schedule P show the difference between MCCA's recent estimates and its current estimates of how much it would pay out for claims arising in all years. The far right hand column shows the difference between the amount it estimated in 2012 and the amount it estimated in 2010, two years previously, that it would pay out for claims arising in each year in the past. The column immediately to the left of the far right hand column shows the difference between the amount MCCA estimated in 2012 and the amount it estimated in 2011, one year previously, that it would pay out for claims arising in each year in the past. The totals, on the bottom line, show that between 2011 and 2012 MCCA reduced its estimates of how much it would ultimately pay out for all claims arising through the year 2011 by $7.493 billion; and that between 2010 and 2012, MCCA reduced its estimates of how much it would ultimately pay out for all claims arising through the year 2010 by $5.541 billion. In short, Schedule P shows that MCCA's initial estimates of the amounts it will ultimately pay out have consistently proved to be too high. This table does not give the assumptions used or what the estimates are based on, only that the estimates are overstated.

MCCA refuses to disclose the assumptions it uses or the calculations it makes to arrive at its estimates. MCCA's actuary, Milliman, Inc., has provided an explanation of the process it goes through to arrive at its projections of how much MCCA will ultimately pay out for claims. Exhibit C, January 4, 2012 Letter from Senior Deputy Commissioner to House Committee on Insurance, Appendix 1, MCCA Methodology.[3] Milliman acknowledges that its projections are based on estimates. It does not, however, explain the basis for any of these estimates. For example, Milliman acknowledges that in estimating how much MCCA is likely to pay out, it estimates how long MCCA claimants will live, what medical costs will be in the future, and the amount MCCA will ultimately spend on claims arising from injuries it believes have already occurred but which haven't been reported yet. Milliman does not, however, disclose the assumptions it uses or the calculations it makes to arrive at these estimates. Nor does it disclose the extent to which the methodologies it has chosen that have produced its estimates have proved to be accurate in the past.

In addition, some of the statements Milliman makes do seem to indicate that the amount Milliman has estimated MCCA will ultimately pay out is unreasonably high. For example, Milliman has estimated that the average MCCA claimant, whose average age is 48, will live until age 76, which is only 6 years less than the average life expectancy for 48-year-olds in standard health. In fact, however, due to their very serious and often multiple injuries, MCCA claimants cannot reasonably be expected to live on average to age 76. This is one indication that Milliman has overstated, perhaps substantially, MCCA's true costs.

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[3] This letter with various appendices was attached to a June 5, 2013 letter from the Department of Insurance and Financial Services to CPAN granting in part and denying in part a FOIA request.

Furthermore, because the premium MCCA collects today, the per-car surcharge, is paid out gradually over the life of claimants, the amount of investment income earned on the money MCCA collects before it is paid out is enormous. Milliman assumes that MCCA will have a return on its investments of 7.6 percent, and that based on that assumption, the $13.7 billion in assets held by MCCA as of June 30, 2011 is $1.03 billion less than the amount that will ultimately be needed to pay for all the claims MCCA projects will be made for injuries occurring through June 30, 2011. Milliman acknowledges, however, that for each 1/10 of a percentage point by which its estimated 7.6 percent return turns out to be inaccurate, that $1.03 billion changes by $200 million. Thus, if MCCA's actual return turns out to be just 1/2 of 1 percent higher than 7.6 percent, MCCA currently has enough to pay the claims Milliman projects; and if the actual return turns out to be 1 percent higher than Milliman has projected, MCCA currently has a $1 billion surplus.[4] In any event, the huge impact that slight differences in investment return assumptions can have highlight the importance of Milliman disclosing the basis for its 7.6 percent assumption. This it does not do. Instead, it simply sets forth the inflation rate it assumes for various components of health care costs without explaining how it determined those rates.

As another example, Milliman explains the various components that have produced the $13.7 billion it says is needed to pay for the claims it projects will arise, but it does not disclose the assumptions and calculations it has used to produce each component. In addition, in order to arrive at that $13.7 billion, it includes various additional loads without disclosing the assumptions and calculations on which those loads are based.[5]

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[4] In theory, the 7.6 percent return Milliman has assumed could also turn out to be higher than MCCA's true rate of return. As a practical matter, however, Milliman virtually always errs on the side of conservatism.

[5] "Loads" are additional percentages by which the actuary raises the rate for various reasons, often without any real justification.

Another important factor is the importance of trend. The rate at which costs are increasing is known as trend. The trend Milliman uses to estimate future costs will have a huge impact on those estimated costs. The trend the actuary chooses depends on which periods of years he includes in the calculation of trend and the weight he gives to different periods; the periods the actuary chooses to include and the weights he gives each period can have a huge impact on the ultimate rate need. Milliman tacitly acknowledges this, but fails to disclose either which periods it has used or the weights it has given each period in its calculation.

The secrecy of this information makes Michigan an anomaly. Each year, the NAIC publishes a report that calculates the profitability of each line of insurance in each state, with one exception: it cannot accurately calculate the profitability of Michigan auto liability insurance because MCCA refuses to disclose its rate-making data. The NAIC qualifies the data in its report with the following statement: "The profit reported for Michigan auto liability is not meaningful because of data reporting anomalies arising from the data related to the Michigan Catastrophic Claims Association." Exhibit A. Because of MCCA's refusal to disclose its rate-making data, Michigan is the only state in the country for which the NAIC cannot calculate an accurate rate of return. MCCA has revealed that its primary reason for withholding the information is that it does not want to defend its rate-making process and actuarial assumptions. Such reasoning is completely contrary to the purpose of FOIA and should carry no weight with this Court.

B. MCCA Is A "Public Body" Within the Meaning of FOIA.

The trial court correctly held that MCCA is a "public body" under FOIA. "Public body" is expressly defined in the Act to include "[a]ny … body which is created by state or local authority or which is primarily funded by or through state or local authority." MCL 15.232(d)(iv) (emphasis added). In this case, MCCA qualifies as a public body on both grounds.

MCCA was created by statutory amendment to the No-Fault Act. See MCL 500.3104(1); *League General Ins Co v The Michigan Catastrophic Claims Ass'n*, 435 Mich 338, 340-341; 458 NW2d 632 (1990) (stating that MCCA was created by 1978 PA 136 to serve as a means of reimbursing member-insurers for PPI benefits paid per occurrence in excess of the retention amount). Further, MCCA is funded "by" or "through" the collection of statutorily authorized premium assessments from member insurers. In *Breighner v Michigan High School Athletic Assoc Inc*, 471 Mich 217, 226; 683 NW2d 639 (2004), the Michigan Supreme Court found persuasive the Court of Appeals' analysis of "by" and "through" as distinctly different methods of government financing. Funding "by" a governmental authority resulted from a direct governmental disbursement, while funding "through" a governmental entity emanated from the government's authority to regulate. *Id*. The Court of Appeals had explained the difference as follows:

> We read "by or through" to distinguish between the different meanings of the word "authority," that is, funding "by" a governmental authority (an *entity*) and funding "through" governmental decision-making authority (the *power* to regulate). Under our reasoning, the former refers to an entity that directly distributes its financial resources to the disputed organization, while the latter refers to the disputed organization indirectly receiving funds through some action or decision of the governmental body. [255 Mich App 579-580 (emphasis in original)].

In this case, it is undisputed that MCCA receives funds "through some action or decision of the governmental body." MCL 500.3104(1) requires auto insurers to be members of MCCA and to be bound by the "plan of operation" that MCCA is statutorily required to adopt. Pursuant to MCL 500.3104(7), MCCA must adopt a plan of operation that authorizes the collection of premium assessments from MCCA's member-insurers. MCCA members pass this funding

obligation on to their insured vehicle owners via a line-item charge. MCCA is therefore a "public body" within the meaning of FOIA.[6]

The definition of "person" in MCL 15.232 does not change this. MCL 15.232(c) defines "[p]erson" as "an individual, corporation, limited liability company, partnership, firm, organization, association, governmental entity, or other legal entity. . . ." Any entity falling within this definition is entitled upon written request to inspect, copy, or receive copies of public records of public bodies. MCL 15.233(1). As an association, MCCA falls within that definition and can make FOIA requests of other public bodies. However, this does not negate the fact that MCCA also falls within the definition of "public body," and there is nothing in the statute indicating that an entity cannot fall within the definition of a "person" entitled to make FOIA requests and also within the definition of "public body" required to respond to FOIA requests. Such an interpretation would render most public bodies exempt from FOIA given the all-encompassing definition of "person."

C. MCCA as an Entity is Not Exempt From FOIA.

The trial court correctly held that MCCA is not exempt from FOIA, but, rather, its records are only exempt if they meet one of the specific exemptions in MCL 15.243. When interpreting a statute, courts "must ascertain the legislative intent that may reasonably be inferred from the statutory language itself." *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 526; 697 NW2d 895 (2005). Judicial construction is not permitted where the language is unambiguous. *Id*. In interpreting words or phrases, courts must consider their plain meaning as

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[6] In *Sclafani*, 255 Mich App 269, the Court of Appeals explained, "we may construe the fact that the Legislature included private organizations within the definition [of public body] to mean that the Legislature believed taxpayers should be able to monitor the use of public money by private organizations."

well as their purpose and placement in the statutory scheme. *Douglas v Allstate Ins Co*, 492 Mich 241, 256; 821 NW2d 472 (2012).

In refusing Plaintiffs' FOIA requests, MCCA relied in part upon a statutory exemption that is not contained within FOIA itself. The exemption instead appears in the No-Fault Act, MCL 500.134(4), which states:

> A record of an association or facility shall be exempted from disclosure pursuant to section 13 of the freedom of information act, Act No. 442 of the Public Acts of 1976, being section 15.243 of the Michigan Compiled Laws.

"Association or facility" is expressly defined to include MCCA. MCL 500.134(6)(c).

FOIA exemptions are enumerated within Section 13 of FOIA and are to be narrowly construed. In *Messenger*, 232 Mich App 641-642, the Court of Appeals stated that "in recognition that imperatives exist for keeping some information from public disclosure, §13 … enumerates several exemptions to the duty to disclose" and they are "to be construed narrowly, in light of the public policy favoring disclosure." Similarly in *Booth*, 444 Mich 231-232, the Michigan Supreme Court recognized that FOIA was "not absolute," that the Act "outlines several instances in which public records may be exempt from disclosure" and that "[t]hese exemptions must be narrowly construed." The exemptions within Section 13 all specify types of records or information that may be withheld from disclosure rather than entire entities. MCL 15.243(1). Furthermore, MCL 15.233(1) expressly states that a person has a right to inspect, copy, or receive copies of all records of public bodies unless they fall within a specified exemption in Section 13.

The trial court interpreted the reference in MCL 500.134(4) to Section 13 of FOIA rather than to FOIA in its entirety to mean that the Legislature intended to exempt information from FOIA only if it came within one of the specified exemptions of Section 13. This is the only reasonable interpretation of the provision that reconciles the two statutes. Further, such

interpretation is in accord with the purpose of FOIA to promote the disclosure of information unless it falls within a specified exemption.

To the extent different sources of legislative history have been proffered in support of MCCA's argument that it is exempt from FOIA, such items cannot be considered because the statutory language is unambiguous. The Michigan Supreme Court has stated that:

> [T]he most "reliable source" of legislative intent is the plain language of a statute. Judicial power is most menacing when a court feels free to roam in search of interpretive cues that are unmoored to the statutory language. Therefore, we are not inclined to inform ourselves of extratextual sources where the language of the statute is plain. When grammar is the constructive tool of choice, all can readily ascertain what a statute commands. But when extratextual tools are brought to bear on otherwise unambiguous language, only judges can say what the statute "means"-- and then only after the fact. We prefer interpretive methods available to all. [*Bukowski v Detroit*, 478 Mich 268, 277; 732 NW2d 75 (2007).]

The trial court properly held that MCCA is not exempt from FOIA under the unambiguous statutory language, and its records are only exempt if they meet one of the specific exemptions in MCL 15.243. Inconvenience and not wanting to defend its rate-making process and actuarial assumptions are not enumerated exemptions in MCL 15.243.

D. The Role of the Insurance Commissioner is Irrelevant to Plaintiffs' FOIA Requests.

Plaintiffs seek records and information pursuant to FOIA from MCCA, a public body that is statutorily required to disclose such records and information upon written request unless they fall within an exemption listed in MCL 15.243(1). There is no exemption listed for public bodies required to make filings with the Insurance Commissioner. The Commissioner's regulatory role under the Insurance Code is not relevant to the FOIA statute and is not relevant to this litigation. The trial court's opinion and order requiring MCCA to produce its records does not violate any separation of powers or usurp the Commissioner's role. Plaintiffs did not ask for, and the trial

court did not order, any review of any action of the Commissioner, including any regulation it may have performed of MCCA.

Likewise, *Rory v Continental Ins Co*, 473 Mich 457; 703 NW2d 23 (2005), is inapplicable to this suit. In *Rory*, 473 Mich 460, the plaintiffs challenged the enforceability of a one-year limitations period in their insurance contract. The Court held that parties may contract for a shorter limitations period absent a violation of law or public policy. *Id*. at 470. The Court noted that the Legislature provided a mechanism to ensure the reasonableness of insurance contracts by giving the Commissioner the discretion to approve form insurance policies, which was done in *Rory*. *Id*. at 474-475. The Court also noted the limited scope of review provided in the Administrative Procedures Act for decisions made by the Commissioner. *Id*. at 475. Here, Plaintiffs are not seeking judicial review of any action performed or any item approved by the Commissioner. Plaintiffs are simply seeking records and information pursuant to FOIA.

Even if Plaintiffs were seeking review of the Commissioner's approval of MCCA's rates, Plaintiffs would still be entitled to obtain the records and information they seek under FOIA. The Commissioner's role would merely affect the standard of review employed by the Court. The fact that the Legislature enacted the Essential Insurance Act after the Michigan Supreme Court's decision in *Shavers*, which provides certain rate-making protections, does not mean that MCCA's compliance with those provisions can never be judicially challenged. Regardless, the provisions of that Act are unrelated to Plaintiffs' requests for records and information under FOIA at issue in this case.

The submission of reports and annual statements to the Commissioner does not exempt MCCA from its obligations under FOIA. The Commissioner's discretion to review MCCA's rates and actuarial standards does not entitle MCCA to deny persons making a FOIA request the

right to access that information. If that was the standard, all public bodies whose work is regulated or reviewed by another entity would be exempt from FOIA. That simply is not, and should never be, the law in this State.

II. MCCA is Obligated to Provide Access to or Copies of the Requested Records Under the Common Law.

The trial court acknowledged that its holdings that MCCA is a public body under FOIA and that Michigan citizens have a right to know how the insurance premium they pay is calculated are intertwined with the theories of the common law right to information and resulting trusts. The United States Supreme Court has observed that "the courts of this country recognize a general right to inspect and copy public records and documents. . . ." *Nixon v Warner Communications, Inc*, 435 US 589, 597; 98 S Ct 1306; 55 L Ed 2d 570 (1978) (citations omitted). Michigan recognizes a general common law principle giving citizens the right to inspect public records and documents. *In re Midland Publishing Co, Inc*, 420 Mich 148, 155 n 7; 362 NW2d 580 (1984). As stated in *Nowack v Auditor Gen*, 243 Mich 200, 204; 219 NW 749 (1928):

> [I]t would be a great surprise to the citizens and taxpayers of Michigan to learn that the law denied them access to their own books for the purpose of seeing how their money was being expended and how their business was being conducted.

Michigan citizens generally have free access to public records. *Booth Newspapers, Inc v Muskegon Probate Judge*, 15 Mich App 203, 205; 166 NW2d 546 (1968), citing *Burton v Tuite*, 78 Mich 363; 44 NW 282 (1889).[7] See also *Breighner v Michigan High School Athletic Ass'n*, 471 Mich 217, 235; 683 NW2d 639 (2004) ("There is no question as to the common-law right of the people at large to inspect public documents and records.").

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[7] In *Nowack*, 243 Mich 208, the Court held that members of the public had to enforce their rights through the office of the attorney general, but where they brought suits in their own names, they had to show a special interest apart from the general public.

Furthermore, as Plaintiffs explained in their Brief on Appeal, the common law has long recognized the right to access private records if a person has a special interest. See Plaintiffs' Brief on Appeal, pp 32-34. A typical example is the right of a shareholder to inspect the records of a corporation due to his "special interest." See, e.g., *North Oakland Co Bd of Realtors v Realcomp, Inc*, 226 Mich App 54, 58; 572 NW2d 240 (1997) ("[O]ur courts have recognized a stockholder's common-law right to inspect corporate records for a proper purpose."), citing *Woodworth v Old Second Nat'l Bank*, 154 Mich 459, 465-466; 117 NW 893 (1908); *People ex rel Bishop v Walker*, 9 Mich 328, 330 (1861); and *Guthrie v Harkness*, 199 US 148; 26 S Ct 4; 50 L Ed 130 (1905).

The MCCA in its Reply Brief on Appeal, pp 8-9, characterizes Plaintiffs' common law claim as "absurd" pointing to *McBurney v Young*, ___ US ___; 133 S Ct 1709; 185 L Ed 2d 758 (2013), MCCA's reliance on *McBurney* is misplaced. It dealt with an unrelated issue. *McBurney*, 133 S Ct 1720, held that Virginia's FOIA did not violate the Privileges and Immunities Clause or the dormant Commerce Clause because it applied only to Virginia citizens. While the Court stated that "there is no constitutional right to obtain all the information provided by FOIA laws," *Id*. at 1718. Plaintiffs make no such allegation here.

The MCCA's "absurd" characterization stands in sharp relief to what the United States Supreme Court actually said. In a unanimous opinion, the United States Supreme Court acknowledged and recognized what is at the heart of Plaintiff's common law claims: "*Most founding-era English cases provided that only those persons who had a personal interest in non-judicial records were permitted to access them*." *Id*. (citations omitted and emphasis added).

As Plaintiffs noted in their Brief on Appeal, that became the law of Michigan. The common law right evolved through the English common law cases and was incorporated into the

Michigan Constitution, now Const 1963, Art III, sec 7. *Phillips v Mirac, Inc*, 470 Mich 415, 426 n 10; 685 NW2d 174 (2004). As stated in *Phillips*, 470 Mich 426:

> These ancient references concerning the status of the common law before Michigan's statehood are significant because in our earliest Constitution, by way of the ordinances of 1787 for the government of the Northwest Territory, *we adopted what was in essence the English Common in existence on that date*. [(Emphasis added).]

The English common law was adopted in the Michigan's first Constitution of 1835, and has been readopted in every Michigan constitution since.

The Plaintiffs' Interest

The Amici agree with Plaintiffs that their special interest, in part, arises from the Michigan Supreme Court's declaration that Michigan motorists are constitutionally entitled to "notice as to how their rates are determined and an adequate remedy regarding that determination." *Shavers*, 402 Mich 601. MCCA was created by statute and is entirely funded by Michigan motorists through mandatory premiums imposed under threat of criminal prosecution. MCL 500.3102(2). Clearly, Michigan motorists have a special interest in knowing how the mandatory rates they are charged are calculated and whether the association they have funded to ensure lifetime care if they are catastrophically injured is financially viable. Catastrophically injured patients also have a special interest in the requested records because they depend on the financial viability of MCCA for their PIP benefits. These special interests are distinct from those of the general public and entitle them to access information which is relevant to their interest. The interest of the Plaintiffs in MCCA's records is manifest.

Constructive and ResultingTrust

In addition, MCCA holds the funds for reimbursement of PIP benefits paid for each catastrophically injured motorist over $500,000 and cannot retain the beneficial interest. These funds are also held in trust for the Michigan auto policy holders. This is further demonstrated by

Insurance Bulletin 98-01, attached as Exhibit 12 to Plaintiffs' Brief on Appeal. In 1998, the MCCA had accumulated excess premium funds. DIFS announced a refund of $1.2 billion effective March 18, 1998, and directed that MCCA's excess funds be paid to the policy holders as "the ultimate payers of the MCCA premium by way of a pass-through of the charge by member companies . . . ." Exhibit 12 to Plaintiffs' Brief on Appeal.

Also under common law, a constructive trust may arise by operation of law to satisfy demands of justice and good conscience. *Union Guardian Trust Co v Emery*, 292 Mich 394, 404-405; 290 NW 841 (1940). "Actual fraud is not necessary, but such a trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by him who holds the legal title." *Id*. at 404. "A constructive trust may be imposed 'where such trust is necessary to do equity or to prevent unjust enrichment . . . .'" *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 188; 504 NW2d 635 (1993), quoting *Ooley v Collins*, 344 Mich 148, 158; 73 NW2d 464 (1955). "'When property has been acquired in such circumstances that the holder of the legal title may not, in good conscience, retain the beneficial interest, equity converts him into a trustee.'" *Kent v Klein*, 352 Mich 652, 656; 91 NW2d 11 (1958) (citation omitted).

The trial court did not err in acknowledging that its holdings are intertwined with the theories of the common law right to information and resulting trust. MCCA is a public body under FOIA, Michigan citizens have a right to know how the insurance premium they pay is calculated, and Plaintiffs are entitled to the information they requested.

III. MCCA's Purported Statutory Exemption in the Insurance Code is Constitutionally Invalid.

In the event MCL 500.134(4) is considered to exempt MCCA from FOIA, such exemption is unconstitutional. Amici Curiae agree with Plaintiffs' assertion that MCL

500.134(4) – which is not expressly enumerated in Section 13 of FOIA – is constitutionally infirm, having been enacted in violation of Art 4, §§24-25. The reasons are more fully explained below.

A. MCL 500.134 Violates Art 4, §25 of the Michigan Constitution.

Art 4, §25 of the Michigan Constitution, sometimes known as the "Reenact-Publish Clause," provides that "[n]o law shall be revised, altered or amended by reference to its title only." Rather, "[t]he section or sections of the act altered or amended shall be re-enacted and published at length." *Id.* The Michigan Supreme Court definitively addressed the requirements of this constitutional provision and the conflicting applications of prior decisions in the seminal case of *Alan v Wayne Co*, 388 Mich 210; 200 NW2d 628 (1972).

In *Alan*, the Court was asked to decide whether the Legislature, through the enactment of Section 11 of Act 31, could lawfully amend or alter the provisions of Act 94, the Revenue Bond Act, by creating "exceptions" to it without reenacting and publishing the section or sections amended. *Id*. at 269. "Our job here," the Court said, "is to determine the meaning and application of Const 1963, art 4, § 25."

The Court began its analysis with a discussion of *Mok v The Detroit Building & Savings Ass'n No 4*, 30 Mich 511 (1875), where three statutes "provided the grist of decision:"

> First, an act of 1853 authorized the formation of corporations for mining, smelting or manufacturing iron and "for other manufacturing purposes".
>
> Second, an act of 1855 authorized the formation of corporations for "building and leasing houses and other tenements". The act of 1855 provided that corporations under that act could be formed under the provisions of the act of 1853 and these building and leasing corporations thus formed should have and possess all the rights and be subject to all the liabilities provided in the act of 1853 and any amendments thereto.
>
> Third, an act of 1869 provided for the incorporation of building and savings association "under the provisions" of the act of 1855. [*Id*. at 271.]

The Court described *Mok* as holding that even assuming that the act of 1869 could lawfully refer parties to the act of 1853, the act of 1869 "could not at the same time make changes or exceptions in the act referred to without reenacting the sections changed or modified." *Id*. at 272.[8]

The Court also considered the contrary result reached in *Burton v Koch*, 184 Mich 250 (1915), where "an amendment was added to one set of laws which was unquestionably intended to change or create a proviso regarding qualifications for voters in another set of laws." 388 Mich 279. *Burton* held the amendment valid. The *Alan* Court explained:

> The [*Burton*] Court approved this result by a process of reasoning that allows the Legislature to amend, repeal, revise or alter any statutes on the books without reenacting and republishing them so long as they publish the *single* statute which is intended to affect all the others. What this Court said in *Burton* was:
>
> > "We ought not to confuse the effect of the amendment with the constitutional duties of the legislature to indicate an amendment in a particular way. . . . The section amended was re-enacted and republished at length as the Constitution provides. The [C]onstitution has been precisely obeyed and the effect of the amendment is, and was intended to be … to provide uniform qualifications for voters in all school districts of the State." *Id*. 255. [*Alan*, 388 Mich 279 (Emphasis by the *Burton* Court.)]

Juxtaposing the result in *Burton* against the conclusions of *Mok*, the Court came down on the side of *Mok* and overruled *Burton*:

> Under the logic and rule of the *Burton* case none of the other sections need be reenacted regardless of how much and in what way they are affected, because no statute has been amended in its specific words. In other words, under the rule of *Burton* and similar cases nothing need be reenacted and republished so long as you don't march directly up to it and strike out words or add other words.
>
> *Mok* stands for the rule that you cannot amend statute C even by putting in statute B specific words to amend statute C, unless you republish statute C as well as statute B under Const 1963, art 4, §25.

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[8] The Court also discussed cases reaching the same result, such as *Clay v Penoyer Creek Improvement Co*, 34 Mich 204 (1876), and *In re Petition of Auditor General*, 275 Mich 462 (1936).

> *Burton,* on the hand, stands for the rule that you *can* amend statute C by putting in statute B words for the purpose of amending statute C so long as you make no specific reference to C, merely by republishing statute B under *Const 1963, art 4, § 25,* but without republishing statute C.
>
> *Mok* says the constitution requires you to do the whole job right. *Burton* says it is good enough to do the job half right. Furthermore, *Burton* says you can avoid the second half of the job of republication if you hide your purpose whereas *Mok* requires the second half of the job of republication even though you disclose your purpose.
>
> *This Court is convinced the constitution is not satisfied with halfway measures and does not prefer dissimulation to straightforwardness. We adopt the rule of Mok and overrule Burton.* [*Id*. at 281 (Emphasis added).]

The Court reached this conclusion despite assertions that it would be unreasonable to require the Legislature to reenact and republish statutes it intended to amend, and that it would in fact require that a large portion of codified law be republished at every session and parts of it several times over. The Court stated, among other things, that "*constitutional duties and requirements may not be avoided on the ground that it might be a lot of work to comply with the constitution*." *Id.* at 282.

The Michigan Court of Appeals relied upon *Alan* in more recently resolving a Reenact-Publish Clause issue involving an amendment to the Michigan Insurance Code in *Nalbandian v Progressive Michigan Ins Co*, 267 Mich App 7; 703 NW2d 474 (2005). Under the Michigan Insurance Code, insurers were permitted to consider speed limit violations in determining whether and at what rates they would provide insurance to drivers, and two insurance eligibility points were assessed for a speed limit violation of 10 miles per hour or less. *Id*. at 9. In 1987, the Legislature amended the Motor Vehicle Code to disallow any insurance eligibility points for violations of 10 miles per hour or less if the violation was for driving 65 miles per hour or less in a 55 mile per hour zone. *Id*. Plaintiff argued that the Motor Vehicle Code amendment also

amended by implication the Michigan Insurance Code and thus need not satisfy Art 4, §25. *Id*. at 14. The Court of Appeals disagreed, stating:

> 1987 PA 154, by which the 55 mph zone exception was enacted, was not a general act that, as a result of some special fact situation, presents an *accidental conflict* with the 2 point rule of the Insurance Code. The conflict between the two is not one resulting from mere inadvertence. To the contrary, vehicle code *§628(11)* quite clearly resulted from a legislative knowledge of the Insurance Code's 2 point rule and an intent to abrogate that rule with respect to 55 mile per hour speed zone violations. The 55 mph speed zone exception constitutes a "fragment[ary]" attempt to "accommodate [the 2 point rule] by [an] indirect amendment[]" that can only be understood or given effect by "fit[ing]" the two acts together. See *Alan*, *supra at 272*. "No such legislation can be sustained.'" *Id*. quoting *Mok*, *supra at 529*. "[*W]hen the Legislature intends to amend a previous act, it must do so in conformance with the plain and unequivocal requirements of ... Const 1963, art 4, § 25*." *Alan*, *supra at 275*. [*Id*. (Emphasis added).]

The Court also rejected plaintiff's assertion that Art 4, §25 did not apply because 1987 PA 154 was "an act complete in itself." *Id.* at 14-15. The Court explained:

> The subject matter of the contested vehicle code *§628(11)*, the imposition of insurance eligibility points, *is not addressed comprehensively within 1987 PA 154*. Instead, vehicle code *§628(11)* is a *piecemeal amendment to an existing comprehensive statutory scheme* regarding insurance eligibility points and speed limit infractions. 1987 PA 154 "attempt[ed] to amend the old law by intermingling new and different provisions with the old ones" found in the Insurance Code *Alan*, *supra at 279*, quoting *Stimer*, *supra at 293* (POTTER, J., dissenting)(citations deleted; quotation marks deleted; emphasis deleted). Thus, 1987 PA 154 was *not an act complete in itself* and *Const 1963, art 4, §25* applied to its enactment. [*Nalbandian*, 267 Mich App 15-16 (Emphasis added).]

The Court thus concluded that Section 628(11) was enacted in violation of Art. 4, §25 and "is without effect." *Id*. at 18; see also *Berrien Co v Michigan*, 136 Mich App 772, 789; 357 NW2d 764 (1984) ("Since the bills amended the revenue-sharing provision by reference to its title only, they are unconstitutional and may not be invoked to support the setoff of MOE payments against the state's revenue-sharing obligations.").

The attempted FOIA exemption in the Insurance Code must meet the same fate. It was simply not sufficient to bury the MCCA exemption within the amendment to MCL 500.134. Nor

is the Legislature statutorily empowered to excuse itself from the Reenact-Publish Clause requirement via the catchall in Section 13(d), MCL 15.243(1)(d), which exempts from FOIA "[re]cords or information specifically described and exempted from disclosure by statute." The assertion that MCL 15.243(1)(d) authorizes the Legislature to provide additional FOIA exemptions in other chapters of the Michigan Compiled Laws is tantamount to arguing that the Legislature need not adhere to the Constitution. This notion violates the very structure of a democratic government. As the Michigan Supreme Court explained in *Federated Publications, Inc v Bd of Trustees of Michigan State Univ*, 460 Mich 75, 83; 594 NW2d 491 (1999):

> The Michigan Constitution is a limitation on the Legislature's power, not a grant of power to it. *Advisory Opinion on Constitutionality of 1976 PA 240,* 400 Mich. 311, 317-318; 254 N.W.2d 544 (1977). As this Court explained in *In re Brewster St Housing Site,* 291 Mich. 313, 332-333; 289 N.W. 493 (1939):
>
> By the Declaration of Independence, all political connection between the colonies and the State of Great Britain was declared to be dissolved and the colonies asserted to be free and independent States. The several States, when organized, succeeded to all of the legislative powers within their respective territorial jurisdictions possessed by the Parliament of England, and as such free and independent States they still possess those powers, except insofar as they have been delegated by the States to the Federal government by the Constitution of the United States *or voluntarily restrained by the people through the Constitution of the State*.

See also *Blank v Dept of Corrections,* 462 Mich 103, 119; 611 NW2d 530 (2000) ("That the Michigan Legislature may legislate absent constitutional limitations does not mean that it may wield legislative power in a manner other than that carefully prescribed by the Michigan Constitution."); *Council 23 American Federation of State, Co and Municipal Employees v Wayne Co Civil Service Comm'n*, 32 Mich App 243, 248; 188 NW2d 206 (1971) ("The legislature's power to legislate is unlimited, except as expressly limited by the Constitution.").

The Legislature's failure to comply with the reenact and publish requirement of Art 4, §25 renders MCL 500.134 unconstitutional and without effect, and defeats the purported basis for MCCA's refusal to comply with FOIA.[9]

B. MCL 500.134 Violates Art 4, §24 of the Michigan Constitution.

MCL 500.134 also violates the title/object clause of the Michigan Constitution. Article 4, §24 provides that "[n]o law shall embrace more than one object, which shall be expressed in its title." Further, "[n]o bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title." Const 1963, art 4, § 24. The Art 4, §24 prohibitions give rise to three distinct challenges: "(1) a 'title-body' challenge, (2) a multiple-object challenge, and (3) a change of purpose challenge." *People v Kevorkian*, 447 Mich 436, 453; 527 NW2d 714 (1994). CPAN properly asserts the first and third challenges here.

While MCL 500.134 purports to amend FOIA to exempt MCCA from its requirements, there is nothing in the lengthy and very detailed title to 1988 PA 349 (codified as MCL 500.134) which would alert the Legislature or the public to that effect. This omission defeats the purpose underlying Art 4, §24, as articulated by the Michigan Supreme Court in *People v Carey*, 382 Mich 285, 296; 170 NW2d 145 (1969):

> The main purpose of Const 1908, art 5, § 21, was to prevent the legislature from passing laws not fully understood and to avoid bringing into one bill subjects diverse in their nature and having no necessary connection. It was intended that the legislature, in passing law, should be fairly notified of its design and that the legislature and public might understand from the title that only provisions germane to the expressed object would be enacted.[10]

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[9] As Plaintiffs explained in their brief on appeal, the Legislature complied with Art 4, §25 when it amended FOIA in 2006 to exempt protected health information from disclosure by public bodies. It could just as easily have done so here.

[10] Art 4, §24 of the Const 1963 was formerly Art 5, §21 of the Const 1908.

See also *Pohutski v City of Allen Park,* 465 Mich 675, 691; 641 NW2d 219 (2002) ("This constitutional limitation ensures that legislators and the public receive proper notice of legislative content and prevents deceit and subterfuge").

The issue before the Court in *Carey* was whether an inspector employed by the Public Service Commission was empowered by art 15, §13 of the Motor Carrier Act to act as a "peace officer" for purposes of law enforcement. *Carey*, 382 Mich 290. Finding that the statute upon which the People relied was constitutionally invalid, the Court explained:

> The provision under consideration creates the type of evil which the Constitution specifically intended to avoid. Certainly, the creation of a new classification of "peace officers," as manifested by the clear and unambiguous language, *is neither necessary nor consonant with the declared legislative purpose and policy* of the motor carrier act. It is *patently diverse in nature from the entire title and body of the act* and it *bears no necessary or rational connection* to the supervision, regulation, and control of motor vehicles *for hire*. Nowhere in the title of the act is it even intimated that there exists, somewhere in the act, the legislative object to create a new classification of "peace officers" as that term has been construed by the Court. Yet, as the instant case bears witness, the operation of this statute as it presently exists could reach any private conduct falling subject to the power of a peace officer. We do not question the legislature's ability under the police power to enact such a law, but we reject as constitutionally impermissible the method employed in article 5, §13 of the motor carrier act… [*Id*. at 297 (Emphasis added).]

MCL 500.134 suffers from the same infirmities. Nowhere in the title of the act is it intimated that the body text exempts MCCA from its FOIA obligations.[11] Further, as Plaintiffs explain in their brief on appeal, there was confusion regarding the scope of the statute at the time of its enactment. The legislative intent section of 1988 PA 349 expresses an intent to "rectify the

[11] The compiler's heading for MCL 500.134 does refer to "records exempt from disclosure." However, in the Michigan Complied Laws, headings are not part of the law and have no part in the Art 4, §24 analysis. See, e.g., *Welsh v Ohanesian,* 318 Mich 24, 32; 142 NW2d 690 (1966) (Souris, J., concurring) (catch line heading which follows a section number is of no interpretive value); MCL 8.4b ("The catch line heading of any section of the statutes that follows the act section number shall in no way be deemed to be a part of the section or the statute, or be used to construe the section more broadly or narrowly than the text of the section would indicate, but shall be deemed to be inserted for purposes of convenience to persons using publications of the statutes").

misconstruction of the applicability of the administrative procedures act of 1969 by the court of appeals in *League General Insurance Company v Catastrophic Claims Association*, Case No. 93744, December 21, 1987, with respect to the imposition of rule promulgation requirement on the catastrophic claims association as a state agency." *League General* did not address FOIA or the question of whether MCCA is a "public body" within the meaning of that statute.

Further, the "rights, powers, and immunities" language in the title of 1988 PA 349 does not satisfy the title/object clause requirement, particularly when considered in context. The title states in part:

> An act to revise, consolidate, and classify *the laws relating to the insurance and surety business*; to regulate the incorporation or formation of domestic insurance and surety companies and associations; to provide their *rights, powers, and immunities* and to prescribe the conditions on which companies and associations organized, existing, or authorized under this act may exercise their powers; to provide the *rights, powers, and immunities* and to prescribe the conditions on which other persons, firms, corporations, associations, risk retention groups, and purchasing groups *engaged in an insurance or surety business* may exercise their powers… [(Emphasis added).]

The reference to "rights, powers and immunities" of "domestic insurance and surety companies and associations" is clearly within the confines of insurance and surety law. One would not know that FOIA is encompassed within this description. MCL 500.134 thus violates the letter and spirit of Art 4, §24 and has no effect.

CONCLUSION

The due process right recognized by the *Shavers* Court emanates from the Court's recognition that full disclosure of rate-making information was essential to ensure that the statutorily-mandated insurance was available to all motorists at fair and equitable rates. This means that motorists must "have the knowledge necessary to protect themselves against erroneous or discriminatory underwriting and rate-making decisions." *Shavers*, 402 Mich 606.

The same "need to know" identified by the *Shavers* Court to ensure fair and equitable rates exists with respect to efforts undertaken by the insurance industry to drastically diminish the comprehensive nature of No-Fault benefits on the ostensible basis that MCCA is financially unsustainable. The asserted teetering financial viability of MCCA – a creature of the Legislature that is funded pursuant to a statutory mandate – is proffered as the basis for wide-sweeping changes to the No-Fault system including statutory amendments that will cap lifetime benefits and throw the neediest healthcare recipients onto the Medicaid rolls. Citizens and affected groups cannot effectively assess this purported need for change without the information MCCA refuses to disclose. The lack of information stymies the Legislature's ability to "formulat[e] public policy" with the assistance of its "superior tools and means for gathering facts, data, and opinion and assessing the will of the public." *Woodman v Kera LLC,* 486 Mich 228, 246; 785 NW2d 1 (2010). Indeed, absent disclosure, the Legislature cannot "provide a forum for all societal factions to present their competing views on a particular question of public policy." *Id*. As one state legislator explained in a guest editorial in the Detroit Free Press:

> The MCCA is funded by the public's money and has almost $14 billion of our money that we in Michigan could use right now, yet rates are set behind closed doors. They hire their own auditors, whose conclusions are favorable to the MCCA at the expense of motorists.
>
> We need to shine a light and open up this association, now that it is about to charge its highest ever annual assessment. All drivers deserve to know where their hard-earned money is going. [Cavanagh, *End Insurance Fund Secrecy*, Detroit Free Press, April 19, 2012.]

No cap should be imposed upon PIP benefits, nor the level of such a cap determined, without full disclosure of all the information necessary to make an informed judgment when the consequences of such decision could negatively impact the ability of catastrophically injured persons to obtain the medical care and rehabilitative services they need, and will likewise impede the medical providers' ability to provide and be compensated for those services.

As an example, it is unlikely that catastrophically injured persons who exhaust their capped benefits will be employed or the beneficiaries of any health insurance policies. In most cases, Medicaid is likely to be the only source of payment to providers. See, e.g., Opinion, *Claims Association Must Release Data*, Crain's Detroit Business, May 21, 2012, <http://www.crainsdetroit.com/article/20120520/SUB01/305209985/claims-association-must-release-data> (accessed July 16, 2013): ("In a previous editorial, we advised caution before eliminating lifetime benefits. Although rising insurance premiums are a concern, eliminating the benefit through no-fault does not eliminate the cost – it simply throws more of it onto Medicaid."). However, while No-Fault assures payment of a provider's reasonable and customary fees, Medicaid payments are significantly less. Medicaid rates for physician reimbursement do not even cover the cost of providing the services in most physician practices. Physicians can only provide care to Medicaid patients if the loss can be spread among patients whose care is reimbursed at higher rates. The same is true of other medical care providers, such as chiropractors, hospitals, residential nursing facilities, physical, occupational and respiratory therapists, providers of durable medical equipment, and nursing providers, among others.

The economic viability of treating Medicaid patients will become far more difficult to maintain as catastrophically injured patients max out of their benefits. As more patients are pushed out of No-Fault and placed onto the Medicaid rolls, it is less likely that the cost of their care can be offset by the decreasing number of higher paying patients. Providers, including members of MSMS, MOA, MAC and MOS, will be forced to subsidize the care of these catastrophically injured patients and will be less financially able to do so. Providers may be forced to decline to treat such patients. Ultimately, the availability of health care may be jeopardized for those who need it the most.

This foreseeable shifting of responsibility from the No-Fault insurers to physicians, hospitals, and other medical providers is a matter of great significance to the members of Amici Curiae. It should not occur in a vacuum without the information necessary to determine whether, and to what extent, MCCA's financial viability is in jeopardy. As an editorial in Crain's Detroit Business explained:

> The association claims it isn't subject to the state's Freedom of Information Act.
>
> That claim is laughable because it is so disrespectful of the public interest. The association absolutely should disclose its financials. The money it manages is huge - $11.4 billion in assets that are acquired through a state mandate. With the fee increase, the association will collect $1 billion *a year* in mandatory yearly assessments. Its operations and finances need to be transparent. Period. [Opinion, *Claims Association Must Release Data*, Crain's Detroit Business, May 21, 2012, <http://www.crainsdetroit.com/article/20120520/SUB01/305209985/claims-association-must-release-data> (accessed July 16, 2013).]

For the reasons expressed above, Amici Curiae urge this Court to enforce MCCA's obligation to disclose and direct MCCA to immediately provide all of the requested information and documents.

Respectfully submitted,

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