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## Michigan's Massive No-Fault Reform – How The Changes May Affect your Business

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### Executive Summary

- Compulsory lifetime medical benefits are abolished.
- New personal injury protection (“PIP”) health coverage plans range from a complete opt-out (under certain conditions) to the existing unlimited coverage, with other limit options of \$250k or \$500k.
- Medical provider reimbursements are capped, on a graduated scale over time, to either Medicare rates (starting as high as 250% until ultimately capping as low as 190%) or to rates charged by the provider on 1/1/2019 (starting as high as 78% and reducing to as low as 52.5%), with the percentage dictated by the type of provider.
- The state will change from file-and-use to a prior-approval rate system.
- Modified 1 year back statute of limitations (claims made tolling until denial).
- Order of priority changes shifting responsibility for uninsured motor vehicle occupants, pedestrians, and bicyclists from auto insurers to the assigned claims facility of Michigan Automobile Insurance Placement Facility (“MAIPF”).
- Out-of-state residents without MI PIP coverage will no longer benefit from the insurer’s MI certification (i.e., non-MI PIP policy morphing to MI PIP coverage).
- Medical expenses may, for the first time under no-fault, be a component of 3rd-party bodily injury (“BI”) claim damages (to the extent not covered by PIP).
- Mandatory 3rd-party liability minimums increase from existing \$20k/\$40k to \$250k/\$500k (with a 50k/100k exception for those signing a waiver).
- The *McCormick* 3rd-party injury threshold is codified under the act.
- Michigan Catastrophic Claims Association’s (“MCCA”) role is expected to greatly reduce after 7/1/2020 and, thereafter, the MCCA can only charge insurers for policies that continue to provide unlimited PIP coverage.
- Mini tort coverage increased to \$3,000, from \$1,000.
- The act, signed 30 May 2019, was ordered to take immediate effect (although many provisions are legislatively phased-in).

The act further strives for premium savings for consumers with mandated rate rollbacks over eight (8) years, required 100% premium reduction for eligible PIP health opt-outs, a prohibition against certain underwriting criteria, and rebates or elimination of MCCA fees.

To be sure, the most significant driving force of the legislation was to reduce costs to the consumer. This goal was not only accomplished by the aforementioned provisions but also by: (1) shifting more of the burden to third-party claims, (2) instituting anti-fraud measures.

# New No-Fault Act Highlights – What Has Changed

The reform bill was a total re-write of the initial 1973 no-fault act. While many of the original provisions remain, it seems there was hardly a single statute that was not at least modified in some fashion – if not completely re-written – while also creating entirely new sections.

## 1st Party (PIP) Changes

The 1973 no-fault act provides for three primary categories of PIP benefits: allowable expenses, work loss, and household replacement services. “Allowable expenses” are defined as “all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person’s care, recovery, or rehabilitation.” MCL 500.3107(1)(b). The only form of cost containment was a requirement that the charge be “reasonable.” That, among many other aspects, has changed dramatically.

### I. PIP Health Coverage Options

Under the new plan, unlimited PIP health coverage is no longer required and, instead, drivers can choose amongst five (5) tiers of PIP coverage, beginning 1 July 2020:

- Unlimited coverage (the same as existing)
- Coverage up to \$500,000
- Coverage up to \$250,000
- Coverage up to \$50,000 – available only to those enrolled in Medicaid, who cannot opt out entirely, and whose spouse or resident relative are otherwise covered (e.g., via Medicaid, PIP, or qualified health policy)
- Opt-out of PIP coverage entirely, if:
  - separate health insurance covers collision injuries.
  - Medicare insured, if the insured’s spouse or resident relative are otherwise covered (e.g., via PIP or qualified health policy).

Similar to the existing law, the coverage level selected applies to the named insured, the named insured’s spouse, and a relative of either domiciled in the same household, and “any other person with a right to claim personal protection insurance benefits under the policy.” MCL 500.3107C.

### II. No-Fault Medical-Provider Reimbursement Schedule

Starting 1 July 2021, medical provider reimbursements will be limited, depending on where the provider falls within 1 of 4 categories:

- Up to 2 annually designated freestanding rehabilitation facilities or medical provider with 20%-30% indigent volume:
  - Reimbursement initially limited to 230% of Medicare (or 70% of 1/1/2019 rates), annually reducing to 220% of Medicare (or 66.5% of 1/1/19 rates) by 7/1/2023
- A medical provider with 30% or more indigent volume:
  - Reimbursement of 250% of Medicare (or 78% of 1/1/2019 rates)
- A hospital that is a Level I or Level II trauma center (for emergency treatment to stabilize the patient, only):
  - Reimbursement initially limited to 240% of Medicare (or 75% of 1/1/2019 rates), annually reducing to 230% of Medicare (or 71% of 1/1/2019 rates) by 7/1/2023
- All other medical providers (except that a neurological rehabilitation clinic is not entitled to reimbursement unless properly accredited):

- Reimbursement initially limited to 200% of Medicare (or 55% of 1/1/2019 rates), annually reducing to 190% of Medicare (or 52.5% of 1/1/2019 rates) by 7/1/2023

As a result, the reasonableness of the charges will no longer be an issue for litigation.

### **III. Mandated Expansion of PIP Coverage**

No longer is an insurer liable for PIP benefits to uninsured motor vehicle occupants, pedestrians, bicyclists, or out-of-state residents. Instead, all such claims will fall on the assigned claim facility (MAIPF) or, in the case of out-of-state residents, their own insurance. Thus, for example, no longer will an out-of-state policy issued by a MI certified insurer morph into a MI PIP policy, just because its out-of-state insured was involved in an accident in MI. In fact, admitted insurers are no longer required to file a certification under MCL 500.3163.

### **IV. Attendant Care**

Motor vehicle insurers are not required to pay for more than 56 hours per week of in-home, family-provided, attendant care.

### **V. Tolling of the PIP One-Year-Back Statute of Limitations**

Under the existing no-fault law, when a car accident victim was denied or cut-off from no-fault benefits, he or she “may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced.” MCL 500.3145(1). The new law provides that this “limitation ... is tolled from the date the person claiming the benefits makes a specific claim for the benefits until the date the insurer formally denies the claim.” The bill cautions, however, that tolling “does not apply if the person claiming the benefits fails to pursue the claim with reasonable diligence.”

### **VI. Michigan Catastrophic Claims Association (MCCA)**

The MCCA’s role of limiting exposure for insurers will presumably reduce substantially, as PIP exposure is capped by the reduced coverage requirements. Once allowable expense health benefit options become available on 7/1/2020, the MCCA will not reimburse insurers on policies that provide less than unlimited, lifetime benefits. Similarly, the MCCA, in calculating membership premiums, can only charge insurers for those policies that continue to provide unlimited PIP coverage.

### **VII. Passing Savings on to Consumers**

The savings realized by insurers as a result of the medical provider reimbursement limits must be passed along to drivers in the form of lower premiums, at proscribed percentage rates, over the course of eight (8) years, commencing 7/1/2020. Additionally, a qualified individual opting out of health coverage must see a 100% reduction in PIP health premium. Insurers will be required to document these savings in rate filings to the Director of the Department of Insurance and Financial Services (DIFS).

### **VIII. Underwriting Changes**

Motor vehicle insurers cannot, as of 7/1/2020, base premium rates on such non-driving factors as: sex, marital status, home ownership, education level attained, occupation, the postal zone in which the insured resides, or credit score. Michigan will also change from a file-and-use to a prior-approval rate review system, effective 7/1/2020.

### **IX. Anti-Fraud Provisions**

Several provisions were included in the new law, including:

- An Anti-Fraud Unit “established as a criminal justice agency ..., dedicated to prevention and investigation of criminal and fraudulent activities in the insurance market.”
- Establishment of a utilization review process overseen by the Department of Insurance and Financial Services, whereby medical providers, effective 7/1/2020, may be compelled to submit necessary records and other information concerning the treatment for review by an insurer or MCCA. The insurer/MCCA could

require a provider to explain the necessity or indication for treatment that is not usually associated with the condition for which the patient is being treated, or that has a greater frequency or duration than usually required.

- Allowing an insurer to recoup attorney fees for defending a claim for which the claimant was solicited by the attorney in violation of state law or the MI Rules of Professional Conduct.
- Doubling of fines and monetary penalties for violations of the act or the Insurance Code.
- A court could refuse to award attorney fees to a PIP Plaintiff attorney if the attorney or a person related to the attorney had a direct or indirect financial interest in the provider of the treatment for which the PIP benefits would have paid.

Additionally, the Insurance Commissioner would be required to create a website page that “allows a person to report insurance fraud and unfair settlement and claims practices,” as well as create a page describing how the Insurance Commissioner “may be able to assist a person who believes that an automobile insurer is not paying benefits, not making timely payments, or otherwise not performing as it is obligated to do under an insurance policy.”

## **X. Independent Medical Examinations**

The new law imposes the following rules for IMEs of claimants “at the request of an insurer”:

1. The IME doctor must be licensed in Michigan;
2. The examining IME doctor must be a licensed, board certified, or board eligible physician qualified to practice in the area of medicine appropriate to treat the car accident victim’s condition;
3. During the year before an IME, the IME doctor must have devoted a majority of professional time to clinical practice of medicine/specialty or teaching in an accredited medical school.

Although specific to PIP, will statute will undoubtedly continue to have applicability to 3rd-party IMEs as well.

## **3rd-Party (BI) Changes**

With the codification of the plaintiff-friendly *McCormick* threshold standard, the ability to claim medical expenses against alleged at-fault drivers, and substantial increases in minimum liability limits, the new law puts added pressure on auto liability claims.

### **I. Suing for Excess Medical Benefits**

Under the new law, a person injured in a car accident can sue for excess medical costs, i.e., those “allowable expenses” that exceed the dollar amount of the PIP health coverage cap they have selected. Michigan now becomes like most other states, with issues of medical billing fraud now a 3rd-party issue (albeit any PIP paid allowable expense is capped, starting 7/1/2021). It will begin to be an issue once the limited PIP health plans roll out starting 7/1/2020.

### **II. Serious Impairment of Body Function Threshold for Pain and Suffering Compensation**

The new law expressly codifies *McCormick v. Carrier*, 487 Mich. 180 (2010), and its injury threshold. This standard is generally seen as plaintiff friendly – at a minimum making summary disposition on the lack of a threshold injury much more difficult than the prior *Kreiner* standard.

This is a significant development, as it presumably alters the standard jury instructions, effective immediately. Previously, no matter how the Supreme Court pendulum swung in interpreting the statutory threshold language, the standard jury instructions simply quoted the statute, reading as follows:

Serious impairment of a body function means an objectively manifested impairment of an important body function that affects the plaintiff's general ability to lead [his/her] normal life. An important body function need not have to be permanent in order to be a serious impairment of body function. M Civ. JI 36.11.

In practice, defendants would seek a special instruction under the *Kreiner* standard, while many plaintiffs sought a special *McCormick* based instruction, once *Kreiner* was overturned in 2010. Judges most often denied the requests, deferring to the standard instruction.

Now that the statute expressly codifies *McCormick*, expect the standard jury instruction to mirror the statutory language, by adding a definition of a "serious impairment" as follows:

As used in this section, "serious impairment of body function" means an impairment that satisfies all of the following requirements:

- a. It is objectively manifested, meaning it is observable or perceivable from actual symptoms or conditions by someone other than the injured person.
- b. It is an impairment of an important body function, which is a body function of great value, significance, or consequence to the injured person.
- c. It affects the injured person's general ability to lead his or her normal life, meaning it has had an influence on some of the person's capacity to live in his or her normal manner of living. Although temporal considerations may be relevant, there is no temporal requirement for how long an impairment must last. This examination is inherently fact and circumstance specific to each injured person, must be conducted on a case-by-case basis, and requires comparison of the injured person's life before and after the incident.

MCL 500.3135(5).

A 3rd-party defendant's burden at trial, thereby, just became more difficult, effective immediately. Similarly, dispositive motions by the defense on the threshold will continue to be justifiable only in certain rare circumstances, as it is generally too easy for a plaintiff to create a question of fact.

### **III. Higher Auto Liability Limits**

Drivers were previously required to carry liability insurance with mandatory minimum limits of \$20,000 for accidental injury or death per person and \$40,000 per occurrence. The new law increases those minimum limits to \$250,000 per person and \$500,000 per occurrence. One may opt for lower coverage, with minimums of \$50,000 and \$100,000, respectively, however, by signing a waiver.

### **IV. Non-Resident Liability**

A non-resident may still sue an alleged at-fault driver for economic loss, only, but now only if he/she suffered a threshold injury. MCL 500.3135(3)(d).

### **V. Mini Tort (Physical Damage)**

The Michigan mini tort law's maximum recovery limit will increase from \$1,000 to \$3,000.

## **Conclusion – Impact On The Insurance Market**

Significant improvements to the state's auto insurance market should result from the new law. Whereas, previously, many insurers pulled out of the state or avoided the state entirely, the new law improves the marketplace, including for trucking insurers:

- elimination of the requirement for lifetime medical benefits
- establishment of medical provider reimbursement limits
- establishment of a utilization review process whereby the necessity, frequency, and duration of medical

treatment may be challenged

- removing requirement that non-MI PIP policies cover MI PIP benefits in certain instances
- shifting PIP coverage for uninsured occupants of other vehicles, pedestrians and bicyclists from insurers to the assigned claims plan (MAIPF)
- removing the need for insurer payment of MCCA premiums in most instances
- creation of an Anti-Fraud unit, among other fraud fighting measures
- allow auto insurers to offer a managed care option for PIP allowable expenses

Sustainable loss ratios may now be possible. Let us know how we can help your company navigate the changes.

***Dickie McCamey - Your partner in mitigating risk and reducing claims exposure.***



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