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## The Importance of a Formal Denial in a Post No-Fault Reform World

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Ever since the Michigan Supreme Court issued its opinion in *Devillers v. Auto Club Ins. Ass'n.*, 473 Mich. 562 (2005), the “One Year Back” rule defense of MCL 500.3145 has proven to be an effective tool, enabling adjusters to take the time they needed to complete complex coverage investigations and allowing insurers to close their books on aged claims with confidence that legal defenses existed to any lingering liabilities. However, The No-Fault reform enacted by the Michigan Legislature effectively overruled *Devillers* and injected substantial uncertainty into the ongoing viability of the “One Year Back” rule as a defense to liability. The Michigan Court of Appeals recently clarified the bounds of the post no-fault reform MCL 500.3145 defense in *Encompass Healthcare PLLC v. Citizens Insurance Company*, \_\_\_ Mich. App. \_\_\_ (Docket 357225 of the Michigan Court of Appeals, approved for publication November 17, 2022).

In *Encompass*, Citizens insured (“RM”) sustained accidental bodily injury related to the operation of a motor vehicle as a motor vehicle in December of 2017. His recovery was complex, and Encompass provided extensive treatment to him, billing Citizens a total of \$921,828.44 for this care. Encompass’s last date of treatment was in October 2018. Citizens sent numerous Explanation of Review (“EOR”) forms to Encompass explaining the adjustments made to Encompass’s charges and reimbursed Encompass a total of \$177,655.25. In November of 2019, Encompass sued Citizens for the balance between what was charged and what Citizens had paid.

Under *Devillers*, the resolution to this case would have been simple. Encompass did not file suit against Citizens within one year from the last date of treatment, and therefore its claims would be dismissed as a matter of law. However, reformed MCL 500.3145(3) holds that the one-year back period is tolled until an insurer issues a **Formal Denial** of the claim. Citizens argued, and the trial court agreed, that EOR’s were formal denials of the claim. Citizens was granted partial summary disposition, and all claims that Citizens had sent an EOR on or prior to November 2018 were dismissed. Encompass appealed.

The Michigan Court of Appeals found that the definition of a “formal denial” was clear under Michigan Law. **A formal denial is an explicit and direct denial that indicates an insurer is denying all liability in excess of what has been paid and that impresses on the insured that the extraordinary step of pursuing relief in the court must be taken.** While a formal denial does not have to be in writing, best practices involve placing it in writing. If not in writing, the denial must still be sufficiently direct to qualify as formal. In *Encompass*, Citizens’ EOR documents were not explicit and direct that all further liability was denied. For example, some of the EOR’s requested additional documentation be submitted for further consideration. Additionally, all parties acknowledged it was common practice to appeal the reimbursement determinations reflected on the EORs, which would often lead to additional payments being issued.

Since Citizens had never sent a formal denial aside from the EORs, and the EORs were not a formal denial under Michigan law, the Court of Appeals held that the one-year back tolling provision had *never even started*. Since Citizens failed to formally deny RM’s claims, Citizens could not take advantage of any of the provisions of MCL 500.3145 and was potentially responsible for the \$744,173.19 balance billing claims of Encompass.

This case should send a couple strong messages to all claims professionals:

1. Time is of the essence when completing coverage investigations. An extra 60 days spent obtaining proofs to support a formal denial is an extra 60 days before your employer can safely return its reserves. What was a 30-day diary should likely become a 14-day diary. Promptly identifying questionable treatment patterns and obtaining independent commentary on injury level early in the claim is now much more important than it was pre-reform.
2. When you have the proofs you need to make a claims decision, make that decision formally, in writing, and ensure it is sent to the insured and all of his/her medical providers. If the denial is partial, specify exactly which benefits are still available and which benefits have been denied. Do not invite the submission of additional proofs as this adds ambiguity to the formality of the denial and could serve to undermine its effectiveness.
3. The one-year back rule as it was once known is gone forever. If you receive a claim in litigation and there is not a formal denial in place, it is not wise legal spend to have your lawyer attempt to pursue a one-year back argument, even if the claims are stale by multiple years. Moving forward, no Michigan PIP claim should be closed without either a full and final release of claims or a formal denial letter. Closing a claim without one of those two documents could now create a lifetime tail exposure for an insurer.

Attorneys who represent claims professionals should also be aware that EUO requests and coverage opinions have taken on a new urgency for promptness. Pre-litigation timeframes are now as important in the life cycle of a no-fault claim as court ordered deadlines. Attorneys are going to have to become more in-tune with the evolving landscape of impediments facing claims professionals in the ever evolving post no-fault reform legal landscape.



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