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Garan Lucow Miller, P.C. 1111 West Long Lake Road, Suite 300 Troy, Michigan 48098 248.641.7600

From the Co-Editors
James L. Borin & Simeon R. Orlowski

Are Medical Marijuana Claims Reimbursable Under the Michigan No-Fault Act?

CO-CONTRIBUTOR - JASON BAAS and MATTHEW LaBEAU¹

On November 4, 2008, Michigan voters passed a ballot initiative legalizing marijuana for medical purposes in the State of Michigan. Many insurers have started to receive claims for payment of medical marijuana related expenses under the Michigan No-Fault Act. The Michigan Medical Marijuana Act² is only a year old, and several issues related to this new law remain unresolved. The purpose of this article is to discuss the implications of the Michigan Medical Marijuana Act on claims made under the Michigan No-Fault Act, and provide guidance for handling such claims.

¹Jason Baas is an Associate in the Firm's Ann Arbor Office and can be reached at (734)663-7514 or jbaas@garanlucow.com. Matthew LaBeau is an Associate in the Firm's Detroit Office and can be reached at (313)446-1530 or mlabeau@garanlucow.com.

²The spellings "marihuana" and "marijuana" are both acceptable. The Act uses the spelling "marihuana" because that is the spelling used in the Michigan Public Health Code.

It is important to recognize that claims for medical marijuana may be compensable under the Michigan No-Fault Act. The broad language of MCL 500.3107(a)(1) provides that allowable expenses consist of “all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person’s care, recovery, and rehabilitation.” Additionally, MCL 500.3157 provides that a medical provider “lawfully rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance may charge a reasonable amount for the products, services, and accommodations rendered.” Combining MCL 500.3107(a)(1) and MCL 500.3157, there are several requirements for an allowable expense under the No-Fault Act: (1) it must be a reasonable charge (2) reasonably necessary for an injured person’s care, recovery, or rehabilitation and (3) it must be lawfully rendered. As long as these requirements are met, and the condition “arises out of” the subject motor vehicle accident, No-Fault benefits are payable to a claimant for expenses incurred for medical marijuana.

The Michigan Medical Marijuana Act is set forth in MCL 333.26421 et seq. A “qualifying patient” who has been issued and possesses a registry identification card can **possess** up to 2.5 ounces of usable marijuana, possess up to 12 marijuana plants kept in an enclosed, locked facility, and any incidental seeds, stalks, and unusable roots. A “qualifying patient” is defined as “a person who has been diagnosed by a physician as having a debilitating medical condition.”

Several conditions are considered to be a “debilitating medical condition.” The definition of “debilitating medical condition” includes “[a] chronic or debilitating disease or medical condition or its treatment that produces 1 or more of the following: cachexia or wasting syndrome; severe and chronic pain; severe nausea; seizures, including but not limited to those characteristic of epilepsy; or severe and persistent muscle spasms, including but not limited to those characteristic of multiple sclerosis.” Given that some No-Fault claims involve individuals with “severe and chronic pain,” this new law has significant implications for many type of auto related injuries.

As indicated above, the patient must obtain a registry identification card from the State of Michigan. The patient is required to provide several pieces of information, including a written certification from a physician. Under the Act, the physician must be a medical doctor or doctor of osteopathic medicine that is licensed to practice in the State of Michigan. Neither a nurse practitioner nor a physician assistant is permitted to provide the certification. The written certification must state the patient’s debilitating condition and state that, in the physician’s opinion, the patient is likely to receive therapeutic or palliative benefit from the medical use of marijuana to treat or alleviate the patient’s serious or debilitating medical condition or the associated symptoms. If the patient is under 18, certification from two physicians is required along with consent from a parent or guardian.

The patient can also specify a primary caregiver to assist in cultivating the plants. This caregiver may receive compensation for costs associated with assisting a patient in the medical use of marijuana. A primary caregiver must (1) be over the age of 21 years old, (2) have agreed to assist with a patient’s medical use of marijuana, and (3) have never been convicted of a felony involving illegal drugs. The Act also provides that “any marijuana, marijuana paraphernalia, or licit property that is possessed, owned or used in connection with the medical use of marijuana” shall not be seized or forfeited. A caregiver may not provide assistance to more than 5 qualifying patients with their medical use of marijuana.

It would seem that, as with prescription medications, a certification from a physician would be sufficient for medical marijuana to be payable under the No-Fault Act. The problem is that the State of Michigan makes it clear that there is no place in Michigan to legally **purchase** marijuana. The statute only permits the possession of marijuana and marijuana plants. The State of Michigan has indicated that the State will not provide any information regarding where or how to obtain seeds and plants to grow marijuana. It seems to be almost counterintuitive that an individual may obtain certification to grow and smoke marijuana for medicinal purposes, however, there is no specified legal way for them to obtain it.

Interestingly, the Act also goes on, at MCL 333.26427(c)(1), to read that “nothing in this act shall be construed to require a government medical assistance program or commercial or non-profit health insurer to reimburse a person for costs associated with the medical use of marijuana.” This seemingly allows health insurers and government medical assistance programs the ability to deny reimbursement for medical marijuana claims. How does this language effect a No-Fault insurer?

I. Processing a Claim for Medical Marijuana

Before processing such a claim, it is imperative to first ensure that the claimant is a qualifying patient. This is done by obtaining proof from the claimant that they have a registry identification card. If the claimant possesses a registry card, he or she will have a physician certifying that they have a debilitating condition and that marijuana will assist with treating the condition. It may be helpful to obtain some background information on the treating physician to ensure they are properly qualified under the Act provide the certification, i.e. make sure they are an M.D. or D.O. It is also important to review the physician’s opinion. The underlying condition must be analyzed to ensure that it arises out of the subject motor vehicle accident and constitutes accidental bodily injury under the No-Fault Act. The debilitating condition may arise from the subject motor vehicle accident. It may also be related to a condition such as cancer, HIV/AIDS, hepatitis C, Crohn’s disease, or Alzheimer’s disease, which are also considered a “debilitating medical condition” under the Act.

An independent medical examination may be advisable to assess whether the claimant is actually suffering from severe and chronic pain related to the subject incident, as well as to seek an opinion regarding whether medical marijuana is appropriate or if other alternatives are advisable. The doctor may also be able to assess whether the claimant is engaging in drug seeking behavior. Additionally, before reimbursing for medical marijuana, it may be reasonable to assess whether other alternatives were considered by the claimant’s doctors prior to prescribing marijuana for severe or chronic pain. In light of the narcotic and possibly addictive nature of marijuana, other analgesics should likely be considered before taking this drastic step.

Once it is determined that the claimant is qualified to use marijuana for medical purposes, it must be determined what expenses are payable under the No-Fault Act. At this time, we do not recommend reimbursing an insured for the purchase of marijuana seeds or plants. Currently, the purchase of these items is illegal in the State of Michigan. We expect there to be more clarification on this issue, but at this time, purchase of seeds or plants is against the law. We simply cannot advise our clients to violate the law. Additionally, insurers are not obligated to pay for treatment that is not lawfully rendered per MCL 500.3157.

II. Paraphernalia

The issue of drug “paraphernalia” also raises several interesting questions. As stated above, the Act provides that “any marijuana, marijuana *paraphernalia*, or licit property that is *possessed, owned or used* in connection with the medical use of marijuana” shall not be seized or forfeited. The Act does not provide that the “purchase” of marijuana or drug paraphernalia is permissible. However, the Act does infer, at MCL 333.26424(g), that “a person” will not be subject to civil or criminal penalties for “providing” a qualifying patient or caregiver with paraphernalia. Is this portion of the Statute simply directed at businesses that sell devices for smoking marijuana? Arguably these immunities could also apply to a No-Fault insurer which reimburses a bill submitted by a qualifying insured.

It is important to note how drug paraphernalia is defined under Michigan law. MCL 333.7451 reads in relevant part:

Drug Paraphernalia: “equipment, product, material, or combination of equipment, products or materials, which is specifically designed for use in planting; propagating; cultivating; growing; harvesting; manufacturing; compounding; converting; producing; processing; preparing; testing; analyzing; packaging; repackaging; storing; containing; concealing; injecting; ingesting; inhaling or otherwise introducing into the human body a controlled substance. “

The criminal Statute then goes on to list, as broad examples of drug paraphernalia, various items from “scales” to “specific devices used for ingesting, inhaling or otherwise used to introduce an illegal substance into the human body”, and “devices used for increasing the potency of any species of plant which plant is a controlled substance.” The Statute also defines drug paraphernalia to include a “kit specifically designed for use in planting, propagating, cultivating, growing, or harvesting any species of plant which is a controlled substance or from which a controlled substance could be derived.”

Of note is that prior to 2006 there was an “exception” within the drug paraphernalia Statute that applied to any “equipment, product or material which may be used in the preparation or smoking of tobacco or smoking herbs other than a controlled substance.” This allowed some leeway with regard to the possession of items that might otherwise be considered drug paraphernalia (ie. Pipes, rolling papers, grow lamps, etc). However, the Statute was amended in 2006 and that exception was removed.

Obviously it does not seem likely that State or Federal police agencies will be bringing criminal charges against an insurance company for reimbursement of items that are deemed medically necessary for the use of medical marijuana. The Act seems to specifically prevent such a measure. However, the reality of the situation is that the legislature needs to address the problems that exist with the current Act and the State’s unwillingness to provide individuals with specific direction as to where they can legally purchase marijuana and related paraphernalia. The

Act also leaves open the ability for a health insurer to deny reimbursement for these medical marijuana claims. How does this apply to a No-Fault insurer? Until these issues are clarified, we would advise our clients to consult with an attorney if a medical marijuana claim is presented.

III. Caregivers

Caregiver claims related to assistance with the use of the medical marijuana are also foreseeable. In order to obtain a registry identification card, a patient must identify a primary caregiver, and the primary caregiver must attest that they have agreed to serve as the primary caregiver. The primary caregiver will also be provided with a registry identification card. It is important to ensure that the caregiver has been identified and has agreed to provide the care. Likewise, it is important to ensure that the caregiver has an identification card, and that a copy is on file. Since the caregiver is limited to only assisting 5 patients, it should be determined that the caregiver is not exceeding this limitation. Since the caregiver is entitled to reimbursement of expenses, a whole new type of attendant care claim is created by the Medical Marijuana Act.

IV. Conclusion

Due to the broad definition of allowable expenses under the No-Fault Act, medical marijuana and related paraphernalia is a potential allowable expense. There are several requirements under the Michigan Medical Marijuana Act that a claimant must satisfy before qualifying under the Act. Additionally, a claimant must demonstrate a medical need that arises out to a motor vehicle accident under the No-Fault Act. Being aware of the requirements under both Statutes will ensure that claims for medical marijuana are reasonably necessary, lawfully provided, and causally related to your loss. Of course, every situation has its unique particularities. We suggest that you very carefully assess the validity of medical marijuana claim submissions because of the likelihood of long term use one it is initiated.