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WHAT'S INSIDE

No-Fault Insurers Should Consider An Offensive Strategy
For Challenging The Reasonableness of Healthcare Provider Charges

*by: Christian C. Huffman**

The same concern over the steadily inflating cost of healthcare that in-part prompted Congress to pass the Affordable Care Act in 2010 served as one impetus for the Michigan Legislature's passing of the no-fault automobile insurance act more than 40 years ago.[1] Indeed, the Michigan Courts have recognized that in passing the No-Fault Act the Michigan Legislature was "as concerned with the rising cost of health care as it [w]as with providing an efficient system of automobile insurance."[2]

To stem the cost of healthcare for automobile accident victims, the Legislature entrusted no-fault insurers with the duty of policing healthcare providers. It did this by requiring that no-fault insurers audit healthcare providers' bills, and challenge the reasonableness of their charges.[3]

No-fault insurers have traditionally tried to achieve their cost-policing duty by paying only what they determine to be a reasonable amount, and then waiting for the healthcare provider to file suit for the outstanding balance. The insurers then attempt to challenge the reasonableness of the healthcare provider's charge from a defensive position.

But, no-fault insurers would in some cases better serve their cost-policing function by adopting an offensive strategy. They can accomplish this by filing a declaratory judgment action seeking a judicial declaration that the balance of the healthcare provider's bill represents an unreasonable charge. Such an offensive strategy offers certain tactical advantages that will in many cases put the insurer in a better position to establish that the healthcare provider's charge is unreasonable.

I. How the no-fault act limits what a healthcare provider may charge

In order for no-fault insurers to adequately perform their cost-policing function, it is necessary to understand the limitations that the Legislature has placed on what healthcare providers may charge motor vehicles accident victims.

Ordinarily, a person's potential liability to a healthcare provider is solely a matter of contract. Thus, the healthcare provider may charge whatever fee the patient is willing to contract for. This is not so where the healthcare provider renders services to someone who has been injured in a motor vehicle accident and is covered by no-fault insurance. This is because the Legislature has set forth statutory limitations in MCL 500.3157, which provides that a healthcare provider "may charge a reasonable amount" for the treatment, but that their "charge shall not exceed the amount the [healthcare provider] customarily charges for like products, services and accommodations in cases not involving insurance."

The statute therefore mandates that healthcare providers charge insured automobile accident victims no more than what they customarily charge for similar services rendered to uninsured, non-automobile accident victims. And, though it serves as an upper limit on what healthcare providers may charge, healthcare provider's customary charges are not dispositive of what they may charge insured automobile accident victims. Rather, the primary limitation is that healthcare providers may charge insured automobile accident victims no more than "a reasonable amount" for their services. This precludes healthcare providers from asserting that a given charge is reasonable, even though they customarily charge less in non-automobile accident cases. It similarly precludes healthcare providers from asserting that their customary charge in non-automobile accident cases is dispositive of what insured automobile accident victims must pay, as it permits a finding that such charges are unreasonable.

MCL 500.3157 serves two functions. First, it furthers the Legislature's goal of "provid[ing] victims of motor vehicle accidents [with] assured, adequate, and prompt reparation for certain economic losses"[4] by prohibiting healthcare providers from charging insured automobile accident victims fees which exceed what the automobile accident victims may be reimbursed by no-fault insurers. Second, it furthers the Legislature's goals of stemming healthcare costs and ensuring that the no-fault act comports with constitutional requirements. Specifically, MCL 500.3157 obligates no-fault insurers "to place a check on health care providers who have no incentive to keep the doctor bill at a minimum"[5] by permitting them to "audit and challenge the reasonableness of bills submitted by healthcare providers."[6] This ensures that "the existence of no-fault insurance *shall not* increase the cost of healthcare."[7] Likewise, by ensuring that healthcare providers do not charge their insureds unreasonable amounts, no-fault insurers avoid having to increase the premiums they charge for their policies.[8] This furthers the Legislative goal of "assuring that compulsory no-fault insurance is available at fair and equitable rates."[9]

II. The availability of declaratory judgment actions

Because MCL 500.3157 prohibits healthcare providers from charging insured automobile accident victims more than "a reasonable amount" for their services, and MCL 500.3107(1)(a) concomitantly limits no-fault insurers to indemnifying their insureds for a "reasonable" amount, the situation often arises where a no-fault insurer audits the healthcare provider's bill, determines that the healthcare provider's charges are unreasonable, and thereafter remits payment on behalf of the insured in an amount less than what the healthcare provider charged.

In the past, healthcare providers routinely filed suit directly against no-fault insurers seeking a judicial determination that the healthcare provider's charge was "reasonable," and thus that the no-fault insurer was obligated to pay the balance of the healthcare provider's bill.[10] This, however, recently changed when the Michigan Supreme Court ruled in *Covenant Med Ctr, Inc v State Farm Mut Ins Co,*[11] that the no-fault act does not vest healthcare providers with standing to file their own actions against no-fault insurers.[12]

In the wake of *Covenant,* some healthcare providers have reverted to the practice of filing a lawsuit against the insured, or threatening to do so, seeking to collect the outstanding balance from the insured based on an express or implied contract theory. In these instances, some no-fault insurers have taken the strategy of agreeing to defend and indemnify the insured[13] if the healthcare provider does, in fact, file such a lawsuit.[14]

More often, however, healthcare providers have continued the practice of filing suit directly against the no-fault insurer by obtaining from the insured an assignment of the insured's cause of action. In such instances, no-fault insurers have continued to utilize the same defensive approach that they employed before *Covenant* was issued, which is to simply wait for the healthcare provider to sue them.

However, no-fault insurers should consider utilizing an offensive strategy. No-fault insurers can do this by paying what they believe to be a reasonable fee, and then filing a declaratory judgment action seeking a judicial declaration that the balance of the healthcare provider's charge is unreasonable. Such a judicial declaration would not only establish that the insured is not contractually liable to the healthcare provider for the balance, but also sestablish that the no-fault insurer has no further liability to the insured for those charges.

Cases involving issues relating to insurance "have consistently been recognized as appropriate subjects for declaratory relief."[15] This is particularly true in cases involving issues governed by Michigan's no-fault act,[16] such as whether the amount charged by a healthcare provider is "reasonable" as required by MCL 500.3157. Indeed, healthcare

providers, and others, have filed declaratory judgment actions seeking a judicial declaration that the amounts they charge *are* reasonable.[17] In fact, the Michigan Court of Appeals has specifically held that a declaratory judgment action is an "appropriate mechanism" for determining whether charges are of the type for which the insured is entitled to coverage under the no-fault act.[18]

III. The advantages of a declaratory judgment action

Adopting an offensive strategy of filing declaratory judgment actions to challenge the reasonableness of healthcare provider's charges offers several tactical advantages to no-fault insurers that will better enable them to fulfill their cost-policing duty.

a. Venue

In any contest, much about the outcome hinges on whether the arena in which it is fought favors one side or the other. In the no-fault context, choice of playing field is governed by MCL 600.1621 of Michigan's venue statutes. It provides that the plaintiff may file suit seeking recovery of no-fault benefits in the county where "a defendant resides, has a place of business, or conducts business, or in which the registered office of a defendant corporation is located."

Since most no-fault insurer's sell policies statewide, they are generally deemed to conduct business in virtually every county in Michigan. Thus, where a healthcare provider obtains an assignment from the insured and files a direct action against the no-fault insurer seeking the balance of the healthcare provider's bill, the healthcare provider can technically sue the no-fault insurer in any county that the healthcare provider chooses. This is so regardless of whether the healthcare provider conducts business in that county, or whether the insured from which the assignment was obtained resides in that county.

Of course, healthcare providers routinely take advantage of this by filing suit in venues where judges and juries are not particularly insurer-friendly. Moreover, judges in such venues are not prone to granting motions by no-fault insurers seeking a change of venue.This is so because the plaintiff's choice of venue is accorded deference.[19] Furthermore, in order to overcome that deference MCR 2.222 requires a no-fault insurer to make a persuasive showing either that it cannot obtain an impartial trial in the chosen venue, or that the chosen venue subjects the no-fault insurer to inconvenience or prejudice.[20] And, since most no-fault insurers are deemed to conduct business in virtually every county in Michigan, persuading a judge that it is inconvenient or prejudicial to the no-fault insurer to litigate in a given county can be extremely difficult — especially when the healthcare provider has specifically selected that venue because the healthcare provider knows that the judge is not sympathetic to insurance companies.

The result often is that the no-fault insurer will be forced to try the case before a jury that is unlikely to rule in the insurer's favor. Moreover, the no-fault insurer will often find itself before a judge that is unwilling to grant the no-fault insurer sufficient discovery time, and more likely to rule against the no-fault insurer with regard to discovery motions, motions for summary disposition, motions in limine, and evidentiary objections. In other words, by letting healthcare providers choose the venue, no-fault insurers often finds themselves litigating in unfriendly territory with the deck significantly stacked against them.

If no-fault insurers instead assume an offensive posture they will have more control over the venue in which the reasonableness of the healthcare provider's charges will be decided. This is because the proper venue will not be any county in Michigan, but instead pursuant to MCL 600.1621 will be the county in which the healthcare provider has a place of business, conducts business, or has its registered office. And, of course, it will be difficult for the healthcare provider to obtain a change of venue, since deference will be given to the insured-plaintiff's choice of venue. Moreover, the healthcare provider will face an uphill battle trying to make

a persuasive showing that it cannot obtain an impartial trial, or will be subjected to inconvenience or prejudice,[21] in a venue in which the healthcare provider has voluntarily chosen to conduct business, or has established its registered office or a place of business.

There will of course be instances in which the permissible venue for the filing of a declaratory judgment action is not particularly favorable. However, it is an issue that no-fault insurer's should strongly consider, rather than continuing to take a defensive posture and permitting healthcare providers to choose the venue.

b. Jury perception

Filing a declaratory judgment action affords the no-fault insurer the ability to control an aspect of juror perception that is even more vital to obtaining a favorable determination regarding the reasonableness of the healthcare provider's fee – who the parties are.

In situations where the healthcare provider obtains an assignment from the insured and commences a lawsuit against the insurer, or in situations where the healthcare provider sues the insured and the insured then files suit against the no-fault insurer seeking indemnity, many jurors may perceive the insurer as a large corporation merely seeking a determination that the outstanding balance of the healthcare provider's bill is unreasonable in order to maximize the no-fault insurer's profits. Where, however, the no-fault insurer files a declaratory judgment action on behalf of the insured, the dynamic changes considerably. In such instances, the jury may well perceive the healthcare provider as a sophisticated party exercising undue influence over the humble accident victim in order to maximize profits. Indeed, as the Court of Appeals has noted, the healthcare provider would likely find itself "on the wrong side of a David and Goliath match-up."[22]

c. More control over litigation

Commencing declaratory judgment actions will also enable no-fault insurers to ensure that the issue of reasonableness is zealously advocated and properly supported.

No-fault insurers unquestionably possess numerous resources that will not be available to the insured if the insured is sued by a healthcare provider. For instance, no-fault insurers necessarily receive and audit bills submitted by healthcare providers statewide, and in some instances even nationwide. Thus, no-fault insurers are able to compile and maintain statistics regarding the amounts charged by numerous healthcare providers for a particular service, and use those statistics to establish that a particular healthcare provider's charge is unreasonable.[23] For the same reason, no-fault insurers are better able to compile information concerning such things as the healthcare provider's costs to render a particular service, and then assess whether the healthcare provider's markup over such costs is excessive.[24] Moreover, no-fault insurers have access to experienced and qualified experts who can adequately explain to jurors why the amount that the healthcare provider charged the insured is unreasonable. And, of course, no-fault insurers are by necessity sophisticated in litigation, and thus are better able than the insured to select an attorney who can thoughtfully and persuasively present such evidence to the jury.

IV. Conclusion

The bottom line is that no-fault insurer's should re-think the means by which they challenge the reasonableness of the amounts that healthcare providers charge their insureds. Although paying what the no-fault insurer deems reasonable and waiting for the healthcare provider to take the offensive has been the traditional approach, for the reasons discussed above, assuming an offensive strategy through the utilization of declaratory judgment actions may be a more effective way for no-fault insurers to fulfill their statutory obligation of challenging the reasonableness of healthcare provider charges.

ENDNOTES

1 *See* MCL 500.3101 *et seq.*

2 *Dean v Auto Club Ins Ass'n,* 139 Mich App 266, 273 (1985); *McGill v Auto Ass'n,* 207 Mich App 402, 408 (1994); *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n,* 257 Mich App 365, 378 (2003), aff'd 472 Mich 91 (2005).

3 *LaMothe v Auto Club Ass'n,* 214 Mich App 577, 582 n 3 (1995); *Bronson Methodist Hosp v Home-Owners Ins Co,* 295 Mich App 431, 448, 457 (2012); *Advocacy Org, supra* at 378; *McGill, supra* at 407-408.

4 *Shavers v Atty General,* 402 Mich 554, 578-579 (1978).

5 *Dean, supra at 273* (internal quotations omitted); *McGill, supra at 408; Advocacy Org, supra* at 378.

6 *LaMothe, supra* at 582 n 3; *Advocacy Org, supra* at 379; *Bronson Methodist Hosp, supra* at 448, 457.

7 *Dean, supra at* 274 (emphasis in original); *McGill, supra* at 407-408.

8 *Admire v Auto-Owners Ins Co,* 494 Mich 10, 29 n 44 (2013).

9 *Shavers, supra* at 581; *Admire, supra* at 29.

10 *See, e.g., Advocacy Org, supra,* at 369, in which a conglomerate of healthcare providers filed suit against Auto Club Insurance Association alleging that Auto Club had "unlawfully been failing to pay the full and 'reasonable' amount of their insureds' medical bills."

11 Mich ___ (2017)(Docket No 152758); 895 NW2d 490.

12 *Covenant, supra,* slip opn at 2.

13 *See McGill, supra* at 406-407; *LaMothe, supra* at 583-584; *Advocacy Org, supra* at 369. No-fault insurers have undoubtedly been misled into believing that they are required to do so by DEPARTMENT OF INSURANCE & FINANCIAL SERVICES BULLETIN NO 92-03. This author has previously authored an article explaining that Bulletin 92-03 is not binding authority pursuant to MCL 24.232(5), and moreover represents an inaccurate interpretation of the no-fault act. *Covenant v State Farm – Special Edition: What PIP Insurers Should Know About Department Of Insurance & Financial Services Bulletin No. 92-03,* LawFax, Volume XXIX, No. 14, (June 8, 2017), available at http://www.garanlucow.com/firm-publications/law-fax-volume-xxix-no-14-jun-8-2017/ (accessed Sept 2, 2017). Accordingly, this author will not re-address those issues herein.

14 Of course, if the insured does file such a lawsuit against the no-fault insurer seeking indemnity, the no-fault insurer's potential liability would be limited by the one-year back rule in MCL 500.3145, as well as other provisions of the no-fault act.

15 *Group Ins Co v Morelli,* 111 Mich 510, 515 (1981).

16 In fact, the Michigan Supreme Court ruled in *Shavers* that a declaratory judgment action was a permissible avenue for challenging the constitutionality of the no-fault act itself. *Shavers, supra* 588-589.

17 *Advocacy Org, supra* at 369.

18 *Manley v Detroit Auto Inter Ins Exchange,* 127 Mich App 444, 451 (1983).

19 *Chilingirian v Fraser,* 182 Mich App 163, 165 (1989).

20 MCR 2.222; *Chilingirian, supra* at 182.

21 MCR 2.222; *Chilingirian, supra* at 182.

22 *LaMothe, supra* at 586.

23 *See, e.g., Advocacy Org, supra* at 381-382.

24 *See, e.g., Bronson Methodist, supra* at 450-451

Christian C. Huffman is a shareholder in the Ann Arbor office of Garan Lucow Miller, P.C. He practices all aspects of insurance litigation, with a specific focus on no-fault automobile insurance issues. He is a magna cum laude graduate of the Michigan State University College of Law, and before joining Garan Lucow Miller served as a research attorney for the Michigan Court of Appeals and as a judicial law clerk for former Chief Justice Clifford W. Taylor of the Michigan Supreme Court. He may be reached at (734) 930-5600, or chuffman@garanlucow.com.