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NO-FAULT REFORM – THE END OF AN ERA – PART II

On May 30, 2019, Governor Whitmer signed SB 1, the no-fault reform amendments, into law during a public signing ceremony that took place on Mackinac Island. Surrounded by Legislators and media from around the state, she indicated that the changes that were being enacted were "historic." However, due to a number of flaws that were identified in SB 1, as noted in our prior Newsletter, Governor Whitmer agreed not to submit SP 1 to the Secretary of State, while she waited for the Legislature to return from the Mackinac Island conference. On June 4, 2019, the Legislature passed HB 4397, the no-fault "amendments to the amendments," which clarified the effective date for the increase in the residual bodily injury liability limits. HB 4397 also clarified when the "mini-tort" damage limit increased from $1000.00 to $3000.00.

Governor Whitmer signed HB 4397 on Tuesday, June 11, 2019. Both SB 1 and HB 4397 were then transmitted to the Secretary of State, where the Great Seal of the State of Michigan was affixed to the Bills and they were assigned Public Act numbers – PA 21 (for SB 1) and PA 22 (for HB 4397). **Accordingly, unless otherwise stated in the texts of these two Acts, these Bills became Law on Tuesday, June 11, 2019.**

In what could best be described as a chaotic situation, there was a great deal of confusion as to when these various provisions took effect. Many commentators were taking the position that the provisions of SB 1 took effect immediately when Governor Whitmer signed the bill on Mackinac Island – May 30, 2019. However, Article 4, §33 of the Michigan Constitution specifically provides:

> "If he [the Governor] approves, he shall within that time [14 days] sign the bill and file it with the Secretary of State and it shall become law."

In a 1984 Attorney General Opinion, number 6201, former Attorney General Frank Kelley advised then-Secretary of State Richard H. Austin that:

> "It is my opinion therefore, that a bill passed by the Legislature, given immediate effect and signed by the Governor, becomes law upon its filing with the Secretary of State."

As stated above, both SB 1 and HB 4397 were filed with the Secretary of State on June 11, 2019. **As a result, these provisions will undoubtedly apply to auto accidents occurring on or after June 11, 2019.** However, there are a few provisions that will apply to pending claims arising out of accidents that occurred before June 11, 2019, but it would appear that those changes will not affect the claimant's substantive rights. These provision are discussed more fully in **Section VI** below.

Section I – Changes in Policy Coverages

As noted in our earlier Newsletter, the PIP choice provisions applies to insurance policies issued or renewed after July 1, 2020. However, with regard to the residual bodily injury liability limits, SB 1 did not provide for a similar effective date, even though the statute indicated that the residual bodily injury liability limit election was to be made on the same form as the PIP coverage elections. HB 4397 clarified this omission, and now provides that after July 1, 2020, the residual bodily injury policy limits must be $250,000 per person, or $500,000 per occurrence, unless the insured opts to obtain lower policy limits, on the same form used to make their PIP coverage choices, but no lower than $50,000 per person and $100,000 per accident.

Section II – Mini Tort Changes

As originally drafted, SB 1 apparently provided for an immediate increase in the mini tort damage limit from $1,000.00 to $3,000.00. HB 4397 clarifies

the effective date of this important change. HB 4397 makes it clear that the tortfeasor remains liable for damage to motor vehicles, up to $3,000.00, for accidents that occur after July 1, 2020.

Section III – Changes to Priorities

For accidents occurring before June 11, 2019, Claimants who were injured while an occupant of another person's vehicle, and who did not have insurance of their own in their household, would turn to the insurer of the owner, registrant or operator of the motor vehicle they were occupying for their no-fault benefits, under the former version of MCL 500.3114(4). Similarly, non-occupants of motor vehicles, such as pedestrians, bicyclists, and moped riders, who did not have insurance of their own in the household, would likewise turn to the insurer of the owner, registrant or operator of the motor vehicle involved in the accident for payment of their no-fault benefits, pursuant to MCL 500.3115(1).

For accidents occurring on or after June 11, 2019, these same individuals will now submit their claims to the Michigan Automobile Insurance Placement Facility, which operates the Michigan Assigned Claims Plan. These individuals will be capped at $250,000.00 for "allowable expense" benefits under MCL 500.3107(1)(a), plus work loss benefits under MCL 500.3107(1)(b), household replacement service benefits under MCL 500.3107(1)(c) or survivor's loss benefits under MCL 500.3108. Work loss, replacement service and survivor's loss benefits do not count against the $250,000.00 cap. **Again, the $250,000.00 cap only applies to "allowable expense" benefits under MCL 500.3107(1)(a), such as hospital and physician expenses, prescription expenses, medical mileage expenses, attendant care expenses, home modification expenses, van modification expenses and the like.**

As for motorcyclists, the basic priority scheme remains unchanged, and until July 1, 2020, they will continue to receive lifetime, unlimited no-fault benefits under the priority scheme set forth in MCL 500.3114(5). However, after July 1, 2020, a motorcyclist may have no control over the coverage level of no-fault benefits that might be available to them. Instead, they are at the mercy of whatever coverage limits the owner of the motor vehicle involved in the accident has opted for! As noted in my prior Newsletter, I am an avid motorcyclist and, if I opted to purchase the lifetime, unlimited no-fault coverage, I would expect that coverage to apply whether I am operating my automobile, walking across the street, or riding my motorcycle, so long as I am involved in an accident with a motor vehicle. Before July 1, 2020, I will still be able to receive lifetime, unlimited no-fault benefits so long as my motor vehicle is insured, since even if I am struck by an uninsured motor vehicle, my motor vehicle insurer occupies the third order of priority under MCL 500.3114(5)(c) – "the motor vehicle insurer of the operator of the motorcycle."

However, for accident occurring after July 1, 2020, unless I am involved in an accident with an individual who has elected to exclude PIP coverage under Section 3107d or Section 3109a(2), my entitlement to no-fault benefits will be capped at whatever PIP coverage level was chosen by the owner of the motor vehicle involved in the accident. The absurdity of this provision becomes apparent when one considers the following:

- I am driving my automobile and am catastrophically injured – I still get lifetime, unlimited no-fault benefits if that is the option I chose;
- I am walking across the street when I am struck by a motor vehicle – I still get lifetime, unlimited benefits if that is the option I chose;
- I am riding my motorcycle when I am catastrophically injured in a motor vehicle accident with a motor vehicle whose owner has opted for $250,000.00 "allowable expense" coverage – I am capped at this amount (plus any work loss, household service or survivor's loss benefits), despite the fact that I chose lifetime, unlimited no-fault coverage for my motor vehicle.

In this writer's humble opinion, this is an oversight that needs to be corrected by the Legislature before these PIP choice amendments take effect on July 1, 2020.

Of course, if the motorcyclist does not own a motor vehicle, and does not otherwise have no-fault coverage available through a spouse or domiciled relative, and there is no other source of PIP coverage that can be identified within the standard order of priority for motorcyclists under MCL 500.3114(5), the motorcyclist would then turn to the Michigan Assigned Claims Plan, where his "allowable expense" benefits would be capped at $250,000 (plus work loss, household service or survivor's loss benefits).

Section IV – Out-Of-State Residents

Prior to June 11, 2019, out-of-state residents would still be entitled to recover no-fault benefits under their out-of-state insurance policies if their insurer was a certified insurer under MCL 500.3163. With one weird exception discussed below, for accidents occurring on or after June 11, 2019, out-of-state residents are no longer eligible to recover Michigan no-fault insurance benefits unless they insure and register a motor vehicle in the State of Michigan. See MCL 500.3113(c). Those out-of-state residents will need to turn to the tort system to obtain compensation, but in order to recover any damages, whether economic or non-economic, the out-of-state resident must prove a threshold injury.

This writer foresees some problems with both handling and defending claims involving out-of-state residents. Since those out-of-state residents are essentially now operating under a tort system, their damages are, for the most part, going to be capped as whatever insurance policy limits are available to the tortfeasor. Let us assume, for example, that the out-of-state resident is seriously injured in a motor vehicle accident, through no fault of his own, on June 30, 2019. Having been shut out of the Michigan no-fault insurance system by these amendments, he now turns to the tort system for his compensation, but until July 1, 2020 – a year down the road at the earliest, depending on the renewal date – the tortfeasor will still have the minimal policy limits of $20,000/$40,000, or even $50,000/$100,000 or $100,000/$300,000. The out-of-state resident may not be willing to settle for those limits, but may very well be inclined to pursue the tort claim to trial and secure a verdict in excess of the applicable policy limits. This will almost certainly result in higher tort payouts, higher personal exposure for the tortfeasor and perhaps more protracted tort litigation than what we have seen in recent years.

The exception is found in MCL 500.3111, which governs accidents occurring outside the State of Michigan. Prior to the amendment, an out-of-state resident occupying a Michigan registered and insured motor vehicle would be entitled to lifetime, unlimited no-fault benefits, even if the out-of-state resident never set foot inside the State of Michigan in his/her lifetime. Now, MCL 500.3111 provides that PIP benefits are payable if "the occupant was a resident of this state **or** if the owner or registrant of the vehicle was insured under a personal protection insurance policy." Consider the following:

- Aunt Sally drives her vehicle from her residence in Kentucky to Michigan to visit you. Her vehicle is insured under a Kentucky policy issued by State Farm. She is excluded under MCL 500.3113(c) and MCL 500.3111 would not apply because the accident occurred in Michigan;
- Aunt Sally flies into Michigan from her residence in Kentucky and you pick her up in your car. You are subsequently involved in an accident in Michigan. Aunt Sally does not get Michigan no-fault benefits because she is an out-of-state resident, excluded under MCL 500.3113(c) and MCL 500.3111 does not apply to accidents occurring Michigan;
- Aunt Sally flies into Michigan from her residence in Kentucky and you pick her up in your car. You are subsequently involved in an accident in Ohio, on your way to visit the Toledo Zoo. Because the accident occurred out of state, and because Aunt Sally was an

occupant of a vehicle whose "owner or registrant of the vehicle was insured under a personal protection insurance policy," she is entitled to benefits under MCL 500.3111, but is arguably excluded from recovering benefits under MCL 500.3113(c).

- So let's assume that MCL 500.3111 applies and Aunt Sally is entitled to Michigan no-fault benefits as a result of the accident occurring in Ohio while occupying a Michigan registered and insured motor vehicle. She used to go to your policy, as the insurer of the owner of the motor vehicle occupied, under the former version of MCL 500.3114(4)(a). No more- she now goes to the MACP, but the statutory provisions governing the operation of the MACP, MCL 500.3171 et. seq., clearly provide that its provisions apply only to "accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle in this state." See MCL 500.3172(1). So where does she go - she was, after all, injured in Ohio?

This makes no sense at all – what one section completely grants, the other completely takes away! Why should entitlement depend upon whether the out-of-state resident has crossed the Michigan-Ohio border? In other words, why is coverage excluded in Michigan and allowed in Ohio? And who picks up her claim? Either the out-of-state resident should be all in or all out. Another legislative "fix" is clearly needed!

SECTION V- *COVENANT* FIX

SB 1 legislatively overrules the Michigan Supreme Court's decision in *Covenant Med Ctr v State Farm*, 500 Mich 191; 895 NW2d 490 (2017). Instead, it specifically provides that a healthcare provider "may make a claim and assert a direct cause of action against an insurer, or under the Assigned Claims Plan . . . to recover overdue benefits payable for charges for products, services, or accommodations provided to an injured person." As pointed out in the original Newsletter, this change applies to products, services and accommodations rendered on or after June 11, 2019.

For example, a chiropractor who treats an injured Claimant on June 1, 2019, will still need to obtain an assignment from the patient, if the chiropractor wishes to pursue payment of those expenses. If that same chiropractor renders treatment on June 14, 2019, no assignment is required, and the provider can institute a direct cause of action against the no-fault insurer, or the MACP, to obtain payment of those expenses.

Section VI- Claims Handling – Procedural Changes

Unlike the changes referenced above, which affect the substantive rights of no-fault Claimants, the following changes are, in the author's opinion, procedural in nature. **As such, they became effective on June 11, 2019, and are applicable to claims arising out of motor vehicle accidents occurring prior to that date.**

» Independent Medical Evaluations

SB 1 provided that an IME physician had to spend the majority of his or her professional time in either the active clinical practice of medicine or instructing students in an accredited medical school or in an accredited residency or clinical research program. As originally introduced, SB 1 also added the requirement that the physician performing the IME must be of the same specialty and, if the treating physician is board certified, the IME physician must carry the same boar certification as the treating. This latter provision somehow did not make it to the Enrolled Bill that was signed into law by Governor Whitmer on May 30, 2019. However, the requirement that the IME physician have the same specialty and, if applicable, the same board certification as the treating physician was put back in by HB 4397. **Accordingly, both of these provisions apply to examinations which take place on or after June 11, 2019.**

So what is the practical effect of these amendments? In many cases, I have seen insurance companies utilize doctors specializing in physical medicine and rehabilitation to combat claims for chiropractic expenses. Now, if we have a chiropractor as a treating physician, the insurer will need to secure the services of a chiropractor to perform the IME. If the injured Claimant is utilizing the services of, say, a chiropractor, a physiatrist and a neurologist, then the no-fault insurer will need to secure three IMEs of its own – one with a chiropractor, one with a physiatrist, and one with a neurologist. Obviously, this will require claim representatives to take a much more active role in the selection of IME physicians, instead of relying upon the IME facility to line up an IME with the first available physician.

» **Statute of Limitations**

Prior to June 11, 2019, the One-Year-Back Rule was strictly applied. However, SB 1 now incorporates a tolling provision, which stops the running of the One-Year-Back Rule "from the date a specific claim for payment of the benefits is made until the date the insurer formally denies the claim." However, this provision does not apply if the Claimant "fails to pursue the claim with reasonable diligence." Therefore, as we see more and more litigation being filed over services rendered after June 11, 2019, Motions for Partial Summary Disposition, based upon the One-Year-Back Rule, will soon become a thing of the past.

» **Attorney Fees**

Effective June 11, 2019, a Claimant's attorney can no longer claim a lien on payment of an undisputed medical expense or, for that matter, any other undisputed claim that may be paid by the no-fault insurer. **Obviously, this provision should put an end to the claims being filed by Plaintiff attorneys who demand that they be named as a payee on undisputed medical expense payments**. In those cases, the insurer needs to make it clear that, because the benefits being paid are not "overdue," Plaintiff's counsel has no right to assert a lien against payment of those medical expenses.

However, this provision also poses a problem for many Plaintiff attorneys, who routinely take a one-third attorney fee on claims for work loss benefits, attendant care service benefits and household replacement service benefits that are voluntarily paid by the insurer. This provision arguably renders those attorney liens invalid, insofar as they pertain to payments issued by the insurer on or after June 11, 2019. It remains to be seen how the State Bar of Michigan will respond if and when an insurer notifies the State Bar of Michigan that a Plaintiff's attorney may be improperly claiming a lien on payment of undisputed no-fault benefits – not just medical expenses! As for my colleagues on the opposite side of the aisle, they should seriously consider the ramifications of continuing to claim a lien on payment of voluntarily paid no-fault benefits of any sort- not just medical expense payments.

» **PIP Claims Processing**

The basic requirement, that an insurer has 30 days to pay a claim after receiving "reasonable proof of the fact and of the amount of loss sustained" remains in effect. However, if a medical provider, or even an attendant care service provider, fails to submit a bill within 90 days after a product, service, accommodation or training was provided, the insurer has a total of 90 days (the initial 30 day period plus a 60 day additional investigatory period) to issue payment before it is deemed to be "overdue."

» **Attorney Fees for Solicited Clients**

Effective June 11, 2019, a no-fault insurer can obtain "a reasonable amount against a Claimant's attorney as an attorney fee for defending against a claim for which the client was solicited by the attorney in violation of the laws of this state or the Michigan Rules of Professional Conduct." In this regard, plaintiffs will now be subject to cross-examination as to whether or not they were solicited by an attorney, and it would appear that the Plaintiff's attorney will not be able to interpose an attorney-client privilege.

However, what if the client was solicited by Attorney A who, in turn, refers the client to Attorney B, who is wholly ignorant of the solicitation by Attorney A until the client is deposed. Is Attorney B liable for the attorney fee sanction under this provision? Probably not – he's not the one who did the soliciting. However, could Attorney A – the one who did the initial soliciting – be the target of this provision? If so, how will we get Attorney A lined up for sanctions? It will be interesting to see how this plays out down the road.

DISCUSSION

Obviously, HB 4397 goes a long ways toward clarifying some of the issues that became apparent in the rush to pass SB 1, prior to the Mackinac Island Conference. However, evidence of sloppy draftsmanship still remains. Fortunately, there is still time for the Legislature to correct some of the issues that we have identified, and which may become apparent as we acclimate ourselves to the new world of No-Fault. One can only hope that the Legislature will be paying attention as these significant changes are rolled out, and that they will not simply turn a "blind eye" to the problems that crop up, on both side of the aisle, when it comes to implementing these provisions. The fact remains, however, that as of June 11, 2019, we can now officially proclaim that it is . . . the End of an Era.