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Mich. Justices Face Daunting Task On No-Fault Amendments

By **Shane Dilworth**

Law360 (February 28, 2023, 3:37 PM EST) -- Upcoming arguments before the Michigan Supreme Court on the retroactivity of amendments to the state's no-fault insurance law has some experts anxious about whether the court will release the "lightning in a bottle" needed for their enactment and maintain payouts for those injured in car crashes.

The justices' review Thursday of a split appellate panel's August decision holding the 2019 amendments are not retroactive has drastic implications for policyholders, the insurance industry and individuals currently receiving personal injury protection, or PIP, benefits, legal experts say.

The lawmakers who crafted the amendments took aim at what they said was a pervasive pattern of overcharging by medical providers, which they blamed for Michigan's sky-high auto insurance rates.

The guardians of benefit recipients Ellen Andary and Philip Krueger said in their briefing to the state high court that the majority was correct in finding USAA Casualty Co. and Citizens Insurance Co. of America must continue to pay the same rates for no-fault benefits as before the amendments were implemented.

In its 2-1 ruling, the **appeals court majority found** the changes in the amendments to the state's PIP benefits do not affect coverage for those who were severely injured in car crashes before the June 2019 effective date.

Specifically, Judges Douglas B. Shapiro and Sima G. Patel concluded lawmakers were not clear on whether the amendments were intended to be retroactive and that applying them in such a way would violate the Michigan Constitution's contracts clause.

High Costs Drive Change

The amendments to Michigan's no-fault law were the first since its enactment in 1973 and were intended to reduce premiums paid by policyholders. According to the city of Detroit's brief in support of the insurers, Michigan drivers paid 83% more for insurance premiums than the national average, and some drivers paid annual premiums in excess of \$6,000.

Mary Massaron, a carrier-side attorney at Plunkett Cooney LLP, told Law360 the cost of insurance coverage was "an ongoing problem" before the amendments.

"For many years, Michigan had the most generous no-fault benefits in the country, and multiple states over many years learned that that kind of generous benefits program makes insurance unaffordable to many people who are required by law to get insurance in order to drive," she said.

In its brief, Detroit said the exorbitant cost of auto coverage contributed to higher crime rates and unemployment among its residents. The city said this problem caused many to drive without insurance, which is illegal, and prohibited some from pursuing employment opportunities in suburban areas where public transportation is not available.

Massaron said the lack of rapid public transportation and the high cost of coverage left the average Michigander with a tough decision.

"If you are not wealthy, and the premiums are \$5,000 or more in some cases, you can't afford it," she said. "That results in one of two things: either you don't drive so you can't get to where the job is, or you're driving uninsured, which has its own set of problems."

The city also noted that prior to the amendments, medical providers regularly charged excessive amounts to insurers for routine medical procedures like MRIs.

Massaron said the statute's requirement for insurers to cover "reasonable" fees for PIP benefits often spurred litigation between providers and carriers.

She went on to say the prior version of the Attendant Care Benefits Program was structured in a way that essentially facilitated many fraudulent claims. The statute allows family care members to be paid to provide attendant care. Often, this is cost-effective and works well for the injured person.

But that area has been plagued by fraud. For example, she said some of those providing attendant care were charging insurers for 24-hour care to individuals who did not need it.

"I had one case in which a person was charging for 24-hour care, and there was evidence that the person providing the care had flown out of the state and wasn't even in the state at the time that some of these charges were being submitted for payment," Massaron said.

She added: "I had another case where an investigator was filming someone who supposedly needed 24-hour care as the person went to get on a boat with some friends and have a great afternoon on the lake. So it's unfortunate that people engage in that kind of behavior, but that was a serious problem."

Amendments Alter Quality of Care

The Michigan Legislature's task of creating and implementing the amendments was arduous, Drew Broaddus, a carrier-side attorney with Secret Wardle in Grand Rapids, told Law360.

"This was the first major attempt to overhaul anything in the no-fault law," he said. "It was somewhat remarkable that legislators were able to get bipartisan support for it and get something that the governor could eventually sign, and a big part of that was these fee schedules."

He went on to say the Legislature "caught lightning in a bottle" when passing the amendments, which limit the amounts providers must pay for no-fault benefits.

Massaron, who also represents the American Property & Casualty Insurance Association, an amicus curiae for the insurers, agreed with Broaddus, saying: "In any major reform, in which multiple interests are going to be affected, it is extremely difficult to come up with a reform package. But amazingly, after years of trying, the Legislature did it."

However, some experts expressed concerns that the amendments curtailed the level of care available to grievously wounded individuals like Krueger, who suffered severe brain injuries from a 2010 car crash; Andary, whose injuries resulted from a head-on collision with a drunk driver; and other similarly situated individuals.

Jeffrey D. Koelzer, a policyholder attorney at Varnum LLP's Grand Rapids office, told Law360 the case will have the largest impact on individuals in situations similar to the plaintiffs'. The amendments, he explained, limit the amount of care PIP providers are required to pay when their insureds are injured in an auto accident.

"The hope is that limiting coverage would reduce the cost of insurance," he said, "but because the amendments reduce the benefits that are covered, the amendments are not beneficial to those who have been injured and need coverage."

He pointed out that the statute's previous language required PIP insurance to provide for "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery or rehabilitation," and the rates of reimbursement were limited only by what constituted "reasonable" and "customarily charge[d]" fees.

He also said there was no cap on the amount of attendant care that could be provided by family members.

Liisa Speaker of the Speaker Law Firm, who represents amicus curiae the Brain Injury Association of Michigan, told Law360 the amendments have decreased the quality of care available to those severely injured in accidents. Additionally, she said the amendments are adversely affecting providers and transportation companies due to the decreased amounts they receive as a result of the amendments' fee schedules.

"Their quality of care has decreased because they don't have as many medical people coming into the home to help them out," she said. "They're left with the family members only, and some of these family members are like sole providers — they don't have any backup nurses to help them."

Question of Retroactivity

The dispute between the policyholders and carriers dates back to 2019 when Krueger and Andary lodged a dispute in state court against their insurers, USAA Casualty Co. and Citizens Insurance Co. of America, respectively. The guardians of Krueger and Andary argued the amendments should not be applied retroactively to reduce coverage for the costs of care, which happened after their carriers started applying the fee schedule in the 2019 amendments.

The trial court judge dismissed the suit, finding the amendments are retroactive. The guardians appealed and, in a split ruling, a 2-1 majority of the Michigan Court of Appeals reversed the decision.

One of the biggest questions facing the Michigan Supreme Court this term is the retroactivity of the amendments.

"That's where I think the real fight is going to be at this point," Broaddus said.

Varnum's Koelzer agreed that retroactivity is a key issue.

"The issue in this case is whether these benefit reductions can apply retroactively to people who were injured before the benefit-reducing amendments went into effect," he said. "For people who have been relying on certain treatments or attendant care arrangements before the amendments went into effect, the prospect of losing some of that care is certainly not beneficial."

A representative for the insurers declined to comment. The remaining parties and their representatives did not respond to requests for comment.

Michael T. Andary, conservator and guardian of Ellen M. Andary; Ronald Krueger, guardian of Philip Krueger; and Moriah Inc., doing business as Eisenhower Center, are represented by George T. Sinas of Sinas Dramis and Mark Granzotto of Mark Granzotto PC.

USAA and Citizens Insurance are represented by Lori M. McAllister of Dykema Gossett PLLC.

The case is Michael T. Andary et al. v. USAA Casualty Insurance Co. et al., case number 164772, in the Supreme Court of Michigan.

--Editing by Philip Shea.