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Summer 2022 Edition

By Wayne J. Miller

I. RETROACTIVITY AND THE ANDARY DECISION

While the summer winds down, all eyes are on the Court of Appeals as we await the decision in the Andary case. The main issue in Andary of course is whether the non-Medicare fee caps under the new law can be applied to injuries that arose before the effective date of the new law (June 11, 2019). The court is considering these two main arguments:

1. Does the statute apply retroactively by its terms? And
2. If so, would it be an unconstitutional impairment of the right to contract. That is, people who bought no-fault contracts prior to June 11, 2019, bought contracts *without* fee caps. The only rule governing reimbursements then was that the charge had to be “reasonable and customary.” So the Court of Appeals is considering whether the new law unconstitutionally impairs the contracts that became “vested” as of a motor vehicle accident occurring prior to June 11, 2019.

The Andary case was argued in the Court of Appeals on June 7, 2022. We await a decision any day now. It is understood that whichever party loses will seek an appeal to the Michigan Supreme Court. So the Court of Appeals decision will be important, but not final.

An important argument *not* made in Andary is whether the fee caps are an unconstitutional “taking” of private property. Simply put, the fee caps (e.g., the non-Medicare fee caps at 55% of pre-law charges) are set at a rate that is so low that providers cannot cover their costs of doing business. So this question, left out of the Andary case, is whether it is unconstitutional for the legislature to mandate a rate that does not permit a private company to cover its costs. This argument is being litigated in other cases and will work its way up the appellate ladder. It is important to note that this argument, if accepted, will invalidate the fee cap altogether, and not just for injuries occurring before June 11, 2019.

II. REVISED FEE CAPS EFFECTIVE JULY 2, 2022

Hard to believe that over a year has passed since the fee caps went into effect on July 2, 2021. As bad as those caps are, the law calls for *additional* cuts as of July 2, 2022. The base rate for the Medicare caps then goes down from 200% of Medicare to 195% of Medicare. Also as of July 2, 2022, the base rate for non-Medicare fee caps goes down from 55% of the January 1, 2019 chargemaster, to 54%.

Offsetting these draconian cuts at least a little bit is the cost of living adjustment under the law. As of July 2, 2022, the adjustment goes up from 4.11% to 5.39%. See DIFS Bulletin 2022-04-INS from 1/18/22.

III. UTILIZATION REVIEW UPDATE

We have recommended against seeking appeals through the DIFS Utilization Review Process. Although providers are getting better at “speaking the language” that DIFS requires for its appeals, the latest figures still show insurers winning about 75% of the time. There are several factors that make the DIFS UR process strongly “tilted” in favor of insurers. These include the use of “medically accepted guidelines” that are typically insurance oriented/generated documents such as the ODG guidelines. Moreover, winning a DIFS UR appeal does not guarantee that the insurer will pay on that claim OR on the next one. §3157a(1)(b) says that providers must: “Comply with any decision of the department under this section” but nothing says what the insurer must do. So we have seen cases where the provider wins but the insurer still fails to pay.

Another pending problem with the DIFS UR process is the relationship between that process and the providers' right of direct action under the new law. Some insurers take the position that providers cannot pursue direct actions if they haven't first gone through the UR process. Others say that going through the UR process is an "election of remedies" that *precludes* pursuing a direct action.

These, like so many other issues, will require appellate decisions to straighten out this continuing confusion.

M&T ABOUT TOWN

M&T is proud to announce that our former partner Maureen Kinsella has been appointed to the Oakland County Circuit Court by Governor Whitmer. Maureen started her new career as a judge in May 2022. She is loving her new job, but we miss her!

IMPORTANT ANNOUNCEMENTS

M&T also is pleased to announce that the following attorneys have joined the firm in 2022: Chimere McCoy; Leah Hougaboom; and Josh Thomas. Chimere is a graduate of University of Detroit Mercy and became licensed to practice law in 2021. Leah is a graduate of Wayne State University Law School, with an undergraduate degree from Michigan State University and became licensed to practice law in 2015. Josh is a graduate of Thomas M. Cooley Law School and became licensed to practice law in 2020. Each of our new attorneys will be practicing under our Michigan auto no-fault insurance law, representing survivors of catastrophic injury, their families, and their professional service providers.

Finally, M&T is delighted to announce that attorney Simone Sprague has been designated as a Super Lawyers Rising Star for 2022, a richly deserved recognition.

About Our Law Firm

Miller & Tischler, P.C., represents survivors of catastrophic brain and spinal injuries, their families and their professional service providers who are having difficulty obtaining compensation for injuries sustained in motor vehicle accidents. We help our clients obtain negligence recoveries against those responsible for their injuries, as well as helping obtain No-Fault insurance benefits. We are a full service motor vehicle injury law firm.

Let Us Help You.



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