ON WHAT AUTHORITY? DIFS EXERCISES ITS REGULATORY POWER TO IMPACT NO-FAULT REFORM

Executive Summary

Since the passage of the No-Fault reform legislation, interested parties have been diligently working to interpret the new statutory language, and determine how it will impact the landscape going forward. The State of Michigan Department of Insurance and Financial Services (DIFS) has issued several orders and bulletins instructing insurance carriers on how to proceed under the new legislation.

The orders issued by DIFS impact the ability of carriers to utilize new statutory language that limits the scope of coverage, and the ability of the Michigan Automobile Insurance Placement Facility (MAIPF) to impose caps on benefits. The bulletins issued attempt to clarify certain provisions under the amended legislation.

A dispute has arisen as to whether DIFS has authority to issue these promulgations, and whether these clarifications modify the language of the statute. Regardless of the outcome of that dispute, observers on both sides of no-fault claims are watching intently.

Introduction

Since the passage of Reform, DIFS issued two orders, and several bulletins, addressing the applicability of the amended provisions of the No-Fault Act. While there are disputes pending as to DIFS authority to issue these pronouncements, they provide clarity as to some of the ambiguities created by the new legislation. This article summarizes the statutory authority of DIFS and impact of its recent orders and bulletins.

DIFS Regulatory Authority

The State of Michigan Department of Insurance and Financial Services (DIFS) is an administrative agency with the purpose of regulating the insurance and financial services industries in the state of Michigan[1]. Under MCL 500.200, DIFS has the obligation to execute the laws of Michigan in relation to insurance. DIFS also has the authority to issue rules and regulations to effectuate the purposes and to execute and enforce the provisions of the insurance laws of Michigan[2]. That being said, DIFS authority comes solely from the legislature, and has no inherent regulatory authority beyond that[3].

DIFS has the authority to investigate insurers for unfair claim practices and initiate civil actions against insurers[4]. Those actions can result in cease and desist orders and monetary penalties.[5]As part of the reform legislation, DIFS was tasked with updating its website to make claims of fraud by claimants and providers, and unfair claims practices by insurers, easier to submit.[6]

The recent legislation limited what factors insurers can consider in establishing or maintaining rates. Insurers are prohibited from considering sex, marital status, home ownership, educational level attained, occupation, postal zone, or credit score.[7] The new legislation also provided for different coverage levels for allowable (i.e., medical related) expenses, and insurers were required to reduce

premiums by certain percentages of the average premium in effect as of May 1, 2019 for each coverage level.[8] Insurers are required to create forms that inform policyholders of the potential coverage options for personal injury protection and bodily injury coverages, and the forms must be signed by insureds and submitted to insurers.[9] DIFS is responsible for enforcing these provisions, and approving proposed rates and forms.

MCL 500.6301 establishes an anti-fraud unit within DIFS that is a criminal justice agency dedicated to prevention and investigation of criminal and fraudulent activities. The agency may investigate all persons, including insurers and agents subject to DIFS authority, who have allegedly engaged in criminal or fraudulent activity. The agency may also conduct criminal background checks on individuals seeking licensure, maintain records of fraudulent and criminal activity, and share information with other criminal agencies.

Pursuant to MCL 500.3157a, medical providers are required to submit to utilization reviews performed by an insurer. An insurer may require a provider to explain the necessity or indication for treatment in writing. If an insurer deems treatment to be overutilized or inappropriate, or the cost of a treatment to be inappropriate, the provider may appeal the decision to DIFS and will be bound by the decision. A provider who knowingly submits false or misleading documents or other information to an insurer, the MCCA, or DIFS, commits a fraudulent insurance act and is subject to criminal penalty.

Orders Regarding Scope of Coverage

Before delving into the specifics of these orders, it is important to keep in mind how the order of priority framework was changed by the new legislation. Under the prior law, a pedestrian or occupant that did not have their own coverage, or coverage through a spouse or resident relative, would seek coverage from the vehicles involved in the accident. Those individuals would be entitled to lifetime allowable expenses, or medical related benefits. Under the new law, those individuals would automatically seek coverage through the MAIPF[10], and would be limited to no more than $250,000 for allowable expenses. The only exception is that, in the case where a person is allowed to opt out of coverage, and that coverage lapses, the coverage limit is $2,000,000. Since the amended statutory language did not have a specific effective date, there was an assumption by many that it was entitled to immediate effect[11].

On September 20, 2019, DIFS issued its first order relative to Reform.[12] This order was meant to address the "limited number of automobile insurers [that] have attempted to apply the amended provisions to claims made under existing, in-force policies without first submitting revised forms and rates for the Director's review and approval." The order prohibited automobile insurers from utilizing the amendments to the No-Fault Act that affect the scope of coverage without first submitting revised forms and rates to DIFS. In doing so, DIFS relied upon statutory authority requiring such submission before policies can be delivered or issued for delivery[13].

Furthermore, the order prohibited insurers from relying upon "conformity to law clauses" as a method of modifying existing policy language, indicating that such reliance would constitute an unreasonable and deceptive policy provision in violation of MCL 500.2236(5). Lastly, the order relied upon the position that the Michigan Insurance Code prohibits automobile insurers from reducing

coverage without first providing notice to policyholders.[14] The order also prohibited MAIPF from providing coverage to claims submitted to it based on the amended provisions that limited scope of coverage where there otherwise would have been a policy in place, unless there was prior approval by DIFS.

On September 24, 2019, DIFS issued its second order.[15] This order specifically targeted MAIPF. It prohibited MAIPF from imposing the $250,000 cap on allowable expenses, which is found in MCL 500.3172(7). DIFS asserted that, since that statute references opt out provisions that do not go into effect until July 2, 2020, the entire statute must have an effective date of July 2, 2020[16]. The order also expressed concern that, if allowable expenses were capped at $250,000, at-fault drivers would be exposed to future allowable expenses without the benefit of the higher mandatory bodily injury policy limits that go into effect on July 2, 2020[17].

The September 20, 2019 order issued by DIFS is primarily aimed to prevent insurers from denying claims on order of priority, and sending potential claimants to the MAIPF for coverage. Under the terms of the order, insurers must first submit rates and forms to DIFS and have them approved before using the new statutory provisions. The September 24, 2019 order, which is more direct, prohibits the MAIPF from enforcing the $250,000 cap on benefits. So taking these orders together, DIFS is, in effect, prohibiting insurers from sending claimants, presently otherwise entitled to coverage, to the MAIPF for coverage, and prohibiting MAIPF from capping benefits.

Not surprisingly, MAIPF did not agree with DIFS interpretation of the law, and filed an action in the Michigan Court of Claims seeking to invalidate the orders. MAIPF argues that the orders are beyond the authority of DIFS. MAIPF also argues that the orders are unconstitutional based on the separation of powers doctrine and constitute an attempt to usurp the power of the Legislature. Lastly, MAIPF argues that DIFS is ordering it to violate the law because it is being told to deny coverage when the statute indicates it must be provided.

If MAIPF prevails, it is important to point out that insurance carriers will have a basis to deny PIP claims on the basis that MAIPF is responsible for benefits. Moreover, at fault drivers and their insurance carriers will face immediate exposure for future allowable expenses, without the benefit of higher limits or fee schedules, when the plaintiff has PIP coverage through MAIPF.

DIFS Bulletins Clarify No-Fault Reform Provisions

DIFS has issued bulletins on a wide range of topics. Some of the bulletins clarify issues that seem self-explanatory. This article will focus on the more impactful interpretations issued by DIFS.

Reasonable Charges – A bulletin was issued on June 28, 2019 noting that the fee schedule for medical expenses does not go into effect until July 1, 2021. Therefore, automobile insurers and health care providers were reminded that, until that time, insurers were obligated to pay, and providers were obligated to charge, a reasonable charge. DIFS also confirmed that the changes to MCL 500.3112, permitting providers to file a direct cause of action against insurers, were effective as of June 11, 2019.

Inapplicability of PIP Choice to Self-Insurers – A bulletin was issued on September 27, 2019 related to self-insurers and municipal governmental insurance pools. DIFS noted that these entities did not provide coverage under a policy, but instead a certificate of self-insurance. The language for PIP coverage limits contained in MCL 500.3107c refers to an "applicant or named insured", neither of which applies to a self-insurer or self-insurance pool. It also makes reference to "insurance policies" which these groups do not issue. Therefore, PIP coverage limits (i.e., $50,000, $250,000, $500,000, or unlimited) do not apply to self-insurers or municipal governmental insurance pools.

Liens on Attorney Fees - One of the more noteworthy changes brought on by No-Fault reform was that, under MCL 500.3148(1), an attorney lien could only be claimed if the benefits were both authorized and overdue (i.e., not voluntarily paid benefits)[18]. Many interpreted this as a prohibition on attorneys claiming a fee when benefits were voluntarily paid. A bulletin was issued on October 14, 2019 providing that an injured person could contract with an attorney to assist in the recovery of no-fault benefits, and that an attorney may hold in trust any funds paid to a claimant via two party check. This would suggest that, as long as there is a contract between the injured person and the attorney, an attorney fee can be charged for payment of voluntarily paid benefits, taking a narrow interpretation of the broad language of MCL 500.3148(1).

Out of State Residents – The reform legislation eliminated the requirement under MCL 500.3163 that authorized insurance carriers file certifications to provide coverage to non-resident policyholders, and eliminated eligibility for no-fault benefits to non-residents unless they owned a motor vehicle registered and insured in Michigan. DIFS clarified on October 18, 2019 that these certifications were valid for accidents occurring prior to June 11, 2019, but had no effect and could not be relied upon to claim coverage on or after that date.

Limits on Attendant Care – DIFS issued a bulletin on November 1, 2019 making it clear that automobile insurers are not be permitted to apply the 56-hour per week limitation on non-professional attendant care under MCL 500.3157(10) until on or after July 2, 2021[19]. DIFS also made note that, under MCL 500.3157(11), insurers were allowed to offer additional hours of attendant care to injured persons. The more significant portion of the bulletin was the assertion that "Insurers decisions whether to contract for additional attendant care benefits will be subject to the Director's authority to perform utilization review under Section 3157a of the Code, MCL 500.3157a." Thus, it appears DIFS may be reserving unprecedented oversight over attendant care agreements between claimants and carriers.

Looking Ahead

Considering the regulatory authority DIFS possesses over insurance carriers, promulgations such as those referenced above carry great weight. To the extent that those promulgations may contradict statutory language, you can expect that insurers, claimants, or other state agencies or associations to challenge the scope of DIFS authority as it pertains to orders and bulletins, and the accuracy of its analysis. DIFS has signaled that it intends to issue several orders and bulletins going forward to provide guidance to the insurance industry. Only time will tell as to how that guidance is interpreted and received.