



The Small Print Taketh Away! Considerations for Settling Your Next Michigan No-Fault Auto Claim

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Introduction

A large majority of civil lawsuits settle before trial. While some statistics reflect that 95% of cases settle, the percentage is likely higher. This is especially applicable to first-party no-fault personal injury protection (PIP) cases in Michigan. Penalty interest and attorney fee provisions¹ provide a bad-faith type component to these claims that creates a huge incentive for insurance carriers to resolve them. In addition, it is not unusual for plaintiff attorneys to have concerns over the causation of injuries, the reasonableness of claimed benefits, or other components of the claim. Therefore, these claims frequently head down the path to settlement.

Given the likelihood that any given PIP claim will settle before trial, it is important to have solid understanding of the benefits available and whether there is an opportunity to obtain a release of some, or all, future benefits. It is also important to be aware of the various pitfalls on settlements that appear to resolve the claim, only have to additional exposures arise. This article discusses important considerations when attempting to settle your next PIP case.



Matt focuses his practice on defense litigation in first party No-Fault claims, uninsured and underinsured motorist claims, automobile negligence, premises liability, general liability, and contractual disputes. He has

also successfully defended numerous corporations against product liability and construction defect claims. Matt has extensive experience in defending catastrophic injury claims, including claims for attendant care, home modifications, and vehicle modifications, as well as consulting insurers regarding catastrophic claims prior to litigation. He has vast experience in all aspects of the litigation process from the discovery process through trial and routinely achieves successful results for his clients. Matt has been a leading authority on the reform of Michigan's No-Fault Act and has numerous presentations and publications on the impacts of the new legislation.

Matt completed ICLE's extensive 40-Hour General Civil Mediation Training, equipping him with specialized negotiation methods to mediate complex civil matters. He can be reached at matthew.labeau@cefllawyers.com or 248-663-7724

The Standard First-Party No-Fault Settlement

In the instance of a Michigan PIP claim, an insurer is liable for benefits without regard to the fault of the parties involved in the accident.² An insurer is liable to pay benefits for "accidental bodily injury arising out of the ownership, operation, and use of a motor vehicle as a motor vehicle."³

The default position on Michigan no-fault claims is that PIP benefits are payable as the loss accrues.⁴ In addition, benefits must be incurred to be payable.⁵ Theoretically, if a matter were to proceed to trial with a result favorable to the plaintiff, it would only include no-fault benefits that had accrued/been incurred at that time, and would not include future benefits.⁶ Therefore, unless stated otherwise, a Michigan PIP settlement generally includes benefits to present, only.

There are four main categories of benefits available to a claimant:

- 1) Allowable expenses.**⁷ These benefits are defined as "reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery, and rehabilitation." While this broad definition includes medical testing and treatment, it also includes medically related expenses such as attendant/nursing care, medical transportation/mileage, prescriptions, home and vehicle modifications, and guardianship/conservator fees. Allowable expenses may be available for a lifetime, or subject to limited coverage levels of \$50,000,⁸ \$250,000, or \$500,000 chosen by the policy holder. In addition, treatment or testing provided after July 1, 2021 may be subject to a fee schedule that caps the amount of reimbursement.⁹

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2) **Work loss.**¹⁰ This benefit is defined as “loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured.” This also includes individuals who were temporarily unemployed at the time of the accident.¹¹ This is subject to a monthly cap and is only available for three years from the date of loss. It should be noted that this is not loss of earning capacity, actual loss of wages must be shown.¹²

3) **Household replacement services.**¹³ These benefits are defined as “expenses not exceeding \$20 per day, reasonably incurred in obtaining ordinary and necessary services in lieu of those that, if he or she had not been injured, an injury person would have performed for himself, herself, or his/her dependents.” These are “ordinary and necessary” services, such as taking out the trash, cleaning the house, or making the beds. This is contrasted from attendant care, an allowable expense, which consists of services required for a person’s medical condition. This benefit is only available for three years from the date of loss.

4) **Survivor loss benefits.**¹⁴ When a person entitled to coverage dies, after the time of death, dependents may claim two categories of benefits. The first is contributions of tangible things of economic value, not including services, that the dependents would have received for support. The second is expenses, not exceeding \$20 per day, reasonably incurred by the dependents in obtaining ordinary and necessary services that the deceased would have performed for their benefit. This benefit is only available for three years from the date of loss.

If benefits are found to be overdue,¹⁵ an insurer is responsible for penalty interest

in the amount of 12% simple interest per annum. In addition, an insurer is responsible for penalty attorney fees if benefits are found to be unreasonably delayed or denied.¹⁶

A good-faith payment by a carrier to the person it believes is entitled to the benefits discharges the carrier from liability to the extent of the payment. However, that is not the case if the carrier receives notice in writing of a claim by some other person.

As with any settlement, it is essential to obtain a release of liability from the claimant. The release should specify which of the above benefits are released, and the date through which they are released. With regards to allowable expenses, the settlement may specify which providers are part of, or excluded from the resolution, or the release may broadly refer to allowable expenses. The release should contain an agreement by the claimant to use the settlement proceeds to pay for the outstanding medicals claims as well as any liens. Ideally, there is an indemnity clause as to outstanding medical expenses and other liens, but the release should at least contain a hold harmless provision. Any settlement should include a release or waiver of any claims for interest and attorney fees as well as the above referenced benefits.

Settlement of Future First-Party No Fault Benefits

It may be in the best interest for both the claimant and the carrier to negotiate a settlement of some or all future benefits. The carrier may be interested in closing out the claim completely, and the claimant may be interested in receiving additional consideration to increase the settlement amount. A claimant is allowed to release future benefits.¹⁷ Frequently, the decision of whether to release futures hinges on

the claimant weighing whether they will need benefits against the value of cashing in the claim early. Just like any deal, there must be value for both parties. The insurer and the claimant must be satisfied that the settlement amount justifies the terms.

A settlement can include **all** future benefits, or some future benefits. If the claim is within the first three years of the accident, a claimant will often agree to a release of work loss and household replacement services benefits through three-year anniversary. A claimant is less likely to waive allowable expenses, especially if there is a significant injury, lifetime coverage available, or a large portion of available limits remain. That being said, an opportunity to obtain a release of future allowable expenses is sometimes available when damages are minimal, the person has healed from their injuries or has completed treatment, or simply the settlement funds being offered are sufficient.

Even if a claimant will not settle all future allowable expenses, there are opportunities to close out various exposures. For example, a claimant may agree to release future attendant care benefits, prescription co-pays, or medical mileage. A claimant may agree to release all future allowable expenses except for “medical treatment.” Also, a claimant may agree to release all future benefits related to certain injuries, but not others. For example, the claimant could release future benefits related to the neck, but not the knee.

Michigan Catastrophic Claims Association (“MCCA”)

The MCCA is an unincorporated, non-profit association with mandatory membership of all insurance carriers that write automobile insurance in Michigan. It is funded by premiums from those carriers and an assessment to policyholders with unlimited allowable expenses coverage. It acts as an indemnitor of Michigan PIP insurance carriers for benefits in excess of a statutory threshold based on the year of policy issuance or renewal for the subject date of loss.

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Insurance carriers must report a claim initially to the MCCA when it involves certain injuries, such as traumatic brain injury, spinal cord injuries resulting in quadriplegia or paraplegia, severe burns, or amputation. In addition, a claim must be reported when the outstanding loss reserve and payments exceed \$300,000.¹⁸

Once a claim is reported, there are various ongoing reporting requirements. In addition, insurance carriers must seek pre-approval from the MCCA for certain claims actions, including any proposed settlement agreement, the amounts to be paid for attendant care and residential care, attendant-care contracts, and agreements to modify a residence or vehicle. This pre-approval extends to agreements to arbitrate, or any other binding alternative-dispute-resolution agreement. A failure to seek pre-approval or report as required can result in the MCCA's refusal to provide reimbursement for some or all benefits paid.¹⁹

Other Insurance and Medicare

Policyholders are permitted to coordinate their no-fault policies, making health insurance and other accident insurance primary to pay benefits.²⁰ However, if the no-fault policy is not coordinated, or if the health insurance has a motor-vehicle exclusion, then no-fault insurance will pay benefits on a primary basis. In those instances, health insurance will assert a lien. Regardless of coordination, Medicare and Medicaid are always primary to PIP benefits.²¹ Therefore, if Medicare or Medicaid pays any allowable expenses, they will assert a lien.

As for release of future allowable expenses, there is no specific Medicare set aside provision relating to no-fault insurance. There is a set aside for workers-compensation benefits under 42 CFR 411.46 which is instructive. In that provision, set asides are not mandatory. Furthermore, the general rule is that medical expenses incurred after the date of a settlement are payable under Medicare, unless the settlement allocates certain amounts for specific future medical

services. This same rationale extends to liability cases in that Medicare will not assert a lien on future medical expenses in a liability case unless there is a specific allocation for future medical expenses. Thus, one could argue that the same rationale would extend to a case involving no-fault insurance.

Theoretically, if a matter were to proceed to trial with a result favorable to the plaintiff, it would only include no-fault benefits that had accrued/been incurred at that time, and would not include future benefits.

The takeaway - a settlement agreement should not make a specific allocation for future medical expenses. It is also important to note that the penalty for non-compliance would be that the claimant is precluded in whole or in part from seeking further Medicare benefits. So the risk is entirely on the claimant. While there is no reason to go against a Medicare set aside if a claimant wants to do one, there is also no reason for a no-fault carrier to insist on one as part of a settlement.

In general, the best practice is to have a release that requires the claimant to satisfy any and all liens out of the proceeds of the settlement. In the instance of a case with a release of future allowable expenses, it is common practice to require the claimant to defend, indemnify, and hold harmless the carriers as to any liens.

Certain other governmental benefits can be set off by the PIP carrier, and should be considered when evaluating potential settlement of a claim. Benefits provided or required to be provided under the laws of any state or the federal government must be subtracted from the PIP benefits otherwise payable for the injury.²² The governmental benefits may only be set off against like kind no-fault benefits.²³ This

set off applies to benefits such as Social Security disability, workers compensation, and unemployment benefits.

Providers and Assignments

PIP benefits are payable to the injured person.²⁴ However, a healthcare provider can separately claim and assert a direct cause of action for overdue and outstanding benefits. A good-faith payment by a carrier to the person it believes is entitled to the benefits discharges the carrier from liability to the extent of the payment. However, that is not the case if the carrier receives notice in writing of a claim by some other person. There are provisions for petitioning a court if there is a dispute as to who should receive payment.

These provisions can create issues when settling medical expenses with claimants. Frequently, in settlement negotiations with a claimant, the claimant provides a list of outstanding medical expenses as part of the settlement demand. If not already paid, a carrier may settle that claim with the expectation that the claimant will turn around and satisfy those charges. It has become common practice by healthcare providers to request that their patients execute an assignment of their right to pursue payment of the charges. If a carrier receives notice of that assignment, but subsequently pays or settles that charge with the claimant, there is a risk that payment will not discharge the claim. A similar situation occurs if a carrier pays or settles an expense after service of a lawsuit by the healthcare provider.

Therefore, when settling with a claimant, we require them to acknowledge that they have not executed any assignments, and to indemnify, defend, and hold harmless to the extent any claims have assignments. If the claimant knows of any assignments, they will generally insist those providers and their charges be excluded from the settlement. This language, coupled with a stated obligation that the claimant is responsible for paying medical expenses out of the proceeds helps create avenues to defer liability should an assignment come up later.

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Conclusion

Michigan PIP claims present a variety of issues that need to be evaluated on a case-by-case basis. In certain cases, the parties achieve a settlement that includes all future benefits. Other matters only include a resolution of benefits through the present because the claimant, the insurance carrier, or both did not deem it appropriate. When evaluating a possible settlement amount and proposed terms, the parties must consider the impact of priority of coverage, possible setoffs and the possible separate claims of medical providers. In addition, it's important to consider MCCA involvement, and the necessary steps for reimbursement must be taken. With this foundational knowledge, you can bring your next PIP case to a successful resolution.

Endnotes

- 1 MCL 500.3142; MCL 500.3148.
- 2 MCL 500.3105(2).
- 3 MCL 500.3105(1).
- 4 MCL 500.3142(1).
- 5 MCL 500.3107.
- 6 This is subject to collateral estoppel and res judicata issues that may prevent the re-litigation of certain issues.
- 7 MCL 500.3107(1)(a).
- 8 Only for Medicaid eligible individuals.
- 9 MCL 500.3157. *Andary v USAA*, __ Mich App __; __ NW2d __; 2022 WL 3692767 (2022), lv gtd, __ Mich __; 979 NW2d 823 (2022) found that claims with accidents occurring prior to June 11, 2019 are not subject to the fee schedule. The Michigan Supreme Court granted the defendants' application for leave to appeal and heard argument in March 2023. In addition, the Department of Insurance and Financial Services (DIFS) issued Bulletin 2021-38-INS, which excludes certain categories of allowable expenses from the fee schedule.
- 10 MCL 500.3107(1)(b).
- 11 MCL 500.3107a.
- 12 *Nawrocki v Hawkeye Security Ins Co*, 83 Mich App 135; 268 NW2d 317 (1978).
- 13 MCL 500.3107(1)(C).
- 14 MCL 500.3108.
- 15 No-fault benefits are overdue if not paid within 30 days of the receipt of proof of the fact and of the amount of loss sustained. MCL 500.3142.
- 16 MCL 500.3148.
- 17 *Lewis v Aetna Casualty Co*, 109 Mich App 136; 311 NW2d 317 (1981).
- 18 See MCCA Plan of Operation, Article 10.
- 19 See MCCA Plan of Operation, Article 10.
- 20 MCL 500.3109a.
- 21 *Varacalli v State Farm*, 763 F Supp 205 (ED Mich, 1990); *Workman v DAIIE*, 404 Mich 477; 274 NW2d 373 (1979).
- 22 MCL 500.3109.
- 23 *Jarosz v ACIA*, 418 Mich 565; 345 NW2d 563 (1984).
- 24 MCL 500.3112.

MDTC Schedule of Events



2023

Wednesday, April 12	12:00 pm – 1:00 pm	Webinar – Using Online Resources for Litigation – Zoom
Thursday, April 27	6:00 – 7:30 pm	Past Presidents Reception – Detroit Golf Club
Wednesday, May 10	12:00 pm – 1:00 pm	Webinar – Heavy Vehicle Collision Investigation and Reconstruction – Zoom
Thursday, June 15	1:00 pm – 5:30 pm	Annual Meeting & Conference – Tree Tops – Gaylord
Friday, June 16	8:00 am – 12:00 pm	
Friday, August 11		MDTC/MAJ Softball Fundraiser – Detroit
Friday, September 15	8:30 am	Golf Outing – Mystic Creek Golf Club
Friday, November 3	8:00 am – 3:30 pm	Winter Meeting – Sheraton Detroit Novi Hotel

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Thursday, June 13	1:00 pm – 5:30 pm	Annual Meeting & Conference - H Hotel – Midland
Friday, June 14	8:00 am – 12:00 pm	
Tuesday, October 10	6:00 – 8:00 pm	MTJ – Detroit Golf Club