Secrest Wardle Senior Partner Nathan J. Edmonds and Associate Alison M. Quinn have been published in the October, 2013, Volume 6, Number 4 *Journal of Insurance and Indemnity Law* on the subject of medical fee schedules in the area of no-fault law.

NO Fault: A Medical Fee Schedule is Reasonable and Necessary

By Nathan J. Edmonds and Alison M. Quinn, *Secrest Wardle*

The current legislative attempt to adopt medical fee schedules in the area of no fault law in Michigan has generated considerable controversy. Currently, no medical fee schedules exist under the Michigan No Fault Act.[1] In contrast, Michigan workers' compensation law[2] has used fee schedules for decades. Under the Michigan Worker's Disability Compensation Act, a medical provider is only allowed to receive what is allowed under the act.[3] However, under the Michigan No Fault Act, providers are allowed to charge whatever they choose, and no fault insurers must pay the "reasonable and customary" amount.[4]

The problem with the phrase "reasonable and customary" is that it is not susceptible to easy definition and understanding. It is so general that it fails to provide any workable guidelines that strike the balance of providing medical care while preventing unwarranted increases in medical costs.

Vague Criteria Lead to Excessive Reimbursements

Who determines what amounts are "reasonable and customary"? A brief answer could be it depends. It depends on who, what, whom, where, when, and how. Who is the judge and/or the jury pool. What are being charged for and who is doing the medical procedure. Where is the service being provided? When is the medical service provided and how much can the provider really expect to get? These statements, although dramatically simplified, illustrate how the multiplicity of factors can make it difficult or impossible to come up with a workable and uniform answer to what is "reasonable and customary" under current Michigan law.

Among the current proposals for reform of No-Fault is a proposal to address this concern. In a stated attempt to rein in increasing costs for medical services and thereby lower automobile premiums and curtail the burgeoning amount of no fault medical provider litigation in Michigan, the proposal is to incorporate a medical fee schedule into the Michigan no fault law, similar to the current Michigan workers' compensation medical fee schedule.

Proponents of reform point out that Michigan is the tenth most expensive state in the nation in terms of No-Fault costs. The average claim in Michigan was $44,000, whereas the next two states were $17,000 and $10,000, respectively.[5]

Under the current version of the No Fault Act, providers are permitted to charge a reasonable amount not to exceed what it "customarily charges for like products, services, and accommodations in cases not involving insurance," and the use of fee schedules is specifically prohibited.[6]

HB 4612, if enacted, would contain costs by tying reimbursement for medical services to the fees paid to reimburse Medicare and "social welfare" payments. It would restrict providers to charging no-fault insurers no more than they customarily receive for like products, services, and accommodations in cases "that do not involve personal protection insurance, the program for medical assistance for the medically indigent under the Social Welfare Act, 1939 PA 280, MCL 400.1 to 400.119b, or the Federal Medicare Program established under Title XVIII of the Social Security Act, 42 USC 1395 to 1395KKK-1."

The proposal would also place the burden of justifying fees on the provider. The proposal states that "any information needed by an insurer . . . to determine the appropriate reimbursement under this section shall be provided by the person providing the treatment or rehabilitative or occupational training." If the information is not provided or is otherwise insufficient the insurer can pay an amount based on the Workers' Compensation medical fee schedule. Many providers oppose use of a medical fee schedule with no-fault claims, but a compelling argument can be made that the change is timely and necessary.

The underlying problem is that "reasonable charge" has not been defined under statute or case law, and that has made it troublesome for both insurers and providers and has been the subject of much litigation.

This is not the first time that medical fee schedules have been proposed in Michigan. In the November 1992 and November 1994 elections, Michigan voters rejected proposals that would have enacted fee schedules for use with no fault claims.[7]

The underlying problem is that "reasonable charge" has not been defined under statute or case law, and that has made it troublesome for both insurers and providers and has been the subject of much litigation. In 2003, in his concurring opinion in *Advocacy Organization for Patients & Providers et al v Auto*

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Club Insurance Association et al,[8] Judge E. Thomas Fitzgerald of the Court of Appeals wrote separately to criticize the fact that the Michigan Legislature had not provided criteria with which to determine whether a charge was reasonable. Judge Fitzgerald "strongly recommend[ed] that legislation be enacted that required the Commissioner of Insurance to adopt medical-fee schedules . . .."[9]

Fee Schedules in Other States

Although the fee schedule issue is relatively new to Michigan, other states have used fee schedules for years, and Michigan is behind the times. Medical fee schedules have been utilized in other no-fault states for a number of years. Florida, for example, has gone through multiple statutory revisions since enacting a fee schedule for use in no-fault claims. Under the most recent revisions that took effect January 1, 2013, providers are now reimbursed for many services at 80% of 200% of the appropriate Medicare Part B schedule.[10]

New Jersey is another example. New Jersey lawmakers first enacted a fee schedule in 1990 and the statute provided that the fee schedule would "incorporate the reasonable and prevailing fees of 75% of practitioners within the region."[11] New Jersey made several changes over the years, including:

- changing the basis of the fee schedule from billed fees to actual amounts paid for services
- allowing the Department of Banking and Insurance to contract with Ingenix to determine fees paid and make fee comparisons with the Medicare Part B provider fee schedule and the New York workers' compensation and no-fault fee schedule.[12]

Similar to the proposed changes in HB 4612, New York has utilized its workers' compensation fee schedule for no-fault claims for decades, and the statute currently provides for its use "except where the insurer or arbitrator determines that unusual procedures or unique circumstances justify the excess charge."[13]

Opponents of medical fee schedules argue that HB 4612 will reduce the amount and quality of care patients receive for their accident-related injuries, and this is the core of the controversy. In our opinion, this argument is misguided. The experience in States that have used fee schedules does not provide any instances of substandard medical care. The systems in place in New York, New Jersey and Florida have operated without any complaints from the persons receiving services. And even in Michigan, the services provided under the Worker's Disability Compensation Act have not generated any complaints of substandard service.

A significant factor giving rise to the controversy is the anticipated revenue loss to medical service providers. But if the question is viewed from the perspective of public policy affecting the State as a whole, there is compelling evidence that change is needed. In fact, one study suggested that "it would cost an insurer 57 percent more to settle a claim from Michigan than it would to settle a claim from another state that involved similar crash circumstances, reported injuries, and claimant demographics."[14] A medical fee schedule would address this problem by containing costs and bringing consistency and stability to the no fault system.

Lower Benefit Caps

Michigan's benefit caps are also far out of line compared to other states. Unlike Michigan's current unlimited cap or the proposed $1 million cap on no-fault benefits under HB 4612, no fault insurers in Florida are only obligated to pay up to $10,000 in benefits per person in a motor vehicle accident. New York's limit is higher, but capped at $50,000 unless the insured purchases additional benefits. New Jersey is the closest to Michigan, and allows drivers to purchase up to $250,000 in PIP benefits. Michigan no fault coverage is a lot more generous than other states. In addition, with a medical fee schedule in place, the $1 million cap will go a lot further than it would under the current law.

"Medically Appropriate and Necessary" as a Question of Law

Another change proposed by HB 4612 is to make the determination of whether a charge is reasonable or whether a product, service, or accommodation is "medically appropriate and necessary" a question of law to be decided by the court, with the requirement that any information needed by an insurer to determine the appropriate reimbursement must be given by the provider. In regard to the growing number of direct provider lawsuits, these changes will likely reduce the amount of jury trials and disputes over what information is discoverable. On the other hand, it will be interesting to see how courts decide the issue of reasonableness. Unlike the serious impairment of a body function threshold, the statutory language does not provide for any situation where the determination is a question of fact for the jury.[15]

As with any major change in a law that affects as many people as No-Fault affects, judicial challenges are likely. But appellate decisions in other states indicate that these lawsuits will not likely succeed in defeating the use of the proposed medical fee schedule, if it is adopted.[16]

In the authors' opinion, although the enactment of HB 4612 in Michigan will undoubtedly bring challenges, the time is ripe for Michigan to join other states and enact a medical fee schedule for use in no fault claims for PIP benefits. Without a medical fee schedule, Michigan no fault insurance will continue to provide excessive compensation to medical providers to make up for shortfalls that medical providers incur from reimbursements from Medicare amounts and from treating uninsured. Moreover, fears of bankrupt or fleeing medical providers are unfounded. ■

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Endnotes

1 MCL 500.3101 *et seq.*

2 MCL 418.101 *et seq.*

3 MCL § 418.315.

4 MCL 500.3107

5 Michigan House of Representatives, Governor Snyder State of the State, 97th Legislature, January 16, 2013.

6 MCL § 500.3157 (emphasis added); Mercy Mt Clemens Hosp v Auto Club Ins Assn, 219 Mich App 46 (1996).

7 Proposal D in 1992 and Proposal C in 1994.

8 257 Mich App 365 (2003).

9 Id. at 386.

10 Fla Stat § 627.736(5)(a).

11 In re Adoption of N.J.A.C. 11:3-29 ex rel. State Dept. of Banking & Ins, 410 NJ Super 6, 15; 979 A2d 770, 775 (2009).

12 Id. at 16-19; NJ St Ann 39:6A-4.6.

13 NY Ins Law § 5108 (McKinney).

14 Heaton, Auto Insurance Reform in Michigan, What Can the Data Tell Us? (Santa Monica, Cal.: Rand, The Institute for Civil Justice 2010), p.4.

15 MCL § 500.3135(2).

16 See, e.g., In re Adoption of N.J.A.C. 11:3-29 ex rel. State Dept of Banking & Ins, supra, and Goldberg v Corcoran, 153 AD2d 113, 118; 549 NYS2d 503, 506 (1989) (holding that adoption of fee schedules in New York did not violate federal or state constitutions).

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