

## **Attorneys don't think shift in no-fault assures savings**

**Under Senate measure, PIP would be capped at \$50K, MCCA eliminated**

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BY: Douglas Levy*

Under a new Senate measure, no-fault personal injury protection benefits would be capped at \$50,000, and would eliminate unlimited lifetime benefits provided by the Michigan Catastrophic Claims Association

An newly introduced Senate bill would cap no-fault personal injury protection benefits at \$50,000 and would eliminate unlimited lifetime benefits provided by the Michigan Catastrophic Claims Association.

The measure, called the most drastic Legislative bill yet, also would dissolve the MCCA itself.

Senate Bill 251 was introduced March 7 by Sen. Virgil Smith, D-Detroit, and Sen. Joseph Hune, R-Hamburg Township. It would apply to injuries from motor vehicle accidents occurring after Dec. 31, 2013.

That date is likely intentional, as the Affordable Care Act's individual mandate takes effect Jan. 1, 2014, said Nelson Miller of The Thomas M. Cooley Law School.

He added that Smith and Hune "may take the view that with near-universal health insurance, when and if we actually get there, Michigan residents have less need for generous no-fault allowable-expense benefits. PIP benefits will then duplicate that health insurance to some extent."

Now is the best time to have this issue brought up, in that "[t]he design is to have everyone insured in this country in the next several years," said Peter Kuhnmuensch, executive director of the Insurance Institute of Michigan in Lansing.

But not everyone who practices no-fault law agrees that SB 251 is the right way to do it. And even though it could make motor vehicle insurance premiums significantly less expensive, there's no promise it will decrease insurance costs.

Some believe this is simply an opportunity for the insurers to take advantage of the fact that all three branches of state government are in Republican hands. The last time this happened was in 1995, when massive tort reform was implemented.

Indeed, in his recent State of the State address, Republican Gov. Rick Snyder put auto no-fault reform as a priority, saying that it must be taken seriously.

And others say this will hemorrhage the rehabilitation and attendant care industry in Michigan. Wayne Miller, a Southfield-based no-fault plaintiff's attorney, said that even if negotiations to SB 251 would raise the cap to, say, \$1 million, it still wouldn't be enough.

"If you have a catastrophic loss, to save a life you're talking several hundred thousand dollars of acute inpatient treatment and rehab, and the sub- and post-acute rehab and so on," he said

"By the time you get to long-term rehab, that basically *begins* at the million-dollar point. A million-dollar cap doesn't hurt the hospitals too bad, but it still kills the rehab industry."

## Looking for answers

Many are criticizing state government, saying that it's never been demonstrated what the impetus for no-fault reform efforts is.

"You hear Republicans and insurance sources say, 'The system is unsustainable,'" Miller added. "You hear that over and over again, but you see no data whatsoever.

"Yet it seems like a snowball rolling down the hill and they don't care about data; they're convinced by their talking points that the system is unsustainable and must be reformed."

Legal organizations have been looking for answers. Recent lawsuits filed by the Coalition Protecting Auto No Fault and the Brain Injury Association of Michigan have sought to have the MCCA explain how it comes up with its annual \$175 charge for each vehicle covered by a motorist's auto insurance.

In late December 2012, Ingham County Circuit Court Judge Clinton Canady III said that the MCCA must open up records related to its financial standing.

Steven Gursten, a Farmington Hills no-fault lawyer, said that if there was proof that SB 251 would lower insurance, then the debate would be valid. But he says this legislation offers no guarantee of savings.

“So we have to depend on the insurance companies to, on their own, decide to dramatically lower insurance premiums, and after [2004’s *Kreiner v. Fischer* decision on serious impairment] and third-party cases got slashed, the exact opposite happened. The payouts were reduced, case filings were reduced, and insurance rates still went up every year.”

Kuhnmuench said that the Insurance Institute’s numbers tell a different story. He said that what’s evolved in health care reimbursements in Michigan is “an unfortunate cost shift.”

“It’s an anomaly in state law that the no-fault statute that requires that [insurers] actually pay charges rather than negotiated rates to health care providers. That results in us paying three or four times the amount that you’d reimburse under a traditional health care plan.”

He says insurers have to set their prices 18 months to two years prior to knowing what their actual costs are.

“We have history to rely on but no certainty on what our underlying expenses will be,” Kuhnmuench explained. “... As long as you can guarantee me what the rate of accidents will be and what the health care inflation will be and how much litigation will occur, I’d be happy to guarantee rate reductions.”

The last time a legislative PIP measure was taken was 2011, with House Bill 4936 and SB 649. These would have let consumers choose their PIP coverage, in denominations of \$500,000, \$1 million, or \$5 million.

Joseph Mierzejewski, a Bloomfield Hills-based no-fault defense attorney, said those would have been better alternatives to SB 251, “except for the fact that, who’s going to elect to decide, ‘Oh, I’m going to be catastrophically injured, so I’d better get the heavier coverage for a higher premium’? Nobody expects that, particularly younger drivers.”

## **The litigation factor**

As for litigation in the first-party arena, Kuhnmuench said it will happen, but not enough to hamper SB 251’s efforts.

He said that in a recent study the Insurance Institute did on cost savings, it was discovered that 94 percent of personal injury claims from auto accidents resulted in claims that were less than \$50,000; the average claim, he said, was approximately \$4,000.

“So you’re talking a potential increase on litigation of 6 percent of the claims, and yes, if you cap the benefits, there will those circumstances where the injured parties’ reimbursable expenses exceed the \$50,000,” he said. “But in our view, it’s a de minimus amount, and the cost savings more than offset the increase in litigation costs.”

He added that there are other forms of insurance many Michigan residents have, such as private health insurance, military insurance, federal health care, or Medicare coverage to handle the uncompensated care.

“And certainly the tort system is there to remediate those who are not at fault,” he added.

But Gursten said that the tort system was exactly the reason why Michigan adopted the No-Fault Act in the first place — to unclog the courts of small, unnecessary lawsuits that arise from auto accidents, and giving every insured equal PIP benefits.

Smith — who, along with Hune, did not return *Michigan Lawyers Weekly’s* calls seeking comment on the bill — had said he wanted to reduce insurance rates for Detroit residents.

But Mierzejewski said it’s vehicle thefts, not no-fault actions, that really drive up the price of insurance there. Gursten added that in Detroit, more than half of the drivers don’t even *have* insurance.

Thomas Azoni, a Troy-based no-fault defense attorney, said he also wants such litigation to be prevented.

“Would it surprise me to find inventive plaintiff’s attorneys filing lawsuits to gain medical benefits under this system? No, it wouldn’t surprise me,” he said.

Wayne Miller said this provision wouldn’t eliminate third-party liability claims (on noneconomic damages), but he added that a lot of attorneys won’t be able to build their cases as much because the ability to develop the medical will now be limited by a \$50,000 cap.

“That’s one of the things lawyers are doing now, is using the no-fault to build the third-party side of the case,” he said.

## **Negotiations imminent**

Miller added that there are better ways of reducing insurance costs than what SB 251, in its introduced form, would provide.

One of the things that makes insurance high is the amount of collision and comprehensive insurance coverage, he explained. That could be curbed by increasing one’s deductible or canceling insurance altogether on older vehicles.

Azoni said the best solution is cost containment via fee schedule consistent with workers’ comp or some other system that takes an average of different insurance companies’ payment schedules.

While Kuhnmuench didn't say that he sees the bill dying much like the 2011 selective-coverage bills, he predicts a steep uphill climb, and that it's good see the debate has been jump-started.

Azoni agreed, adding that with the opening salvo for legislative negotiations having been sounded, it can only get better.

"While this bill has a low chance of passing on its own, ultimately, if reasonable minds prevail, there will be a basket of reforms that provide the insurance industry with cost containment while, at the same time, providing injured auto accident victims with a reasonable array of medical benefits available to them after an accident," he said.

"It's there to be had; they just need to sit down and work it out."

One thing that *does* need to be worked out, according to George Sinas, a Lansing attorney and general counsel for CPAN, is bill language he finds troubling.

In subsection 23 of Sec. 3104, the bill reads: "The [MCCA] shall continue in existence until all liabilities due to loss occurrences for which it has liability under subsection (22) are paid. On payment of the final liability, the board shall notify the commissioner, wind up the affairs of the association, transmit any remaining money held by the association *to its members* in a manner provided for in the plan of operation, and dissolve the association" [emphasis added].

The MCCA has approximately \$14 billion in its bank account, he said.

"How much of that \$14 billion is going to be left, or will it be way more than \$14 billion, because, say, the stock market is improving?" he said. "And why is it going to the insurance companies?"

"This thing, the way it's written, could be one of the biggest cash grabs for insurance companies. Why isn't it coming back to the people?"

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## **Senate Bill 251**

**SB 251** — To establish a maximum for medical and hospital expenses under personal protection insurance

A bill to amend 1956 PA 218, "The Insurance Code of 1956," by amending sections 3104 and 3107 (MCL 500.3104, 500.3107)

Sec. 3104: "... The [Michigan Catastrophic Claims Association] does not have liability for losses occurring before July 1, 1978 or for losses under motor vehicle accident policies issued or renewed after December 31, 2013.

"The association shall continue in existence until all liabilities due to loss occurrences for which it has liability under subsection (22) are paid. On payment of the final liability, the board shall notify the commissioner, wind up the affairs of the association, transmit any remaining money held by the association to its members in a manner provided for in the plan of operation, and dissolve the association. ..."

Sec. 3107. "Except as otherwise provided in this section, personal protection insurance benefits are payable for the following:

"(a) For loss occurrences under motor vehicle accident policies issued or renewed before January 1, 2014, allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. For loss occurrences under motor vehicle accident policies issued or renewed after December 31, 2013, personal protection benefits are payable for allowable expenses consisting of all reasonable charges incurred up to a maximum of \$50,000.00 for reasonably necessary products, services, and accommodations for an injured person's care, recovery, or rehabilitation. ..."

*Sponsored by Virgil Smith and Joseph Hune*

*Referred to Committee on Insurance*