STATE OF MICHIGAN
MI Supreme Court

Proof of Service

Case Title:	Case Number:
ELLEN M ANDARY V USAA CASUALTY INSURANCE COMPANY	164772

1. Title(s) of the document(s) served:

Filing Type	Document Title
Brief	CPAN Supreme Court Amicus Brief

2. On 02-06-2023, I served the document(s) described above on:

Recipient	Address	Type
Charles Raimi City of Detroit Law Department 29746	raimic@detroitmi.gov	e-Serve
Peter Ellsworth Dickinson Wright PLLC P23657	pellsworth@dickinsonwright.com	e-Serve
Kriss Gillengerten Sinas Dramis Law Firm	krissgillengerten@sinasdramis.com	e-Serve
Mary Massaron Plunkett Cooney P43885	MMASSARON@PLUNKETTCOONEY.COM	e-Serve
Lauren Kissel Sinas Dramis Law Firm 82971	lauren@sinasdramis.com	e-Serve
Jordan Wiener Hewson & Van Hellemont, P.C. P70956	jwiener@vanhewpc.com	e-Serve
Jeffery Stuckey Dickinson Wright PLLC 34648	JStuckey@dickinsonwright.com	e-Serve
Jacquelyn A. Klima Kerr, Russell and Weber, PLC P69403	jklima@kerr-russell.com	e-Serve
Miriam Aukerman American Civil Liberties Union of Michigan P63165	maukerman@aclumich.org	e-Serve
Nancy Thomas Miller Canfield	thomasn@millercanfield.com	e-Serve
Christopher Kerr Michigan Department of Attorney General P57131	kerrc2@michigan.gov	e-Serve
Thomas Cranmer Miller Canfield Paddock & Stone, PLC P25252	Cranmer@millercanfield.com	e-Serve

RECEIVED by MSC 2/6/2023 5:20:51 PM

Stephen Hulst RMPC 70257	sjhulst@rhoadesmckee.com	e-Serve
Liisa Speaker Speaker Law Firm P65728	lspeaker@speakerlaw.com	e-Serve
Paul Hudson Miller Canfield 69844	hudson@millercanfield.com	e-Serve
Kyle Williams Disability Rights Michigan P77227	kwilliams@drmich.org	e-Serve
Latisha DeRouin	tish@granzottolaw.com	e-Serve
Courtney Kissel Dykema 74179	ckissel@dykema.com	e-Serve
Steven Hicks Attorney at Law P49966	steve@chair2consulting.com	e-Serve
Marla Linderman Richelew Linderman Law PLLC 55759	lindermanlaw@sbcglobal.net	e-Serve
Nicholas Gable Disability Rights Michigan P79069	ngable@drmich.org	e-Serve
Peggy McGregor Mark Granzotto, PC	pm@granzottolaw.com	e-Serve
George Sinas Sinas Dramis Law Firm P25643	georgesinas@sinasdramis.com	e-Serve
Mark Granzotto Mark Granzotto, PC 31492	mg@granzottolaw.com	e-Serve
Lisa Gore American Civil Liberties Union of Michigan	lgore@aclumich.org	e-Serve
Jill Wheaton Dykema 49921	jwheaton@dykema.com	e-Serve
KJ Miller Michigan Catastrophic Claims Association P62014	kjmiller@micatastrophic.com	e-Serve
Ryan Shannon Dickinson Wright PLLC P74535	rshannon@dickinsonwright.com	e-Serve
Stephen Sinas Sinas Dramis Law Firm P71039	stevesinas@sinasdramis.com	e-Serve
Joanne Geha Swanson Kerr, Russell and Weber, PLC 33594	jswanson@kerr-russell.com	e-Serve
Michelle Everett	meverett@vgpclaw.com	e-Serve

RECEIVED by MSC 2/6/2023 5:20:51 PM

Vandeveer Garzia 76943		
Donald Brownell Vandeveer Garzia P48848	dbrownell@vgpclaw.com	e-Serve
Lori McAllister Dykema 39501	lmcallister@dykema.com	e-Serve
Taylor Pan Hewson & Van Hellemont P75350	tpan@vanhewpc.com	e-Serve
Wayne Miller Miller & Tischler, P.C. 31112	wmiller@msapc.net	e-Serve
Daniel Korobkin American Civil Liberties Union Fund of Michigan P72842	DKOROBKIN@ACLUMICH.ORG	e-Serve
Sajid Islam Vandeveer Garzia P81829	sislam@vgpclaw.com	e-Serve
Kathryn Haroney ACLU of Michigan	kharoney@aclumich.org	e-Serve

This proof of service was automatically created, submitted and signed on my behalf through my agreements with MiFILE and its contents are true to the best of my information, knowledge, and belief.

02-06-2023
Date

/s/ Cynthia Villeneuve
Signature

Kerr, Russell and Weber, PLC

RECEIVED by MSC 2/6/2023 5:20:51 PM

RECEIVED by MSC 2/6/2023 5:20:51 PM

STATE OF MICHIGAN

IN THE SUPREME COURT

ELLEN M. ANDARY, a legally incapacitated adult, by and through her Guardian and Conservator, MICHAEL T. ANDARY, M.D., PHILIP KRUEGER, a legally incapacitated adult, by and through his Guardian, RONALD KRUEGER & MORIAH, INC., d/b/a/ EISENHOWER CENTER, a Michigan corporation,

Plaintiffs-Appellees,

v.

USAA CASUALTY INSURANCE COMPANY, a foreign corporation, and CITIZENS INSURANCE COMPANY OF AMERICA, a Michigan Corporation,

Defendants-Appellants.

Supreme Court Case No.164772

Court of Appeals Case No. 356487

Ingham County Circuit Court
Case No. 19-738-CZ

BRIEF OF AMICUS CURIAE CPAN
IN SUPPORT OF
AFFIRMANCE OF THE COURT OF APPEALS DECISION

KERR, RUSSELL AND WEBER, PLC
Joanne Geha Swanson (P33594)
Attorney for Amicus Curiae CPAN
500 Woodward Avenue, Suite 2500
Detroit, MI 48226-3427
(313) 961-0200; FAX (313) 961-0388
E-mail: jswanson@kerr-russell.com

RECEIVED by MSC 2/6/2023 5:20:51 PM

TABLE OF CONTENTS

INDEX OF AUTHORITIES ii

STATEMENT OF QUESTIONS PRESENTED 1

STATEMENT OF INTEREST OF AMICUS CURIAE 1

INTRODUCTION 2

ARGUMENT 7

I. The *Andary* Majority Correctly Held that the Provider Fee Caps and Family Care Cap do not Apply to Insureds Who Were Injured Before the Effective Date of the No-Fault Amendments. 7

A. Defendants' Argument That the Majority's Decision Undermines the Legislature's Cost Savings Objective is a Political Statement, Lacks Evidentiary Support, and Should Not be Considered by this Court. 8

B. The *Andary* Majority Correctly Held That Applying the Amendments to Insureds Who Were Injured Before the Amendments Took Effect is Retroactive Application. 14

C. The *Andary* Majority Correctly Held That 2019 PA 21 does not Express an Intent That MCL 3157(7) and (10) Apply Retroactively. 20

D. The *Andary* Majority Correctly Held that Plaintiffs Possess Contractual Rights and Under *LaFontaine*, Plaintiffs' Policies are Governed by the No-Fault Act in Effect at the Time They Were Purchased. 25

II. The *Andary* Majority Properly Concluded That Retroactive Application of the Amendments Violates the Contracts Clause of the Michigan and U.S. Constitutions. 28

A. Retroactive Application Violates the Contracts Clause. 29

1. The Amendments Impair Existing Policy Obligations and Expectations. 30

2. The Impairment of Existing Policy Obligations and Expectations is not Necessary to the Goal of Decreasing Future Policy Premiums. 32

3. The Chosen Means are not Reasonable and Have Caused Thousands of Legacy Insureds Substantial Suffering and Loss of Care. 33

4. The Requirements for Finding a Contracts Clause Violation Have Been Satisfied. 36

B. Cases From Other States Recognize a Contract Clause Violation When Statutes Purport to Alter Existing Insurance Policies. 36

III. The *Andary* Majority Properly Remanded the Due Process and Equal Protection Claims to the Trial Court for Discovery. 40

RELIEF REQUESTED 41

RECEIVED by MSC 2/6/2023 5:20:51 PM

INDEX OF AUTHORITIES

Cases

AFT Mich v State (On Remand),
315 Mich App 602; 893 NW2d 901 (2016) 32

AFT Michigan v State of Michigan,
501 Mich 939; 904 NW2d 417 (2017) 30

Aguirre v State of Michigan,
315 Mich App 706; 891 NW2d 516 (2016) 29

Allstate Ins Co v Garrett,
550 So 2d 22 (Fla Dist Ct App, 1989) 36, 37

Andary v USAA,
Mich App ; NW2d (2022), 2022 WL 3692767 .... passim

Borman LLC v 18718 Borman, LLC,
777 F3d 816 (6th Cir 2015) 29

Buhl v Oak Park,
507 Mich 236; 968 NW2d 348 (2021) 14, 15, 20, 21

Clevenger v Allstate Ins Co,
443 Mich 646; 505 NW2d 553 (1993) 16

Covenant Med Ctr, Inc v State Farm Mut Automobile Ins Co,
500 Mich 191; 895 NW2d 490 (2017) 19

Derderian v. Genesys Health Care Systems,
263 Mich App 364; 689 NW2d 145 (2004) 9

Douglas v Allstate Ins Co,
492 Mich 241; 821 NW2d 472 (2012) 18

Farmers' Co-Op Creamery Co v Iowa State Ins Co,
84 NW 904 (Iowa, 1900) 37, 40

Frank W Lynch & Co v Flex Technologies, Inc,
463 Mich 578; 624 NW2d 180 (2001) 20, 21

Harleysville Mut Ins Co v State,
401 SC 15; 736 SE2d 651 (2012) 36, 37, 38

Hofmann v Auto Club Ins Ass'n,
211 Mich App 55; 535 NW2d 529(1995) 18

In re Certified Question,
447 Mich 765; 527 NW2d 468 (1994).. 28, 29

In re George L. Nadell & Co,
294 Mich 150; 292 NW 684 (1940).. 9

In re Workers' Comp Refund,
46 F3d 813 (CA 8, 1995).. 36, 39

Johnson v Michigan Mutual Ins Co,
180 Mich App 314; 446 NW2d 899 (1989).. 18

Kee v Shelter Ins,
852 SW2d 226 (Tenn, 1993).. 37, 39

Kirven v Cent States Health,
409 SC 30; 760 SE2d 794 (2014).. 36, 38

LaFontaine v Saline, Inc v Chrysler Group, LLC,
496 Mich 26; 852 NW2d 78 (2014).. 14, 16, 25, 26

Lahti v Fosterling,
357 Mich 578; 99 NW2d 490 (1959).. 27

Landgraf v USI Film Products,
511 US 244; 114 S Ct 1522; 128 L Ed 2d 229 (1994).. 21

Mercy Mt Clemons Corp v Auto Club Ins Ass 'n,
219 Mich App 46; 555 NW2d 871 (1996).. 19

Munson Medical Center v Auto Club Ass'n,
218 Mich App 375; 554 NW2d 49 (1996).. 19

Natl Ed Assn-Rhode Island by Scigulinsky v Ret Bd of Rhode Island Employees' Ret Sys,
890 F Supp 1143 (D RI, 1995).. 30

People v Snider,
239 Mich App 393; 608 NW2d 502 (2000).. 9

Proudfoot v State Farm Mut Ins Co,
469 Mich 476; 673 NW2d 739 (2003).. 15

Prudential Prop & Cas Ins Co v Scott,
161 Ill App 3d 372; 514 NE2d 595 (1987).. 36, 37

Rohlman v Hawkeye-Security Ins Co,
442 Mich 520; 502 NW2d 310 (1993).. 17

RECEIVED by MSC 2/6/2023 5:20:51 PM

Romein v Gen Motors Corp,
436 Mich 515; 462 NW2d 555 (1990).. 27

Sharp v Preferred Risk Mutual Ins Co,
142 Mich App 499; 370 NW2d 619 (1985).. 18

Shavers v Kelley,
402 Mich 554; 267 NW2d 72, 79 (1978).. 40, 41

Sims v Sims,
298 Mich 491; 299 NW 158 (1941).. 9

Van Marter v American Fidelity Fire Ins Co,
114 Mich App 171; 318 NW2d 679 (1982).. 18

Ward v Dixie Nat'l Life Ins Co,
595 F3d 164 (4th Cir 2010) 29

Statutes

MCL 500.2111f.. 24

MCL 500.2111f(8).. 24

MCL 500.3104(7)(d).. 5

MCL 500.3107(1)(a).. 16, 26

MCL 500.3107c 10

MCL 500.3110(4) 15

MCL 500.3113(c) 10

MCL 500.3157(7) 7, 10, 23, 24

MCL 500.3157(10) 7, 10, 23

MCL 500.3157(14) 24

MCL 500.3157a 10, 34

MCL 500.3172(7) 10

MCL 500.3181 10

MCL 500.6301 .... 11, 34

RECEIVED by MSC 2/6/2023 5:20:51 PM

Other Authorities

G. Sidney Buchanan, *A VERY RATIONAL COURT*,
30 Hous L Rev 1509 (1993).. 30

R. Randall Kelso, *CONSIDERATIONS OF LEGISLATIVE FIT* ...,
28 U Rich L Rev 1279 (1994).. 30

Rules

MCR 2.116(C)(8).. 5, 8

MCR 7.312(H)(3) 1

Constitutional Provisions

Const 1963, art 1, § 10 28

U.S. Const, art I, § 10.. 28

RECEIVED by MSC 2/6/2023 5:20:51 PM

STATEMENT OF QUESTIONS PRESENTED

The questions identified in this Court's September 29, 2022 Order are whether the majority decision in *Andary v USAA*, Mich App ; NW2d (2022), 2022 WL 3692767, correctly held that (1) claimants injured before the effective date of 2019 Public Act 21 are not subject to the limitations on benefits set forth in MCL 500.3157(7) [the weekly cap on family-provided attendant care] and MCL 500.3157(10) [the provider fee caps], imposed by the 2019 amendments to the Michigan No-Fault Act; (2) that application of the amended statute to such claimants would violate the Contracts Clause of the Michigan Constitution, Const 1963, art 1, § 10; and (3) that the case should be remanded to the Circuit Court for discovery to determine whether the No-Fault amendments, even when applied only prospectively, pass constitutional muster.

STATEMENT OF INTEREST OF AMICUS CURIAE [1]

CPAN was founded in 2003 by 26 professional associations to advance their strongly held belief that it was in the public interest to preserve Michigan's model No-Fault insurance system and to ensure that the auto insurance industry kept the promise made to Michigan citizens when the No-Fault Act was passed. The original members consisted of 15 major medical groups and 11 consumer groups, representing constituencies with widely divergent political views. Despite their differences, these associations united behind the common objective of protecting the rights of No-Fault patients and providers. In 2009, CPAN opened membership to the general public and its members now includes consumers, individual professionals, and private businesses, as well as professional organizations.

---

[1] Pursuant to MCR 7.312(H)(4), CPAN states that neither party's counsel authored this brief in whole or in part. CPAN further states that none of the parties or their counsel contributed money that was intended to fund the preparation or submission of the brief and that no person other than CPAN and its members made such a monetary contribution.

RECEIVED by MSC 2/6/2023 5:20:51 PM

RECEIVED by MSC 2/6/2023 5:20:51 PM

CPAN has over 700 members, including the Michigan State Medical Society, Michigan Osteopathic Association, Michigan Association of Chiropractors, Michigan Brain Injury Provider Council, Michigan Dental Association, Michigan Home Care and Hospice Association, Michigan Rehabilitation Association, Spectrum Health Continuing Care System, Michigan Assisted Living Association, Michigan Orthotics and Prosthetics Association, Brain Injury Association of Michigan, ATPA Michigan, Michigan Association for Justice, Michigan Protection and Advocacy, Michigan Paralyzed Veterans of America, Michigan Disability Rights Coalition, and other stakeholders, individuals, accident survivors, family members, and care providers.

CPAN, which until 2019 was known as The Coalition Protecting Auto No-Fault, has been a focal point for No-Fault issues since its inception. CPAN proceeds on all fronts in furtherance of its mission, including public education (town halls, roundtable events, seminars, and information resources), working with the Legislature, monitoring regulatory activity, and advocating the views of its members in our appellate courts. CPAN has appeared as amicus curiae in approximately 43 cases addressing a variety of No-Fault issues of interest to its members. See CPAN Amicus Activity Summary, https://protectnofault.org/legal-efforts (accessed February 6, 2023). CPAN was permitted to submit an amicus curiae brief when this case was pending in the Ingham County Circuit Court and the Michigan Court of Appeals and appreciates the opportunity to express its views to this Court.

INTRODUCTION

It has been said that "the true measure of any society can be found in how it treats its most vulnerable members."[2] When there is a lack of respect for their humanity and dignity, there is

---

[2] This quote has been attributed to Mahatma Gandhi but there are other iterations as well. For example, Hubert Humphrey is quoted as saying, "The moral test of government is how that government treats those who are in the dawn of life, the children; those who are in the twilight of

likewise disregard for the extent of their suffering. And so, nowhere in Defendants' brief will you find any acknowledgement that those who have endured the brunt of Defendants' decision to retroactively apply the family care cap and provider fee caps to "legacy insureds" are not "a small group of health care providers" with "a loud voice," but many thousands[3] of catastrophically injured people who have hardly a voice at all.[4]

Like Mrs. Andary and Mr. Krueger, these legacy insureds were tragically injured in automobile accidents many years ago and have been wholly dependent upon health care providers and caregivers ever since. These are not people intent on defrauding the system. Rest assured, they would give *anything* if they could have their former lives back, as would the family members who have set aside their own career goals to help their loved ones find value in the lives they now have. Any one of us could be in their shoes, which makes so very shocking the callous disdain that Defendants exhibit when, for example, they refer to these catastrophically injured people as "*cash*

---

life, the elderly; those who are in the shadows of life, the sick, the needy and the handicapped." https://www.britannica.com/quotes/Hubert-Humphrey (accessed February 6, 2023).

[3] The MCCA website now reflects 16,880 open claims involving catastrophic injury. http://michigancatastrophic.com/Consumer-Information/Claim-Statistics (accessed February 1, 2023). Those whose injuries were sustained before the No-Fault amendments took effect are referred to here as the "legacy insureds."

[4] See Defs' Br at 1, stating that the decision of the *Andary* majority "benefitted a small group of health care providers – albeit a group that has a loud voice …"

RECEIVED by MSC 2/6/2023 5:20:51 PM

cows,"[5] "*big business*,"[6] and "*a significant cost* for insurers and the MCCA."[7] And that is, in fact, what this is all about: Defendants seek to shirk their vested obligations to provide for the care, recovery, and rehabilitation of their legacy insureds at the level promised and undertaken when their insureds were injured. In amending the No-Fault Act, the Legislature knew that was not permissible and expressed no intent whatsoever to apply these amendments retroactively to pre-amendment accidents, which explains why Defendants have had to present the wildly contorted and flailing legal analysis that was properly rejected by the *Andary* majority.

In this Court, Defendants resort to political innuendo, characterizing the cost of treating their legacy insureds as the reason for increased auto premiums and offensively "otherizing" them in this farcical tug-of-war. The majority "*found for the few*, *at the cost of the many*." Defs Br. at 5 (emphasis added). "[S]o providers can be paid more for services provided for *certain claimants*, all drivers must go back to paying more." *Id*. at 5 (emphasis added). "Because the cost of charges for *these persons* will go back up, premiums will go back up, upending the point of the reform." *Id*. at 5 (emphasis added). "The Court of Appeals' decision … largely eliminated the savings that would have been passed on to the driving public," and "ignored the interests of the millions of less vocal Michigan citizens who appreciated the reforms." *Id*. at 43, 1.

---

5 See Defs' Br at 3, stating that "many health care providers" were so "[u]nhappy they could no longer count on auto accident victims to be cash cows, they threatened to stop caring for such patients."

6 See Defs' Br at 5, referring to the care of persons injured in pre-amendment accidents as "big business for providers."

7 See Defs' Br at 5. The full sentence states, "By reading these amendments out of existence for the small group of persons injured in pre-amendment accidents, but the care of whom may be big business for providers and a significant cost for insurers and the MCCA, the majority found for the few, at the cost of the many."

RECEIVED by MSC 2/6/2023 5:20:51 PM

Nothing in the record supports this divisive rhetoric. Defendants, in moving for summary disposition under MCR 2.116(C)(8), deemed supportive evidentiary facts unnecessary. Their naked allegations are doubtful for several reasons discussed *infra*. Among them is the fact that PA 21 includes other "cost-saving" provisions that are unaffected by the prohibition against applying the provider fee caps and family care cap to legacy insureds. Further, PA 21 includes measures that are specifically designed to address the alleged fraud and overcharges that, Defendants say, have increased costs. While even that assertion lacks a record in this Court, if such was needed, such provisions are targeted to reduce spending using a scalpel instead of a hatchet.

Defendants disregard the effect of these other cost-saving provisions. They insist that premium reductions depend upon the applicability of the provider fee caps and family care cap to pre-amendment accidents (the legacy insureds), stating that the *Andary* majority has "strip[ed] away much of the cost savings meant to pay for the mandatory discounts drivers have been receiving…" Defs Br at 39, n 22. But actuarially, one must wonder why. The legacy insureds paid premiums years ago that were calculated and priced to provide lifetime benefits for catastrophic injury. That is the purpose of the premium MCCA assesses against its member insurers, who pass the cost on to their insureds as a per vehicle MCCA charge. By statute, the assessed premium must be in an amount that is sufficient to cover the lifetime claims of all persons expected to be catastrophically injured in that year. See e.g., MCL 500.3104(7)(d). As MCCA itself says, "The law requires the MCCA to assess an amount that is sufficient to cover the lifetime claims of all persons expected to be catastrophically injured in that year." Assessment Data, https://www.michigancatastrophic.com/Consumer-Information/Assessment-Data- (accessed

RECEIVED by MSC 2/6/2023 5:20:51 PM

February 6, 2023).[8] Thus, the cost of benefits for the legacy insureds was calculated at the level promised when their accidents occurred and was (or should have been) reserved at that time.

It is tragic that years and decades later, Defendants are using 2019 PA 21 to walk back the very bargain that enabled these tragically injured people to reassemble their lives with a measure of dignity and value. Defendants do not acknowledge the hardship these most vulnerable individuals have endured as they struggle with the loss of care they thought their No-Fault policies had secured. The plight of some of these legacy insureds is described in detail in the Amicus Brief of Andrew Phelps et al. Their health care providers have a story to tell as well, many of whom have been forced to terminate their services and, in some cases, close down their businesses because of the unsustainable provider fee caps. See the Order Granting Plaintiff's Emergency Motion for Preliminary Injunction in *Gedda v State Farm*, Washtenaw County Circuit Court Case No. 22-152-NF, where Judge Archie Brown opined that "[t]he legislature did not intend that high-tech health care providers be paid at the same rate as a teenager working in the fast-food industry," Phelps Amicus Br., Exhibit 5, and the affidavits of nurse case managers attached to the Phelps Amicus Br, which demonstrate how the provider fee caps have resulted in the unavailability of qualified providers to accept auto accident victims.[9]

---

[8] The website also states that the "assessments provide the funds for the indemnification of those members against ultimate loss sustained under statutory required personal protection insurance in excess of the applicable amount set forth in section 3104(2) of the Michigan Insurance Code… For the period July 1, 2021 through June 30, 2023, the member retention level is $600,000." After an insurer's payments reach that level, the insurer is reimbursed by the MCCA.

[9] For example, the affidavit of Mercedes Bailey, RN, CCM, filed in the *Gedda* case, recites that Stephen Gedda's current care provider "has indicated that it cannot financially continue to provide the care Stephen needs due to a lack of payment by Stephen's auto insurer…," that she has unsuccessfully attempted to find other care providers able to care for Stephen's complex care needs, but those providers "either will not work with auto insurers like State Farm due to payment issues and/or they do not have sufficient staff to cover the type of care Stephen needs." Phelps Amicus Br, Exhibit 6.

RECEIVED by MSC 2/6/2023 5:20:51 PM

Defendants seek to convince this Court that "[t]he Legislature, acting to save the No-Fault system and decrease costs to Michigan drivers, *balanced the interests of all parties*, and made these reforms in a legally permissible way …" Defs Br. at 5 (emphasis added). But where in that *balance* lies the *interests* of the legacy insureds if the cost savings required for premium reductions can only be achieved by slashing their benefits, disrupting their care, and creating immense anxiety and uncertainty in their already difficult lives? This "balance" might be fine with Defendants, but it is clearly ***not*** what the Legislature intended, and, if it was the Legislature's intent, it would be constitutionally impermissible. There is no error in the *Andary* decision. This Court should affirm.

ARGUMENT

I. The *Andary* Majority Correctly Held that the Provider Fee Caps and Family Care Cap do not Apply to Insureds Who Were Injured Before the Effective Date of the No-Fault Amendments.

This appeal involves the retroactive application of certain provisions of 2019 PA 21, which amended the Michigan No-Fault Act effective June 11, 2019. MCL 500.3157(7) caps a health care provider's reimbursement for services not covered by Medicare to 55% of the provider's charges as of January 1, 2019. MCL 500.3157(10) caps at 56 hours, the weekly attendant care that can be provided by family members or persons who have a social or business relationship with the insured. Defendants say these amendments were enacted to cut costs and lower auto insurance premiums but the savings will now not be achieved due to the decision in this case. *Andary v USAA*, Mich App ; NW2d (2022), 2022 WL 3692767.

Rejecting each argument Defendants concocted to take advantage of the amendments and be relieved of their pre-amendment obligations, the *Andary* majority held that the amendments cannot be applied to persons injured before the effective date of the Act. In a thorough and thoughtfully analyzed decision, the *Andary* majority concluded the following:

RECEIVED by MSC 2/6/2023 5:20:51 PM

RECEIVED by MSC 2/6/2023 5:20:51 PM

- Applying the amendments to legacy insureds cannot be characterized as prospective simply because benefits are not payable until services are rendered. The determinative question is when the right to benefits vested, not when the services provided pursuant to those benefits were rendered.

- The Legislature did not express an intent to apply the amendments retroactively and the statutory language Defendants rely upon is unavailing.

- Plaintiffs have contractual rights under the No-Fault policies and are not merely seeking statutory benefits that are subject to legislative change.

- The policies incorporated the No-Fault Act as it existed when the policies were issued.

- Retroactive application of the amendments violates the constitutional guarantee against the impairment of contracts.

There is no error in the *Andary* decision. This Court should affirm.

A. Defendants' Argument That the Majority's Decision Undermines the Legislature's Cost Savings Objective is a Political Statement, Lacks Evidentiary Support, and Should Not be Considered by this Court.

In reaching the above conclusions, the *Andary* majority turned a blind eye to the political context surrounding this case although even today, Defendants insist upon drawing battle lines between "the millions" and "the few,"[10] those who gain and those who lose, and Michigan drivers and auto accident victims.[11] Such divisive rhetoric is unavailing in this forum where the Court's singular loyalty is to the rule of law. Defendants' speculation as to how the *Andary* decision will affect the Legislature's "cost savings" objective is inherently political and improper. In moving for summary disposition under MCR 2.116(C)(8), Defendants chose to proceed without discovery and without a record. Now, lacking evidence, Defendants want this Court to give weight to mere allegations. That is impermissible. This Court does not go outside the printed record in search of

---

[10] See Defs Br. at 1.

[11] See e.g., Defs Br. at 39, n 22 (stating that the *Andary* majority "narrowly benefit[s] a small group of claimants … to the detriment" of others.

necessary evidence the proponent did not provide. *In re George L. Nadell & Co*, 294 Mich 150; 292 NW 684 (1940). As this Court explained in *Sims v Sims*, 298 Mich 491, 496; 299 NW 158 (1941), "in considering this case on appeal, we are confined to the record and cannot consider facts not appearing from the record."

In fact, Defendants have forfeited any argument which depends upon their "cost savings" allegations. In *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000), the Court of Appeals concluded that "[defendant] took no steps to develop a testimonial record in support of his claim that his counsel was ineffective and therefore *largely forfeited it*" (emphasis added). Similarly, in *Derderian v. Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004), the court held that the trial court properly dismissed plaintiffs' claim for tortious interference with hospital or group practice contracts where plaintiffs failed to produce evidence of contracts with such entities.

Here, there is no record as to whether premiums will be reduced if the provider fee caps and family care cap are applied to legacy insureds because Defendants did not want to create a record and successfully opposed Plaintiffs' insistence that such a record was necessary. Absent an evidentiary record, allegations that "cost savings" will not be achieved if *Andary* is affirmed are unsupported and should not be considered.

There is reason to doubt, in any event, the veracity of Defendants' hyperbolic cost savings allegations. *First*, that the MCCA "sen[t] refunds to Michigan drivers" and "announced" that "its costs went down as a result of the caps" does not mean that the amendments sought to be applied to the legacy insureds "resulted in immediate savings." Defs' Br. at 3. The $400 check each auto owner received came from the surplus of MCCA funds that had been reserved to pay for the legacy

RECEIVED by MSC 2/6/2023 5:20:51 PM

insureds.[12] Certainly, if there *was* any evidence of cost savings directly *traceable* to the application of the family care and provider fee caps to the legacy insureds, it would have been clearly and specifically described by Defendants. Nothing of the sort has been provided.

Second, other rate-reducing features of 2019 PA 21 are completely unaffected by the *Andary* decision. The principal issue before this Court is discrete, relating to whether the family care and provider fee caps in MCL 500.3157(7) and (10) can be retroactively applied to legacy insureds who were injured before the amendments took effect. *Andary* remanded *but did not decide* whether these amendments could be constitutionally applied *prospectively*. That issue is now for the Trial Court to decide in the first instance.

Likewise, *Andary* has no effect on other features of 2019 PA 21 that are intended to reduce premiums. These provisions include:

- MCL 500.3107c (allowing individuals to opt out of PIP benefits if they have health coverage or to choose among various PIP benefit limits);
- MCL 500.3172(7) (limiting the benefits payable under the Michigan Assigned Claims Plan to $250,000, absent applicable exception);
- MCL 500.3113(c) (restricting the eligibility of out-of-state residents to claim no-fault benefits);
- MCL 500.3157a (creating a utilization review process for challenging providers' treatment and charges);
- MCL 500.3181 (allowing managed care policies);

[12] It is unlikely Michigan drivers would have wanted a $400 check had they understood it would later be touted as a refund achieved by depriving the catastrophically injured insureds of the life-sustaining care that had enabled them to survive their tragic accidents and devastating injuries. As for the $48 per auto surcharge that MCCA says will be charged beginning July 1 to replenish the fund, it is likely that the good people of the State of Michigan will say, "here, take it." As Judge George Jay Quist wrote in *O'Keefe v State Farm*, Kent County Circuit Court Case No. 22-05555-NF, "The public has a clear interest in ensuring the most vulnerable in our society receive the care they need." Phelps Amicus Br, Exhibit 9.

RECEIVED by MSC 2/6/2023 5:20:51 PM

- MCL 500.6301 (creating an anti-fraud unit as a criminal justice agency within the DIFS to investigate criminal and fraudulent activities).

Third, how the family care cap could actually reduce attendant care costs is enigmatic. The cap does not mean that the prescribed hours of care are unnecessary, and it does not override the level of care prescribed by the insured's health care provider. The cap only means that attendant care in excess of 56 hours per week cannot be provided by family members. Insureds must instead use less effective care administered by a revolving door of ever-changing caregivers at more expensive agency rates. How will this result in a savings?

Fourth, as explained above, the cost of unlimited lifetime benefits to legacy insureds has already been actuarially figured into the premiums that were charged when the policies were issued. Those obligations should have been reserved years ago. As the *Andary* majority explained:

> The premiums and reserves for pre-amendment PIP policies were set by insurers based upon the risk that the persons covered might need lifetime care for catastrophic injuries. Put simply, the insurers have already collected premiums in an amount sufficient to provide unlimited benefits, and to release them from that responsibility would substantially diminish their well-settled obligations under the pre-amendment no-fault scheme. [*Andary* at *6][13]

As MCCA itself admits, "The law requires the MCCA to assess an amount that is sufficient to cover the lifetime claims of all persons expected to be catastrophically injured in that year" and may also "adjust future assessments for excesses or deficiencies in prior assessments." Assessment Data, https://www.michigancatastrophic.com/Consumer-Information/Assessment-Data- (accesses February 6, 2023). If these legacy costs have already been reserved by previously collected premiums, who is the beneficiary of the reduction in costs that retroactive application will ostensibly achieve? The *Andary* majority properly perceived that "From the insurers'

[13] As explained above, the MCCA, known as the Michigan Catastrophic Claims Association, indemnifies insurers for PIP claims that exceed a certain dollar threshold.

RECEIVED by MSC 2/6/2023 5:20:51 PM

perspective, retroactive application would yield a windfall with no corresponding benefit to their insureds." *Andary*, at *6. And even given Defendants' insistence that the cost savings will allow for future premium reductions, why should that be? Why should the vested benefits of *legacy insureds* be slashed to fund premium savings for *future insureds*?

Fifth, stabilizing the *PIP premium* for eight years does not mean overall *auto premiums* will not increase. Quite the contrary, because the No-Fault Reform Act only requires insurers to provide premium reductions for PIP benefits, insurance industry representatives earlier admitted that increased liability exposure will cause overall auto premium costs to rise. Insurance Alliance of Michigan's former Executive Director Tricia Kinley said that "[S]ome aspects of the bill increasing liability on consumers will actually increase, as opposed to decrease, auto insurance premiums in Michigan, raising real questions whether this proposal can live up to the savings the governor and lawmakers have promised…"[14] See also, Detroit Free Press (6/11/19) attributing to Ms. Kinley that "Michigan motorists will be required to buy significantly more liability coverage under the new auto insurance law, and there are no assurances those extra costs will not offset reductions the law requires in the personal injury protection (PIP) portion of motorists' premiums." Ms. Kinley also said, "We sure hope that they don't wash each other out," noting that the liability portion of the premiums "will undoubtedly go up."[15]

---

[14] Kim Russell, *Insurance industry warns no-fault reform bill will not save as much as promised*, WXYZ.com (posted and updated May 29, 2019), <https://www.wxyz.com/news/insurance-industry-warns-no-fault-reform-bill-will-not-save-as-much-as-promised> (accessed February 3, 2023).

[15] Paul Egan, *Insurance Official: No guaranteed savings under new Michigan auto law*, Detroit Free Press (June 11, 2019), <https://www.freep.com/story/news/local/michigan/2019/06/11/no-guaranteed-savings-under-new-michigan-auto-law/1369364001/> (accessed February 3, 2023).

RECEIVED by MSC 2/6/2023 5:20:51 PM

On July 19, 2019, it was reported that Insurance Alliance "told the Free Press that the new law's requirement that insurers provide increased liability protection could mean higher premiums."[16] And on January 10, 2020, the Free Press reported, "The auto insurance industry has not made any across-the-board predictions for what will happen to drivers' premiums" under the new system.[17] Insurance agents have said they will recommend motorists buy unlimited PIP and umbrella policies of at least $1 million to cover potential lawsuits from increased liability exposure. MIRS reports that Bev Barney, CEO of the Michigan Association of Insurance Agents, acknowledged confusion regarding premium savings, stating "[i]t is strictly on the PIP coverage, which is the medical coverage. And that is not your entire premium. Anything related to your vehicle itself, collision coverage . . . there is no automatic savings or rollback on that … I think consumers are sitting out there thinking, 'Wow, my insurance rates are going to go down by half' and that's not the reality that most are going to experience."[18]

RECEIVED by MSC 2/6/2023 5:20:51 PM

---

[16] Nancy Kaffer, *There's one big problem with Michigan's no-fault auto insurance reform*, Detroit Free Press (July 19, 2019), <https://www.freep.com/story/opinion/columnists/nancy-kaffer/2019/07/19/michigan-no-fault-auto-insurance-reform/1759554001/> (accessed February 3, 2023).

[17] JC Reindl, *No-fault auto insurance: Michigan drivers won't learn savings until spring or summer*, Detroit Free Press (January 10, 2020), <https://www.freep.com/story/money/business/2020/01/10/michigan-no-fault-auto-insurance-driver-savings/2845005001/> (accessed February 3, 2023).

[18] With its amicus brief at the Trial Court level, CPAN submitted a report prepared by insurance industry expert Doug Heller, who was retained to review insurers' rate, rule, and form filings under the new law. Consistent with the insurance industry acknowledgements described above, Mr. Heller's report shows increases in various components of the auto insurance premiums. See Heller Report. That report is attached as Exhibit 1.

Indeed, as CPAN has reported, during 2022 alone, DIFS approved applications for rate increases of nearly $500 million. The applications were filed prior to the *Andary* ruling.[19]

B. The *Andary* Majority Correctly Held That Applying the Amendments to Insureds Who Were Injured Before the Amendments Took Effect is Retroactive Application.

Defendants persist in asserting that retroactivity is not an issue in this case because the family care and provider fee caps only apply to treatment rendered after the effective date of the Amendments and thus operate prospectively. Defendants rely on language in MCL 500.3157(7) that prescribes the fee cap level "[f]or treatment or training rendered after July 1, 2021 …" and in MCL 500.3157(14) stating that subsections (2) to (13) "apply to treatment or rehabilitative occupational treatment rendered after July 1, 2021." The language in §3157(7) merely states the time-period for which various fee percentages apply. §3157(14) likewise states the effective date of the statutory amendments.

That the amendments apply to treatment rendered after a specified date does not mean that they apply prospectively to legacy insureds. The *Andary* majority recognized that the retroactivity question is not whether the affected treatment will be rendered before or after the effective date of the statutory amendments but rather, "whether applying the new statute will 'impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past.'" *Andary*, at *5, quoting *LaFontaine v Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 39; 852 NW2d 78 (2014). See also, *Buhl v Oak Park*, 507 Mich 236, 244; 968 NW2d 348 (2021) (quoting *LaFontaine* in stating, "in determining retroactivity, we must keep in

---

[19] *Auto Insurance Companies Sock Consumers with Half-Billion in Rate Increases in 2022*, https://protectnofault.org/news/auto-insurance-companies-sock-consumers-with-half-billion-in-rate-increases-in-2022 (accessed February 3, 2023).

RECEIVED by MSC 2/6/2023 5:20:51 PM

mind that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past.").

In *Buhl*, this Court held that because plaintiff's cause of action accrued before the effective date of an amendment to the Government Tort Liability Act, which allowed municipalities to rely upon common law defenses and specifically, the open and obvious rule, the amendment could not be applied retroactively to bar her claim. *Buhl*, 507 Mich at 243. This Court explained that retroactive application "would relieve defendant of the legal duty it owed to plaintiff at the time the injury occurred" and "a newly enacted statute or amendment should not be retroactively applied if doing so would relieve a party of a substantive duty." *Id*. at 247. The *Andary* majority properly reached the same conclusion here. See also, discussion *infra*.

Defendants also argue that because benefits accrue and are payable when services are rendered and not before, they are governed by the law that exists on the date of payment and retroactivity is not an issue. Defendants rely upon MCL 500.3110(4), which states that "[PIP] benefits payable for accidental bodily injury accrue not when the injury occurs but as the allowable expense, work loss or survivors' loss is incurred," and *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 484; 673 NW2d 739 (2003), stating that there is no obligation "to pay for an expense until it is actually incurred."

These texts are unremarkable, stating only when benefits are payable, not when the right to benefits vested. The latter question is relevant to retroactivity, the former is not. The level of benefits to which Plaintiffs were entitled, irrespective of when the treatment secured by those benefits is rendered, vested when the accident occurred. At that point, Defendants became responsible to pay all reasonable charges for reasonably necessary services for the care, recovery, and rehabilitation of Plaintiffs, whenever, and for however long, those charges are incurred,

RECEIVED by MSC 2/6/2023 5:20:51 PM

without family care caps or provider fee caps. See e.g., *Clevenger v Allstate Ins Co*, 443 Mich 646, 656; 505 NW2d 553 (1993) (plaintiff's right to recover for reasonable expenses, whenever incurred, vested at the time of the accident).

Hence relying in large part on this Court's decision in *LaFontaine v Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 28-29; 852 NW2d 78 (2014), the *Andary* majority properly rejected Defendants' attempt to characterize their application of the amendments to legacy insureds as prospective only. Defendants were applying the amendments retroactively to alter vested benefits, which was improper "because the Legislature did not clearly demonstrate an intent for the amendments to apply retroactively to persons injured in pre-amendment accidents." *Andary*, at *1.

There is no question that vested benefits were altered. In fact, Defendants not only claim that they are entitled to reduce the payments they promised to provide on behalf of their legacy insureds, they argue that PA 21's premium reduction goal *wholly depends upon this reduction*. In other words, Defendants are arguing that cost savings will not be achieved by merely applying the reductions to persons injured after the effective date of the amendments; to accomplish the cost-savings intent of the Act insurers must be permitted *to reduce the payments they have been making for the care, recovery, and rehabilitation of legacy insureds for years and decades*. This is a purposeful claw back of vested benefits. It is *not* prospective application.

Under the No-Fault insurance agreements that vested when Mrs. Andary and Mr. Krueger were injured in auto accidents, MCL 500.3107(1)(a) provided for the recovery of PIP benefits for "[a]llowable expenses consisting of ***all*** reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." This obligation was carried into Plaintiffs' compulsory No-Fault policies with Defendants USAA and Citizens and became an integral part of the bargain for which their premiums were priced and

RECEIVED by MSC 2/6/2023 5:20:51 PM

paid.[20] The insurer's obligation to pay all reasonable charges was not limited by hourly caps on family-provided attendant care or provider fee caps.

For example, the Andarys' USAA policy states, "In return for payment of the premium and subject to all the terms of this policy, we will provide the coverages and limits of liability for which a premium is shown on the Declarations." Policy at 3. PIP benefits are shown on the Declarations. Allowable PIP benefits are set forth in Part B and include medical expenses. *Id*. at 10. Medical expenses are defined as "all reasonable fees for **reasonably necessary products and services** and accommodations for a **covered person's** care, recovery, or rehabilitation." *Id*. at 9 (emphasis in original). USAA further states that "**We** are obligated to pay only those expenses that are reasonable charges incurred for: a. **Reasonably necessary products and services**; and b. Reasonably necessary accommodations for a **covered person's** care, recovery, and rehabilitation." *Id*. at 10 (emphasis in original). Then, under Limit of Liability for medical expenses, the policy states "There is no maximum dollar amount for reasonable and necessary **medical expenses** incurred for a **covered person's** care, recovery, or rehabilitation." *Id*. at 10 (emphasis in original).

The insurers' contractual obligations to pay ***all*** reasonable charges for reasonably necessary products, services, and accommodations incurred for their insureds' care, recovery, and rehabilitation were triggered at the time of Mrs. Andary's injury on December 5, 2014 and Mr. Krueger's injury on March 10, 1990. Under longstanding Michigan law, those promised benefits include all reasonably necessary attendant care, including reimbursement for *in home* attendant

[20] By law, the No-Fault statute sets the minimum coverage the policy must provide; the policy cannot be more restrictive than the statute. *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 531, n10; 502 NW2d 310 (1993) ("compulsory insurance statute in effect declares a minimum standard which must be observed, and a policy cannot be written with a more restrictive coverage", citing 12A Couch, Insurance, 2d (rev ed), § 45:697, p 334).

RECEIVED by MSC 2/6/2023 5:20:51 PM

care provided by family members without any limitation on the hours of family-provided care. In *Douglas v Allstate Ins Co*, 492 Mich 241, 248; 821 NW2d 472 (2012), this Court stated that the No-Fault Act does not create different standards depending on who provides the services and the standard of proof for attendant care services "applies equally to services that a family member provides and services that an unrelated caregiver provides."

The Court of Appeals has required reimbursement for services a mother rendered to her adult son, *Sharp v Preferred Risk Mutual Ins Co*, 142 Mich App 499, 514; 370 NW2d 619 (1985), as well as services rendered by the insured's stepmother. *Van Marter v American Fidelity Fire Ins Co*, 114 Mich App 171, 185; 318 NW2d 679 (1982). Further, our courts have consistently held that those who provide care and services to No-Fault insureds are entitled to be paid their reasonable and customary charges, and neither Medicare, Medicaid, workers' compensation, private health insurance or other fee schedules could be used to determine whether a provider's charge is reasonable. For example,

- In *Johnson v Michigan Mutual Ins Co*, 180 Mich App 314, 321-322; 446 NW2d 899 (1989), the Court of Appeals rejected the assertion that reimbursement must approximate Medicaid.
- In *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 114; 535 NW2d 529 (1995), the Court rejected the assertion that a reasonable charge is what a private health insurer would have paid.
- Workers compensation fee schedules and other statutory schemes or contractual agreements were expressly rejected as a means of determining allowable expenses in *Munson Medical v Auto Club Ass'n*, 218 Mich App 375, 390; 554 NW2d 49

RECEIVED by MSC 2/6/2023 5:20:51 PM

(1996), overruled in part on other grounds, *Covenant Med Ctr, Inc v State Farm Mut Automobile Ins Co*, 500 Mich 191; 895 NW2d 490 (2017).

- And in *Mercy Mt Clemens v Auto Club Ins Ass 'n*, 219 Mich App 46, 55-56; 555 NW2d 871 (1996), the Court held that amounts customarily paid under workers' compensation, Medicare, Medicaid, BCBSM are not admissible to prove customary charge.

This was the state of the law when Mrs. Andary and Mr. Krueger purchased their policies and when their policies vested. All of the providers who rendered treatment and care were paid their reasonable and customary charges without regard to fee caps or caps on family provided attendant care. The insurance premiums paid to their insurers secured those unambiguous rights.

The Phelps Amicus Brief recites the horrendous disruption of care experienced by catastrophically-injured insureds and their families when their insurers refused to pay providers at the pre-amendment levels. The MAJ Amicus Brief concomitantly explains the difficulty experienced by non-Medicare reimbursable health care providers who have struggled to maintain care for their clients with dwindling and unsustainable reimbursements. MAJ describes the results of a study conducted by the Michigan Public Health Institute to assess the availability of services to persons who have sustained catastrophic injuries in auto accidents. The study showed that 6,857 accident survivors have been discharged from their home care agencies, ten home care agencies and/or rehabilitation facilities have closed with 14 additional closures expected, 4,082 jobs have been eliminated, and at least five accident survivors have died due to disruption of their care. See Phase II Provider Survey Results, MAJ Apx.7. Retroactive application of the amendments have unquestionably impaired the vested contractual rights of the legacy insureds.

RECEIVED by MSC 2/6/2023 5:20:51 PM

C. The *Andary* Majority Correctly Held That 2019 PA 21 does not Express an Intent That MCL 3157(7) and (10) Apply Retroactively.

The legislative intent is the overriding consideration when determining whether a statutory enactment applies prospectively or retroactively. *Buhl v Oak Park*, 507 Mich at 243-244. All other rules of statutory construction are subservient to this intent. *Id*. See also, *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001), explaining that in determining whether a statute applies retroactively or prospectively, "[t]he primary and overriding rule is that legislative intent governs" and "[a]ll other rules of construction and operation are subservient to this principle." *Id*. at 583, quoting *Franks v White Pine Copper Division*, 422 Mich 636, 670; 375 NW2d 715 (1985) (internal quotations omitted).

When the Legislature does not include specific language in the statute showing a clear, direct, and unequivocal legislative intent to require retroactive application, the presumption is that the Legislature intended that the statute have only prospective application. See *Lynch,* 463 Mich at 583, quoting *Franks*, 422 Mich at 671 ("statutes are presumed to operate prospectively unless the contrary intent is clearly manifested."). "This is especially true if retroactive application of a statute would impair vested rights, create a new obligation and impose a new duty, or attach a disability with respect to past transactions." *Id*., *Franks*, 422 Mich at 671–674.

In *Lynch*, this Court found nothing in the statutory language of the Sales Representative Commissions Act (SRCA) suggesting a legislative intent that the statute be applied retroactively and noted signals that exactly the opposite was intended. *Id*. at 583-584. The Court found it "most instructive" that the Legislature "included no express language regarding retroactivity," adding:

> *We note that the Legislature has shown on several occasions that it knows how to make clear its intention that a statute apply retroactively*. See, e.g., MCL 141.1157; MSA 5.3188(257) ("This act shall be applied retroactively ..."); MCL 324.21301a; MSA 13A.21301a ("The changes in liability that are provided for in the amendatory act that added this subsection shall be given retroactive application"). [*Id.* at 584 (emphasis added).]

RECEIVED by MSC 2/6/2023 5:20:51 PM

See also *Buhl*, 507 Mich at 245, quoting *Lynch*. The presumption of prospective application may not exist where the statute is remedial or procedural in nature, but this exception does not apply if it denies "vested rights." In *Lynch*, this Court cautioned against using general characterizations of statutes when analyzing this exception and further emphasized that a statute affecting substantive rights is not remedial:

> Plaintiff argues that the SRCA is remedial because no new cause of action is created. Instead, according to plaintiffs, the act merely supplements and furthers remedies otherwise available. However, we have rejected the notion that a statute significantly affecting a party's substantive rights should be applied retroactively merely because it can also be characterized in a sense as "remedial." *Franks,* supra at 673–674, 375 N.W.2d 715. In that regard, we agree with Chief Justice Riley's plurality opinion in *White v. General Motors Corp*., 431 Mich. 387, 397, 429 N.W.2d 576 (1988), that the term "remedial" in this context should only be employed to describe legislation that does not affect substantive rights. Otherwise, "[t]he mere fact that a statute is characterized as 'remedial' ... is of little value in statutory construction." *Id*., quoting 3 Sands, Sutherland Statutory Construction (4th ed), § 60.02, p 60. Again, the question is one of legislative intent. [*Lynch*, 463 Mich at 584-585.]

Lynch noted that retroactive application of the SRCA would "change significantly the substance of the parties' agreement and unsettle their expectations." *Id*. at 585. The Court further agreed with the United States Supreme Court's observation in *Landgraf v USI Film Products*, 511 US 244, 271; 114 S Ct 1522; 128 L Ed 2d 229 (1994):

> that a requirement that the Legislature make its intention clear "helps ensure that [the Legislature] itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf*, *supra* at 268. This is especially true when a new statutory provision affects contractual rights, an area "in which predictability and stability are of prime importance." *Id*. at 271. [*Lynch*, 463 Mich at 587 (parallel citations omitted).]

Lynch ultimately concluded that the SRCA "would substantially alter the nature of agreements concerning payment of sales commissions that were entered into before the act's effective date" and reemphasized "the strong presumption against the retroactive application of statutes in the absence of a clear expression by the Legislature that the act be so applied." *Id*. at 588.

RECEIVED by MSC 2/6/2023 5:20:51 PM

RECEIVED by MSC 2/6/2023 5:20:51 PM

Here, as the *Andary* majority properly concluded, the Legislature has not clearly, directly, and unequivocally expressed an intent to apply the amendments retroactively. Nothing in the statute purports to apply the amendments to persons who were injured, and whose policies vested, before the effective date of the amendments. Because the Amendments do not clearly, directly, and unequivocally demonstrate a legislative intent to require retroactive application, the amendments must be presumed to have only prospective effect.

Prospective application of the No-Fault reform act was acknowledged by DIFS Director Anita Fox at a Genesee County Virtual Town Hall question and answer period on June 15, 2020. An audience member asked Ms. Fox whether the caller's sister, who required continued care and treatment from an auto accident injury the previous year, would lose her coverage when the new law took effect. Ms. Fox emphasized that "auto insurance…vests or becomes fixed at the benefit on the day of your accident" and "back under the old law and the current law it's the coverage that was in place that matters for what kind of coverage you have:"

> 48:25 Moderator: My sister was in a car accident last year and still needs treatment and care from that accident. Is she going to lose her coverage if she doesn't pick unlimited coverage?
>
> 48:35 Anita Fox: Well first I'm sorry to hear about your sister's accident and glad that she had insurance coverage. And the answer for that is that's one of the big differences between healthcare and auto insurance. We know that with your health insurance if you have it today you go to the doctor you - - you have coverage and they'll pay [inaudible] some of your cost but if you lose your job or your health care today and tomorrow you go you have no coverage. *With auto insurance it vests or becomes fixed at the benefit on the day of your accident.* So your sister having lifetime medical under that policy will for the - - forever have unlimited coverage for the medical costs associated with that accident as long as she needs them. So you're from - - that back *under the old law and under the current law it's the date of the accident and the coverage that was in place that matters for what kind of coverage you have*.

See <https://www.youtube.com/watch?v=gBhlWJ6Cn_0&t=2958s> (accessed February 3, 2023) (emphasis added).

As of May 2, 2021, a question and answer on the Department of Insurance and Financial Services (DIFS) website also explained that coverage for previously sustained injuries continues *under the terms of the policy in effect at the time of the accident*:

> I have ongoing health issues from a crash that occurred before the law went into effect. Will I still get care under the new law?
>
> Yes, your care will still be covered. Your coverage for this accident continues under the terms of your policy at the time of the accident and will continue regardless of any future PIP medical option. <https://www.michigan.gov/autoinsurance/0,9555,7-405-96983_96984---,00.html> (accessed May 2, 2021).[21]

These are telling admissions, consistent with the conclusion that the statutory language does not express a clear, direct, and unequivocal legislative intent to apply the amendments retroactively. As the *Andary* majority concluded:

> [D]efendants fail to identify *any* language within chapter 31 of the Michigan Insurance Code, i.e., the no-fault act, so indicating, either explicitly or by implication. Indeed, 2019 PA 21 provided an effective date of June 11, 2019, and it contains no language referring to retroactive application. See *Brewer v A.D. Transport Exp, Inc.*, 486 Mich. 50, 56, 782 N.W.2d 475 (2010) ("[P]roviding a specific, future effective date and omitting any reference to retroactivity supports a conclusion that a statute should be applied prospectively only.") (quotation marks and citation omitted) [*Andary* at *3].[22]

---

[21] The DIFS has since changed the answer to this question on its website. The answer now reads: "Yes, medically appropriate care will still be covered. For all patients, no matter when they were injured, the law did not change the benefits the benefits [sic] and services to which auto accident victims are entitled. The Court of Appeals ruled that cost control provisions may not be applied to treatment rendered to people injured in accidents before June 11, 2019. That decision has been appealed to the Michigan Supreme Court. The Supreme Court has indicated that while the case is on appeal, the decision of the Court of Appeals will have precedential effect, and thus MCL 500.3157(7) and MCL 500.3157(10) may not be applied to claims related to persons injured in accidents that occurred prior to June 11, 2019."
Frequently Asked Questions, <https://www.michigan.gov/autoinsurance/0,9555,7-405-96983_96984---,00.html> (accessed February 3, 2023)

[22] As explained more fully in Plaintiffs' brief to this Court, pages 14-17, language expressing an intent to make the statute retroactive was removed from the original draft of the bill that ultimately became 2019 PA 21. See Pls' Br at 15 ("the amendment of §3157 in its original Senate form

RECEIVED by MSC 2/6/2023 5:20:51 PM

The *Andary* majority properly rejected Defendants' assertion that such language exists within MCL 500.2111f, a new provision of chapter 21 of the Insurance Code, which "[Defendants] assert demonstrates an intent to retroactively apply the amendments by implication." *Id*. The *Andary* majority disagreed:

> Chapter 21 of the Insurance Code does not define the benefits and payments that must be provided to no-fault policy beneficiaries. Rather, MCL 500.2111f merely defines how premium rates are to be determined under the new no-fault scheme. Defendants specifically rely on MCL 500.2111f(8), which provides that in its rate filings, "An insurer shall pass on ... savings realized from the application of section 3157(2) to (12) to treatment, products, services, accommodations, or training rendered to individuals who suffered accidental bodily injury from motor vehicle accidents that occurred before July 2, 2019." But this rate-setting provision does not mandate that the limits on benefits provided in MCL 500.3157 shall be applied to persons injured before its effective date. And the claim that it does so by implication is very weak. The statute merely provides that if there are such savings, they must be used to reduce future rates. Whether such savings will occur is not defined by this statute. For these reasons, we conclude that MCL 500.2111f does not "clearly, directly and unequivocally" demonstrate an intent to apply the new limits retroactively. *Davis*, 272 Mich App at 155, 725 N.W.2d 56. [*Id*. (footnote omitted)].[23]

Thus, Defendants' attempt to impute to MCL 500.2111f(8) a clear and unequivocal intent to apply the amendments retroactively is unavailing.

---

provided that the new reimbursement scheme that it proposed to implement would have been applicable to every claim for benefits regardless of when the injury occurred."). The language "regardless of when the accidental bodily injury occurred" was removed from the statute as ultimately enacted but is precisely what Defendants ask this Court to read into the statute. See Defs' Br at 21-22, where Defendants insist that MCL 500.3157(7) and MCL 500.3157(14) "plainly apply to all treatment provided to a claimant rendered *after* July 1, 2021, regardless of when that claimant's accident occurred."

[23] In a footnote, the *Andary* majority also noted "that in the scores of pages issued by the Legislative Service Bureau regarding 2019 PA 21, no reference is made to application of the newly imposed limits to those who were injured prior to its adoption. Nor do they refer to MCL 500.2111f as mandating such application." *Id*. at 3, n7. See Pls' Br. for further discussion of this statutory provision.

RECEIVED by MSC 2/6/2023 5:20:51 PM

D. The *Andary* Majority Correctly Held that Plaintiffs Possess Contractual Rights and Under *LaFontaine*, Plaintiffs' Policies are Governed by the No-Fault Act in Effect at the Time They Were Purchased.

When a contract is governed by statute, the applicable version of the statute is that in effect when the contract is executed. Thus, when private parties enter a contract involving a subject governed by statute, a change in the statute does not alter the contract. In *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 28-29; 852 NW2d 78 (2014), this Court stated that a contract is governed by the laws in existence at the time the contract is made, which form a part of the contract as a measure of the parties' obligations.

LaFontaine involved an amendment to the Motor Vehicle Dealer Act (MVDA). *Id*. at 28. Plaintiff became an authorized Chrysler dealer pursuant to a 2007 agreement which the parties agree was subject to the MVDA. *Id*. at 29. At the time of contracting, the MVDA required auto manufacturers to give notice and, if challenged, show good cause if they intended to contract with another dealer within a six-mile radius of an existing dealership. *Id*. at 30. No such provision appeared in the 2007 agreement, and but for the statute, Chrysler could have shared the sales locality with any same line-make dealer it deemed appropriate.

The six-mile radius was still in effect when in 2010, Chrysler sought to authorize a new dealership more than six miles but less than nine miles from plaintiff. *Id*. at 30-31. After execution of a letter of intent with the new dealer, the MVDA was amended to extend the existing dealer radius to nine miles. *Id*. at 31. Plaintiff thereafter objected to the new dealership arguing that the later enacted 2010 MVDA amendment applied. *Id*. This Court stated that it is well settled that:

> the obligation of a contract consisted in its binding force on the party who makes it. *This depends upon the laws in existence when it is made*. They are necessarily referred to in all contracts, and form a part of them, as the measure of obligation to perform them by the one party and right acquired by the other. [*Id*. at 35–36 (footnote and citation omitted)]

RECEIVED by MSC 2/6/2023 5:20:51 PM

This Court ultimately concluded that the relevant market radius in effect when the 2007 Agreement was executed governed the parties' agreement. *Id*. at 42. It also concluded that the 2010 amendment could not be retroactively applied. Finding that there was nothing in the language of the 2010 amendments that evinced the Legislature's intent to apply the 2010 amendment retroactively, this Court examined the amendment's effect on existing contract rights, i.e., whether the new statute "takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability with respect to transactions or considerations already past." *Id*. at 40 (footnote omitted) (internal citations omitted). This Court ultimately concluded:

> Because retroactive application of the 2010 Amendment would interfere with Chrysler's contractual right to establish dealerships outside of a six-mile radius of LaFontaine, such retroactive application is impermissible on these facts. Accordingly, the relevant market area in effect when Chrysler reached its 2007 Dealer Agreement with LaFontaine governs that agreement. [*Id*. at 42]

The very same principles govern here and, as *LaFontaine* shows, Plaintiffs' auto policies are not subject to the amendments. They are governed by the No-Fault law in effect when the policies were purchased. At that time, MCL 500.3107(1)(a) provided for the recovery of PIP benefits for "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation," which, under appellate court decisions, meant that (1) attendant care services were payable irrespective of whether the caregiver was a family member or agency-provided, and (2) providers' reasonable and customary charges were payable without reference to provider fee caps. These are the obligations that vested when Plaintiffs were injured. The amendments cannot now be retroactively applied to impair Plaintiffs' vested rights.

RECEIVED by MSC 2/6/2023 5:20:51 PM

This Court should reject Defendants' assertion that the benefits afforded to the legacy insureds were purely statutory, not contractual, and were subject to change at the whim of the Legislature. The *Andary* majority aptly explained the folly in that assertion:

> PIP benefits are not *purely* statutory in nature. The no-fault act sets the mandatory minimum coverage for PIP policies and is the "rule book" for disputes over that coverage, *Rohlman v Hawkeye-Security Ins Co*, 442 Mich. 520, 524-525, 502 N.W.2d 310 (1993), but it does not follow that the policies sold by insurers promising unlimited lifetime care are nullities. Indeed, suits against insurers for PIP benefits are brought as contract actions, and insurers may pursue traditional contract defenses not [sic] have not been abrogated by the no-fault act. See *Meemic Ins. Co. v Fortson*, 506 Mich. 287, 300-303, 954 N.W.2d 115 (2020). It is clear therefore that a PIP policy confers enforceable contract rights upon those entitled to benefits. [2022 WL 3692767 at *6].

Indeed, absent Plaintiffs' enforceable contracts with USAA and Citizens, Defendants would have no reimbursement obligations whatsoever. They are the Defendants in this lawsuit because of the contractual relationship.

Equally unavailing is Defendants' argument that Plaintiffs could not have reasonably relied on the then existing No-Fault Act and the benefits their policies provided because Plaintiffs had no vested right to continuation of the statute as it existed when their accidents occurred. The *Andary* majority rejected this argument, finding that the workers compensation cases Defendants relied upon, were distinguishable. *Andary* at *6.[24] Unlike Defendants' PIP policies, which provide a contractual right to reimbursement for reasonably necessary services without limitation, the contracts at issue in *Lahti* and *Romein* were unwritten employment contracts which did not provide a right to workers compensation upon injury or any amount to be paid. *Id*.

Further, *Romein* presented "unique circumstances" involving a clearly remedial statute to correct a defect illuminated by a judicial interpretation of the prior law:

---

[24] *Lahti v Fosterling*, 357 Mich 578; 99 NW2d 490 (1959), and *Romein v Gen Motors Corp*, 436 Mich 515; 462 NW2d 555 (1990).

RECEIVED by MSC 2/6/2023 5:20:51 PM

> The Supreme Court explained that the 1987 amendment was specifically intended to correct what the Legislature determined was an improper interpretation of the 1981 act by the Courts: "[I]t is clear that the Legislature was modifying the coordination of benefits provision to cure a perceived defect resulting from the interpretation of the prior law [by the Court]. Therefore, the amendment is remedial." [*Andary*, *id*. at *7 (internal citation omitted)].

The No-Fault amendments here are not remedial because they were not "aimed at a narrow problem regarding a technical or procedural difficulty or an attempt to correct what the legislature viewed as an erroneous judicial interpretation of an existing statute." *Id*. Indeed, the *Andary* majority remarked that the assertion that lowering rates and decreasing benefits is "remedial" is "far too broad a use of the term," stating:

> Rather, they enacted far-reaching alterations to a statutory scheme that had stood for 50 years and on which virtually the entire population of the state relied. It is a broad policy-based change, not a remedial statute. [*Id*.]

II. The *Andary* Majority Properly Concluded That Retroactive Application of the Amendments Violates the Contracts Clause of the Michigan and U.S. Constitutions.

The United States and Michigan constitutions prohibit the enactment of legislation that impairs existing contractual obligations. U.S. Const, art I, § 10; Const 1963, art 1, § 10. Using language nearly identical to the federal prohibition, our Michigan Constitution provides that "[n]o bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted." The purpose of the "contract clauses" "is to protect bargains reached by parties by prohibiting states from enacting laws that interfere with preexisting contractual arrangements." See *In re Certified Question*, 447 Mich 765, 776-777; 527 NW2d 468 (1994).

In this case, the *Andary* majority properly held that retroactive application of the amendments to the legacy insureds violates the constitutional prohibition against the impairment of contracts, stating, "even if retroactive intent had been demonstrated, imposing the new limits would substantially impair no-fault insurance contracts entered into before the amendments'

RECEIVED by MSC 2/6/2023 5:20:51 PM

effective date, and therefore would violate the Contracts Clause of the Michigan Constitution." *Andary*, at *1. This Court should affirm.

A. Retroactive Application Violates the Contracts Clause.

In evaluating a claim for impairment of contract, our courts apply a three-prong test. The first prong asks whether "the state law has, in fact, operated as a substantial impairment of a contractual relationship." *In re Certified Question*, 447 Mich at 777 (citing *Allied Structural Steel v Spannaus*, 438 US 234, 244; 98 S Ct 2716; 57 L Ed 2d 727 (1978), and *Romein v Gen Motors Corp*, 436 Mich 515; 462 NW2d 555 (1990)). This requires a court to determine whether there is a contractual relationship, whether a change in the law impairs that contractual relationship, and whether the impairment is substantial. *Aguirre v State of Michigan*, 315 Mich App 706, 716; 891 NW2d 516 (2016) (citation omitted).

"[A]n impairment takes on constitutional dimensions only when it interferes with *reasonably expected* contractual benefits." *Id*. (emphasis added) (internal quotations and citations omitted). See also, *Borman LLC v 18718 Borman, LLC*, 777 F3d 816, 826-828 (CA 6, 2015) (considering whether contracting party reasonably expected or relied upon the impaired term). Or the court might consider whether the legislation attaches "new and perhaps unanticipated legal consequences to past conduct" such as would threaten "to 'deprive citizens of legitimate expectations and upset settled transactions.'" *Ward v Dixie Nat'l Life Ins Co*, 595 F3d 164, 176 (CA 4, 2010), quoting *Gen Motors Corp v Romein,* 503 US 181, 191; 112 S Ct 1105; 117 L Ed 2d 328 (1992).

The second and third prongs require the court to consider whether "the legislative disruption of contract expectancies [is] necessary to the public good" and whether "the means chosen by the Legislature to address the public need are reasonable." *In re Certified Question*, 447 Mich at 777. The burden to make this showing rests with the proponent of the legislation. See

RECEIVED by MSC 2/6/2023 5:20:51 PM

AFT Mich v State of Mich, 501 Mich 939; 904 NW2d 417, 418 (2017) (affirming in part contract clause violation where a statutory amendment contravened school employees' contracts with their employers "and the state failed to demonstrate that this measure was reasonable *and necessary* to further a legitimate public purpose") (emphasis added).

The requirement that the means be "reasonable and necessary" elevates the inquiry above rational basis review toward a heightened review standard. See generally, *Natl Ed Assn-Rhode Island by Scigulinsky v Ret Bd of Rhode Island Employees' Ret Sys*, 890 F Supp 1143, 1151 (D RI, 1995) (holding that intermediate scrutiny applies to contract clause challenge); R. Randall Kelso, *CONSIDERATIONS OF LEGISLATIVE FIT …*, 28 U Rich L Rev 1279, 1301–04 (1994) (contract clause test is "reasonable and necessary" - heightened rational review); G. Sidney Buchanan, *A VERY RATIONAL COURT*, 30 Hous L Rev 1509, 1573–75 (1993) (describing how the U.S. Supreme Court analyzes contract clause issues under a "heightened version of rational-basis scrutiny" – a "stricter and more complex form of rational-basis scrutiny.").

Here, the Contract Clause prohibits retroactive application because the amendments will substantially impair existing policy obligations and expectations, the legislative impairment of policy obligations and expectations is not necessary for the public good, and the means chosen are not reasonable.

1. The Amendments Impair Existing Policy Obligations and Expectations.

Defendants' performance under the insurance agreements since the time of Plaintiffs' injuries certainly caused Plaintiffs to rely upon and legitimately expect the continued receipt of vested benefits that were promised and provided. The policies promised that, in exchange for premium payments, the insurers would pay all allowable expenses for reasonable charges incurred for reasonably necessary products, services and accommodations for their care, recovery, and

RECEIVED by MSC 2/6/2023 5:20:51 PM

rehabilitation. All providers who rendered treatment and care to Plaintiffs were paid their reasonable and customary charges without regard to fee caps. Nor were the policies subject to hourly caps on family provided attendant care.

If the amendments are applied retroactively, the benefits Plaintiffs have been receiving under their policies will be substantially reduced and Defendants will be relieved of obligations they promised to perform. This will substantially impair policy obligations and expectations that, until now, were confirmed by Defendants' performance. As the *Andary* majority explained, the new limitations were not collateral or minor, bargained for or expected, and life decisions were likely made in reliance upon the benefits actually promised:

> [I]nsureds and those whose benefits are provided by their policies had a legitimate expectation that should they be injured in a motor vehicle accident, they would receive unlimited lifetime benefits, so long as the charges were reasonable and the care reasonably necessary. These individuals "did not bargain for or contemplate," *id.* at 26, 852 N.W.2d 78, that limits would be placed on the amount of attendant care family members can provide an injured person, or that treatment not compensable by Medicare would be limited to 55 percent reimbursement from the insurer. *And these new limitations do not create minor or collateral effects on those settled expectations; to the contrary, they directly and drastically limit the ability of motor vehicle accident victims to continue to obtain the care they require*. Indeed, accident victims and those who care for them have relied on these benefits for nearly 50 years. Severely injured individuals and their families have made long-term life changes based on the pre-amendment no-fault act. Some in reliance on the promise of unlimited PIP benefits may have foregone the opportunity to make alternative arrangements in the event of catastrophic injury (e.g., purchase of disability or accidental injury insurance) as a substitute. And some family members providing attendant care have chosen to leave employment and forego income and careers so that their loved one may be cared for at home by family rather than in an inpatient care facility. Finally, the number of catastrophically injured individuals that would be affected by retroactive application of the amendments is by no means *de minimis*. According to the Michigan Catastrophic Claims Association (MCCA), there are more than 17,000 victims of pre-amendment auto accidents whose benefits would be cut. [*Andary* at * 5 (emphasis added)].

See also, *Id.* at 8.

The *Andary* majority rejected Defendants' assertion that the provider fee caps and attendant care cap merely clarified the meaning of a reasonable charge, stating "2021 PA 19 make[s] no

RECEIVED by MSC 2/6/2023 5:20:51 PM

reference to the fee caps and attendant-care cap being reasonable, nor is there a definition of 'reasonable' added in the amendment." *Id.* at n12. This case, the majority concluded, is comparable to the reduction in contracted-for teacher salaries, which were held to have violated the Contracts Clause in *AFT Mich v State (On Remand),* 315 Mich App 602; 893 NW2d 901 (2016). The *Andary* majority explained that the *AFT* court reasoned that the statute directly and purposefully required employers not to pay contracted-for wages, noting that the statute was "not a broad economic or social regulation that impinges on certain contractual obligations by happenstance or as a collateral matter." *Andary* at *9 (quoting *AFT*, 315 Mich App at 616). Here, the provider fee caps and attendant-care cap "are at the core of the no-fault amendments" and "the impairment of contract is severe." *Id*. The first prong is satisfied.

2. The Impairment of Existing Policy Obligations and Expectations is not Necessary to the Goal of Decreasing Future Policy Premiums.

As discussed above, the level of scrutiny for contract clause cases is not merely rational basis. Reasonable and necessary invokes a higher level of scrutiny. Mere assumptions and possibilities are not enough. Here, Defendants have not shown that retroactively applying the amendments to already vested policies is necessary to accomplish the legislative goal of substantially reducing future auto policy premiums. Indeed, because the No-Fault Reform Act only requires insurers to provide premium reductions for PIP benefits, insurance industry representatives earlier admitted that increased liability exposure will cause overall premium costs to rise. This is discussed in detail, *supra*. And in fact, an analysis of rate increases approved for 35 car insurance companies in the state, conducted by the Consumer Federation of America, has shown this to be true. See *Michigan car insurance rates up more than 7% in 2022 in wake of no-fault reform meant to lower rates*, https://www.michiganradio.org/politics-government/2022-10-14/michigan-car-insurance-rates-up-more-than-7-in-2022-in-wake-of-no-fault-reform-meant-to-

RECEIVED by MSC 2/6/2023 5:20:51 PM

lower-rates (accessed February 5, 2023). When the results of the analysis were reported, total increases had reached $498,977,294 with additional requests for increases of about $68 million awaiting approval. *Id*.

Earlier in this brief at pages 9-12, CPAN discussed the illusory nature of Defendants' cost-savings allegations and why Defendants' speculation, unsupported by evidence, was doubtful. That discussion is equally applicable here. The *Andary* majority properly concluded that retroactive application of the amendments to the legacy insureds would result in a windfall to the insurance companies who received premiums for the uncapped benefits they are now refusing to provide:

> [T]he fee schedules and attendant-care cap drastically reduce the previously unlimited PIP benefits, and there has been no demonstration that the rest of 2019 PA 21 would be affected if the amendments are applied prospectively only. The goal of lowering insurance rates is contingent on the lowering of benefits, but because the lowering of premiums is only prospective, it would severely limit the benefits promised in the policies when higher premium rates, reflective of the greater benefits, were charged and paid for. And since the insurers have already been paid for the benefits promised under those policies, retroactive application would permit insurers to retain all the premiums paid prior to the 2019 amendments while allowing them to provide only a fraction of the benefits set out in those policies. Giving a windfall to insurance companies who received premiums for unlimited benefits is not a legitimate public purpose, nor a reasonable means to reform the system. [*Andary* at *10].

3. The Chosen Means are not Reasonable and Have Caused Thousands of Legacy Insureds Substantial Suffering and Loss of Care.

In addition to the significant doubt as to whether retroactive application of the amendments will accomplish the goal of substantially reducing policy premiums (discussed above), the means chosen are not reasonable. *It is not reasonable to statutorily reduce the benefits that the legacy insureds purchased many years ago in order to reduce premiums to future policyholders*. Catastrophically injured persons are entitled to rely upon the vested benefits and the level of care their insurers promised to provide. It is highly inequitable to relieve insurers of their obligations

RECEIVED by MSC 2/6/2023 5:20:51 PM

to *existing insureds* so a better premium price can be offered to *future insureds*. Under no scenario can the retroactive application of the amendments be characterized as fair, just, or reasonable.[25]

Nor is it reasonable to arbitrarily enforce an across the board 45% reduction in provider fees, irrespective of whether the provider's charge master on January 1, 2019 was reasonable and competitive or excessive. Providers who set their 2019 rates at a profit margin *greater than* 45 percent (or those whose charges were otherwise excessive) may be able to survive the reduction, but many providers who charged reasonable and competitive rates in 2019 are going out of business, reducing the ability of brain-injured persons to obtain the reasonably necessary care and treatment their insurers' promised to pay. This has thrown the legacy insureds in a state of panic, fearful of losing the carefully crafted medical regime that has allowed them to survive.

There are certainly other more equitable and effective ways to reduce costs. Indeed, Defendants' mantra is that the restrictions are necessary to redress fraud and overcharging. But PA 21 already provides more targeted means to address these issues. MCL 500.3157a creates a utilization review process for challenging a provider's treatment and charges and MCL 500.6301 creates an anti-fraud unit as a criminal justice agency within the DIFS to investigate criminal and fraudulent activities. MCL 500.3181 permits managed care policies. These are the provisions that will address the alleged abuses that Defendants say have increased costs.

We should note here what is not the problem. The fact that catastrophically-injured people require monitoring 24 hours a day, seven days a week from various combinations of nursing, rehabilitative, and attendant care providers is not the problem, it is a reality. Nor is the fact that the

---

[25] Defendants' discussion of the reasonableness of the means chose by the Legislature is very general and does not address the reasonableness of retroactive application of the amendments to the legacy insureds, which is the issue before this Court. Defs Br. at 38-39.

RECEIVED by MSC 2/6/2023 5:20:51 PM

nature of the catastrophic and life-threatening injuries that the legacy insureds have sustained requires continuous intensive and highly skilled treatment. This is also a reality. Yes, the care of the legacy insureds is expensive but that is why they purchased insurance, that is why they were promised lifetime benefits, and that is why insurers imposed an MCCA surcharge on every insured automobile and why, until the $400 refund, the MCCA had accumulated an approximate $5 billion surplus.[26]

Reducing benefits afforded to the legacy insureds will not reduce their needs. The care will still be required; it just won't be available to auto accident victims and if it is, the legacy insureds will lack the means to pay for it, leaving them with a thwarted bargain struck decades ago when, in exchange for surrendering their right to sue the person that caused their injury, the legacy insureds were promised that all reasonable charges for services reasonably necessary for their care, recovery and rehabilitation would be paid. They are now being told that the promise is no longer true and oh, by the way, it is too late to sue the wrongdoer who caused the accident. Sorry … you are on your own.

If retroactive application to the legacy insureds was truly the means chosen by the Legislature, its aim was misguided. Retroactive application of family care caps and provider fee caps will not solve concerns of fraud and abuse. It is causing devastating harm to these patients who are living under the threat of losing their care, facing institutionalization, or if already institutionalized possibly having to leave the safe place they have considered home. It has also

[26] The refund checks "came out of a surplus from previously paid assessments into a survivors fund managed by the Michigan Catastrophic Claims Association, not from lowered premiums. The MCCA is charged by law with keeping enough money in the fund to guarantee payment for future care for the most seriously injured car crash survivors." https://www.michiganradio.org/politics-government/2022-10-04/critics-mcca-was-reckless-irresponsible-with-surplus-in-fund-for-survivors-its-now-a-big-deficit.

RECEIVED by MSC 2/6/2023 5:20:51 PM

been devastating to health care providers, creating a shortage of providers who can financially afford to treat auto accident patients. This does not approximate necessary or even rational legislation.

4. The Requirements for Finding a Contracts Clause Violation Have Been Satisfied.

Each requirement for finding a contracts clause violation has been satisfied here. Plaintiffs have contracts with Defendants that afford them certain vested rights. The No-Fault amendments substantially impair those rights. It is not necessary for the Legislature to impair Plaintiffs' rights under the vested policies in order to achieve its goal of decreasing future policy premiums, and the means chosen to achieve that goal are neither reasonable, just, nor effective.

B. Cases From Other States Recognize a Contract Clause Violation When Statutes Purport to Alter Existing Insurance Policies.

Courts across the country have found a contract clause violation when a statute *retroactively redefines* insurance policy obligations. These cases, through their very holdings, conclude that retroactive application of statutory amendments to existing insurance policies trigger contract clause scrutiny. See e.g., *Allstate Ins Co v Garrett*, 550 So 2d 22, 24 (Fla Dist Ct App, 1989) (relating to PIP benefits); *Prudential Prop & Cas Ins Co v Scott*, 161 Ill App 3d 372, 381-382; 514 NE2d 595 (1987) (affecting family exclusion clause); *Harleysville Mut Ins Co v State*, 401 SC 15, 29-30; 736 SE2d 651 (2012) (definition of occurrence); *Kirven v Cent States Health*, 409 SC 30, 40; 760 SE2d 794 (2014) (definition of "actual charges");[27] *In re Workers' Comp Refund*, 46 F3d 813, 821 (CA 8, 1995) (recipient of excess premiums); *Kee v Shelter Ins*, 852

[27] The full citation is *Kirven v Cent. States Health & Life Co, of Omaha*, 409 SC 30; 760 SE2d 794 (2014), opinion after certified question answered, No. 3:11-CV-2149-MBS, 2014 WL 12734325 (D S C Dec. 12, 2014).

RECEIVED by MSC 2/6/2023 5:20:51 PM

SW2d 226, 229 (Tenn, 1993) (statute of limitations savings provision); *Farmers' Co-Op Creamery Co v Iowa State Ins Co*, 84 NW 904, 905 (Iowa, 1900) (contractual limitations).

Auto - PIP Benefits: The insurance company argued against retroactive application in *Allstate Ins,* where plaintiff Allstate asserted that obligations in a policy entered into before the effective date of the statute would be impaired by a statutory amendment providing that personal protection insurance benefits could not be withdrawn unless the insurer obtained a report from a physician licensed under the same licensing statute as the physician for whom treatment was to be withdrawn stating that treatment was no longer necessary or reasonable. The Court agreed, holding that any application of the amendment to a policy entered before the amendment became effective violates the contract clause. 550 So 2d at 24-25.

Auto – Family Exclusion: *Prudential* was an action for declaratory judgment seeking a determination of the respective rights of an auto insurer, the insured, and other parties under an insurance policy. One of the issues was whether a provision of the Insurance Code enacted after issuance of the policy and after the accident, barred application of the policy's family exclusion clause. In holding the statutory provision inapplicable to the policy, the Court concluded that the Code provision "affects [the insurer's] duty to pay and to defend" and therefore affected substantive rights that would be impaired by the statute. 161 Ill App 3d at 382.

CGL – Definition of Occurrence: In *Harleysville*, 401 SC at 29, the Supreme Court of South Carolina concluded that new legislation substantially impaired the contractual relationship between insurers and their policyholders "by mandating that all CGL policies be legislatively amended to include a new statutory definition of occurrence and by applying this mandate retroactively." The Court explained:

> While we hold that it is within the legislature's power to statutorily define the meaning of "occurrence," *it violates the Contract Clause to apply this new*

RECEIVED by MSC 2/6/2023 5:20:51 PM

> *definition retroactively as it substantially impairs pre-existing contracts by materially changing their terms*. *Hodges*, 341 S.C. at 94, 533 S.E.2d at 585–86 (holding "[f]or purposes of Contract Clause analysis, a statute can be said to impair a contract when it alters the reasonable expectations of the contracting parties"); *Henry v. Alexander*, 186 S.C. 17, 194 S.E. 649 (1937) (holding a deviation from the terms of a contract constitutes an impairment of contract); *Superior Motors, Inc. v. Winnebago Indus., Inc*., 359 F.Supp. 773, 777 (D.S.C.1973) (stating impairment of contract occurs when legislation "attempts to make material alterations in the character, terms or the legal effect of an existing contract"). [*Id*. at 29-30 (emphasis added).]

Health – Definition of Actual Charges: In *Kirven*, 409 SC at 34, the defendant insurer sought to apply to a guaranteed for life, pre-existing supplemental health insurance policy a subsequently enacted statutory definition of "actual charges" in computing the amount of cash benefits payable to plaintiff under the policy. The new statute defined actual charges to mean the amount the health care provider agreed to accept or was obligated by law to accept pursuant to participation or supplier agreements rather than the amount billed for the services, resulting in diminished payments to plaintiff. *Id*. at 36. In determining whether there was a substantial impairment, the South Carolina Supreme Court considered "whether the law in question altered the reasonable expectations of the parties" and concluded that a substantial impairment would occur. *Id*. at 41. The Court also concluded that the statute was not reasonably related to achieving the purportedly significant and legitimate public purpose of policy affordability:

> [B]enefits were paid to Kirven for many years based on what she was billed by her medical providers; "therefore, it is a stretch to contend that the Defendants now need protection from the terms of the adhesion contract[ ] ... issued [to] the Plaintiff[ ]." . . . As Judge Anderson observed, section 38–71–242 "merely protects the [insurers'] private interests." *Id*. at *17. We conclude "there has been no showing that section 38–71–242's alteration of the meaning of 'actual charges' in [Kirven's policy] was necessary to meet an important societal problem related to the affordability of specified disease policies going forward." [*Id*. at 42-43.][28]

[28] The Court added, "In concluding that section 38–71–242 does not support a legitimate public purpose, we are influenced by the nature and purpose of supplemental insurance policies …" *Id.*

RECEIVED by MSC 2/6/2023 5:20:51 PM

Workers Comp – Excess Premiums: In *Workers' Compensation Refund*, 46 F3d at 816, various insurance companies challenged the constitutionality of a Minnesota statute that retroactively redistributed excess premiums paid to the Workers Compensation Reinsurance Association from the insurers to the employers. The WCRA reinsured all providers of workers compensation insurance in Minnesota pursuant to an operating plan, rules, and agreements. *Id*. Both insurance companies and self-insured employers were required to pay premiums to WCRA. *Id*. In accordance with the agreements, WCRA distributed a $100 million surplus to its members, but when further accounting revealed an additional surplus of $302 million, the Minnesota legislature quickly enacted a law requiring that both the earlier and later surplus amounts be paid to employers. *Id*. at 817. The Eighth Circuit Court of Appeals held that the statute substantially impaired the insurers' contracts with WCRA and was not justified by a significant and legitimate purpose. *Id*. at 821. This was despite the fact that the WCRA agreements contained an automatic amendment provision which expressly incorporates into the documents all amendments to Minnesota law as of their effective date. *Id*. at 818. The Court concluded that this clause could only apply prospectively:

> Unlike retroactive amendment, prospective amendment does not affect settled plans or arrangements. An expansive interpretation of the automatic amendment clause to permit complete retroactive amendment essentially deems all rights or obligations in those contracts illusory, because these rights could always be changed or obliterated. [*Id*. at 819.]

Statute of Limitations: In *Kee*, 852 SW2d at 229, the Tennessee Supreme Court held that a statute of limitations savings provision could not be applied to a loss occurring, and a policy executed, before the statutory amendment's effective date because "it would impair the accrued contractual rights of the insurer." The Court thus stated:

> Accordingly, we conclude that where the contract was already executed and the contractual right accrued before the amendment's effective date, retrospectively

RECEIVED by MSC 2/6/2023 5:20:51 PM

applying the 1989 amendment impairs the obligation of contract and violates Article I, Section 20 of the Tennessee Constitution. [*Id.*]

Fire – Contractual Limitation: In *Farmers' Co-Op Creamery*, 84 NW at 904, a suit for fire loss was filed after the six-month contractual limitation provision contained in the fire insurance policy. After the date of loss, a statute was passed prohibiting contractual limitations periods of less than one year. *Id*. The Iowa Supreme Court held that the statute could not be applied, stating, "Contract rights and obligations cannot, as a general rule, be changed by subsequent legislation. It is fundamental that the legislature cannot impair the obligations of a contract. These rules are well established …" *Id*.

These cases support the *Andary* majority's finding that retroactive application of the amendments to the legacy insureds violates the Contracts Clause.

III. The *Andary* Majority Properly Remanded the Due Process and Equal Protection Claims to the Trial Court for Discovery.

The *Andary* majority did not err by remanding the due process and equal protection claims to the Trial Court for "discovery necessary to determine whether the no-fault amendments, even when applied only prospectively, pass constitutional muster." *Andary* at *10. Defendants' argument seeks to simply avoid the issues. But the challenges are sound and must be fully litigated.

In *Shavers v Kelley*, 402 Mich 554, 583; 267 NW2d 72, 79 (1978), involving a constitutional challenge to the No-Fault Act, this Court explained, "[t]he challenged rational bases for the legislative judgments under the act are 'predicated' upon complicated statistics and actuarial facts of the motor vehicle insurance 'trade' or business (which have substantial economic consequences)" and "the 'complexity of problems' inherent in a judicial determination of whether the legislative judgments of the No-Fault Act are constitutional, 'makes it the more imperative that the Court in discharging its duty, in sustaining governmental authority within its sphere and in enforcing individual rights, shall not proceed upon false assumptions,'" *Id*. at 616, quoting

RECEIVED by MSC 2/6/2023 5:20:51 PM

Borden's Farm Products Co v Baldwin, 293 US 194, 210-211; 55 S Ct 187; 79 L Ed 281 (1934). This Court further quoted Justices Stone and Cardozo's concurring memorandum in *Borden's* "that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer." *Shavers*, 402 Mich at 616, quoting 293 US at 213.

There was no error in the *Andary* court's remand order.

RELIEF REQUESTED

Amicus Curiae CPAN respectfully requests that this Court affirm the Court of Appeals decision.

Respectfully submitted,

KERR, RUSSELL AND WEBER, PLC

By: */s/Joanne Geha Swanson*
Joanne Geha Swanson (P33594)
Attorney for Amicus Curiae CPAN
500 Woodward Avenue, Suite 2500
Detroit, MI 48226-3427
(313) 961-0200; FAX (313) 961-0388
E-mail: jswanson@kerr-russell.com

Dated: February 6, 2023

RECEIVED by MSC 2/6/2023 5:20:51 PM

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Amicus Curiae CPAN, certifies pursuant to MCR 7.312(A), MCR 7.312(H), and MCR 7.212(B) that this brief is printed in Times New Roman 12-point typeface utilizing Microsoft Word 2016 and contains 13,539 words, including headings, footnotes, and quotations.

Respectfully submitted,

KERR, RUSSELL AND WEBER, PLC

By: *<u>/s/Joanne Geha Swanson</u>*

Joanne Geha Swanson (P33594)
Attorney for Amicus Curiae CPAN
500 Woodward Avenue, Suite 2500
Detroit, MI 48226-3427
(313) 961-0200; FAX (313) 961-0388
E-mail: jswanson@kerr-russell.com

Dated: February 6, 2023

RECEIVED by MSC 2/6/2023 5:20:51 PM

CERTIFICATE OF SERVICE

Cynthia J. Villeneuve, being first duly sworn deposes and says that on February 6, 2023 she filed the foregoing document with the Clerk of the Court using the Court's electronic filing system which will electronically serve all parties of record.

/s/*Cynthia J. Villeneuve*
Cynthia J. Villeneuve

RECEIVED by MSC 2/6/2023 5:20:51 PM

Exhibit 1

RECEIVED by MSC 2/6/2023 5:20:51 PM

DOUGLAS HELLER
310-480-4170 | douglasheller@ymail.com

RECEIVED by MSC 2/6/2023 5:20:51 PM

April 24, 2020

Coalition Protecting Auto No-Fault
Board of Directors
216 N. Chestnut St.
Lansing, MI 48933

Dear CPAN Board:

I have been asked to review public Rate, Rule, and Form filings that have been submitted to the Michigan Department of Insurance and Financial Services (DIFS) pursuant to Public Acts 21 and 22 of 2019 (PA 21/22) and in response to the Acts' changes to Michigan's Auto No-Fault Laws.[1] In this letter I share some of initial findings and concerns regarding the filings I have reviewed.

Please note that my investigation has been hampered to some degree by the apparent decision by DIFS to allow several of Michigan's largest auto insurers to file their entire PA 21/22 Rate, Rule, and Form application on a non-public basis.[2] As I note below, some company filings I have reviewed include exhibits that were submitted confidentially and are inaccessible to the public, including exhibits with important data alleged to provide actuarial support for certain rates and premium rating factors. This hinders my ability to fully assess these filings. However, the withholding of certain documents within otherwise public filings is not nearly as disruptive to public accountability as the submission of entirely "non-public" filings by State Farm, Progressive, Auto Club, and USAA, which represent more than 50% of the Michigan auto insurance market. This is, in my view, wholly inappropriate and out of step with a reasonable regulatory review process, and this barrier to public access undermines the credibility of rates and rules that will take effect under PA 21/22 on July 2, 2020.

[1] I have prepared this document myself and not on behalf of or in the name of any other organization with which I am affiliated. For reference, however, I serve as the Insurance Expert for Consumer Federation of America and as an insurance consultant to other consumer interest organizations across the country. I am also a consumer representative member of the U.S. Department of Treasury's Federal Advisory Committee on Insurance and an appointed consumer representative to the California Automobile Assigned Risk Plan Advisory Committee. I hold Master of Public Administration (MPA) and Bachelor of Arts (BA) degrees. A complete CV is attached.
[2] DIFS has told me that, pursuant to MCL 500.2406 (1), these "non-public" filings will be made public after their July 2, 2020 effective date. (April 19, 2020 email from Karen Dennis, Director, Office of Insurance Rates and Forms, DIFS.)

This letter is primarily drawn from a review of the PA 21/22 filings submitted by Auto-Owners Insurance Group and Citizens Insurance (a member of The Hanover Insurance Group), which collectively represent about 16.5% of the Michigan auto insurance market and are the largest insurers to have submitted non-confidential filings. I have segmented my analysis into the following areas:

1. PIP premium rate reductions, overall rates, and profitability
2. Rating based on credit history and geography

Where I cite to documents included in PA 21/22 filings, I am referring to the most current version available from the National Association of Insurance Commissioner System for Electronic Rates and Forms Filing (SERFF) as of April 10, 2020.

1. PIP premium rate reductions, overall rates, and profitability

PIP premium rate reductions

According to PA 21/22 insurers are required to reduce the premium rates for PIP (referred to as "personal protection insurance" in the statute) by between 10% and 45% on average from the insurer's premium rate that was in effect for PIP coverage as of May 1, 2019. Specifically, pursuant to MCL Section 2111f(2), carriers are required to provide the following average reductions from the 2019 rate for traditional PIP coverage:

- 10% for Unlimited PIP coverage
- 20% for $500,000 PIP Medical coverage
- 35% for $250,000 PIP Medical coverage
- 45% for $50,000 PIP Medical coverage

While both Citizens and Auto-Owners appear to meet these thresholds, it is notable, as is explained below, that Citizens is collecting significantly more premium under the new offerings than they collected when they provided all customers with an Unlimited PIP coverage, even though the insurer will have less loss exposure due to new coverage limits. According to Page 1 of Exhibit A of its filing, Citizens Insurance is raising its rates by $17,386,920 starting July 2, 2020, excluding the amount it collects for the Michigan Catastrophic Claims Association (MCCA).[3]

In fact, the only reason these companies' filed premium rates produce compliant reductions is because policyholders with Unlimited PIP will face a much smaller MCCA assessment and those purchasing a reduced limit PIP Medical policy will no longer be charged an MCCA assessment.[4]

[3] Source: SERFF# HNVR-132213674, Exhibit A

[4] A review of several other smaller market participants finds similar changes. Farmers Insurance Exchange's Smart Plan Auto PA 21/22 application shows that Farmers is increasing the premium for the exposure it retains and relies on the changes to the MCCA assessment to achieve compliant average premium rate reductions. Source: SERFF# FARM-132247447 17 PIP Reduction Exhibit – FSPA. Similarly Farm Bureau General (SERFF# FBMI-132224650) and

RECEIVED by MSC 2/6/2023 5:20:51 PM

That is to say, in the wake of PA 21/22, several insurers are either charging more (Citizens, Farmers Smart Plan, Farm Bureau General, Hartford Underwriters) or the same (Auto-Owners) for each dollar of PIP insurance retained by the carriers compared with what was charged prior to the enactment of these measures, ostensibly aimed at lowering the cost of claims.

This refusal by several insurers to lower PIP rates comes despite the fact that PA 21/22 reduced the PIP exposure insurers have in several ways. For example,

- As of June 2019, MCL 500.3113 limited PIP coverage for some non-resident Michigan drivers;
- Beginning in July 2020, uninsured claimants (such as seniors, pedestrians, or bicyclists), will receive PIP benefits under the Assigned Claim Plan and be capped at $250,000). (MCL 500.3114) It is notable that this should lower PIP costs the most in areas, such as Detroit, where there are the highest levels of uninsured persons, but Detroiters do not see relief, as is discussed below;
- Utilization Review Rules for PIP claims takes effect in July 2020 (MCL 500.3157a) and are intended to reduce claim costs to insurers and therefore lower policy rates; and
- The creation of an Anti-Fraud Unit (MCL 500.6301 et seq.) was also meant to create savings by reducing fraudulent claims.

Notwithstanding all these purported savings strategies in PA 21/22, several insurance carriers' plans either maintain or increase PIP rates for the risk that stays with the companies and is not covered by MCCA.

The following chart shows Citizens Insurance's average premium differences between the new coverages and the prior PIP premium rates both before and after adjusting for the MCCA fee change. Additionally, a calculation is provided showing the different amount of exposure retained by the carrier for each coverage compared with the exposure under the Unlimited PIP previously provided.

RECEIVED by MSC 2/6/2023 5:20:51 PM

Hartford Underwriters (SERFF# HART-132301524) are increasing the average premium for PIP Medical, excluding reductions due to the MCCA assessment.

Citizens Insurance PIP Medical average premium rates by coverage limits [5]

	5/1/19 Unlimited PIP	7/2/20 Unlimited PIP	7/2/20 $500K PIP Medical	7/2/20 $250K PIP Medical	7/2/20 $50K PIP Medical
Citizens Insurance's Exposure per Policy	$580,000	$580,000	$500,000	$250,000	$50,000
Change in Citizens Insurance's Exposure per Policy [difference between $580,000 and new limit]	-	0%	-13.8%	-56.9%	-91.4%
Average PIP Medical Premium Excluding MCCA Assessment	$ 337.16	$ 355.53	$ 347.76	$ 316.43	$ 240.73
Average PIP Medical Premium Including MCCA Assessment	$ 533.04	$ 455.53	$ 347.76	$ 316.43	$ 240.73
Average PIP Premium Change Excluding MCCA		+5.4%	+3.1%	-6.1%	-28.6%
Average PIP Premium Change Including MCCA		-14.5%	-34.8%	-40.6%	-54.8%

As the table shows, the premium to cover Citizens Insurance's $580,000 exposure on an Unlimited PIP Medical Policy is 5.4% higher than the company charged on May 1, 2019 for the same coverage. The only reason the average premium charged to the company decreases more than the 10% decrease requirement under law is because of the significant impact of the MCCA assessment reduction. Incredibly, Citizens will charge 3.1% more for $500,000 PIP Medical coverage than it charged for the $580,000 of coverage it provided prior to the law change taking effect. Because there can be no excess claims in any of the limited coverage offerings, there is no MCCA assessment, which is how Citizens reaches a premium reduction of those coverages, despite increasing the premium held for itself.

With respect to the $250,000 and $50,000 coverages, as the "Change in Citizens Insurance's Exposure per Policy" row reveals, the premium reductions relative to the cost of PIP Unlimited coverage in 2019 are not commensurate with the substantial reduction of risk under the new lower limits. The $250,000 limits policy, for example, leaves Citizens with 56.9% less exposure than the Unlimited policy, but the premium only drops 6.1%. Similarly, $50,000 limits represent

[5] Source: SERFF# HNVR-132213674, Supporting Document Attachments\PIP Rate Reduction Exhibit_v1.1.xlsx

RECEIVED by MSC 2/6/2023 5:20:51 PM

a 91.4% decline in exposure, but only leads to a 28.6% drop in premium, before accounting for MCCA. It is well understood that the "first dollars of coverage" on an insurance policy are more expensive to insure, because while most injury accidents may cost at least a few thousand dollars, fewer cost $250,000 and fewer still cost $580,000. Therefore, we would not expect a decline in premium equal to the decline in exposure, but the extreme difference between the exposure reduction and the premium reduction is because, even adjusting for the higher cost of "the first dollars," this is a rate increase compared with what Citizens previously earned on the portion of insurance it retained.

Unlike Citizens, Auto-Owners Insurance has not filed to increase the average premium rate it charges customers for the PIP Medical exposure that it will retain under PA 21/22 policies. Nor does it lower the premium, however. Instead, Auto-Owners has filed for a rate that assumes that it will cost the same to cover PIP claims under the new strictures of PA 21/22 as it did to cover claims before the law takes effect. As with Citizens, Auto-Owners relies on the impact of the reduced or eliminated MCCA assessment to achieve compliance.

Because the companies are relying on the MCCA reduction to achieve their mandated average premium reductions, it is notable that the lowering of the MCCA assessment only applies for one year. That is, the $100 annual assessment is effective July 2, 2020 through June 30, 2021. Although I welcome a clarification, it appears that the statutory requirement for these average premium reductions will last through 2028, which means that if there is an increase in the MCCA fee anytime after June 30, 2021, there would likely have to be a reduction in the PIP Unlimited premiums charged by insurers for the coverage they retain to offset the MCCA increase. However, Section 500.2111f(7) allows companies to request, and the DIFS director to approve, rates that do not meet the threshold average premium reductions. I am concerned that insurers may fulfill the initial mandate to lower PIP premiums – while public scrutiny is at its highest – by relying on this one year MCCA assessment reduction, but they may seek relief from ongoing compliance if the MCCA assessment, which is itself determined by an industry-led board, rises in the future.

A final point on this subject is that even when accounting for the MCCA decrease, the customer savings that are calculated are only an average. This means that some people will get more than the minimum required savings, others will see less than the promised relief, and still others will pay more for auto insurance, even with their MCCA savings, than they ever have before. As Auto-Owners acknowledges in its filings, some safe drivers in 48228, in the northwest part of Detroit, will see PIP Unlimited coverage rise from $383.08 currently to $703.62 when the PA 21/22 rates take effect; this 83.7% increase is hardly the 10% savings promised under the law. A slightly lower (64%) premium increase faces some good drivers living in Detroit 48203. Both of these predominantly African American neighborhoods have household median incomes that are less than half the Michigan statewide median income, meaning that the pain of the PA 21/22 rate increase these residents face will be particularly acute.

RECEIVED by MSC 2/6/2023 5:20:51 PM

Overall Rates

The average premium changes discussed above reflect the anticipated average amount that future customers will pay for their PIP Medical coverage. It is based on the companies' current book of business, so the actual average premium reductions could be larger or smaller depending upon how the mix of business changes in the future. Additionally, the amount that individual policyholders actually pay for their PIP Medical coverage will vary significantly from this projected average based on rating factors – such as driving record, vehicle type, territory, and credit history (discussed below).

However, another point of analysis in the wake of PA 21/22 is the overall rate changes that are included in the company applications, as that helps to understand what the insurers expect to earn in the new auto insurance environment. As I have already noted, Citizens will earn $17 million in additional rate compared with its pre-PA 21/22 rate level. Based on the filings I have reviewed, excepting the MCCA fee reduction, Michigan insurers will not collect less premium from drivers under the new law, and there appear to be a few reasons for this.

One reason that the overall rates facing Michiganders are not going down is that rates for bodily injury liability coverage are increasing. Citizens, for example, includes a 10.6% increase to its bodily injury rates.[6] Auto-Owners includes a 3.0% increase to its bodily injury rates.[7] This upward pressure on rates, perhaps less discussed than the promised PIP savings, is summarized in a filing by the Insurance Services Office (ISO),[8] in which the advisory organization states the following:

> In response to 2019 Mich. Pub. Acts 21 (former Senate Bill 1) and 2019 Mich. Pub. Acts 22 (former House Bill 4397), the incurred losses and loss adjustment expenses for Bodily Injury have been adjusted by a factor of 1.10 to account for expected increases in losses…

In other words, ISO expects a 10% increase in bodily injury liability claim costs due to the law change. A more detailed explanation for higher bodily injury premiums under PA 21/22 was presented by Citizens parent company Hanover in its 2019 10-K, in which it wrote: "In contrast, the minimum amounts of bodily injury coverage drivers are required to purchase will increase, and we anticipate an increase in tort liability and related litigation from these changes."[9]

Another coverage for which rates appear to be increasing is Uninsured/Underinsured Motorist (UM/UIM) Coverage. Citizens Insurance's rates include a 5.7% increase for UM/UIM coverage, Auto-Owners has filed for a 5% increase for its UIM and 0.9% for its UM, and Farmers for a 26% UM increase.

---

[6] Source: SERFF# HNVR-132213674, Exhibit S

[7] Source: SERFF# AOIC-132194645, Exhibit B – Rate Indication

[8] Source: SERFF# ISOF-132210867, PP-2019-RLC1-MI-Sect B-Determination of Filed Loss Costs. ISO is an insurance advisory organization that provides rate information to it insurance company members and files that information with DIFS.

[9] The Hanover Insurance Group, Form 10-K for the fiscal year ended 2019. February 24, 2020. p.22

RECEIVED by MSC 2/6/2023 5:20:51 PM

While drivers spend about 25 to 50% less on these two coverages (BI and UM/UIM) combined compared with PIP, the expenditure on these bodily injury-related coverages may increase under PA 21/22 as consumers find themselves with greater exposure to both liability and uninsured/underinsured losses in the wake of the law changes.

Finally, and perhaps most importantly, despite the law changes in PA 21/22, both Citizens and Auto-Owners filed data that they argue support an increase in the amount of overall PIP rate they should be allowed to collect. In the case of Auto-Owners Insurance Group, the company is foregoing its reported +3.1% "indicated rate level change" for PIP and instead maintaining PIP rates at the pre-PA 21/22 level. Citizens Insurance reports a need to increase PIP rates by +2.5% but has elected to take a +1.1% increase to its PIP rates.

Whether or not Citizens and Auto-Owners are representative of the market as a whole cannot be publicly known, because the state's other large auto insurers have been allowed to file their rates confidentially. What can be gleaned from these two large Michigan insurers (as well as Farmers, a smaller player in the Michigan market), though, is revealing. For the benefits that drivers are asked to give up in order to achieve savings, and for the systemic constraints imposed under the promise of cutting claim costs, Michigan consumers will be expected to pay the same overall rate for the reduced coverage to Auto-Owners Group (0.0% Rate Change for All Coverages Combined Without MCCA), and Michiganders will actually pay more overall to Citizens Insurance (+3.4% Total Rate Change Excluding MCCA) after implementation of PA 21/22 than policyholders paid before the changes.

Profitability

While insurers had long complained about the challenges of successfully doing business in Michigan as a pretext for high rates and the push to enact PA 21/22, it is worth taking a moment to review a paragraph in the 2019 10-K Report of Citizens Insurance's parent company, Hanover Insurance Group:

> Pursuant to Michigan's statute, the maximum dividends and other distributions that an insurer may pay in any twelve month period, without prior approval of the Michigan Insurance Commissioner, is limited to the greater of 10% of policyholders' surplus as of December 31 of the immediately preceding year or the statutory net income less net realized gains, for the immediately preceding calendar year. Citizens declared dividends to its parent, Hanover Insurance, totaling $106.0 million, $87.9 million and $99.9 million in 2019, 2018 and 2017, respectively. [p.110]

This means that during the most recent three years, Citizens sent $293.8 million in dividend payments upstream to its Massachusetts-based parent company. With about 212,000 policies, that dividend payment cost each policyholder about $1,386 in total over the course of three years. And now, under PA 21/22, Citizens will be charging their customers even more.

RECEIVED by MSC 2/6/2023 5:20:51 PM

2. Rating based on credit history and geography

PA 21/22 offered two bold promises meant to calm concerns that financially vulnerable drivers, especially in Detroit, would continue to suffer high and unaffordable premiums for now-diminished protection if the law were enacted. In particular, PA 21/22 adopted a prohibition on the use of a resident's ZIP code in setting premiums [MCL Section 500.2111 (4)(f)] and further stated, at Section 500.2108 (8):

> A filing under this chapter must specify that the insurer will not refuse to insure, refuse to continue to insure, or limit the amount of coverage available because of the location of the risk, and that the insurer recognizes those practices to constitute redlining. An insurer shall not engage in redlining as described in this subsection.

These provisions appear to have been aimed at limiting the disparate impact of territorial rating and underwriting in Michigan, in which drivers in predominantly African American ZIP codes, and Detroit in particular, faced an auto insurance market that was either unaffordable or unavailable to them. A third provision, states "An insurer shall not use an individual's credit score to establish or maintain rates or rating classifications for automobile insurance." [MCL Section 500.2162] This prohibition seems to have been in response to concerns that the use of consumer credit scores in pricing auto insurance made coverage inaccessible to safe drivers whose financial struggles can leave their credit history battered even if their driving record remains pristine.

Unfortunately, though quite predictably by virtue of other lesser-touted provisions, none of these safeguards offer any meaningful protection from high prices. As the review of Citizens Insurance's and Auto-Owners Group's filings reveal, drivers living in predominantly African American communities in Southeast Michigan and Detroit in particular will continue to face daunting premiums, even for limited coverage, that are often much higher than premiums of other communities, including whiter, wealthier communities very nearby. Further, the prohibition on the use of credit score is no prohibition whatsoever, as the purported ban on credit scoring is gutted by the definition of the term, which limits the prohibition only to the use of "the numerical score ranging from 300 to 850 assigned by a consumer reporting agency to measure credit risk and includes FICO credit score." [Section 500.2151 (e)] Auto insurers remain allowed, under PA 21/22, to use an "insurance score," which is a "a number or rating that is derived from an algorithm, computer application, model, or other process that is based in whole or in part on credit information…" [[Section 500.2151 (f)]. The "insurance score" that is still allowed, and not the nominally different "credit score," happens to be precisely the credit-based factor that insurers have used in the past.

In this section, I calculate rates for a variety of drivers following the algorithms prescribed in the PA 21/22 filings of Auto-Owners and Citizens. While there are other factors that could alter the premiums either up or down for an individual customer, such as the vehicle model and year, the calculations I present below fairly reflect the differences in premiums that good drivers will

RECEIVED by MSC 2/6/2023 5:20:51 PM

encounter depending upon their home address and their “insurance score.” Where there is insufficient data in the public file to confirm the precise impact of credit, I have noted it.

Auto-Owners Insurance

Impact of Credit History

According to its PA 21/22 rates and rules, Auto-Owners applies an “Insurance Score [] developed from credit related information including: types of accounts, balances, dates opened, and account activity, plus public record items such as judgments and liens and inquiries initiated by the insured.”[10] The effect of this credit-based score on customers’ premiums for all coverages is significant. For example, without considering other factors such as driving safety or territory, a 40-year old driver will see their six-month base rate for Bodily Injury coverage adjusted to as low as $105.76 for the best credit customers and as high as $297.23 for the worst credit customers, a 181% swing. The cost of credit history on PIP premiums is even more severe due both to the higher cost of PIP coverage and the larger percentage impact that Auto-Owners applies to its credit factor for PIP coverage. Six-month PIP Medical premiums (again, unadjusted for driving record, vehicle, territory, and other factors) can range from $664.21 for a top credit rating to $2,618.51 for a bottom tier credit history, or 294% more.

Using the Auto-Owners Insurance Score factor tables for PIP Medical coverage for a 40-year old driver, and incorporating the discount provided for having no prior insurance claims on their record, I have calculated the adjustments to the semi-annual base rate for a claims-free driver, depending upon credit history. Auto-Owners has 53 credit-based tiers in its Insurance Score, and, for illustration purposes, I have created four credit-history categories for testing a theoretical customer:

1. Best Credit – rated on the highest score available (Tier 53, Insurance Score: 900-997)
2. Good Credit – rated on the 12th highest score (Tier 42, Insurance Score: 819-821)
3. Moderate Credit – rated on the median score (Tier 27, Insurance Score:757-760)[11]
4. Poor Credit – rated on the lowest score available (Tier 1, Insurance Score: 1-371)

Auto-Owners: Six-month base premium for 40-year old, claims free driver

	Best Credit	Good Credit	Moderate Credit	Poor Credit
Rating Factor	0.312	0.42	0.612	1.23
Premium	$358.01	$481.93	$702.25	$1,411.38

Territorial rating compounds the problem

The elimination of the use of ZIP codes as a rating factor and the statutory language targeting “redlining” have not changed the reality that will confront Detroiters when the new PA 21/22

[10] Source: SERFF# AOIC-132194645, MI Complete Manual - 07-02-2020

[11] While Tier 27 is the median tier, this driver has an Insurance Score of 760 out of 997, which may represent better credit than is usually considered moderate or average. Since the publicly available portion of the Auto-Owners filing does not more fully describe the distribution of drivers among the tiers, I use the median as a proxy for moderate credit.

RECEIVED by MSC 2/6/2023 5:20:51 PM

rates and rules take effect. Namely, having a Detroit ZIP code, or, more precisely, living in a Detroit area census tract block group, means you will still face wildly high and unaffordable auto insurance premiums, especially if you don't have pristine credit. For those drivers who both live in Detroit and have imperfect credit histories, these rating plans produce a "double whammy" as described below.[12]

Under the Auto-Owners rule plan the cost of PIP Medical coverage can vary by as much as 262% depending upon where you live, all else being equal. So, for example, a claims free driver with perfect credit living in parts of Hudsonville 49426, just west of Grand Rapids, will receive a six-month PIP Medical premium quote of $307.89.[13] But if that exact same driver lives on certain blocks (though we don't quite know which) in Detroit 48205, the cost of the exact same coverage rockets to $1,113.40 for half a year.

Below are premiums for different PIP Medical coverage limits for a 40-year old driver with no prior auto insurance claims in different ZIP codes around Michigan.[14] For each driver, I present the premiums for each PIP Medical coverage option. The tables are repeated to show the combined impact of geography and credit history on drivers.

40-Year Old, Claim Free Driver Six-Month Premium by Coverage Limits and Credit History				
BEST CREDIT	**PIP Medical Unlimited**	**PIP Medical $500K**	**PIP Medical $250K**	**PIP Medical $50K**
Hudsonville 49426	$308	$302	$280	$188
Kalamazoo 48906	$362	$355	$330	$221
East Lansing 48912	$410	$402	$373	$250
Saginaw 48607	$566	$554	$515	$345
Pontiac 48342	$666	$653	$606	$406
Detroit 48238	$1,024	$1,003	$932	$625
Detroit 48214	$1,106	$1,084	$1,007	$675
Detroit 48205	$1,113	$1,091	$1,013	$679

[12] Another analysis could be conducted to demonstrate that drivers living in Detroit will be most likely to face both the negative impacts of territory and the negative impacts of credit score. This analysis would build upon research such as the Federal Reserve Bank of Chicago's 2019 paper, which includes Michigan data, that shows lower-income, urban communities have substantially more subprime credit scored households than wealthier suburban communities. George, T., Newberger, R. G., & O'Dell, M. (2019). The Geography of Subprime Credit. Profitwise, (6), 1-11. https://www.chicagofed.org/~/media/publications/profitwise-news-and-views/2019/pnv6-2019-the-geography-of-subprime-credit.pdf

[13] Auto-Owners does not disclose in the public filing which parts of ZIP code 49426 are covered by this rate, and because there are 21 different territories at least partly in this ZIP, the rates vary and can increase by 23% to as high as $379.49 for the tested driver if they live in the highest priced territory of the ZIP code.

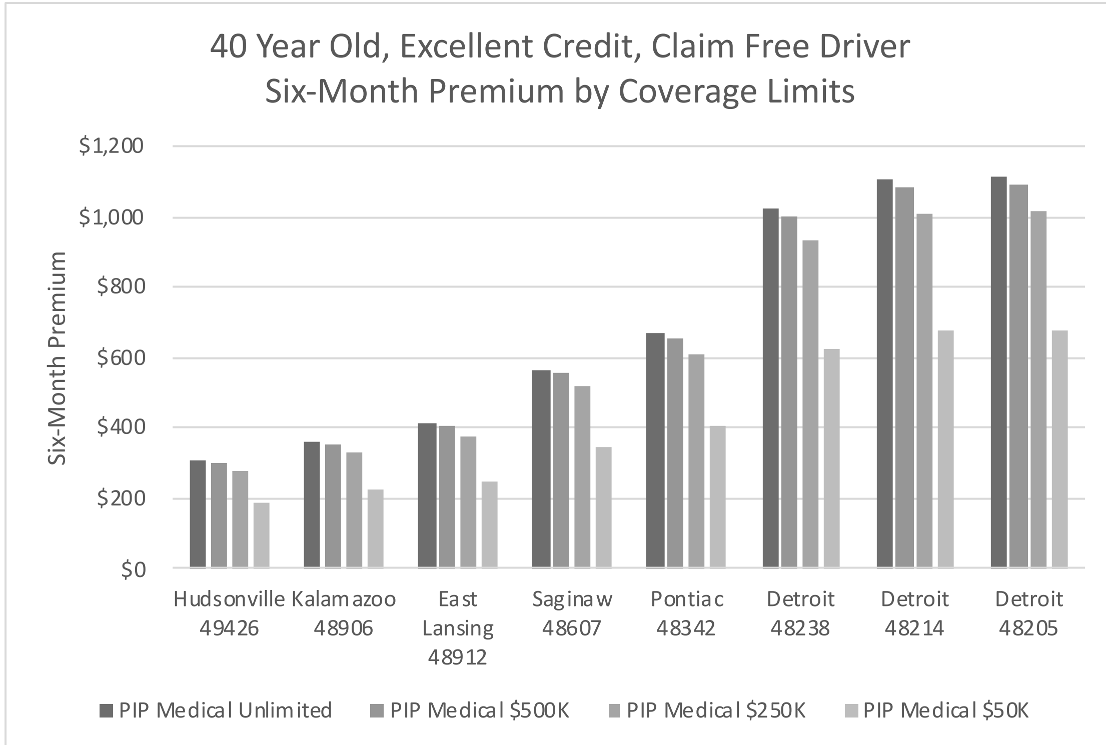
[14] These tests are based on the rate offered in at least one territory of each of the ZIP codes. Because each of the tested ZIP code has several territories, depending upon the neighborhood in the ZIP code in which they live, some drivers will be priced differently than shown.

RECEIVED by MSC 2/6/2023 5:20:51 PM

GOOD CREDIT	**PIP Medical Unlimited**	**PIP Medical $500K**	**PIP Medical $250K**	**PIP Medical $50K**
Hudsonville 49426	$414	$406	$377	$253
Kalamazoo 48906	$488	$478	$444	$298
East Lansing 48912	$552	$541	$503	$337
Saginaw 48607	$761	$746	$693	$464
Pontiac 48342	$896	$878	$816	$547
Detroit 48238	$1,378	$1,351	$1,254	$841
Detroit 48214	$1,489	$1,459	$1,355	$908
Detroit 48205	$1,499	$1,469	$1,364	$914
MODERATE CREDIT	**PIP Medical Unlimited**	**PIP Medical $500K**	**PIP Medical $250K**	**PIP Medical $50K**
Hudsonville 49426	$604	$592	$550	$368
Kalamazoo 48906	$711	$696	$647	$434
East Lansing 48912	$805	$789	$732	$491
Saginaw 48607	$1,110	$1,087	$1,010	$677
Pontiac 48342	$1,306	$1,280	$1,189	$797
Detroit 48238	$2,008	$1,968	$1,828	$1,225
Detroit 48214	$2,170	$2,127	$1,975	$1,324
Detroit 48205	$2,184	$2,140	$1,987	$1,332
POOR CREDIT	**PIP Medical Unlimited**	**PIP Medical $500K**	**PIP Medical $250K**	**PIP Medical $50K**
Hudsonville 49426	$1,214	$1,190	$1,105	$740
Kalamazoo 48906	$1,428	$1,400	$1,300	$871
East Lansing 48912	$1,617	$1,585	$1,472	$986
Saginaw 48607	$2,230	$2,185	$2,029	$1,360
Pontiac 48342	$2,625	$2,573	$2,389	$1,601
Detroit 48238	$4,037	$3,956	$3,673	$2,462
Detroit 48214	$4,361	$4,274	$3,969	$2,660
Detroit 48205	$4,389	$4,302	$3,994	$2,678

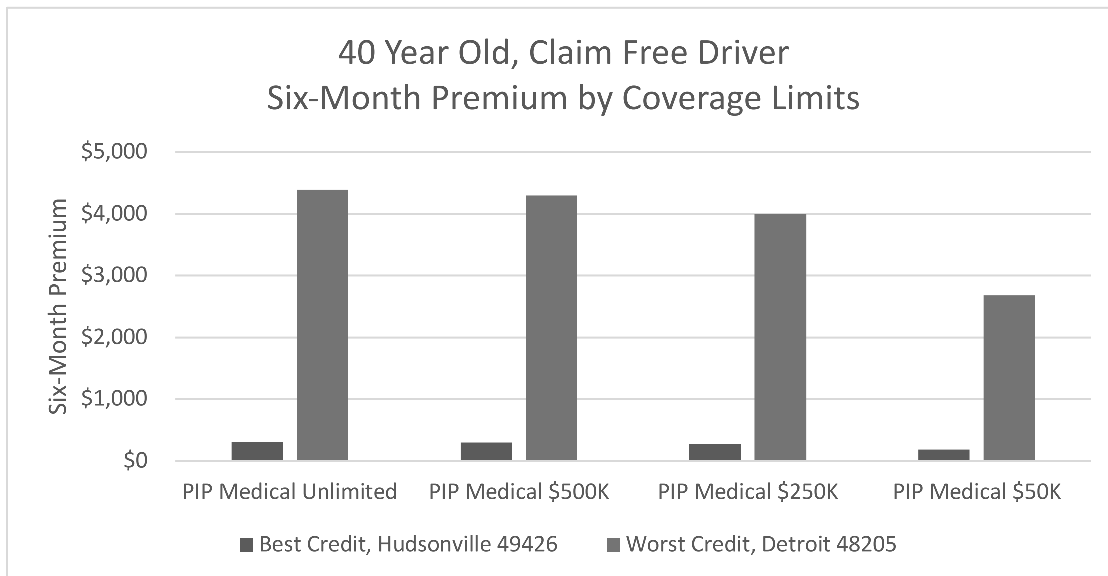
As the following graph of the premiums for drivers with the best possible credit shows, it will cost motorists in the Detroit ZIPs more to purchase PIP Medical coverage with a $50,000 limit than drivers in other parts of the state will have to pay to maintain traditional unlimited PIP coverage (with the one exception that PIP $50K in Detroit 48238 is slightly less expensive than PIP Unlimited in Pontiac).

RECEIVED by MSC 2/6/2023 5:20:51 PM



RECEIVED by MSC 2/6/2023 5:20:51 PM

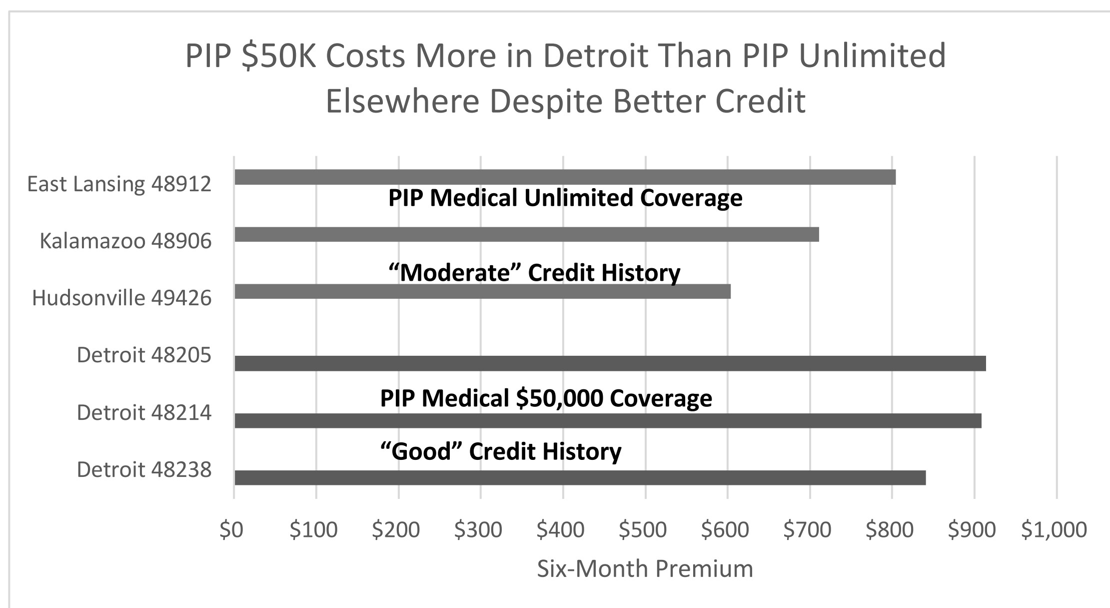
The differences between an excellent credit, claims free driver in Hudsonville and a poor credit, but still claims free driver in Detroit 48205 are staggering, as illustrated below. The combination of having poor credit and living in Detroit leaves that driver paying more than 10 times the amount charged to the excellent credit driver in Hudsonville with the same record.



It is not just in Detroit, however, that good drivers with less than stellar credit will suffer unaffordable insurance premiums. The premium for a PIP $250k coverage policy in Saginaw and

Pontiac are $515 and $603, respectively for a driver who has unblemished credit, but it rises to more than $2,000 every six months – more than $4,000 a year just for the limited PIP Medical portion of their policy – if, instead, they have a poor credit history.

The price difference facing drivers living in Detroit lingers even if the credit history of the customers is reversed. As the table below shows, it costs more for a good credit driver in Detroit to purchase $50,000 of PIP Medical coverage than it costs for a moderate credit driver to buy Unlimited PIP coverage if they live in Hudsonville, Kalamazoo, or East Lansing. As with the other data, all the drivers shown have never filed a claim.



It is worth remembering that all the premiums described above reflect only the cost of PIP Medical and do not include the additional costs drivers will incur to purchase their PIP Wage Loss coverage as well as other mandatory coverages such as Bodily Injury Liability or the Comprehensive and Collision coverage required if they have a loan on their vehicle. Taken altogether, it is clear that Auto-Owners Insurance's pricing of PA 21/22 policies still leave Detroit drivers and other financially stretched Michiganders with unaffordable auto insurance.

Citizens Insurance

In its PA 21/22 filing, Citizens provides semi-annual (six-month) base rates for each of its coverages. These are, in essence, the starting point for pricing all customers; each customer will have its rates adjusted upward or downward by multiplying several different rating factors that cover such characteristics as their driving record, vehicle type, and garaging territory. In this analysis, I provide some examples of the premium calculations for the two primary no-fault coverages, PIP Medical and PIP Wage Loss, for different drivers. However, for context, the table below illustrates the base rates for the most familiar coverages a driver would purchase.

RECEIVED by MSC 2/6/2023 5:20:51 PM

Citizens Insurance – Six-Month Base Rates for Common Coverages[15]

BI	PD	PIP Medical	PIP Wage	Attendant Care	UM/UIM BI	COMP	Basic COLL	Mini Tort	PPI	MCCA
$756	$41	$2856	$830	$24	$80	$799	$1596	$96	$154	$50

Impact of Credit History

For the premiums I present below, I have assumed that each driver being insured has not had accidents or violations. Citizens reduces a customer's premium from the base rate according to a score it calls its "Market Discount." This score is a composite of a customer's credit-based insurance score "in combination with non-credit variables:

- Driver, vehicle, and coverage composition on the policy
- Accident and violation history
- Residence type and account status
- Prior Insurance status, including liability limits and continuity of coverage"[16]

Because I am unable to find a more detailed description of how the credit and non-credit inputs produce a particular Market Discount (and I suspect the precise algorithm is either filed as a non-public document or not provided to DIFS), I have made certain assumptions for the purposes of my comparisons. As I explain below, I believe my assumptions understate the impact of credit history on Citizens policyholder premiums, but even these conservative interpretations help illustrate the effect on financially vulnerable consumers.

In its formula, Citizens presents about 4,629 possible Market Discount scores. My first assumption, about which I am entirely confident, is that drivers with better credit get better scores, so long as the other non-credit inputs are also "good." Because of the use of non-credit variables, I also assume that drivers with the worst credit, but with clean driving records and continuous coverage, for example, would not get the worst Market Discount. I believe that in order to get the best overall Market Discount score, the policyholder must have very high credit as well as the best scores for the non-credit variables included in this rating factor. This driver will get the most significant discount available and will see their premiums drop as follows:

	Base Rate	Market Discount	Best Credit Premium
PIP Medical (Unlimited)	$2856	0.0204	$58.26
PIP Wage Loss	$830	0.0204	$16.93

[15] Source: SERFF# HNVR-132213674, Exhibit 10, Base and Endorsement Rates

[16] Source: SERFF# HNVR-132213674,Rule Guide

RECEIVED by MSC 2/6/2023 5:20:51 PM

For drivers with worse credit, it is impossible to precisely guess what rating relativity would be applied. As a note, to support the use of this factor, I believe Citizens should be compelled to disclose the complete algorithm to demonstrate that it is neither unfairly discriminatory nor duplicative of other factors used. Indeed, under PA 21/22, there are limits on the use of prior insurance for rating purposes through January 1, 2022, which suggests this factor may violate the law, depending upon how it is actually constructed. [MCL Section 500.2116b]

For this analysis, I assume that the credit-based insurance score represents a significant proportion of the overall factor calculation. If the most significant discount goes to a driver with a perfect credit history, I use the following assumptions to estimate the impact of different credit histories that are not confounded by other non-credit variables:

- A driver with good credit gets rated in the top 10%,
- A driver with moderate credit gets rated in the top 25%, and
- A driver with very poor credit gets rated in the top 40%.

With those assumptions the resulting six-month premiums are as follows:

	Best Credit	Good Credit	Moderate Credit	Poor Credit
PIP Medical (Unlimited)	$58.26	$213.34	$383.56	$740.28
PIP Wage Loss	$16.93	$62.00	$111.72	$215.14

Without being able to review its actual algorithm, I believe this is a reasonably conservative estimate of the impact of credit history on Citizens Insurance policyholders. It suggests that under the new PA 21/22 rates, a Citizens Insurance policyholder's PIP Medical + PIP Wage Loss premium for six months could range from $75.19 to $955.41 depending on their credit score, with the poor credit driver paying 1,171% more for coverage.

Territorial rating compounds the problem

The above comparison dramatically understates the actual impact on a dollar basis of credit history, because it is not yet adjusted for territory. Very few Michigan drivers would get precisely the premiums in the table above based on their credit score, because rates also vary significantly by territory. In fact, only 11 of the 8,159 different Michigan census tract block group territories in Citizens Insurance's rating manual have ratings of 1.0 for PIP coverages such that they would see premiums exactly as described above depending upon their credit history. (For reference, one of the 1.0 rated census tract block groups is in White Lake, MI.) For most drivers, however, their premium will go up or down based upon where they live.

RECEIVED by MSC 2/6/2023 5:20:51 PM

To illustrate how the variation in rates by territory in the Citizens plan maintains the severe penalties that have long burdened Detroit drivers, I have calculated PIP premiums for the same four drivers as above (each with a different credit-based "Market Discount") based on whether they are living in a census tract block group in Detroit 48215 (tract # 261635124001 on Alter Road) or one in Grosse Pointe Park 48230 (tract # 261635502001 on Maryland Street). The addresses used for these quotes are, as the map below shows, less than one mile away from each other. The neighborhoods, though, are demographically very different.

- The residents of the Detroit census tract are 95% African American and 3% White (non-Hispanic) and the median household income is $19,436
- The residents of the Grosse Pointe Park census tract are 16% African American and 72% White (non-Hispanic) and the median household income is $108,384

The premiums for PIP Medical Unlimited and PIP Wage Loss for each of these drivers, using the assumed credit impact of the Market Discount factor described above, are as follows:

RECEIVED by MSC 2/6/2023 5:20:51 PM

Six-month quotes for combined PIP Unlimited coverage, by credit-based Market Discount and Territory

Census Tract ↓	Market Discount →	Best Credit	Good Credit	Moderate Credit	Poor Credit
Detroit 261635124001	PIP Medical	$327	$1,199	$2,156	$4,160
	PIP Wage Loss	$95	$348	$628	$1,209
	Combined Total	**$423**	**$1,547**	**$2,783**	**$5,369**
Grosse Pointe Park 261635502001	PIP Medical	$111	$405	$729	$1,407
	PIP Wage Loss	$29	$105	$190	$366
	Combined Total	**$139**	**$511**	**$919**	**$1,772**

In short, the premium for the Detroit driver is three times higher than for their neighbor eight-tenths of a mile to the South in Grosse Pointe Park, even if they have the exact same credit history.

Of course, as is noted in footnote 12, data suggest that there will be a lot more subprime credit residents in the poorer census tract on the Detroit side of this border, so it is likely that the average consumer's credit-based "Market Discount" score will be lower in Detroit. Factoring in a difference in credit in combination with the territorial punishment facing Detroiters reveals just how severely the promises of PA 21/22 fall short for those who have historically struggled most with auto insurance premiums. While an excellent credit driver living in Grosse Pointe Park may be offered a combined PIP policy for $139 for six months, the premium for the same combined coverage would be more than 10 times higher -- $1,547 -- for the Detroiter with merely a top 10% (Good Credit) Market Discount score. If the Detroit resident had a very low credit score, even with the same driving record as the Grosse Pointe Park driver, they will be quoted $5,369 for six-months, a 3,750% increase.

Of course, the centerpiece of PA 21/22 was the ability to choose lower limits coverage in order to save on insurance costs. Here are the various PIP Medical options' premiums for each of the above drivers:

RECEIVED by MSC 2/6/2023 5:20:51 PM

Six-month quotes for PIP Medical, by limits, credit-based Market Discount and Territory

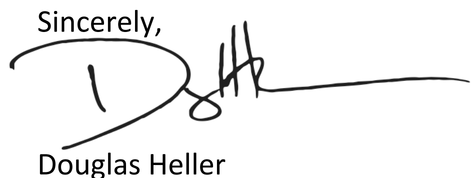
Census Tract ↓	Market Discount ⟶	Best	Good	Moderate	Poor
Detroit 261635124001	PIP Unlimited	$327	$1,199	$2,156	$4,160
	PIP $500K ($1000 Deductible)	$308	$1,129	$2,031	$3,919
	PIP $250K ($1000 Deductible)	$269	$984	$1,770	$3,416
	PIP $50K ($1,000 Deductible)	$174	$637	$1,145	$2,209
Grosse Pointe Park 261635502001	PIP Unlimited	$111	$405	$729	$1,407
	PIP $500K ($1000 Deductible)	$104	$382	$686	$1,325
	PIP $250K ($1000 Deductible)	$91	$333	$598	$1,155
	PIP $50K ($1,000 Deductible)	$59	$215	$387	$747

Because of the outsize impact of the Territory and credit-based Market Discount rating factors, a driver with a perfect driving record and the best credit-based market discount who lives in Detroit actually pays 57% more for *$50,000 of PIP Medical coverage* than the same driver would pay for *Unlimited PIP Medical coverage* if they lived less than a mile away in Grosse Pointe Park.

Conclusion

The insurance industry and public officials who pressed for and supported PA 21/22 promised that changes in Michigan's Auto No-Fault Insurance laws would bring relief to Michigan drivers, especially those in Detroit who found it most difficult to afford auto coverage in the past. A review of the filings by the few large companies that have allowed their filings some amount of public scrutiny indicate that the promise was hollow. The bulk of the savings that will be realized is attributable to the change in the MCCA assessment, and the insurers will be capturing the same or more premium for the risk that remains on their books. For those residents who live in Detroit or who have less than good credit, or, worse, live in Detroit and have imperfect credit, the premiums that will be taking effect on July 2, 2020 will continue to be unaffordable by all reasonable measures.

Sincerely,



Douglas Heller

RECEIVED by MSC 2/6/2023 5:20:51 PM

DOUGLAS HELLER

310-480-4170 | douglasheller@ymail.com

RECEIVED by MSC 2/6/2023 5:20:51 PM

Executive Summary

Douglas Heller is an independent consultant and nationally recognized insurance expert. During two decades of work on public policy and regulatory matters related to insurance, Heller has led regulatory challenges to insurance company rates and practices, represented consumer interests at insurance rulemaking and legislative hearings, served as a consulting expert in litigation, authored several reports on auto insurance pricing in the United States, and, for nine years, served as the Executive Director of the national consumer advocacy organization, Consumer Watchdog. His work has saved policyholders billions of dollars on insurance premiums and helped curb unfair auto insurance pricing practices. In addition to conducting research for and providing expertise to consumer rights organizations and consumer attorneys, Heller serves as a member of the U.S. Department of Treasury's Federal Advisory Committee on Insurance (FACI) as as an appointed board member of the California Automobile Assigned Risk Plan (CAARP) Advisory Committee.

Professional Employment History

Independent Consultant

2013-Present

Consumer advocate and consulting expert providing insurance policy expertise and guidance to Consumer Federation of America and other public interest organizations. Conducts research; authors reports; works with policymakers, regulators, coalitions, and media; and provides other strategic services on behalf of social sector clients. Recent projects include:

- Author of peer-reviewed article "An Auto Insurance Lifeline for Safe Driving, Lower-Income Marylanders," commissioned and published by the Abell Foundation (2019)
- *Investigatory Hearing on the Use of Group Rating in Private Passenger Automobile Insurance,* serving as lead advocate and subject matter expert for Consumer Federation of California (2019)
- *In The Matter of the Proposed Rulemaking, Gender Non-Discrimination in Automobile Insurance Rating,* serving as lead advocate and subject matter expert for Consumer Federation of California (2018)
- Consulting expert in the matter of *Rudnicki v. Farmers Insurance Exchange, et al.* (2018)
- Co-author, with J. Robert Hunter, FCAS, MAAA, of "Private Passenger Auto Premiums And Rating Factors – Are They Actuarially Sound?" for Consumer Federation of America (2017)
- Serving as expert on behalf of the Maryland Consumer Rights Coalition and providing testimony before the Maryland General Assembly's Low Cost Auto Policy Workgroup (2017)
- *In the Matter of the Rate Application of State Farm General Insurance Company*, file number PA 2015-00004, serving as lead advocate for Consumer Federation of California during all phases of the public hearing in this homeowners insurance rate matter;
- *In the Non-Compliance Matter Regarding GEICO Insurance*, NC-2015-00001, serving as lead advocate and subject matter expert for Consumer Federation of California;
- *In the Matter of the Rate Application of Wawanesa General Insurance Company*, file number PA 2015-00011, serving as lead advocate and subject matter expert for Consumer Federation of California;
- *In the Matter of the Rate Applications of Hartford Underwriters Insurance Company and Trumbull Insurance Company*, file number PA 2014-00011, serving as lead advocate and subject matter expert for Consumer Federation of California;
- Presenting on the subject of the regulation of California's insurance industry at The Insurance Law Committee of the California State Bar symposium (May 2013).

Federal Advisory Committee on Insurance
Member-Consumer Representative

2020-Present

Federally appointed consumer representative member of FACI, which provides advice and recommendations to assist the U.S. Department of Treasury's Federal Insurance Office in carrying out its statutory authority.

California Automobile Assigned Risk Plan Advisory Board
Board Member-Consumer Representative

2013-Present

Appointee of California Insurance Commissioner Dave Jones, serving as "Consumer Representative" on the board of the public entity that oversees the state's auto insurance private passenger and commercial residual markets and the state's program for low-income motorists.

USC Sol Price School of Public Policy
Adjunct Instructor

2015

Teaching "Strategic Planning in the Social Sector" in the Master of Public Administration Program.

Consumer Watchdog
Executive Director/Executive Director Emeritus (2013)

2004- 2013

Nationally-recognized consumer advocate, managing a staff of consumer advocates, public interest lawyers and administrative personnel, and serving as the organization's lead policy analyst and advocate concerning property and casualty insurance issues.

Advocacy Director, Consumer Advocate, and Community Organizer 1997-2004

Coordinated organization's legislative, regulatory and media advocacy related to insurance, political and corporate accountability and energy and utility issues. Testified before Congress and several state legislatures. Authored several studies, op-eds and news releases on a range of issues including auto insurance discrimination, energy deregulation, medical malpractice insurance, and insurance industry investment practices.

Education [Accreditations and Affiliations]

University of Southern California, Sol Price School of Public Policy — May 2014
Master of Public Administration (MPA) with an emphasis on Public Management
Dean's Certificate of Merit in Recognition of Excellence in Academics

University of California, Berkeley — May 1994
BA, Political Science
Summa Cum Laude and Highest Honors in Political Science

Phi Beta Kappa 1994
Phi Kappa Phi 2014

Contact

310.480.4170
douglasheller@ymail.com | www.linkedin.com/pub/doug-heller/61/939/810

RECEIVED by MSC 2/6/2023 5:20:51 PM