STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

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,	Case No. 19-738-CZ Hon. Wanda M. Stokes
Plaintiffs,	
v.	
USAA CASUALTY INSURANCE COMPANY, a foreign corporation, and CITIZENS INSURANCE COMPANY OF AMERICA, a Michigan corporation,	
Defendants.	

BRIEF OF AMICUS CURIAE MICHIGAN STATE MEDICAL SOCIETY

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INTRODUCTION

Amicus Curiae Michigan State Medical Society (MSMS)[1] joins in the position of Plaintiffs Ellen M. Andary, by and through her Guardian and Conservator Michael T. Andary, M.D. (collectively, "Andary"), Philip Krueger (Krueger), by and through his Guardian Ronald Krueger & Moriah, Inc. d/b/a Eisenhower Center (Eisenhower Center), and Eisenhower Center, with respect to the non-Medicare fee schedules set forth in the recent amendments to the No-Fault Act. In 2019, the Legislature made a number of amendments to Michigan's No-Fault Act, MCL 500.3101 *et seq*., including, among other things, allowing insureds to purchase limited personal injury protection (PIP) benefits, returning tort remedies to automobile accident victims, and setting fee schedules for medical and rehabilitation services for those injured in automobile accidents. The Legislature's stated purpose for the amendments is to lower insurance premiums.[2]

With respect to the fee schedules, rates for those services that currently have a Medicare code are set at a percentage of the Medicare rate. However, rates for those services that do not currently have a Medicare code are set at a percentage of the rate that each individual provider listed in its charge master description on January 1, 2019. That percentage is 55 percent starting in July 2021, and decreases to 54 percent in July 2022 and 52.5 percent in July 2023. Thus, not only will different providers of the same services have different rates for those services, only those who set their fees with a profit margin of *more than* 47.5 percent in 2019 will be able to survive these amendments. This legislation actually rewards the behavior it meant to curtail.

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[1] Michigan State Medical Society is a professional association which represents the interests of over 14,000 physicians in the State of Michigan. Organized to promote and protect the public health and to preserve the interests of its members, MSMS is frequently called upon to express its views with respect to legal issues of significance to the medical profession.

[2] As set forth in the amicus brief of the Coalition Protecting Auto No-Fault (CPAN), the amendments are not likely to achieve lower premiums, and in fact, premiums will increase. MSMS concurs with CPAN's position and incorporates by reference the arguments in its brief.

These fee schedules ostensibly apply retroactively to insurance policies purchased prior to the amendments. Accident victims like Plaintiffs, who purchased their policies years ago and have been receiving necessary medical and rehabilitation services pursuant to their rights under their private contracts with their insurers, stand to lose valuable contract rights. Some providers will go out of business as a result of these amendments. Other providers will be unable to offer services that fall within these fee schedules because they can only be reimbursed at a fee that is below cost. One of the hardest hit industries will be residential rehabilitation facilities such as the Eisenhower Center. These types of facilities provide residences and 24-hour care for the most catastrophically injured patients, as well as rehabilitative services such as physical therapy, occupational therapy, speech language pathology, psychology, social work, therapeutic recreation, massage therapy and nutrition services. As these facilities close, their patients will lose their homes along with the necessary care they have been receiving. Some will have to rely on family members who do not have the proper training to deal with these extreme injuries. Others may become eligible to go to Medicaid facilities where the cost of their care will shift to the taxpayers. Still others will have nowhere to go. The non-Medicare fee schedules will have a lasting and devastating impact on patients as well as the providers of certain services.

STATEMENT OF FACTS

Amicus Curiae MSMS relies on the facts stated by Plaintiffs in their Complaint and Response to Defendants' Motion to Dismiss.

ARGUMENT

I. Retroactive Application of the Non-Medicare Fee Schedules in the Amendments to the No-Fault Act Constitutes an Impairment to Existing Contracts in Violation of the United States and Michigan Constitutions.

The Contracts Clause of the Michigan Constitution provides that "[n]o bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted." Const 1963, art I, §

10. This Clause is nearly identical to that of the United States Constitution. US Const, art I, § 10, cl 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ."). "[T]he purpose of the Contract Clause is to protect bargains reached by parties by prohibiting states from enacting laws that interfere with preexisting contractual arrangements. *Fun 'N Sun RV, Inc v Michigan (In re Certified Question)*, 447 Mich 765, 777; 527 NW2d 468 (1994), citing *Allied Structural Steel Co v Spannaus*, 438 US 234, 242; 98 S Ct 2716; 57 L Ed 2d 727 (1978).

Michigan courts have adopted the three-prong test set forth by the United States Supreme Court in *Allied*, 438 US at 244-247, to determine if a state law impairs an existing contract: (1) whether the state law has operated as a substantial impairment of a contractual relationship; (2) whether the legislative disruption of contract expectancies is necessary to the public good; and (3) whether the means chosen to address the public need are reasonable. *Fun 'N Sun*, 447 Mich at 777 (citations omitted). "The severity of the impairment measures the height of the hurdle the state legislation must clear." *Allied*, 438 US at 245. Severe impairment "will push the inquiry to a careful examination of the nature and purpose of the state legislation." *Id*. This standard reflects the importance of protecting private contracts:

> The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them. [*Id*.]

"If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation." *Energy Reserves Group, Inc v Kansas Power & Light Co*, 459 US 400, 411; 103 S Ct 697; 74 L Ed 2d 569 (1983).

The Legislature has enacted amendments to the No-Fault Act that are ostensibly retroactive without limitation.[3] Prior to the amendments, MCL 500.3107(1)(a) provided for the recovery of PIP insurance 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. . . ." Among other revisions, the amendments deleted the word "all" from MCL 500.3107(1)(a) and added an entirely new provision, MCL 500.3157, which establishes fee schedules for services provided to accident victims. MCL 500.3157(1) provides:

> Subject to subsections (2) to (14), a physician, hospital, clinic, or other person that lawfully renders treatment to an injured person for an accidental bodily injury covered by personal protection insurance, or a person that provides rehabilitative occupational training following the injury, may charge a reasonable amount for the treatment or training. The charge must not exceed the amount the person customarily charges for like treatment or training in cases that do not involve insurance.

Subsections (2) through (14) then set limits to the amounts providers may recover based on criteria such as the Medicare rate for each particular type of treatment or training and the provider's indigent volume.

MSMS disputes the constitutionality of Subsection (7), which sets the rate for services that do not have a Medicare code at a percentage of each provider's charge description master in effect on January 1, 2019. Specifically, MCL 500.3157(7)(a) sets the rate at 55 percent, with that rate decreasing to 54 and 52.5 percent over the following two years. This means that unless the provider had a markup of 45 to 47.5 percent as of January 1, 2019 for these types of services, the provider will not be able to provide such services at cost, let alone above cost. For accident

[3] One area of legislation where retroactivity is more common is tax legislation, and even that requires a "modest period of retroactivity," "confined to short and limited periods required by the practicalities of producing national legislation." *United States v Carlton*, 512 US 26, 32; 114 SCt 2018; 129 LEd2d 22 (1994) (citations omitted).

victims, this means that they may not be able to receive these types of treatments and therapy. For providers of these types of treatments and therapy whose patients are primarily automotive accident victims, this fee schedule effectively puts them out of business, interfering with treatment plans the physician may have prescribed for their patients.

A. The Amendments Impair Private Contractual Rights that have Already Vested.

Defendants' entire argument is based on the standards for contractual rights created entirely by statute, which is not the situation in this case. Here, the No-Fault Act requires individual citizens to enter into private contracts with insurance companies. The terms of those contracts, including coverage over the minimum and the premium paid for the contracts, are the result of the negotiations between private parties and the risk factors applicable to the individual insured. If the terms of the contracts were created entirely by statute, there would be no need to purchase an insurance policy. This is not a case in which a party is asserting a vested right to the continuation of an existing law.

"[I]nsurance policies are subject to the same contract construction principles that apply to any other species of contract." *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). "Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract." *Id*. at 468. A person's right to rely on a written contract is a bedrock principle of law in this country:

> The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable. It draws strength from common-law roots and can be seen in our fundamental charter, the United States Constitution, where government is forbidden from impairing the contracts of citizens, art. I, § 10, cl. 1. [*Id*. at 469.]

An insurance policy is enforced in accordance with its terms, and an insurance company can only be held liable for risks that it assumed. *Henderson v State Farm Fire and Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999).

"Rights created under an insurance policy become fixed as of the date of the accident." *Madar v League Gen Ins Co*, 152 Mich App 734, 742; 394 NW2d 90 (1986); see also *Clevenger v Allstate Ins Co*, 443 Mich 646, 656; 505 NW2d 553 (1993) ("The rights and obligations of the parties vested at the time of the accident."). "'The liability of the insurer with respect to insurance becomes absolute whenever injury or damage covered by such policy occurs. The policy may not be canceled or annulled as to such liability by agreement between the insurer and the insured after the occurrence of the injury or damage.'" *Detroit Auto Inter-Ins Exchange v Ayvazian*, 62 Mich App 94, 100; 233 NW2d 200 (1975), quoting 1 Long, The Law of Liability Insurance, s 3.25, pp 3-83-84. The insurable interest that entitles a person to personal protection benefits is the health and well-being of that person. *Madar*, 152 Mich App at 739.

There is a significant difference in the standard for the vesting of rights created by statute and the vesting of rights created by private contracts. For example, in *Fun 'N Sun*, 447 Mich at 775-776, the plaintiff policyholders claimed that amendments to the Worker's Compensation Act impaired implicit contract rights in the surplus reserves of the statutorily created state accident fund. The Court found that there was no clear legislative intent to create a contract between the policyholders and the state with respect to ownership of the funds. *Id*. at 781. However, the Court found that the policyholders had vested contractual rights under the policies themselves:

> The policy in effect when premiums were paid by plaintiffs provided that, in return for the premium, the fund promised to pay benefits required by the worker's compensation law. Therefore, policyholders do have a *vested contractual right to liability coverage* for the period in question for which premiums have been paid. [*Id*. at 786 (Emphasis added).]

The amendments to the Act did not affect those vested rights. *Id*.

Here, retroactive application of the amendments setting the fee schedule for services that do not have a Medicare code will impair contracts already in place between insureds and insurers and contracts between accident victims and their providers. Insureds who purchased insurance policies prior to the amendments should get the benefit of their bargain. The premiums they paid were based on a number of factors that assessed the risk to the insurer, including the payment of unlimited PIP benefits in the event of a catastrophic accident. The amendments essentially eliminate an entire category of benefits that an accident victim can receive because providers will not be able to provide such benefits below cost. Accident victims receive nothing in return for this diminution in the value of their policies. Prior to the amendments, "victims of motor vehicle accidents would receive insurance benefits for their injuries as a substitute for their common-law remedy in tort." *Shavers v Kelley*, 402 Mich 554, 579; 267 NW2d 72 (1978). With the amendments, accident victims will again have tort remedies. However, victims whose claims are barred by the applicable statute of limitations cannot get back the tort remedies they gave up in exchange for the PIP benefits that are now diminished.

Furthermore, for accidents that occurred prior to the amendments, the victims' rights to their benefits vested at the time of the accidents. Those victims receiving ongoing benefits, such as Philip Krueger, entered into contracts with their providers, such as the Eisenhower Center, for products, services and/or accommodations that are reasonably necessary for their care, recovery, or rehabilitation based on a legitimate, contractual expectation that those products, services, and accommodations were covered by their insurance. Retroactive application of the fee schedules substantially impairs all of these contracts. For this reason, among others, Defendants' reliance on *O'Bannon v Town Court Nursing Center*, 447 US 773; 100 SCt 2467; 65 LEd2d 506 (1980), is

inapposite. In *O'Bannon*, 447 US at 784, the Court considered whether Medicaid patients had an interest in receiving care in a particular facility such that they would be entitled to a hearing before the government decertified the facility as a "skilled nursing facility." The Court found that the Medicaid statute gave the patients the right to choose among *qualified* facilities without government interference but did not confer rights with respect to *unqualified* facilities. *Id*. at 785. Key to the Court's holding was that the patients could obtain care from other, qualified facilities. *Id*. at 785-786. Here, however, the qualifications of the facilities are not at issue, but they will be forced to stop providing services to accident victims due to an arbitrary imposition of a fee schedule below cost. This is not a question of patients losing their provider of choice, but, rather, losing the ability to receive necessary care from *any* provider.

B. The Amendments Constitute an Interference with the Practice of Medicine.

Few people have the financial ability to provide services at a cost to themselves. If a health care provider will only be paid for a service at an amount below the cost of providing the service, the provider is simply not going to offer that service. Thus, a fee schedule that sets payment for certain services at an amount below cost effectively eliminates the availability of such services and limits the options for treatment. This not only impairs the insured's contractual rights, it interferes with the practice of medicine.

Victims of automobile accidents can benefit from a variety of physician prescribed treatments that are not covered by Medicare. For example, among the most catastrophically injured accident victims are those who suffer from severe spinal cord or traumatic brain injuries. These are our most vulnerable citizens. While some of the health care services these patients receive are Medicare coded, physicians may also prescribe other types of therapy and care that are not. The quality of care these patients receive has a profound impact on their quality of life as well as longevity. Furthermore, the inability to provide the care that patients need, resulting in the

deterioration of a patient's condition, will simply increase costs elsewhere in the system. The non-Medicare fee schedules hinder the physicians' ability to prescribe services necessary to the patient's care, recovery, and rehabilitation. This legislative interference will mean the difference between life and death for some accident victims.

The legislative disruption of contract expectancies is not necessary to the public good where it interferes with the practice of medicine, leaves catastrophically injured accident victims unable to obtain necessary treatments for which they previously paid a premium, and shifts the cost of their care to the taxpayers. The Legislature's stated purpose for the amendments is to lower the cost of no-fault insurance but the means chosen to achieve this goal are not reasonable, as CPAN's amicus brief explains.

Furthermore, the non-Medicare fee schedules reward the very behavior they were enacted to curtail. By basing the current rate on each provider's individual charge master rate as of January 1, 2019, the Legislature is actually rewarding those whose charges may have been perceived as unreasonably high (and whose fees may have been the impetus for the fee schedule provisions) and punishing those who provided quality care at more reasonable rates. Some health care providers might list higher rates on their charge masters for the purpose of negotiating a "discount" with insurance companies, where others do not engage in those same billing practices. The amendments were meant to restrain providers from charging an excess amount, but instead actually reward those providers with a history of overcharging, who will now be the only few who can stay in business. Now, those that charged reasonable fees will not be able to survive the amendments because they kept their rates well below a 45 percent profit margin, while those who engaged in excessive billing practices will have access to the entire market. This unintended

consequence completely undermines the purported premium savings objective of the fee schedules.

II. The Non-Medicare Fee Schedules Violate the Due Process and Equal Protection Clauses of the United States and Michigan Constitutions.

Amicus Curiae MSMS concurs in and incorporates by reference the argument set forth in the Amici Curiae Brief of Michigan Osteopathic Association (MOA) and Michigan Association of Chiropractors (MAC). As set forth in the MOA/MAC brief, retroactive application of the non-Medicare fee schedules violates the Due Process Clauses of both the Michigan and United States Constitutions because it deprives insureds of vested contract rights. Retroactive and prospective application of the non-Medicare fee schedules violate Due Process by depriving providers of their livelihood and unreasonably interfering in the practice of their professions. US Const, Am XIV, Sec 1; Const 1963, art 1, § 17. The non-Medicare fee schedules also violate the Equal Protection Clauses of the Michigan and United States Constitutions because they result in different fees for different providers of the same services. US Const, Am XIV, Sec 1; Const 1963, art 1, § 2.

RELIEF REQUESTED

For the reasons set forth, Amicus Curiae Michigan State Medical Society respectfully requests that this Court deny Defendants' Motion to Dismiss.

Respectfully submitted,

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Dated: April 27, 2020

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2020, pursuant to this Court's Public Notice, I electronically filed the foregoing Brief of Amicus Curiae with the Clerk of the Court by email to CircuitCourtRecords@ingham.org, and served a copy on counsel of record by email: LMcAllister@dykema.com, Georgesinas@sinasdramis.com, and MGranzotto@granzottolaw.com.

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