

## What's Wrong With Michigan's No-Fault Automobile Insurance

By Matthew Coffey

### Overview of Michigan's No-Fault Law

On Oct. 1, 1973, Michigan joined a growing number of states in adopting a “no-fault” automobile insurance law, which has remained in tack ever since. Impetus for the law came from supposed dissatisfaction with the previous system, commonly referred to as a “tort system.” Under a tort system, people injured in automobile accidents could sue the at-fault driver without limitations. There were several specific complaints about the tort system that led to Michigan enacting the No Fault Act of 1973.

It was believed that tort failed to provide appropriate levels of compensation for injury victims — inadequate compensation for serious injuries and overcompensation for minor ones. Even if appropriate compensation was awarded, the tort system was also thought to be slow, which could delay victims’ access to medical treatment. Since it relies heavily on the court system to provide compensation, it was also argued that the tort system had become a costly burden on the courts through excessive litigation. Finally, it was believed that the tort system discriminated against low-income injury victims, who may have been forced to accept inadequate compensation because lengthy litigation was expensive.

since 2001.<sup>2</sup> This legislative interest is likely driven by a

belief among voters that auto insurance premiums are too expensive.

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No-fault insurance was viewed as a solution to many of these issues. It uses a different approach to providing compensation for injury victims: Insurance companies of both parties involved in an automobile accident, no matter who is at fault, pay the costs of treating the injuries incurred by insured drivers. It’s a small, but distinct difference: The no-fault system insures drivers against the cost of treating their own injuries if they are hurt in an auto accident. Under tort, drivers are insured for the costs of treating injuries they may have inflicted upon others (if they are found to be at fault). The no-fault system is designed to reduce the need for litigation — what the tort system relies on heavily. In fact, Michigan’s no-fault law limits the ability of injury victims to sue the at-fault driver.<sup>1</sup>

### Problems with the No-Fault System

#### Costs

The Michigan Legislature has demonstrated an interest in reforming the state’s auto insurance laws for many years. Lawmakers have introduced more than 350 bills that would modify the state’s insurance laws

And there’s evidence to back up this belief, although calculating the average premium paid by Michigan drivers and comparing that to other states is not a straightforward task. Because auto insurance companies function by managing risks and expected losses, they operate most efficiently when they can differentiate the price of their premiums based on the insured’s risk

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<sup>1</sup> This restriction only applies to noneconomic losses. MCL § 500.3135(3)c-d.

<sup>2</sup> Based on data compiled by MichiganVotes.org, a service operated by the Mackinac Center for Public Policy.

profile. In simple terms, the riskier it is for a company to insure a driver, the higher the insurance premiums they will charge. This makes it challenging to calculate an average statewide auto insurance premium.

Despite these limitations, a few organizations have estimated the average auto insurance premiums across the country, state by state. Although the rates vary, and sometimes dramatically, a common fact is that Michigan's rates are some of the highest in the nation.

The National Association of Insurance Commissioners, an organization governed by and supporting the work of state insurance regulators, released a study in early 2017 that estimates average auto insurance premiums by state. Using data from 2014, they estimate Michigan's average annual premium to be \$1,351. This is up 24 percent from 2010 and third highest in the nation, behind only New Jersey and Louisiana. The national average, based on NAIC's estimates, is \$982, 27 percent less than Michigan's average rate.<sup>3</sup>

Carinsurance.com, a website focused on helping consumers shop and purchase auto insurance, also published estimates of average premiums by state. Their research is based on data obtained from Quadrant Information Services, the Insurance Information Institute and the U.S. Census Bureau. The average Michigan premium based on their research was \$2,484 in 2017, the highest in the nation and 83 percent higher than the national average of \$1,355. In fact, Michigan was 13 percent higher than the second highest state, Louisiana.<sup>4</sup>

A third estimate comes from Insure.com, an auto insurance clearing house, which contracted with Quadrant Information Services to conduct state-by-state comparison of average auto insurance premiums. This analysis also places Michigan in the unenviable position of leading the nation in average auto insurance premiums. Michigan's annual average rate is \$2,394, 82 percent more than the national average of \$1,318 and 25 percent higher than the next highest state, Louisiana. Insure.com has conducted this analysis for the last six years and Michigan has ranked first or second each year.<sup>5</sup>

While the estimates vary and there are reasons to use caution when comparing auto insurance premiums across states, it is meaningful that these analyses all rank Michigan's average premium among the most expensive in the nation.

It should not be surprising to learn, therefore, that the Insurance Information Institute estimates that a whopping 21 percent of Michigan drivers are uninsured — one of the highest rates in the nation.<sup>6</sup> The more expensive the premiums, the more likely it is for drivers to accept the risks of driving uninsured.

These analyses also suggest that were Michigan to reform its auto insurance laws and make them more like those in other states, the premiums drivers pay would decrease.

It's hard to pin down exactly what factors and to what extent each factor contributes to the relatively high costs of Michigan auto insurance premiums. One possible explanation is that Michigan drivers are just simply riskier to insure, maybe causing more accidents and damage than drivers in other states, for example. Or, perhaps Michiganders tend to drive the types of vehicles that are more expensive to insure.

But these plausible explanations do not appear to be supported by data. In a 2010 RAND Corporation study, Paul Heaton tried to figure out what the main cost driver of Michigan's auto insurance premiums. Using data from 2007, he created a statistical model that estimated the expected average claim cost in Michigan after factoring in 72 variables that might affect this cost. He then compared this expected average claim cost with the actual average claim cost in Michigan.<sup>7</sup>

Heaton's analysis found that the expected average claim in Michigan should cost about \$12,885 based on the characteristics of the accidents and the injuries that occurred. But the actual average claim cost in Michigan

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3 NAIC's estimate is an average of the estimated premiums they calculated for three types of coverage: liability, comprehensive and collision. The report also states that the estimate makes "no distinction as to policyholder classifications, vehicle characteristics, or the election of specific limits or deductibles...[n]or do the results consider differences in state auto and tort laws, rate filing laws, traffic conditions, or other demographics." "Auto Insurance Database Report 2013/2014" (National Association of Insurance Commissioners, Jan. 2017), <https://perma.cc/7NF5-W4SF>.

4 "State Car Insurance Rates" (CarInsurance.com, May 22, 2017), <https://perma.cc/7BMU-EANA>.

5 Penny Gusner, "Car Insurance Rates by State, 2017 Edition" (Insure.com, July 28, 2017), <https://perma.cc/EH62-VG7B>. Insure.com's methodology analyzed rates from six large insurers in 10 ZIP codes in each state in May 2017 for 20 of the best-selling vehicles in the U.S. The estimates are based on what full coverage would cost for a single, 40-year-old male with a clean driving record and good credit.

6 "Uninsured Motorists" (Insurance Information Institute, 2017), <https://perma.cc/AS7U-3G8G>.

7 Paul Heaton, "Auto Insurance Reform in Michigan" (RAND Corporation, 2010), 3, <https://perma.cc/Q9GQ-9JB7>.

was 57 percent higher, at \$20,229.<sup>8</sup> This analysis suggests that it is not any unique characteristic of Michigan drivers or accidents that is driving up premium prices, but rather the unique series of policies that Michigan uses to regulate auto insurance.

## Unlimited Personal Injury Protection

A key and unique element of Michigan's auto insurance laws is that it provides no limit to the benefits provided under personal injury protection, or PIP. PIP benefits cover the cost of medical and medical-related expenses incurred from treating injuries sustained during an automobile accident. They include a wide range of treatment and care, such as expenses for hospital services, modifications to homes, transportation, in-home attendant care, lost wages, occupational rehabilitation services and even funeral services and survivor benefits.<sup>9</sup>

Only the 12 states that use a no-fault system like Michigan mandate that insurers provide PIP coverage to each insured driver. But all states except Michigan limit PIP benefits. In fact, the second-most generous mandated PIP coverage exists in New York, where drivers must purchase \$50,000 worth of PIP coverage. Most of the other no-fault states require PIP coverage of between \$3,000 and \$40,000.<sup>10</sup>

These essentially unlimited benefits are contributing to the high costs of auto insurance premiums in Michigan. The Insurance Institute of Michigan hired Michael Miller of EPIC Consulting, LLC in 2007 to estimate what the impact would be on premiums if Michigan capped PIP benefits. Miller projected premiums to fall by 9 percent if PIP was capped at \$400,000 and 16 percent if capped at \$50,000.<sup>11</sup> This would translate to hundreds of dollars in savings each year for all insured Michigan drivers.

Miller also analyzed more than 70,000 past PIP claims made in Michigan and found that the rare, extremely expensive cases were the main drivers of PIP costs. For instance, Miller reported that 94 percent of claims were for under \$50,000 and these claims accounted for only about 22 percent of total PIP costs. Claims of \$400,000 or more, on the other hand, represented only 0.5 percent of all claims but were responsible for 43 percent of total

PIP costs.<sup>12</sup> This suggests that while every driver pays the cost of unlimited PIP coverage, only a tiny fraction of people injured in car accidents benefit from this generous provision.

Sharon Tennyson of Cornell University studied Michigan's no-fault auto insurance system in 2011 and compared its outcomes to those in other states. She found that, largely because of unlimited PIP benefits, Michigan's average claim in 2010 cost \$35,446. This was more than double the second highest no-fault state's average, which was New Jersey at about \$16,000 per claim. The average claim costs for all the other no-fault states, not including Michigan, was under \$10,000.<sup>13</sup>

These data and analyses suggest that Michigan's unique approach to providing no cap to the benefits of PIP coverage is a key driver of the rising costs of auto insurance premiums in this state.

## No Fee Schedules

Both private medical insurance, such as coverage offered from Blue Cross and Blue Shield, and government insurance programs, such as Medicare and Medicaid, use "fee schedules" or other formulas to determine the amount they will pay for particular medical procedures and services. Private insurers and government programs will declare the maximum amount they'll pay on behalf of the insured patient for an MRI, for example. These fee schedules or formulas limit the costs insurers incur and help medical providers budget for their expected revenue for providing services paid by third parties.

Michigan's No Fault Act, however, provides no such fee schedules or formulas nor sets any specific limits on what auto insurers must compensate medical providers for certain procedures and services. As a result, medical providers under PIP can bill whatever amount they deem "reasonable," defined as what would be charged for the same product or service when there is no insurance coverage.<sup>14</sup>

This is one reason why it is not uncommon for auto insurers to pay medical providers significantly higher amounts for the same service or procedure compared to what is paid by health insurance companies and

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8 Paul Heaton, "Auto Insurance Reform in Michigan" (RAND Corporation, 2010), 4–5, <https://perma.cc/Q9GQ-9JB7>.

9 MCL § 500.3107-8.

10 JC Reindl, "No-Fault Fixes? How Other States Reined in Auto Insurance," *Detroit Free Press*, May 9, 2017, <https://perma.cc/E6NM-PP2G>.

11 Michael J. Miller, "Private Passenger Automobile: Analysis of No-Fault Legislative Reforms" (Insurance Institute of Michigan, June 2007), 4, <https://perma.cc/AZX5-CX4A>.

12 Michael J. Miller, "Private Passenger Automobile: Analysis of No-Fault Legislative Reforms" (Insurance Institute of Michigan, June 2007), 4, <https://perma.cc/AZX5-CX4A>.

13 Sharon Tennyson, "The High Costs of Michigan's No-Fault Auto Insurance: Causes and Implications for Reform" (Michigan Chamber of Commerce, April 22, 2011), 6, <https://perma.cc/3DXE-5QUR>.

14 MCL § 500.3107(1)(a); MCL § 500.3157.

government programs like Medicare and Medicaid. The Detroit Free Press recently analyzed these differences and found medical providers charging auto insurers up to 10 times more than they are paid by Medicare for the exact same service. Specifically, the paper found MRI providers charging about \$5,000 for a single MRI when billed to an auto insurers. Meanwhile, Medicare pays about \$500 per MRI scan and hospitals in Michigan typically charge between \$1,900 and \$2,600 per MRI.<sup>15</sup>

Third-party payment systems that are used to pay for insurance claims reduce the incentives for consumers to be price-conscious. This is one reason fee schedules and HMO and PPO plans are commonly used in the health insurance industry. They help contain the costs that medical providers charge insurers, because consumers cannot provide that pressure themselves like they would in most other markets. Medical providers have no such limits when it comes to settling claims from automobile injuries, and this is a key contributor to the high cost of auto insurance in Michigan.

## Broad Insurance Coverage

So far, much of this discussion has centered on issues relating to the costs of the immediate medical services provided to accident victims in Michigan. But Michigan's PIP system provides a wider range of benefits than just paying for the charges one might incur from receiving treatment at a hospital after being injured in an automobile accident.

For instance, PIP includes work loss and replacement services benefits. Work loss benefits are capped at three years and 85 percent of gross earnings and replacement services are capped at \$20 per day for up to three years. Replacement services are designed to cover the cost of services in and around the home that cannot be accomplished by the injured person as the result of an injury from an automobile accident. These benefits increase the cost of the required PIP coverage all insured Michigan drivers must purchase.<sup>16</sup>

Michigan's PIP laws also mandate that insurers pay for medical services known as "attendant care."<sup>17</sup> Attendant

care is providing medical aid to an automobile accident victim and includes tasks such as helping the person bath, use the toilet, take medication, travel for medical purposes and administer to other medical needs. In most cases, these services are provided to the accident victim in their own home and provided by friends or family members, who do not necessarily have any medical training nor are they required to. These attendant care providers are then paid by the injured person's auto insurer.<sup>18</sup>

No written contract need exist between attendant care providers and their "patient." Rather, all that is required is documentation that care was provided. Like other aspects of medical coverage under the no-fault law, the amount that can be billed as attendant care has no limit other than that it be deemed "reasonable."<sup>19</sup> As such, there is no standard attendant care rate nor is there any limit on the number of hours of attendant care that can be provided.

An attendant care provider can bill an insurance provider for 24 hours of service per day at whatever rate they think a court would deem reasonable under the circumstances. Based on this author's experience, attendant care rates can vary from as low as \$8 per hour to as high as \$30 per hour. In cases of attendant care being provided to victims with serious injuries, it is not uncommon to see family members receiving annual payouts that exceed \$100,000.

There are, of course, cases where extensive and expensive attendant care is needed and where it is an economically valuable alternative to institutional care. The problem, however, is the challenge of reliably verifying when the scope and extent of attendant care in the home by untrained family members is the best option and as such it is rife for abuse. This is not to suggest or imply that most or many attendant care providers cheat, but the point remains that it is very difficult to discern when attendant care providers are needed and when they are taking advantage of the system for their own personal gain.

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15 JC Reindl, "How Aggressive Lawyers, Costly Lawsuits and Runaway Medical Bills Make Detroit Car Insurance Unaffordable," *Detroit Free Press*, May 6, 2017, <https://perma.cc/JD4S-MVCE>.

16 MCL § 500.3107(b); MCL § 500.3107(c).

17 Although, there is no specific provision in the law that specifies attendant care as one of PIP's covered costs. The "allowable expenses" under MCL § 500.3107(1)(a) have been interpreted to include attendant care as a result of case law, specifically *Vanmarter v. American Fidelity* 114 Mich App 171 (1982) and an attorney general opinion, OAG no. 6155 (1983). Spouses can be compensated under MCL § 500.3107 for providing home care to those injured in auto accidents.

18 For more about attendant care, see Steven Gursten, "Michigan No-Fault Law 101: What Is Attendant Care?" (Michigan Auto Law, Jan. 4, 2012), <https://perma.cc/E5EK-LBMX>; "Important Case Law about Michigan Attendant Care after an Accident" (Michigan Auto Law, 2017), <https://perma.cc/7NDS-U685>.

19 MCL § 500.3107(a).



## The Return of Tort

As mentioned, one of the driving causes for instituting a no-fault auto insurance system back in the early 1970s was the perceived ineffectiveness and expense of relying on the judicial system to determine who was owed what as a result of an accident. By using a no-fault system and restricting the ability of accident victims to file tort lawsuits, it was believed that the role of the courts in this area would be greatly reduced, lowering costs and speeding up the determination and delivery of benefits.

Unfortunately, there's little evidence that this has worked. In fact, Michigan in 2010 ranked as one of the top 10 most litigious states for tort claims in the nation.<sup>20</sup> Additionally, data from Michigan's State Court Administrative Office shows a significant and steady increase in automobile negligence lawsuits.<sup>21</sup>

This should seem a bit puzzling. How could it be that Michiganders still regularly file auto-related tort lawsuits despite having their ability to do so restricted in the no-fault law? Part of the explanation is the changes the courts have made to essentially undermine these tort restrictions.

Under no-fault, accident victims can only sue the at-fault driver or vehicle owner if the injury they sustained is serious. This is referred to as a "threshold injury," because the injury must meet a certain level of severity before it can be used as a basis for a suit against a driver.<sup>22</sup> Michigan, unlike some states, has a "verbal" statutory threshold and not a "monetary" threshold. The verbal threshold is defined specifically in the no-fault law and provides at-fault drivers with some limited or conditional immunity from tort suits. The threshold is defined as "death, serious impairment of body function, or permanent serious disfigurement."<sup>23</sup> What meets this threshold to sue has been interpreted very inconsistently by the Michigan Supreme Court since no-fault was enacted, meaning that the limitation on lawsuits has fluctuated greatly from very weak, to stringent and then back to very weak again.

In 1995, the Michigan Legislature recognized the legal wiggle room left in using such a verbal threshold and attempted to define more specifically what is meant by "serious impairment of body function." An amendment to Michigan's no-fault law was adopted, refining this definition to "an objectively manifested impairment of an

important body function that affects the person's general ability to lead his or her normal life."<sup>24</sup>

This 1995 amendment of the no-fault law was interpreted first by the Michigan Supreme Court in a case known as *Kreiner v. Fischer* in 2004. *Kreiner* established a multistep process for determining whether or not a serious impairment existed. The standard was relatively difficult to meet, requiring injured plaintiffs to prove that they had an objective impairment of an important body function which affected their overall ability to lead their normal life. The *Kreiner* court determined that minor or insignificant effects did not meet the threshold, rather, only serious injuries affecting the course or trajectory of a person's life would fit the bill. This ruling seemed to confirm the original intent of no-fault, which was to restrict accident victims' ability to sue based on the fact that certain benefits would be guaranteed to them by their insurer.<sup>25</sup>

*Kreiner*, however, was overruled by the Michigan Supreme Court in 2010 in a case called *McCormick v. Carrier*. In *McCormick*, the Michigan Supreme Court held that *Kreiner* was wrongly decided because it interpreted the no-fault law when it was clear as written and was not in need of interpretation. Despite criticizing the *Kreiner* court for its willingness to interpret what did not need interpretation, the *McCormick* court went forward with yet another interpretation of the statute.<sup>26</sup>

*McCormick* held that when considering a serious impairment of body function the overall course or trajectory of a person's life need not be affected. Rather, an effect upon any one aspect of the person's life at any point in time was sufficient. In other words, a person's life need not be drastically altered and the threshold could be met if some part of their life had been changed as a result of the accident.

*McCormick* also held that it's not a person's injury that must be manifested objectively, but only the impairment arising from the injury. In other words, it is the effect of the injury that needs to objectively demonstrated, not necessarily the injury itself. For instance, someone's impairment of pain could be objectively verified by claiming that they can no longer do activities that cause them pain, such as run, lift heavy objects, etc., as those impairments would be readily observable to others. Under the previous

20 "Annual Guide to State Litigation Climates Shows Most Litigious" (LexisNexis, June 22, 2010), <https://perma.cc/Y9V7-ZRA8>.

21 JC Reindl, "How Aggressive Lawyers, Costly Lawsuits and Runaway Medical Bills Make Detroit Car Insurance Unaffordable," *Detroit Free Press*, May 6, 2017, <https://perma.cc/JD4S-MVCE>.

22 MCL § 500.3135.

23 MCL § 500.3135(1).

24 MCL § 500.3135(5).

25 471 Mich 109; 683 N.W.2d 611 (2004).

26 487 Mich 180; 795 N.W.2d 517 (2010).

*Kreiner* ruling, a person in that type of situation would have to demonstrate that their pain was a direct result of an objectively manifested injury incurred in the accident.

The *McCormick* ruling significantly watered down the verbal threshold standard used to determine if an accident victim has a legal right to pursue additional damages from the at-fault driver. Under this interpretation, if accident victims can demonstrate that any one particular aspect of their lives has been changed significantly as a result of the accident and they have some objective impairment — e.g., they can't run or throw a ball or need a cane to walk, etc. — they have a reasonable chance of maintaining the legal right to sue.

Another court interpretation that has expanded the ability of accident victims to use the courts to win additional damages is related to the concept known as “proximate cause.” Historically, in tort cases, in order for an injured victim to sue, there must be a connection between the defendant's conduct and the plaintiff's injury, the proximate cause. Proximate cause consists of factual or “but for” causation and legal or “proximate” causation. Factual causation simply connects the accident to the injury by applying a “but for” test — “but for” the accident, the injury would not have occurred. Proximate causation, on the other hand, is more of a policy consideration by the court, based essentially on foreseeability or predictability of harm. If the ultimate injury was too far afield or too attenuated as determined by the court, there would be a lack of proximate causation and the defendant is not liable.

But under Michigan's current no-fault law, the causation standard is much different as interpreted by Michigan courts. In this respect, Michigan courts have held that the technical requirement of “proximate cause” in terms of an insurer's obligation to provide PIP benefits is not necessary and that “almost any casual connection or relationship will do” between accident and injury.<sup>27</sup>

While later decisions have criticized this “any connection” standard, it is unclear whether this has been expressly overruled. For example, the Michigan Supreme Court has stated that the “any connection” standard is discredited, but it did not indicate that technical proximate cause was required in auto-related PIP cases. Rather the standard is that the connection

between accident and injury must only be “more than incidental, fortuitous, or but for.”<sup>28</sup>

As a result, the standard to establish causation in a third-party tort lawsuits is higher than the standard to establish causation in a PIP case. This means that an insurer may be responsible for providing PIP benefits in a case where there may not be causation between accident and injury under traditional tort law and thus no viable suit for damages. This lower standard makes it easier for accident victims to use the courts to sue insurance companies even if they could not have maintained a tort claim under traditional proximate cause standards.

This low standard in PIP has created significant opportunities for attorneys to seek unreasonable and unnecessary medical treatment solely for purposes of building third-party tort claims. Any attorney practicing auto law is probably well aware of medical providers who routinely and systematically prescribe medical treatment that is unnecessary for the patient's care and recovery, but could nevertheless still be claimed as a paid benefit under PIP given the low causation standard. It is also certainly true that a small number of attorneys send their clients to these providers for purposes of building tort cases.

Most reputable attorneys and physicians do not engage in this practice, but there is little doubt that it does occur. In fact, there are attorneys who routinely build third-party tort cases on the back of the generous PIP system. This is not the intent of the PIP system in providing prompt payment of reasonable benefits to auto accident victims and is precisely what no-fault meant to restrict. Of course, the cost of building expensive lawsuits on the back of the PIP system also plays a role in driving up the cost of auto insurance premiums, because insurers need to price their exposure to such suits.

An additional factor contributing to the cost of auto insurance in Michigan and directly affecting both auto negligence and PIP lawsuits is the relatively short time table that an insurance company has to pay medical bills. Insurers must pay benefits within 30 days after receiving proof of the service being performed.<sup>29</sup> If an insurance company does not pay during this short window and a lawsuit is filed against them, the attorney representing the claimant can be awarded attorney fees. If the court determines that the insurer “unreasonably” refused to

27 *Scott v. State Farm Mutual Insurance Company*, 278 Mich 578; 751 N.W.2d 51 (2008) vacated in part, appealed in item part, 482 Mich 1074; 758 N.W.2d 249 (2008), vacated appeal denied, 483 Mich 1032; 766 N.W.2d 273 (2009).

28 *Oostdyk v. Auto Owners Insurance Company*, 498 Mich 913; 870 N.W.2d 926 (2015).

29 MCL § 500.3142.

pay or delayed the payment, the insurer must pay this attorney fee on top of the benefits that are owed.<sup>30</sup>

There is not a corresponding provision awarding attorney fees against the claimant, except in a circumstance where the claim is “fraudulent or so excessive as to have no reasonable foundation.”<sup>31</sup> These factors provide an incentive for attorneys to file these cases against insurance companies as often as possible. It also provides a good platform to build third-party auto negligence cases. The cost of these lawsuits is something insurers need to factor into their premiums, which, of course, increases costs for drivers.

## **Ideas for Reforms to Decrease Auto Insurance Premiums**

It is of course far easier to point out the many flaws with the no-fault system than it is to come up with reasonable solutions to the many problems. One option, of course, would be to return to the previous tort-based system, similar to what is used in many other states. It may be an expensive and difficult transition from Michigan’s current no-fault system, however. Although it’s difficult to predict the effects of a major change such as this, it could potentially result in even higher premiums than Michiganders pay today, especially if there are no limitations placed on tort claims. Taking this into consideration, the more prudent approach would be to reduce or remove the key drivers of high insurance premiums in the current no-fault system. Below are some suggestions that would likely reduce the costs of insuring a vehicle in Michigan but keep the core concepts and goals of a no-fault system in place.

### **Give drivers a choice over level of PIP coverage**

There’s no doubt that some people have benefited from Michigan’s unique requirement of forcing all drivers to purchase unlimited PIP coverage. But it’s important to remember that the vast majority of all insured drivers will never need this level of coverage. Drivers should be allowed to purchase a variety of different levels of coverage, such as \$10,000, \$25,000 or \$100,000. The other 11 states that use a no-fault system require drivers to purchase PIP coverage ranging from \$5,000 to \$50,000.

And, of course, if drivers still demand unlimited PIP coverage, they would potentially be able to purchase it from insurance companies. It’s just now these drivers will have to bear more of the direct costs of that

expensive benefit themselves rather than spreading it across all drivers, nearly all of whom will never use it.

### **Create fee schedules for medical services paid for by auto insurers**

The “reasonableness” standard meant to contain the costs medical providers can charge for treating injuries sustained during an auto accident has proven to be ineffective. Instead, the state could create specific fee schedules for procedures in statute or otherwise provide a streamlined statutory third-party process for review of medical bills. Similar fee schedules are used for Medicaid and Medicare coverages and these existing fee schedules could be used as the baseline for an auto insurer fee schedule.

While most auto insurers currently use third-party reviewers to determine “reasonableness” of medical provider chargers, there is no obligation for medical providers to consider the findings of these reviews. The statutes could be amended to specifically require providers to present proof that a third-party review of the charges is not reasonable.

Another strategy that could work in conjunction with a fee schedule is to allow auto insurance companies to negotiate rates directly with medical providers. Insurers and providers could negotiate their own rates that differ from the fee schedule, but then must use the fee schedule for all non-negotiated services. Such agreements already exist between some providers and insurers but are relatively uncommon, because insurers have very little bargaining power with medical providers in such deals. There could be a mechanism that requires providers and insurers to negotiate reasonable fee containment and if they cannot agree then they must revert to the fee schedule or be bound by a third-party review.

### **Strengthen the causation standard for automobile accident lawsuits**

The current standard used by courts to connect auto accidents to claimed injuries under PIP is too low and potentially connects conditions which are too attenuated or remote. The law should be amended to require the same causation standard as exists in third-party cases — proximate cause.

### **Toughen restrictions on litigation**

A key component of a no-fault auto insurance system is reducing costs by restricting the ability of injury victims to sue. As a result of ambiguous statutory language and interpretative court rulings, Michigan’s no-fault system

<sup>30</sup> MCL § 500.3148.

<sup>31</sup> MCL § 500.3148(2).

effectively functions without that key component. It should be noted, however, that this issue could be positively affected by other reforms already mentioned. For instance, fee schedules, negotiated rates and required third-party reviews will each, if enacted, reduce the number of PIP lawsuits as provider bills will be less likely to be disputed.

An alternative may be an internal review process with appeal procedures similar to that used by private health insurance plans like Blue Cross Blue Shield. In addition, before any PIP suit is commenced some form of alternative dispute resolution should be required — especially alternative dispute resolution in the form of mediation, which has proven to be a very successful means of settling cases once they have been filed in circuit or district courts.

### **Create the same standard for awarding attorney fees in auto accident lawsuits**

The no-fault law's provisions awarding attorney fees is unequal and slanted against insurers. For example, an insured may be awarded attorney fees if the insurance company "unreasonably" denies or delays in paying the claim. A delay or denial is presumed to be unreasonable if the bill isn't paid within 30 days. On the other hand, an insurer is only eligible for attorney fees if the claims made by the insured are so excessive as to constitute fraud. Instead, policymakers should make clear that the same standard — "unreasonable" — used for both insurers and the insured when determining who can be awarded attorney fees. Equalizing attorney fees in this fashion will go a long way towards reducing the number of PIP lawsuits.

### **Eliminate or make optional paying for coverage that includes attendant care provided by family and friends**

Like its unlimited PIP coverage requirement, family and friend attendant care is a unique feature of Michigan's no-fault system. Also like unlimited PIP coverage, there is no doubt that some people use this benefit appropriately and it's the best solution for their particular needs. But it's also important to remember that nearly every driver will never use this benefit, and yet are required to pay for it. Policymakers should either eliminate this as one of the benefits covered under mandatory PIP or make it an optional add-on that drivers can purchase if they want. Further, attendant care, like other medical provider billing, should be subject to a fee schedule or other cost control mechanism.

## **Conclusion**

Michigan's No Fault Act was a well-intended experiment by the Legislature to address the multiple

problems created by an unchecked, wide open tort system. The prevailing logic was to eliminate fault as a consideration in auto accident litigation so that each party to an accident would instead use their own insurance company for medical coverage, wage loss and other benefits, such as PIP. It was thought that this would reduce the large volume of auto accident lawsuits clogging the court system and make it simpler and easier for everybody to receive benefits after being injured in an accident. In an effort to insure that the system would work and out of an apparent concern for injured victims of auto accidents, the Legislature created unlimited medical benefits, easily the most generous in the nation.

At the same time, the no-fault law provided exceptions to the rule that an injured person can only claim benefits from their auto insurance company. This exception essentially allows people with serious injuries to still sue the at-fault driver, despite the existence of unlimited PIP benefits. Decisions from the Michigan Supreme Court have gone back and forth over the years in determining what qualifies as a serious enough injury, with the prevailing view giving the exception a much broader interpretation than what the court was previously willing to do.

The effect of this is that the Michigan's no-fault system doesn't really operate as a true no-fault system. The tradeoff of restricting victims' right to sue in exchange for unlimited medical coverage is illusory. There's little doubt that these factors play a major role in driving up the costs of auto insurance premiums in Michigan, making them some of the highest in the nation.

One must question the continued viability of the no-fault system in its current form and it is reasonable to conclude that the no-fault law's original goal of insuring all drivers, eliminating or reducing lawsuits while at the same time providing unlimited benefits has failed.

Recognizing the failure of the current system, the Legislature should take actions to reform it. It need not throw out the entire no-fault system, but rather modify it in ways that will help reduce the costs of insurance premiums. The good news is that policymakers do not need to reinvent the wheel — several other states have no-fault systems but do not experience the same high cost premiums Michiganders are currently forced to pay. The ideas recommended in this paper would simply make Michigan's auto insurance system more similar to those in other states and are aimed at putting downward pressure on the cost of insurance. The result should be lower premiums for all Michigan drivers and fewer uninsured cars and drivers out on the road.



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