STATE OF MICHIGAN
MI Court of Appeals

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ELLEN M ANDARY V USAA CASUALTY INSURANCE COMPANY	356487

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

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, and MORIAH, INC., d/b/a EISENHOWER CENTER, a Michigan corporation,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

Court of Appeals Case No. 356487

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

Hon. Wanda M. Stokes

BRIEF OF AMICUS CURIAE CPAN IN SUPPORT OF PLAINTIFFS-APPELLANTS' APPEAL

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STATEMENT OF QUESTIONS PRESENTED

The specific questions presented are stated in Plaintiffs-Appellants' brief on appeal and include (1) whether the weekly cap on family-provided attendant care and the non-Medicare fee schedule apply retroactively to auto insurance policies that vested before the effective date of the amendments, (2) if so, whether retroactive application violates the constitutional prohibition against the impairment of contracts and the principles addressed by the Michigan Supreme Court in *La Fontaine Saline, Inc v Chrysler Group*, and (3) irrespective of retroactivity, whether the amendments violate equal protection and due process?

STATEMENT OF INTEREST OF AMICUS CURIAE CPAN[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 now includes consumers, individual professionals, and private businesses, as well as professional organizations.

The members of CPAN number over 1,000 and include the Michigan State Medical Society, Michigan Osteopathic Association, Michigan Association of Chiropractors, Eisenhower

[1] Pursuant to MCR 7.212(H)(4), CPAN states that neither party's counsel authored this brief in whole or in part. While CPAN's general counsel is one of the attorneys for Plaintiffs, this amicus brief has been written and submitted by undersigned counsel. 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.

Center, Michigan Brain Injury Provider Council, Michigan Dental Association, Michigan Home Care and Hospice Association, Michigan Rehabilitation Association, Spectrum Health System, Michigan Assisted Living Association, Michigan Orthotics and Prosthetics Association, Brain Injury Association of Michigan, Mary Free Bed Rehabilitation Hospital, ATPA Michigan, Michigan Association for Justice, Michigan Protection and Advocacy, Michigan Paralyzed Veterans of America, Michigan Disability Rights Coalition, Peckham, NeuroRestorative of Michigan, Special Tree, Origami Rehabilitation, PharmaScipt, Hope Network Neuro Rehabilitation, Lighthouse Neuro Rehabilitation, Rehab Without Walls, Siporin & Associates, The Recovery Project, 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 40 cases addressing a variety of No Fault issues of interest to its members. See https://protectnofault.org/legal-efforts. CPAN was permitted to submit an amicus curiae brief when this case was pending in the Ingham County Circuit Court and appreciates the opportunity to express its views to this Court.

INTRODUCTION

The issue raised by this appeal affects over 18,000 Michigan residents who were catastrophically injured in auto accidents and are receiving personal protection insurance benefits (PPI) under vested auto insurance policies. Before July 2, 2020, each motor vehicle owner in this state was required to purchase unlimited PPI benefits under penalty of fines and imprisonment.

The benefits provide unlimited lifetime coverage for medical expenses necessary for the injured person's care, recovery, and rehabilitation. This statutory requirement guaranteed that catastrophically injured accident victims would receive necessary care and treatment for the rest of their lives.

The Michigan Catastrophic Claims Association (MCCA) reimburses insurers when the level of payment on catastrophic claims exceeds a set amount, currently $580,000. These payments are funded by Michigan auto owners, who are assessed a "MCCA fee" as part of their auto insurance premiums. The MCCA reports that it is paying (as of June 20, 2020) on ***18,140*** open catastrophic claims involving injury "to the brain, and/or spinal cord which results in serious and permanent disability, i.e., paralysis, coma, and reasoning ability." See MCCA > Consumer Information > Claim Statistics (michigancatastrophic.com) (accessed May 2, 2021) (Exhibit 1). These are the people receiving vested benefits that will be reduced if the No Fault Reform Act amendments that are the subject of this appeal ("the Amendments") are applied retroactively.[2]

The Amendments were adopted in 2019 and take effect July 1, 2021. MCL 500.3157(10) imposes a weekly 56-hour cap on family provided in-home attendant care. MCL 500.3157(7) imposes fee schedules that cap reimbursement for necessary products, services, and accommodations that are not compensable by Medicare at the unsustainable rate of 55% of the provider's charge as of January 1, 2019. If the treatment or service is covered by Medicare, a

[2] MCCA publishes the annual amount of the MCCA assessment on its website with an introduction that states, "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. The MCCA also adjusts its annual assessments to compensate for excesses or deficiencies in earlier assessments." But now the people MCCA reserved as lifetime claimants in the year of their injuries will not be getting the benefits that were promised to them (and thus that would have been reserved). See MCCA > Consumer Information > Assessment Data (michigancatastrophic.com) (accessed May 4, 2021).

provider can be reimbursed for 200% of the amount Medicare will pay. MCL 500.3157(2). Together, the amendments affect 54.08% of the reimbursement MCCA makes to No Fault insurers for payments to providers who serve catastrophically injured patients. According to MCCA's payment summary, from July 1, 2019 through June 30, 2020, 19.90% of payments were for residential care, 16.57% were for family provided attendant care, and 17.61% were for agency-provided attendant care. See MCCA Payment Summary by Category (Exhibit 2).[3]

Neither Plaintiffs Ellen Andary and Philip Kruger nor the other over 18,000 catastrophically injured Michigan insureds could have foreseen that they would be the unlucky victims of a split-second auto accident that would change their lives forever. But having purchased auto insurance policies with unlimited benefits in the years before their accident, they rightfully believed that if such a tragedy occurred, their care would be assured. Now they are being told that this is not so, that the policies themselves are irrelevant, and that the benefits they currently receive (and rightfully expected to continue) have been retroactively reduced by the Legislature. The insurer defendants have argued that retroactive application is perfectly proper and legally supported. With little more than the wave of a hand, the Trial Court agreed.

Time is now of the essence. Whether considered from a constitutional, statutory, or contract law perspective, the result is the same: the Trial Court's decision cannot be reconciled with fundamental principles that prohibit the retroactive displacement of vested contractual obligations. First, the statute itself provides no evidence that the Legislature intended retroactive application, so the presumption of prospective application applies (as one appellate court has already held as to another provision of the No Fault Reform Act). Second, the purported statutory reduction of

[3] See PAYMENTSUMMARY20190701_20200630_1.pdf (michigancatastrophic.com) (accessed May 2, 2021) (Exhibit 2).

vested contractual obligations violates the contracts clause of the Michigan and United States Constitutions. Third, well-recognized principles addressed by the Supreme Court in *LaFontaine Saline, Inc. v Chrysler Group* establish that a contract is governed by the statutory law that exists when the contract is entered and amendments that impair such rights should not be retroactively applied. Beyond the issue of retroactive application, the Amendments violate the constitutional guarantees of equal protection and due process. These issues are critical to the over 18,000 auto accident victims that will experience a loss or reduction of care when the Amendments take effect July 1.

ARGUMENT

I. Retroactive Application of the Cap on Family-Provided Attendant Care and Provider Fee Schedules Will Have a Devastating Impact on Brain-Injured Persons and the Health Care Industry That Serves Them.

This challenge to the *retroactive application* of the 56-hour weekly cap on family-provided attendant care and the non-Medicare-reimbursable fee schedule presents one of the most significant issues to arise since the inception of the No-Fault Act. At stake is the integrity of vested insurance policies Michigan citizens were required to purchase under penalty of criminal law. 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 the care, recovery, and rehabilitation of auto accident victims. Over 18,000 catastrophically injured persons in Michigan are currently receiving the promised benefits. Some have been receiving their vested benefits for decades. But as of July 1, the lives of these vulnerable individuals will be thrown into chaos.

Michigan's No-Fault insurers intend to give the Amendments retroactive application and are making plans to retreat from policy obligations that vested and became payable when their insureds were injured. Premiums were based upon the full level of benefits the policies promised

to provide without fee schedule limitations or caps on family-provided attendant care. But now, patients (and providers) are being notified that the insurers will no longer honor their original commitment. As far as the insurers are concerned, their contractual policy obligations have been commuted by legislative action. See e.g., Letters from Insurers, collectively attached as Exhibit 3: *Farmers' Insurance Letter* ("Please be advised that as of July 2nd, 2021, we will be unable to consider your bills for payment in their current format …"); *State Farm* Letter ("We are writing … to give notice of the impact of the changes to family attendant care effective July 2021. Please note effective July 2021 family provided attendant care will be limited to 56 hours per week"); *Frankenmuth Insurance Letter* ("The Michigan auto fee schedule will go into effect on July 2 …"); *Medata Letter* ("In preparation of the upcoming medical treatment payment guidelines …"); *Farm Bureau Insurance Letter* ("On 7.1.2021 the no fault statute changes regarding [sic] family provided attendant care will go into effect. We will only be considering 56 hours per week for family provided attendant care").[4]

Insurers will reap a windfall from the diminution of their obligations to catastrophically injured insureds. The value of that windfall is glaringly apparent in the insurers' assertion that the diminished obligations will result in significant premium reductions on new policies. If that is so, and the attendant care and fee schedule reductions will significantly reduce premiums, it must mean that a substantial portion of the premium paid by catastrophically injured residents was based upon vested benefits the insurers will no longer provide. In other words, Mrs. Andary and Mr.

[4] It is interesting to note that the Farm Bureau letter refers to "an agreed upon monthly rate for 24-hour attendant care" that "breaks down to $12.25 per hour." The writer characterizes this as a "reasonable rate for family provided attendant care" based upon research of the Bureau of Labor statistics for the average rate for health care providers in the area ($12.15) and denied a requested increase. Now, however, this non-Medicare reimbursable provider fee will be slashed by 45%, resulting in a clearly unreasonable fee by Farm Bureau's own assessment.

Kruger paid a substantial portion of their policy premiums for the very benefits that will be reduced or removed due to the Amendments. This is demonstrated by Appendix 4 to MCCA's Annual Report to the Insurance Commissioner (for fiscal year ended June 30, 2019), titled Exhibit of Estimated Premium Cost Components. In Appendix 4, the MCCA reports that for the 2019-2020 MCCA Assessment, the residential care component was 23.7%, the agency attendant care component was 22.3%, and the family-provided attendant care component was 16.2% of the total MCCA assessment. Together, these components comprise 62.2% of the 2019-2020 MCCA assessment.[5]

Other MCCA statistics show a similarly significant impact. According to MCCA's summary of categories of payment by their percentage of total payments from July 1, 2019 through June 30, 2020, 19.90% of payments were for residential care, 16.57% were for family provided attendant care, and 17.61% were for agency-provided attendant care. *Id*. This means that 54.08% of the payments MCCA makes to No Fault insurers are for benefits that will now be reduced by the No Fault Amendments.[6]

Because the same level of care most likely cannot be provided without the same level of payment, the 18,000 catastrophically injured persons in Michigan will bear the brunt of the insurers' windfall. They are people like Ellen Andary, who was permanently incapacitated by a brain injury in 2014 when the vehicle in which she was a passenger was struck head-on by a drunk driver. And Philip Krueger, who was just 18 years old in 1990 when he sustained multiple injuries

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[5] See http://www.michigancatastrophic.com/Portals/71/MCCA%20Annual%20Report%20to%20the%20DIFS%20Director%2006302019.pdf (accessed May 2, 2021) (Exhibit 3).

[6] See PAYMENTSUMMARY20190701_20200630_1.pdf (michigancatastrophic.com) (accessed May 2, 2021) (Exhibit 1).

while a passenger in a pickup truck. Like Mrs. Andary, the severe traumatic brain injury Mr. Kruger suffered left him permanently disabled and completely unable to care for himself. He has resided at Eisenhower Center since 1997.

Defendant insurers do not argue that the level of care Plaintiffs are receiving, or the concomitant provider charges, are unreasonable or not reasonably necessary to their care, recovery, or rehabilitation. Nonetheless, if insurers are permitted to disregard the promises made in already-vested policies, Plaintiffs, along with thousands of other brain-injured people in Michigan, will go without the necessary care their doctors have prescribed. The insurers make light of this cataclysmic deadline, characterizing this case as no more important than challenges to any other amendments and unworthy of "an accelerated appeal." It is anything but that. The lives of brain-injured people literally hang in the balance. Where efforts to maximize the patient's engagement in their own rehabilitation depends upon continuity, commitment, and the personal relationships family caregivers provide, auto accident victims (like Mrs. Andary) will unquestionably suffer when their trusted family members are replaced by a revolving door of agency strangers. Likewise, when providers can no longer viably operate at reimbursement levels that slash fees *by 45%*, what the insurers previously acknowledged to be reasonably necessary products, services, and accommodations for the injured person's care, recovery, and rehabilitation will be unavailable to insureds. Many of the products and services required by brain-injured persons fall into this category, including attendant care (whether family or agency-provided) and the essential residential care and rehabilitation facilities that people like Mr. Krueger call "home." Many of these providers will not survive at the new payment levels.

Aspire Rehabilitation, for example, is a neuro rehabilitation clinic that operates a residential facility for traumatic brain injury patients. On April 29, Aspire notified its clients'

guardians and case managers that Aspire will cease client care and wind up its business operations on June 30, requiring clients to transition to other residential options. The letter explains that "the catastrophic market-changing decrease" in reimbursement would "cut company revenue nearly in half," and although the company has "looked at every option" and "run every reasonable scenario," it could not "find a way forward." See Aspire Rehabilitation Letter (attached to MBIPC Amicus Brief). See also, Special Tree Affidavit (attached to MBIPC Amicus Brief) (projecting layoffs and a reduction in services due to reduced payments under the non-Medicare fee schedule); Eisenhower Affidavit (attached to MBIPC Amicus Brief) (stating that Plaintiff Eisenhower Center expects to cease operations on December 31 and lay off approximately 450 employees if the payment it receives to serve about 125 residential auto accident victims is slashed by 45%). The closure of Eisenhower will force Mr. Krueger to leave the home he has lived in for 24 years. There are many thousands of other catastrophically injured people in Michigan who will suffer the same upheaval. Where they will go is unknown.[7]

Home health care providers are similarly imperiled. Not only will patients who presently receive round the clock family-provided attendant care be limited to a weekly maximum of 56 hours, the reduced reimbursement levels will make it difficult to replace the additional hours through agencies. A 45% reduction in hourly reimbursement for attendant care is not sustainable. See e.g., Health Partners Affidavit (attached to MBIPC Amicus Brief) (explaining that Health Partners cannot continue to operate at the impending fee schedule levels and expects to be

[7] Because unsustainable fee schedules will force providers of reasonably necessary products, services and accommodations out of business, the insurers' commitment to provide necessary services to their insureds - an obligation that remains under the new law - will be unattainable. See MCL 500.3107(1), effective June 11, 2019, which states in part "Subject to the exceptions and limitations in this chapter … personal protection insurance benefits are payable for the following: (a) Allowable expenses consisting of reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation."

terminating its operations on June 30, laying off approximately 580 employees). This will leave Michigan's vulnerable brain-injured citizens unable to get the care they require at a time when caregivers in Michigan are already in short supply.[8]

A survey conducted by CPAN shows a chaotic future for these patients and their families. A majority of the 586 survey respondents (56%) provide home-based care to patients that require constant care, 24 hours a day, seven days a week. 73.62% provide attendant care services to a motor vehicle accident victim that they knew or had a relationship with prior to the victim's accident. Nearly half of the patients have been receiving care for more than five years and rely upon established routines designed to maintain their dignity. Fifty percent of the patients were exclusively cared for by family members. Many had concerns that the switch to agency-care providers would be disruptive and affect the level of care received. The patients' conditions are complicated and not easily managed. As one father explained:

> "My daughter requires all of her needs to be done by others. Hygiene, dressing, meds, feeding, positioning, everything. Many of these functions require two caregivers to [perform]. My wife and I want to provide care to our daughter and want to be compensated the same as anyone else would be. She is familiar with us and we provide the absolute best care available. We do use professional caregivers also. Problems we have with professional caregivers are, they don't show up, they are late, it could be a different caregiver every day, every time we have a new caregiver, they have to learn all the procedures for caring for our daughter. Our daughter is a human being not a robot without feelings. She deserves the most appropriate care at a reasonable price that is available . . .

Another respondent wrote:

> I had to quit my job in 2009 due to the severity of issues she encounters on a daily basis … Things have worsened over the past couple years and I have to be with her 24/7 because NO ONE understands her or her reactions as I do. She has five types of seizures, a traumatic brain injury, is non-verbal, has left side hemiparesis and has

[8] See, e.g., Shortage of paid caregivers keeps family members up at night, hoping for "something sustainable" | Michigan Radio (accessed April 30, 2021).

> over 50 allergies to medications… she requires my attention every second of the day. Her survival is crucial to my diligence and detail of her everyday care.[9]

See Summary of CPAN Attendant Care Survey (Exhibit 4).

It is unclear where these most vulnerable patients will get the highly specialized care, treatment, and supervision they require when brain-injury providers reduce services or go out of business altogether due to the fee schedule reductions. A survey of more than 110 brain injury rehabilitation providers, commissioned by the Michigan Brain Injury Provider Council, reported likely service reductions, closures, and layoffs:

- 86% of post-acute care facilities have either no confidence at all (65%) or very little confidence (21%) that they can operate their business at a sustainable level under the reduced fee schedules. 21% are only slightly confident.

- 79% of respondents expect to decrease the number of auto accident patients they serve under the reduced fee schedules by 31 to 40 patients (on average), meaning that between 4,800 and 6,200 patients will potentially lose care from these facilities alone.

- 90% of the survey respondents expect employee layoffs under the new fee schedules, with potential job losses across respondent providers of between 3,250 and 4,650.

See Summary of MBIPC Survey (attached to MBIPC's Amicus Brief). Another survey of 71 respondents, conducted by IBH Analytics, garnered similar results:

- 90% estimated that services offered to brain injury patients would be reduced.

- 57% stated they were either very likely or likely to terminate services to auto accident victims.

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[9] The family members whose hours are being reduced by the new law have few options. One survey respondent described his decision to walk away from his career to help with his brother's care. "I knew family being involved was the key to him surviving. I am the one who changes his trach (tracheostomy tube) monthly. I am the one who drives him to all his appointments. I am the one who is there to wipe his tears when he gets depressed." Another said "I had to quit my job to take care of my daughter. I am now 64 years old and have been out of the job force for 14 years. What am I supposed to do to take care of both of us now?" See CPAN Survey Summary at page 2.

- Layoffs are expected across all categories of respondents.
- Nearly all respondents said they cannot sustain quality services at the reduced reimbursement level.

See Summary of IBH Analytics Business Impact Survey (Exhibit 5). This loss of services to the brain injured population evokes images of the 1990s when many of Michigan's state mental health institutions were closed to save costs, sending many patients out on the streets or to community-based programs that were never properly funded. A similar lapse can be expected here, one that taxpayers will have to fund through Medicaid or other public programs. Given the magnitude of patients and affected families, courts might expect a deluge of lawsuits seeking to stay the withdrawal of benefits if a final decision on theses jurisprudentially important issues is not expeditiously obtained.

II. Retroactive Application of the Amendments is Prohibited Because (1) Given the Absence of Express Language Showing a Clear, Direct, and Unequivocal Legislative Intent to Require Retroactive Application, the Presumption is that the Legislature Intended Prospective Application; (2) Retroactive Application Violates the Contracts Clause of the Michigan and U.S. Constitutions; and (3) *LaFontaine* Recognizes That the Statute in Effect When the Contract is Executed Governs.

Under the No-Fault insurance agreements in effect when Plaintiffs Ellen Andary and Philip 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 paid.[10] The insurer's obligation to pay all reasonable charges was not limited by hourly caps on family-provided attendant care or provider fee schedules.

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.[11] 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 and became payable 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 included all reasonably necessary attendant care, including

[10] 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).

[11] The USAA policy is attached to Plaintiffs' Appendix to its Brief on Appeal.

reimbursement for *in home* attendant care provided by family members without any limitation on the hours of family-provided care. See e.g., *Van Marter v American Fidelity Fire Ins Co*, 114 Mich App 171, 185; 318 NW2d 679 (1982) (insurer must pay for attendant care rendered by stepmother); *Manley v DAIIE*, 425 Mich 140, 153; 388 NW2d 216 (1986) (attendant care provided by parents is allowable expense); *Sharp v Preferred Risk Mutual Ins Co*, 142 Mich App 499, 514; 370 NW2d 619 (1985) (mother's services to adult son are compensable). In *Douglas v Allstate Ins Co*, 492 Mich 241, 248; 821 NW2d 472 (2012), the Supreme 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."

Our appellate courts have also consistently held that those who provide care and services to No Fault insureds were 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. See e.g., *Johnson v Michigan Mutual Ins Co*, 180 Mich App 314, 321-322; 446 NW2d 899 (1989) (rejecting assertion that reimbursement must approximate Medicaid); *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 114; 535 NW2d 529(1995) (rejecting argument that a reasonable charge is what private health insurance would have paid); *Munson Medical v Auto Club Ass'n*, 218 Mich App 375, 390; 554 NW2d 49 (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) (workers' comp fee schedules could not be used to determine allowable charges); *Mercy Mt Clemens v Auto Club Ins Ass 'n*, 219 Mich App 46, 55-56; 555 NW2d 871 (1996) (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.

If applied retroactively, the No Fault amendments at issue in this appeal will change everything for Mrs. Andary, Mr. Krueger, and the over 18,000 other catastrophically injured persons in Michigan who are receiving No-Fault benefits under their vested policies. MCL 500.3157(10) imposes a weekly 56-hour cap for in-home attendant care provided by members of the injured person's family and friends. Although the unequivocal case law cited above establishes that prior to the Amendments MCL 500.3107(l)(a) entitled Mrs. Andary to be reimbursed for every hour of prescribed attendant care that was reasonably necessary to her care, recovery and rehabilitation *irrespective of the identity of the care provider*, her family members and friends will now be limited to collectively providing only 56 hours of weekly in-home care. Under the Amendments, the rest of Mrs. Andary's care, and that of others just like her, must be provided by more highly paid strangers.[12]

In addition to the amendments governing attendant care, absent certain exceptions, MCL 500.3157(2) and (7) impose *fee schedules* that cap reimbursement for products, services, and

[12] In the trial court, Defendants touted as an "out" left by the Legislature a provision which allows a policyholder "to purchase attendant care benefits in excess of 56 hours." Defs' Mot to Dismiss at 12. This is apparently intended to show that although Mrs. Andary purchased unlimited attendant care benefits years ago, received them for over five years, and is now having them retroactively taken away, the Legislature is graciously permitting Mrs. Andary to purchase the same benefits again for additional premium. Defendants also argued that "the patient can select family members to provide their attendant care services[,] … the Act . . . in no way dictates … providers used by patients … , if the insurer chooses not to pay for family caregivers, "they [family members] can care for her of their own volition," *meaning without pay*, and "[i]f 56 weeks are not enough, she [Mrs. Andary] *can still pay her children to care for her*." *Id*. at 6; Defs' Trial Court Reply at 8, n7. Defendants' argument is shameful. How can Mrs. Andary pay these fees when she, like Mr. Krueger, is brain injured and can no longer be gainfully employed? This is precisely what her No Fault insurance was supposed to be for. And how can family members, who gave up jobs and careers to provide the best care for their loved one, be expected to support themselves without an income?

accommodations that are not compensable by Medicare at 55% of the provider's charge as of January 1, 2019, while reimbursement for provider services that are compensable by Medicare will be reimbursed at 200% of the payable amount. As discussed above, many providers, including attendant-care providers and residential rehabilitation facilities that care for spine and brain injury patients like Mr. Krueger, will be unable to operate at the reduced reimbursement amounts and will be forced out of business. Their patients, like Mr. Kruger, will be forced from their homes.

Under the policies in effect when Plaintiffs were injured, all of the providers who rendered treatment and care were paid their reasonable and customary charges without regard to fee schedules or caps on family provided attendant care. The insurance premiums paid to their insurers secured those unambiguous rights. If the Amendments are applied retroactively, the benefits Plaintiffs have been receiving under their policies will be substantially diminished, as will their care and treatment. This creates a windfall for the insurers, who will be arbitrarily relieved of obligations for which the Andary and Krueger policy premiums were long ago computed and paid. The law does not allow this disregard of vested contractual obligations. The Defendant insurers' intent to apply the Amendments retroactively violates the presumption of prospective application, the constitutional prohibition against the impairment of contracts, and the result in *LaFontaine*.

A. The Amendments Must be Applied Prospectively, Consistent with the Court of Appeals Holding in *Jones v Assurance.*

In the Trial Court, the parties did not address whether the presumption of prospective application governs the Amendments, but it is a pivotal issue and should be decided now. If this Court agrees that the statutory language does not show a clear, direct, and unequivocal intent to require retroactive application, the Contract Clause and *LaFontaine* doctrine challenges will be moot. Equal protection and due process claims will remain, but only with respect to future policies.

This Court recently held that another provision of the No Fault Reform Act could only be applied prospectively. In *Jones v Esurance Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued February 25, 2021 (Docket No. 351772), a 2019 amendment to MCL 500.3145, which provides for tolling of the No Fault one-year back rule, was held to be prospective only because there was insufficient evidence that the Legislature intended retroactive application. This Court deemed it clear from the text of MCL 500.3145 that "the Legislature did not intend the tolling provision of subsection (3) to have retroactive effect," stating that this "is evidenced by the lack of any 'expression of intent,' let alone an expression that is 'clear, direct, and unequivocal,' that the Legislature intended the tolling provision to be applied retroactively." *Jones*, 2021 WL 745509, at *5.[13]

In *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001), the Michigan Supreme Court explained 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). Moreover, "statutes are presumed to operate prospectively unless the contrary intent is clearly manifested." *Id*., *Franks*, 422 Mich at 671. "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. The Court in *Lynch* found nothing in the statutory language of the Sales Representative Commissions Act suggesting a legislative intent that the statute be applied retroactively and noted signals that

[13] Although unpublished, *Jones* is discussed because it addresses retroactive application of a No Fault Reform Act amendment. *Jones* is attached to Plaintiffs' Appendix to its Brief on Appeal.

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.]

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*, the Supreme 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 relies on the so-called "exception" to the general rule of prospective application providing that "statutes which operate in furtherance of a remedy or mode of procedure and which neither create new rights nor destroy, enlarge, or diminish existing rights are generally held to operate retrospectively unless a contrary legislative intent is manifested." … 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 U S 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.

As in *Jones*, 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 family-provided attendant care cap and the non-Medicare fee schedule. MCL 500.3157 applies to a person "that lawfully renders treatment to an injured person …" but expresses no intent to retroactively apply the amendments to persons treating an already injured person. 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 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 May 2, 2021) (emphasis added).

A question and answer on the Department of Insurance and Financial Services 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)

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. Prospective application is required.

B. 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.

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 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) (emphasis added), 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 *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.").

1. The Amendments Impair Existing Policy Obligations and Expectations.

Here, Defendants' performance under the insurance agreements since the time of Plaintiffs' injuries, consistent with longstanding case law requiring the payment of attendant care services irrespective of whether the care is provided by family members or agency caregivers and requiring the payment of providers' reasonable and customary charges without reference to fee schedules, certainly caused Plaintiffs to rely upon and legitimately expect the continued receipt of these vested

benefits. 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 rehabilitation. All providers who rendered treatment and care to Plaintiffs were paid their reasonable and customary charges without regard to fee schedules. Nor were the policies subject to 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. The Amendments substantially impair policy obligations and expectations. 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.

The Trial Court did not analyze the required level of scrutiny for contract clause challenges. Rather, the Trial Court's analysis was superficial, relying upon the application of the rational basis test in *Shavers v Kelly*, and deferring "to the Legislature's judgment as to the necessity and reasonableness of the measure." Trial Court Op. at 9 (Plaintiff's Appx). 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.

The initial challenge to the constitutionality of the No Fault Act included a 35-day trial consisting of 5,000 pages of transcript and over 200 exhibits. *Shavers v Kelley*, 402 Mich 554, 583; 267 NW2d 72, 79 (1978). As the Supreme 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 *Borden's Farm Products Co v Baldwin*, 293 US 194, 210-211; 55 S Ct 187; 79 L Ed 281 (1934). The Supreme 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.

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. Appendix 4 to MCCA's Annual Report to the Insurance Commissioner (for fiscal year ended June 30, 2019) estimates that the percentage of the MCCA assessment attributable to residential care will only decrease from 23.7% in 2019-2020 to 19% in 2020-2021 and for family-provided attendant care from 16.2 % to 12%. The allocation for agency-provided attendant care reflected an increase from 22.3% in 2019-2020 to 24.8% in 2020-2021. This results in a collective total for these components of 55.8% in 2020-2021 compared to 62.2% in 2019-2020, a mere 6.4% reduction in the MCCA-assessment for categories related to the amendments. <http://www.michigancatastrophic.com/Portals/71/MCCA%20Annual%20Report%20to%20the%20DIFS%20Director%2006302019.pdf> (accessed May 2, 2021) (Exhibit 4).[14]

Indeed, because the No Fault Reform Act only requires insurers to provide premium reductions for PIP benefits, insurance industry representatives admit that increased liability

[14] It is unclear of the extent to which other changes to PPI coverage, such as permitting policyholders to select less than lifetime benefits, have been included in these estimates.

exposure will cause overall premium costs to rise. Insurance Alliance of Michigan's 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…"[15] 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."[16] On 7/19/19, 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."[17] And on 1/10/20, 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.[18] Insurance agents have said they will recommend motorists buy unlimited PIP and

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[15] Kim Russell, WXYZ.com, *Insurance industry warns no-fault reform bill will not save as much as promised*, <https://www.wxyz.com/news/insurance-industry-warns-no-fault-reform-bill-will-not-save-as-much-as-promised> (posted and updated May 29, 2019) (accessed May 3, 2021).

[16] 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 May 3, 2021).

[17] 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 May 3, 2021).

[18] 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/

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."[19]

3. The Chosen Means are not Reasonable.

In addition to the fact that retroactive application of the Amendments will not accomplish the goal of substantially reducing policy premiums, the means chosen are not reasonable. It is not reasonable to statutorily reduce the benefits that catastrophically injured persons 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 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.

Further, it is not reasonable to force catastrophically injured people to obtain their intimate and personal care from a revolving-door of unfamiliar agency-provided attendants (at rates that

business/2020/01/10/michigan-no-fault-auto-insurance-driver-savings/2845005001/> (accessed May 3, 2021). Insurance Alliance was an amicus for Defendants when this case was pending in Ingham County Circuit Court.

[19] 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 (attached Exhibit 7).

are typically higher than family caregivers receive). 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 rates at a profit margin *greater than* 45 percent may be able to survive the reduction, but many providers who charged reasonable and competitive rates in 2019 will go out of business, reducing the ability of brain-injured persons to obtain the reasonably necessary care and treatment their insurers' promised to pay for the care, recovery, and rehabilitation of their insureds. There are certainly other more equitable and effective ways to reduce costs. The means chosen here are unreasonable and will have dire consequences for brain-injury patients and their providers.

4. 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");[20] *In re Workers' Comp Refund*, 46 F3d 813, 821 (CA 8, 1995) (recipient of excess premiums); *Kee v Shelter Ins*, 852 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).

[20] 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).

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 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.]

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.][21]

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

[21] 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, as we described above." *Id.*

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 essential 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 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*.

Under the compulsory provisions of the No-Fault statute as it has existed since its inception, Michigan citizens were compelled to purchase insurance policies. Those policies did not contain an hourly cap on family provided attendant care or fee schedule limitations. For over 18,000 catastrophically injured insureds, the policy obligations vested when the insureds were injured. As in the above cases, the Contract Clause prohibits retroactive application of the No Fault Amendments.

C. Under *LaFontaine*, Plaintiffs' Policies are Governed by the No Fault Act in Effect at the Time They Were Purchased; the No Fault Amendments Cannot be Retroactively Applied.

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), the Supreme 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*. The 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) (emphasis not added).]

The 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, the 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). The 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. As *LaFontaine* shows, Plaintiffs' auto policies are not subject to the No Fault 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 fee schedules. This obligation was carried into Plaintiffs' compulsory No Fault policies without hourly caps on family-provided attendant care or reduced fee schedules. On this basis as well, the No Fault Amendments cannot be retroactively applied to Plaintiffs' vested policies.

III. The Amendments Violate Equal Protection and Due Process.

Irrespective of whether the amendments are applied prospectively or retrospectively, significant equal protection and due process concerns were raised by Plaintiffs' complaint. They should not have been summarily dismissed.

Both the United States and Michigan Constitutions forbid the State from depriving any person of "life, liberty, or property, without due process of law." US Const, Am XIV, Sec 1; Const 1963, art 1, § 17. The Due Process Clause has been interpreted to contain a substantive component in addition to the procedural component. *Gillette Commercial Operations North America & Subsidiaries v Dept of Treasury*, 312 Mich App 394; 878 NW2d 891, 906-907 (2015). "The essence of a claim of violation of substantive due process is that the government may not deprive a person of liberty or property by an arbitrary exercise of power." *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 173; 667 NW2d 93 (2003) (citation omitted). The statute must be "rationally related to a legitimate governmental interest." *Id.*

Further, the United States and Michigan Constitutions forbid the State from depriving any person of "the equal protection of the laws." US Const, Am XIV, Sec 1; Const 1963, art 1, § 2. The Equal Protection Clause is violated if the "statute is arbitrary and not rationally related to a legitimate governmental interest." *Landon Holdings*, 257 Mich App at 173. See also, *Phillips v*

Mirac, Inc, 470 Mich 415, 432-433; 685 NW2d 174 (2004) (explaining the circumstances under which each of the three levels of scrutiny may apply). However, strict scrutiny applies to equal protection challenges involving the exercise of a fundamental right. *Doe v Dep't of Soc Servs*, 439 Mich 650, 662; 487 NW2d 166 (1992). The fourteenth amendment "undoubtedly intended . . . that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property." *Templar v Michigan State Board of Examiners of Barbers*, 131 Mich 254, 256; 90 NW 1058 (1902), citing *Barbier v Connolly*, 113 US 27, 31; 5 Sup Ct 357; 28 L Ed 923 (1884). Equal protection of the laws implies the "exemption from any greater burdens and charges than such as are equally imposed upon all others under like circumstances." *Id*.

A. The Cap on Family-Provided Attendant Care Violates Equal Protection and Due Process.

The cap on family provided attendant care violates due process and equal protection. Under the Amendments, injured persons whose care is provided by family members are treated differently than those similarly situated persons who purchase more expensive and less personal agency-provided care. The fundamental rights to privacy and bodily integrity are violated by requiring patients like Mrs. Andary to submit to a revolving door of agency-provided strangers to provide for her personal and intimate needs such as toileting, bathing, and dressing. The number of hours of required care is established by the treatment plan prescribed for the patient and should not depend upon whether the care is rendered by agency caregivers or lesser paid family caregivers. Plaintiffs' rights to due process and privacy are violated when Plaintiffs are denied the right to choose their medical and attendant care providers.

B. Fee Schedules for Providers Whose Services are Not Reimbursed by Medicare Violate Equal Protection and Due Process.

Due process and equal protection are also violated by the disparity in reimbursement levels for No-Fault providers (like Plaintiff Eisenhower Center). Medicare-compensable services are reimbursed at 200% of the amount paid by Medicare while non-Medicare compensable services will be paid at the rate of only 55% of the provider's charge as of January 1, 2019. In addition, by basing the rate on each provider's charge, this legislation discriminates against those who charged reasonable rates and rewards those who charged extremely excessive rates. Only providers who set their rates at a profit margin *greater than* 45 percent will be able to continue providing such services. On the other hand, for many providers that had reasonable and competitive rates in 2019, this 55% payment level is unsustainable and will cause them to go out of business, violating their due process right to property (including owning a business). The reduction will also arbitrarily impact the ability of brain-injured persons who rely upon non-Medicare compensable services to obtain the care and treatment they require. Indeed, providers will be deterred from treating motor vehicle patients, further impairing their access to care. Clearly, the Amendments create two classes of patients and two classes of providers and treats them in a dissimilar manner. There is no rational basis for these classifications, let alone a compelling interest.

CPAN supports Plaintiffs' analysis of these issues.

RELIEF REQUESTED

Amicus Curiae CPAN therefore respectfully requests that this Court reverse and hold that the Amendments (1) cannot be retroactively applied for the reasons stated above, and (2) cannot be prospectively applied because to do so would violate equal protection and due process.

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: May 26, 2021

CERTIFICATE OF SERVICE

Cynthia J. Villeneuve, being duly sworn, deposes and says that on May 26, 2021 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

STATE OF MICHIGAN
IN THE COURT OF APPEALS

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, and MORIAH, INC., d/b/a EISENHOWER CENTER, a Michigan corporation,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

Court of Appeals Case No. 356487

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

Hon. Wanda M. Stokes

APPENDIX OF EXHIBITS TO
BRIEF OF AMICUS CURIAE CPAN IN SUPPORT OF
PLAINTIFFS-APPELLANTS' APPEAL

Exhibit 1

March 01, 2021

Assessment Data
Historic and Future Retentions
Historic Vehicles
Claim Statistics
Annual Insurance Report
FAQ
Additional Resources

Claim Statistics

Catastrophic claims involve injury to the brain, and/or spinal cord which results in serious and permanent disability. i.e., paralysis, coma, and reasoning ability.

MCCA Claim Statistics Inception to Date Fiscal Year 7/1/1978 to 6/30/2020

Reported Claims:	44,400
Open Claims:	18,140
Total Payments Made:	$19,128,116,505

Exhibits

Injury Distribution Chart
Payment Distribution Chart
Age Distribution Chart
Payment Summary by Category

Exhibit 2

MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION
Payment Summary by Category
07/01/2019 TO 06/30/2020

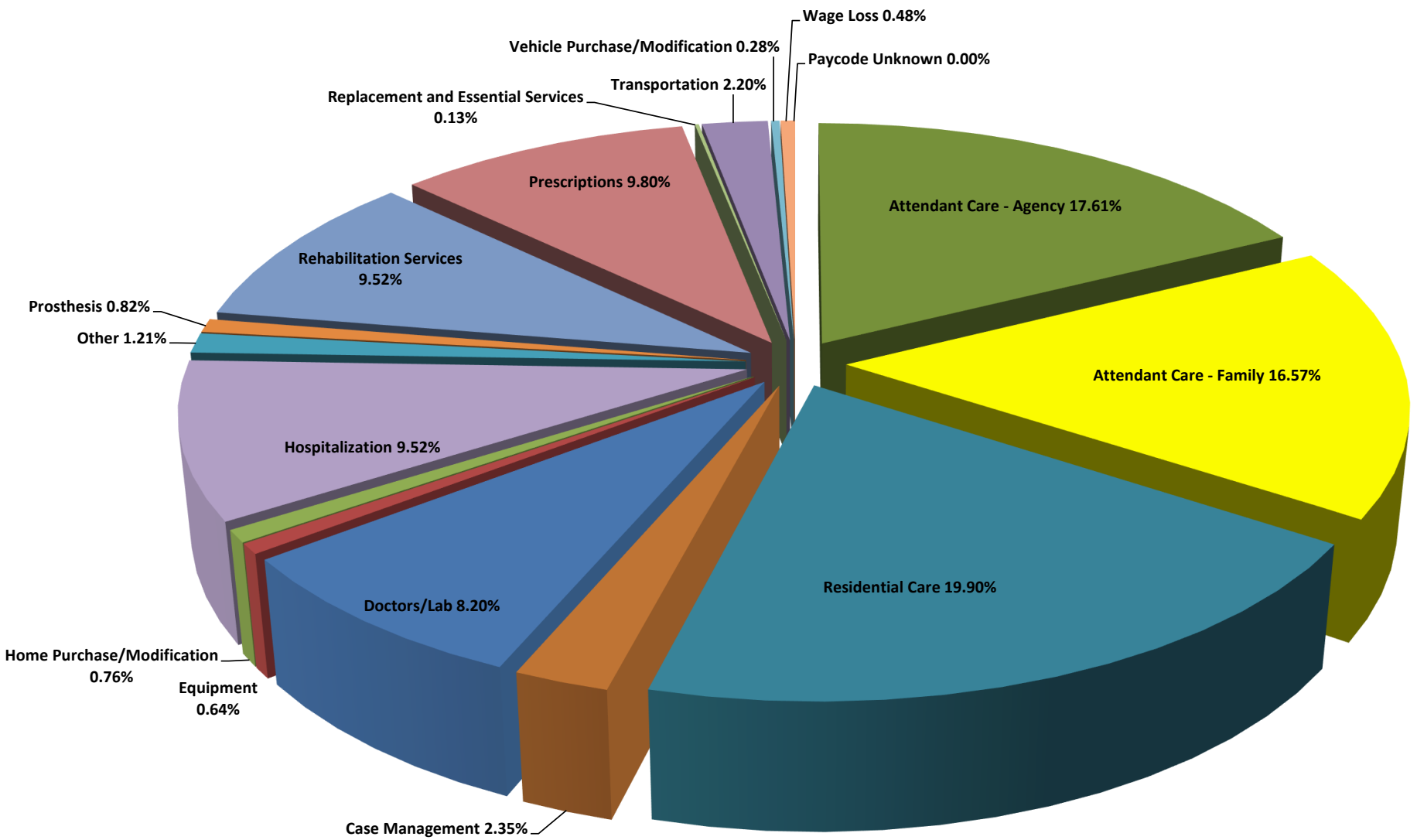


Exhibit 3

FARMERS INSURANCE

Toll Free: (800) 435-7764
Fax: (877) 217-1389
Email: myclaim@farmersinsurance.com
National Document Center
P.O. Box 268993
Oklahoma City, OK 73126-8993

April 5, 2021

COMMUNITY RESOURCE CONSULTANTS INC
CRCI
PO BOX 622
ST CLAIR SHORES MI 48080

RE: Claim Number: 1021931292-1-1
Insured: Michael Schiavi
Policy Number: 011279277 1
Loss Date: 02/24/1985
Injured Party: Michael Schiavi
Subject: Important Claim Information

Dear Provider:

We are in receipt of your most recent bill in connection with the above-captioned motor vehicle accident, for which payment is enclosed. Please be advised that as of July 2nd, 2021, we will be unable to consider your bills for payment in their current format, as they are missing information that allows them to be reviewed in accordance with the Michigan No-Fault fee schedule.

All bills must include pertinent claim information for the injured party, such as patient name/address/phone number, patient date of birth, proper diagnosiscodes, proper CPT codes for each item being billed, place of service, etc. Your bill, in its current format, may be missing some or all of this information.

In order to provide the necessary information for bill review purposes, you may utilize a Form CMS-1500 to submit your claims, which is a standard billing format for providers. If you have a form that is different from the Form CMS-1500, you may submit your claim on that alternate form, and we will advise you if your bills are not able to be reviewed or if they are missing information.

It is recommended that you begin submitting your claims on this billing form as soon as possible, so as to avoid delay of payment to you starting July 2nd, 2021. Please note that we are unable to provide direction orguidance as to how to bill your charges, or what CPT codes to use; please consult your billing department for further instruction.

If you have any questions or concerns, call me at (248) 488-2731.

Thank you.

Farmers Insurance Exchange

Jennifer Jenkins
Med/PIP Special Claims Representative
jennifer.jenkins@farmersinsurance.com
(248) 488-2731

COVID-19 Notice – In light of the national health emergency, I am currently working from home. I can be reached by telephone and e-mail; my phone number and email address have not changed. E-mail communications are preferred to avoid any potential delays caused by mailing. If you are unable to email and hard copies of communications are required, they may be sent to our National Document Center at P.O. Box 268994, Oklahoma City, OK 73126-8994. We are unable to receive deliveries at any location from FedEx, UPS or any other courier at this time, as our claims office locations have been temporarily closed.

Check(s): 1629553376

Providing Insurance and Financial Services
Home Office, Bloomington, IL

State Farm

April 5, 2021

[redacted]
[redacted]
[redacted]

State Farm Claims
PO Box 106170
Atlanta GA 30348-6170

RE: Claim Number: [redacted]
Date of Loss: June 2, 2005
Our Insured: [redacted]

Dear [redacted]:

We are writing in follow up to our conversations to give notice of the impact of the changes to family attendant care effective July 2021. Please note effective July 2021 family provided attendant care will be limited to 56 hours per week

If you have any questions or need further assistance, please call us at (844) 292-8615 Ext. 9729075056.

Sincerely,

Coronda Anderson
Claim Specialist
(844) 292-8615 Ext. 9729075056
Fax: (844) 218-1140

State Farm Mutual Automobile Insurance Company

Frankenmuth Insurance

Frankenmuth Mutual Insurance Company
Ansur America Insurance Company
Patriot Life Insurance Company
Patriot Insurance Company

April 8, 2021

T4 P1 - 648 ********AUTO**ALL FOR AADC 480
[redacted]

SUBJECT: MICHIGAN NO-FAULT REFORM – NEW FEE SCHEDULE

Dear [redacted]:

The Michigan auto fee schedule will go into effect on July 2, 2021. (MCL 500.3157)

Michigan Auto Fee Schedule Structure

The new Michigan auto no-fault fee schedule is set up as a three-tier pricing structure. The three tiers, in priority order, are defined in the legislation as follows:

1. ***The amount payable to the person for the treatment or training under Medicare***
2. ***Amount payable under the person's charge description master (person meaning provider, attendant, etc.), effective Jan. 1, 2019***
3. ***The average amount the person charged for the treatment on Jan. 1, 2019***

To ensure our compliance of paying bills in accordance to the new fee schedule, **please submit your official Jan. 1, 2019 charge description master or average charge sheet to us within 30 days.**

This can be emailed to (preferred): MIAutoFeeSchedule@fmins.com

or

Mailed to:
Frankenmuth Insurance Company
1 Mutual Avenue
Frankenmuth, MI 48787-0040
Attn: Medical Bill Review

If your organization operates multiple locations, a separate submission will be required for each. However, if the business name, tax identification number, rates, codes and billing address are identical, then one submission will cover all locations.

Any questions or comments, please email: MIAutoFeeSchedule@fmins.com

or contact:

Bonnie Ellison
1-800-234-4433 x2914

Jamie Martin
1-800-234-4433 x2659

medata®
5 Peters Canyon Road, Suite 250, Irvine, CA 92606

www.medata.com
tel: 714.918.1310
800.854.7591
fax: 714.918.1325

March 24, 2021

[redacted]
COMMUNITY RESOURCES CONSULTANT
23000 GREATER MACK AVE SUITE 200
SAINT CLAIR SHORES, MI 48080

Re: 2019 Michigan Charge Description Master Request

Dear Billing Department,

Medata provides medical bill review services and software solutions for insurance companies that issue auto no-fault coverage policies for Michigan drivers.

In preparation of the upcoming medical treatment payment guidelines for Michigan No-Fault claimants effective July 2, 2021, our organization is requesting your practice's charge description data (price sheet) that was **in effect on January 1, 2019**. As required by Michigan Insurance Code, Section 500.3157(7), where **Medicare does not provide an amount payable** for a given treatment, payment will be at "the person's charge description master in effect on January 1, 2019".

The charge description master should include the following data elements:

- Tax Identification Number (FEIN) or SSN
- National Provider Identification (NPI)
- Practice Address (street address, city, state, zip code)
- Revenue code (if applicable)
- Service Code / CPT / HCPCS
- Modifier(s)
- Description
- **January 1, 2019 charge amount**

In order to streamline the aggregation of provider charges, we kindly request that your charge description master be submitted in an electronic format (e.g. Excel, CSV, etc.) via our web-based provider portal. Please go to the following website to access the portal and follow the on-screen directions for uploading your charge data:

https://assist.medata.com/servicedesk

Instructions for accessing the portal can be found on the reverse side of this document. Thank you for your cooperation and assistance in navigating the no-fault reform requirements.

Best Regards,

Medata

FARM BUREAU INSURANCE
Michigan Insurance Company
Farm Bureau Mutual
Farm Bureau Life
Farm Bureau General
[redacted]
7373 West Saginaw Highway, PO Box 30400, Lansing, Michigan 48909-7900
FarmBureauInsurance.com

01/28/2021

[redacted]
Holly MI 48442

RE: Claim No.: [redacted]
Date of Loss: 10/18/1977
Your Client: [redacted]

Dear [redacted]

This letter is to follow up and outline our position following our 3/1/21 phone conversation regarding your request for an attendant care rate increase. I have reviewed the file as well as the Bureau of Labor statistics regarding the attendant care rates. Per the file in April of 2018 you spoke to the claim rep and settled on an agreed upon monthly rate for 24-hour attendant care. This rate breaks down to $12.25 per hour.

I have reviewed the Bureau of Labor statistics website, it appears the average rate for a home health care provider is $12.15 per hour (as of 2019). At this time, you are being paid over the mean or median rate for family provided home health aide. This, based on research, appears to be a reasonable rate for family provided attendant care in the area. No change will be considered at this time. If you have any documentation you would like to submit for our review please feel free to do so.

In the second part of our conversation we discussed the change in the no-fault law regarding family provided attendant care. On 7/1/2021 the no fault statute changes regarding family provided attendant care will go into effect. We will only be considering 56 hours per week for family provided attendant care. I have included the applicable case law below for your review and records.

500.3157 Charges for treatment or training for injured persons; limitation on eligibility for payment or reimbursement; applicability; "freestanding rehabilitation facility" defined; qualification for payment requirements; attendant care; neurological rehabilitation clinic; applicability to ambulance operation; definitions.

(10) For attendant care rendered in the injured person's home, an insurer is only required to pay benefits for attendant care up to the hourly limitation in section 315 of the worker's disability compensation act of 1969, 1969 PA 317, MCL 418.315. This subsection only applies if the attendant care is provided directly, or indirectly through another person, by any of the following:

(a) An individual who is related to the injured person.

(b) An individual who is domiciled in the household of the injured person.

(c) An individual with whom the injured person had a business or social relationship before the injury.

(11) An insurer may contract to pay benefits for attendant care for more than the hourly limitation under subsection (10).

Section 315 of the worker's disability compensation act of 1969, 1969 PA 317, MCL 418.315
(1) ... Attendant or nursing care shall not be ordered in excess of 56 hours per week if the care is to be provided by the employee's spouse, brother, sister, child, parent, or any combination of these persons.

If you have any questions please feel free to contact me.

Respectfully,

Jennifer Rosso
Jennifer Rosso
Medical Claims Representative

Exhibit 4

Annual Report

of the

Michigan Catastrophic Claims Association

To the Director

Department of Insurance and Financial Services

For the Fiscal Year Ended June 30, 2019

Issued December 2019

Appendix 4

Michigan Catastrophic Claims Association
Exhibit of Estimated Premium Cost Components

Cost Component Category	2019 - 2020 Assessmet		2020 - 2021 Assessment	
	Estimated Costs	Cost Distribution	Estimated Costs	Cost Distribution
Residental Care	$41.98	23.7%	$18.98	19.0%
Attendant Care - Agency	39.39	22.3%	24.84	24.8%
Attendant Care - Family	28.64	16.2%	12.02	12.0%
Prescriptions	15.37	8.7%	11.25	11.3%
Hospitalization	12.33	7.0%	7.11	7.1%
Doctors/Lab	10.51	5.9%	5.77	5.8%
Rehabilitation Services	10.12	5.7%	7.13	7.1%
Other	4.61	2.6%	1.71	1.7%
Case Management	3.55	2.0%	2.54	2.5%
Transportation	3.06	1.7%	2.13	2.1%
Loss Adjustment Expenses	2.84	1.6%	2.17	2.2%
Home Purchases/Modifications	1.50	0.9%	1.01	1.0%
Prosthesis	0.98	0.6%	0.84	0.8%
Non-Inflationary Cost	0.88	0.5%	1.53	1.5%
Equipment	0.78	0.4%	0.64	0.6%
Vehicle Purchases/Modifications	0.46	0.3%	0.33	0.3%
Total	$177.00	100.0%	$100.00	100.0%

Exhibit 5

Home-Based Attendant Care Survey Findings: At-A-Glance
Total responses: 568

Most accident victims in Michigan who receive in-home care receive it from family members or loved ones.

- 73.62% provide attendant care services to a motor vehicle accident victim that they knew or had a relationship with prior to the victim's accident.
- The majority of survey respondents (55.79%) provide attendant care services to a victim that needs 24/7 attendant care.

These victims will be severely impacted by the new 56 hour per week cap on attendant care services, which will be disruptive to their care.

- 92.31% are concerned that the services they provide are going to be affected by the 56 hour per week limitation.
- "I had to quit my job to take care of my daughter. I am now 64 years old and have been out of the job force for 14 years. What am I supposed to do to take care of both of us now?"
- "No one else will understand how to deal with my sister who has a traumatic brain injury… they don't have a program for adult daycare around here, she has needed 24/7 safety and supervision since her car accident in 1994."

At a time when more accident victims and their families will need to look to agencies to help them provide care, many will be forced to shut their doors due to the 45% reimbursement cut in the new fee schedule.

- 91.04% are concerned that the rate they are paid for attendant care services is going to be reduced or limited by the fee schedule.
- "The agency notified us that they may not be able to provide the extra help we need… I have no idea how we can care for 24 hours a day and only receive 56 hours of pay... I can't find even any openings in foster care…"

This is a crisis of care: 81.43% are concerned that the services they receive are going to be affected by the 56 hour per week limitation.

FOR IMMEDIATE RELEASE

CONTACT: Scott Swanson
scott@moonsailnorth.com
517.582.0084

CPAN survey finds vast majority of Michigan accident victims who receive in-home care are concerned about their future

Home care elements of no-fault reform will cause chaos for vulnerable patients

LANSING, Mich.—(April 29, 2021)—A new **CPAN** survey of Michigan auto accident victims and their home-based attendant caregivers—often family members—finds that the majority are deeply worried about how they'll continue to function after impending cuts to reimbursement rates are enacted.

2019 changes to the no-fault insurance law which take effect this July limit reimbursement for in-home family-provided attendant care to 56 hours per week—even if the patient requires help and supervision around the clock. If the patient requires additional care beyond 56 hours per week, he or she will have to turn to a commercial agency. In addition to this hourly limitation, a new fee schedule cuts reimbursement rates for attendant care by 45% after July 1, 2021. This will have a devastating impact on both the family members and the commercial agencies that provide home health care. Family members will be unable to adequately be compensated for their services and commercial home health care agencies will be forced to lay off staff or close their doors entirely, leaving many patients without recourse to get the care they need.

CPAN's survey found that the majority of provider respondents (56%) deliver home-based attendant care services to patients that need 24/7 care. Nearly half of accident victims have been receiving attendant care for more than five years and rely on routines that allow them to live with some measure of independence and dignity. Fifty percent of accident victims are cared for at home exclusively by family members.

There were 568 total responses to the survey, which gave users the opportunity to anonymously tell their heartbreaking stories.

"I had to quit my job in 2009 due to the severity of issues she encounters on a daily basis," one caregiver said. "Things have worsened over the past couple years and I have to be with her 24/7

because NO ONE understands her or her reactions as I do. She has five types of seizures, a traumatic brain injury, is non-verbal, has left side hemiparesis and has over 50 allergies to medications… she requires my attention every second of the day. Her survival is crucial to my diligence and detail of her everyday care."

Another caregiver added: "If we are limited to 56 hours of care a week, Angie will drastically lose her care… care that keeps her from injury or death."

Said another: "Our family doesn't want our daughter to go into a group home or other facility… my daughter would be extremely lonely without her loved ones nearby."

A whopping 81% of patients said they are concerned that the services they receive are going to be affected by the 56 hour per week limitation, throwing vulnerable Michigan residents into chaos while they're contending with a resurgent pandemic that continues to rage across the state.

"I have been providing attendant care to my brother for almost 14 years," a caregiver said. "I made a decision to walk away from my career to help with his care. I knew family being involved was the key to him surviving. I am the one who changes his trach (tracheostomy tube) monthly. I am the one who drives him to all his appointments. I am the one who is there to wipe his tears when he gets depressed."

In addition to issues with access to care, patients and family members are concerned about having to rely on commercial providers. In many cases, family-provided attendant care is the best suited for the patient's needs. Having to get additional care from a commercial agency would result in a disruption of the care system that the patient is used to and oftentimes does not provide the patient with the same level of care and dedication that a family member provides.

Another caregiver said: "My daughter requires all of her needs to be done by others. Hygiene, dressing, meds, feeding, positioning, everything. Many of these functions require two caregivers to [perform]. My wife and I want to provide care to our daughter and want to be compensated the same as anyone else would be. She is familiar with us and we provide the absolute best care available. We do use professional caregivers also. Problems we have with professional caregivers are, they don't show up, they are late, it could be a different caregiver every day, every time we have a new caregiver, they have to learn all the procedures for caring for our daughter. Our daughter is a human being not a robot without feelings. She deserves the most appropriate care at a reasonable price that is available, family provides that care."

CPAN President **Devin Hutchings** said the survey was conducted to provide lawmakers and other decision makers with data around attendant care, since there is no database of individuals who receive home-based care stemming from auto accidents. Home-based care is an important tool in health care delivery and often critical for the progress in patient recovery.

Hutchings said our lawmakers need to understand the ripple impact of these changes on patients and the health care community in our state.

"As Michigan's watchdog for policyholders and accident victims, it is important to gather this information, especially as coronavirus is still spreading," Hutchings said. "The cuts to home-based, family-provided care impacts not only current accident victims, but also anyone who needs care in the future. We will continue to fight to ensure that these vulnerable Michiganders receive the access to the care they need."

Please see an additional fact sheet on the survey here.

###

CPAN is a broad bi-partisan, Michigan based coalition, whose mission is to be the consumer advocate for auto insurance policyholders, those who have been injured in a motor vehicle crash and the medical providers caring for them, representing them at the Capitol, in the courts, and in the public forum. For more information, please visit www.CPAN.us.

Exhibit 6

MICHIGAN NO-FAULT LAW CHANGE BUSINESS IMPACT

Survey Details

IBH Analytics conducted an industry survey to determine the impact of changes to Michigan's No-Fault Insurance laws that came into effect in July of 2020. IBH Analytics surveyed firms who serve those who have suffered injuries from vehicle accidents. The firms invited to participate in the survey were contacted via an email list provided and are all located in the State of Michigan. Firms self-reported their projected impacts once the laws come into full effect.

Impact to Services

A negative impact to services provided: 90% of firms estimate a reduction in services offered for TBI clients once the law is in full effect. 0% believe that they will be able to expand their services for TBI clients and only 10% believe that their services will stay the same once the law is enacted.

Exiting the business: 57% of firms stated they are either very likely or likely to exit the business of serving individuals who have experienced a vehicle accident. 29% of firms reported they were unlikely or very unlikely to exit the business of serving individuals who have experienced a vehicle accident 14% of firms that were indifferent to this question.

Fee schedule to sustain quality services: Almost all firms note they cannot sustain quality services at the fee schedule enacted to begin July 2021. The average pay cut an organization can withstand while continuing to provide quality services is 13.7% compared to enacted pay cut of 45%.

Impact to Revenue

Confidence in replacing no-fault revenue severely diminished: 72% of firms are not at all confident that they would be able to replace No-Fault revenue due to the law that has been enacted. 16% are only slightly confident in their ability to replace No-Fault revenue while 8% are moderately confident. Only 3% of firms are highly confident that they would be able to replace No-Fault revenue.

Change in annual revenue: 81% of firms estimate a decrease in annual revenue due to the law enacted. Approximately half of these estimate a decrease in revenue of 50% or more with 9% estimating a 100% decrease in revenue. 19% of all firms estimate no change or a positive change to the firm's annual revenue due to the newly enacted law.

REVENUE AND EMPLOYEE IMPACT

Across all organization settings the average number of full-time employees in 2021 is projected to decrease from 2019. The table to the right shows the average annual revenue percent change estimate by organization setting along with 2019 and projected 2021 average full-time employee counts.

With the number of full-time employees projected to decrease in 2021, industry layoffs are expected to occur.

Percent Change in Revenue by Organization Setting with Full-Time Employee Summaries

Organization Setting	Number of Firms	Revenue Percent Change	2019 FTE	Projected 2021 FTE
Acute Care Hospital	5	-39%	308	254
Inpatient Rehabilitation Unit within an Acute Care Hospital	5	-45%	153	119
Specialty Care Hospital (Long Term Acute Care Hospital)	4	-39%	33	29
Free Standing Rehab Hospital	3	-48%	29	25
Subacute Rehabilitation Facility	6	-38%	749	314
TBI Residential Program (AFC licensed beds)	13	-45%	1,360	755
TBI Residential Program (Semi-independent or apartments)	12	-46%	1,002	510
Outpatient Rehabilitation (Hospital Based or affiliated)	4	-45%	127	97
Outpatient Rehabilitation (Non-Hospital Based – Private)	19	-45%	1,212	627
Vocational Programs/ Sheltered Workshops	9	-37%	1,042	496
Private Practice	20	-36%	388	329
Home Health Care	13	-31%	1,555	1,030

SUMMARY OF IMPACTS

72% of firms are not at all confident that they will be able to replace the lost No-Fault revenue

OVER HALF of firms are likely or very likely to exit the business of serving individuals who have experienced a vehicle accident

9 OF 10 firms estimate a reduction of services once the law is in full effect

13.7% the average pay cut a firm can withstand while continuing to provide quality services

This survey was completed by IBH Analytics. The survey was a twenty-two question survey conducted online. The sample size was seventy-one firms. Not all firms answered each question. Areas of focus included: impact to services, revenue impact, and employee impact. Organization setting refers to the setting in which firms treat injuries from vehicle accidents. Firms could select more than one setting.

Exhibit 7

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

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

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.

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

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.

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

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.

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

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.

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

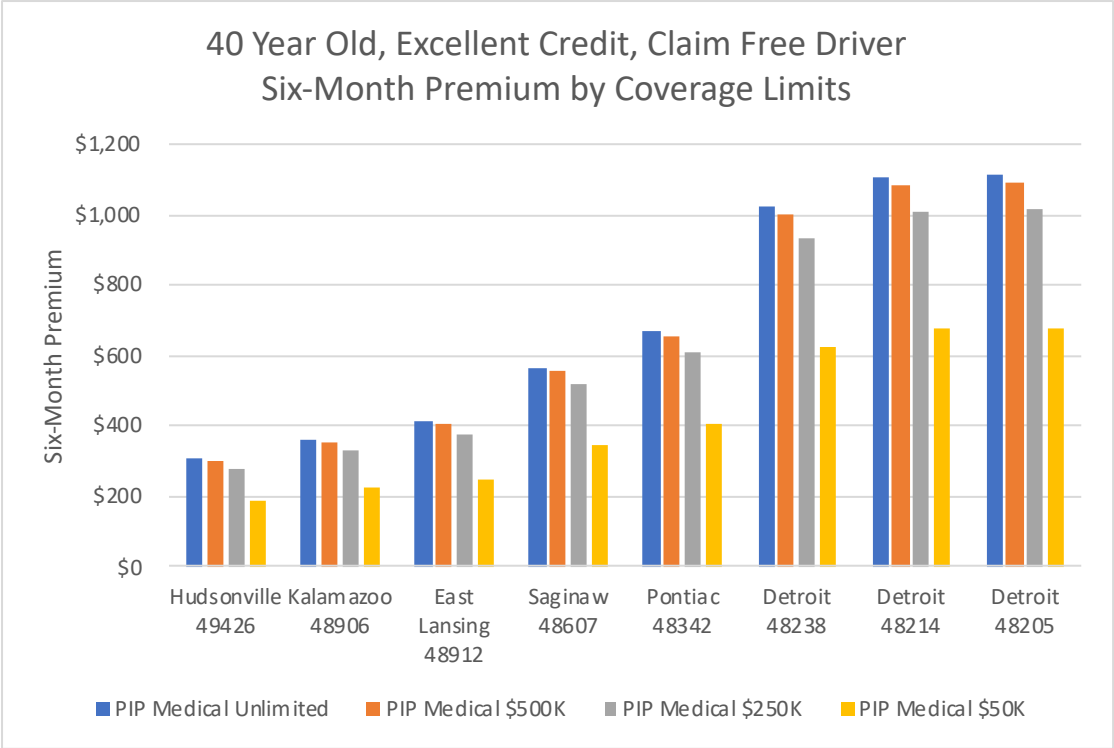
[12] Another analysis could be conducted to demonstrate that drivers living in Detroit will be most likely to face both the negative impacts of territory and the negative impacts of credit score. This analysis would build upon research such as the Federal Reserve Bank of Chicago's 2019 paper, which includes 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.

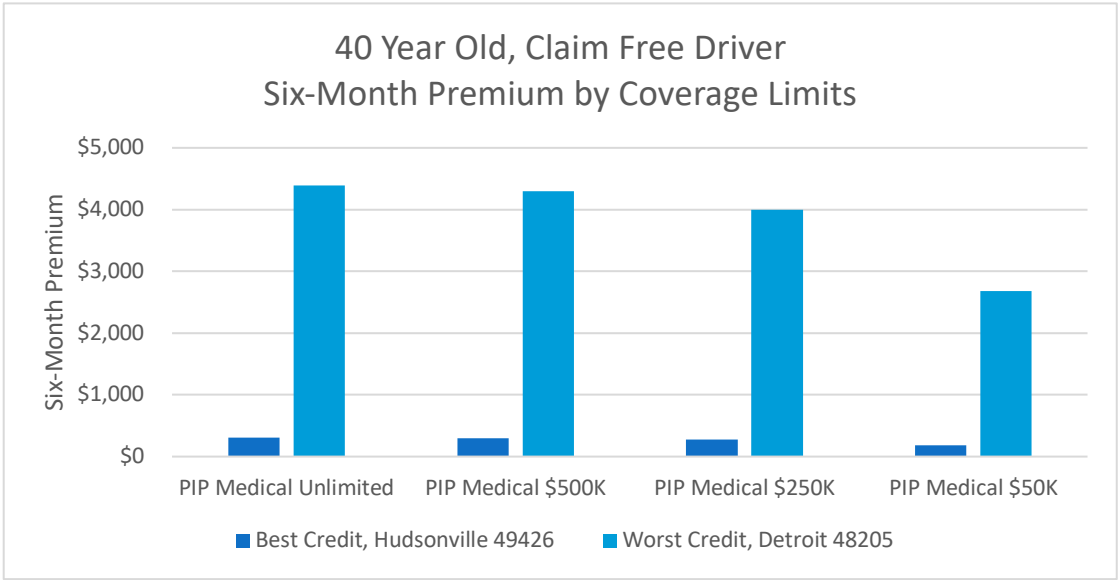
[14] These tests are based on the rate offered in at least one territory of each of the ZIP codes. Because each of the tested ZIP code has several territories, depending upon the neighborhood in the ZIP code in which they live, some drivers will be priced differently than shown.

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).



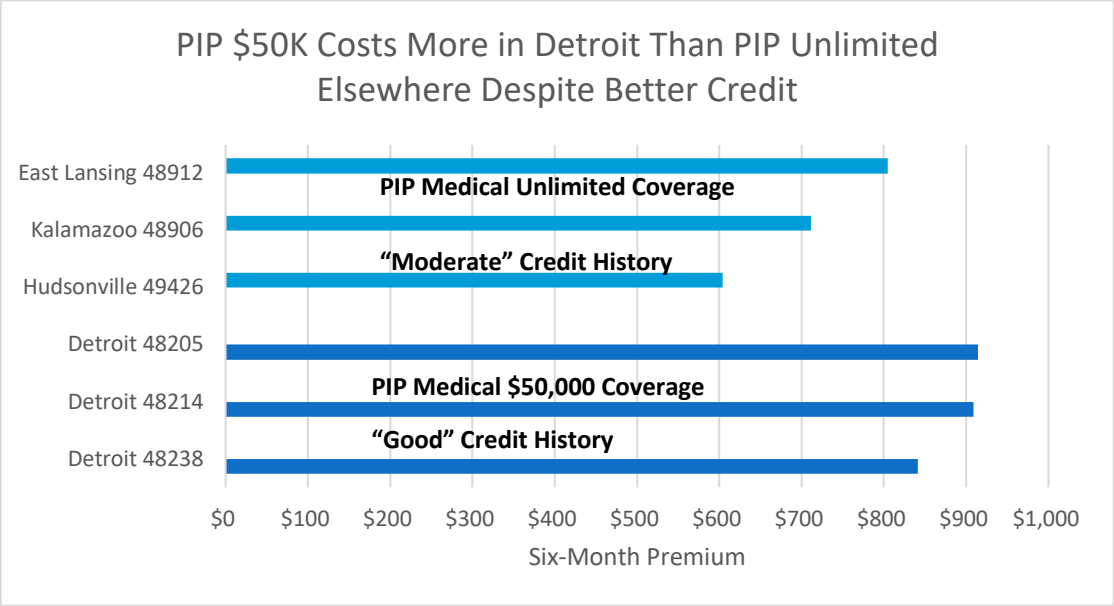
The differences between an excellent credit, claims free driver in Hudsonville and a poor credit, but still claims free driver in Detroit 48205 are staggering, as illustrated below. The combination of having poor credit and living in Detroit leaves that driver paying more than 10 times the amount charged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

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

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

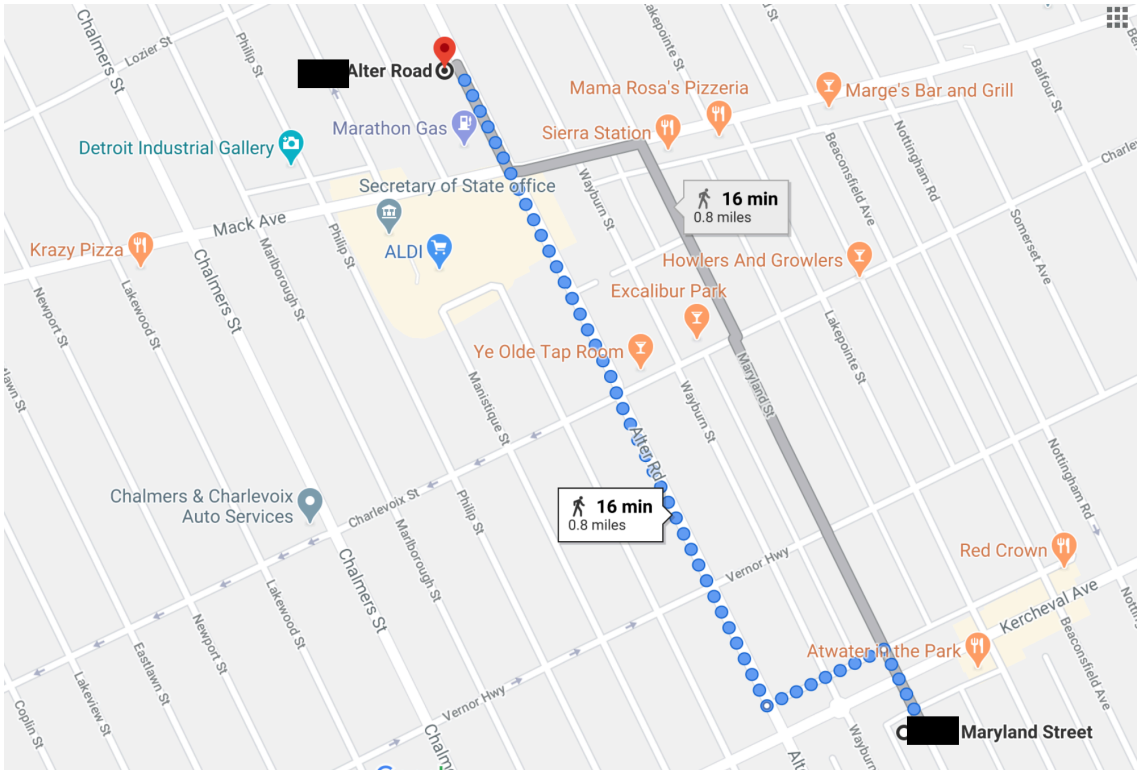
Without being able to review its actual algorithm, I believe this is a reasonably conservative estimate of the impact of credit history on Citizens Insurance policyholders. It suggests that under the new PA 21/22 rates, a Citizens Insurance policyholder's PIP Medical + PIP Wage Loss premium for six months 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.

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:

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:

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

DOUGLAS HELLER

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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

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