

# *Pursuing Provider Payments in No Fault Cases Post-Covenant*

Joseph Gavin  
Richard Hillary  
Andrew Oostema<sup>1</sup>

## INTRODUCTION

Since 1973, when our Legislature enacted the Michigan No-Fault Act, health care providers could file a lawsuit directly against a no-fault insurer to recover unpaid medical charges. This all changed on May 25, 2017, when the Michigan Supreme Court issued its opinion in *Covenant Medical Center, Inc v State Farm Mutual Automobile Insurance Co.*<sup>i</sup>

The Michigan Supreme Court in *Covenant* held that under the no-fault act, health care providers do not possess a direct statutory cause of action against no-fault insurers for unpaid no-fault benefits. According to the Court, only the injured person can bring a direct action against a no-fault insurer under the act. The Court's decision upset a long line of lower court decisions holding not only that health care providers have a right to bring a direct lawsuit against a no-fault insurer under the plain text of the no-fault act, but also that providers doing so "meets the [no-fault act's] goal of prompt reparation for economic losses."<sup>ii</sup>

In the wake of *Covenant*, what are a provider's options when a no-fault insurer unlawfully fails to pay the provider for treating a patient who is covered under the no-fault system? This paper will attempt to answer this question and provide providers with guidance for recovering unlawfully unpaid no-fault charges in a post-*Covenant* world.

## I. WHAT COVENANT DOES NOT AFFECT

First, a word about what remains unchanged.

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In the year since its issuance, patients, providers and practitioners alike have struggled to implement *Covenant*'s edict. In many respects, the decision has raised more questions than it has provided answers. However, despite its significance, *Covenant* leaves several aspects of the no-fault act unchanged. Individuals are still generally eligible for benefits when they suffer accidental bodily injury in a motor vehicle accident.<sup>iii</sup> They are still entitled to benefits to cover reasonably necessary medical services, supplies and accommodations, among other things. Carriers are still responsible to pay reasonable and customary charges incurred for such care and treatment. And they are still liable to pay benefits when presented with reasonable proof of the fact and amount of an insured's loss, whatever the source of such proof.<sup>iv</sup>

This has several implications. Obviously, healthcare providers should continue to provide reasonable and necessary care and treatment to all patients in need, including those injured in accidents. They should likewise continue to expect payment of their reasonable and usual charges. Providers should continue to bill auto carriers for the services they provide. All of this remains unchanged despite *Covenant*.

But what of the now more-emboldened no-fault insurance industry? How can a provider protect its interests when, despite providing a carrier with reasonable proof of a payable claim, the carrier dangles *Covenant* in response, essentially forcing the claim into litigation or to be forever barred?<sup>v</sup>

The answer can be summed up in a word: assignments. Providers still have standing to bring a lawsuit against a carrier to recover unpaid benefits, but now they generally must do so as the injured person's assignee for their cause of action to survive.<sup>vi</sup>

## II. ASSIGNMENT OF A RIGHT TO BENEFITS PAYABLE IN THE FUTURE

As a general rule under Michigan law, all legitimate claims and causes of action are freely assignable. This was true at common law and remains the law in Michigan today.<sup>vii</sup>

The no-fault act leaves this general rule in place, but modifies it slightly.

In the only provision of the act that speaks to assignments, section 3143 directs that "[a]n agreement for assignment of a right to benefits payable in the future is void." The Michigan Legislature modeled this provision after Section 29 of the Uniform Motor Vehicle Reparations Act, which provides a very similar prohibition of assignments but excludes from the prohibition "benefits for the costs of products, service, or accommodation provided or to be provided by the assignee." UMVARA 29(2). The Comment to Section 29 of UMVARA explains that an objective of the act is to ensure that benefits are paid to an injured person as that person incurs expenses and to "reduce the chance that payments will be applied to improvident purposes." It goes on to say that an injured person's

assignment of a right to benefits payable in the future to a health care provider is consistent with this purpose.

The Michigan No-Fault Act includes no such exception. This could be because our Legislature intended to give providers a direct cause of action against no-fault insurers, a proposition the Michigan Supreme Court rejected in *Covenant*. It could also be because our Legislature, in the give-and-take often associated with enacting legislation, simply did not consider the question. By the text of the statute, however, it is unclear why the no-fault act does not permit assignments of benefits payable in the future to health care providers. What is clear is that Michigan courts will invalidate an assignment of benefits where that assignment provides for the transfer of benefits payable in the future.<sup>viii</sup>

### III. THE SOLUTION: ASSIGNMENTS OF PAST DUE AND OWING BENEFITS

First, under the act, there is a very good reason to conclude that when a patient presents and agrees to pay for the services to be provided, an assignable claim accrues to him at that moment even though services have yet to be provided. Such an assignment would not be one of a “future” benefit and would, therefore, not be void under section 3143. While this analysis is likely correct, opponents argue the assignment is still one for future benefits because services had not yet been provided. This only breeds litigation on the validity of the assignment.

In light of this, how can a health care provider protect itself? The simplest answer is that health care providers should secure assignments from their patients after the medical services are provided. At that point, there can be no doubt benefits are now owing to the patient. The patient can then assign due and owing benefits to the health care provider, or to anyone else for that matter. The no-fault act does not prohibit this type of assignment, and to the contrary endorses it by voiding only assignments of “future” benefits.

We recognize that this can present a business organizational problem for many providers. A medical provider’s first encounter with most patients (emergent care excepted) is largely administrative. This is the point in time where assignments, consents to treat and other administrative documents are presented to a patient for review and signature. For these providers, the encounter with the patient at discharge is largely clinical. In order to ensure that a medical provider’s assignment does not violate the no-fault act, however, we believe best practices demand that the provider shift the time when the assignment is obtained from the patient’s admission to the patient’s discharge. While this may present practical challenges for many providers, it is essential to preserve the provider’s ability to pursue a direct cause of action against a no-fault insurer in the event of non-payment.

#### IV. THE FORM OF THE ASSIGNMENT

Once a medical provider has positioned itself to obtain an assignment from the patient at discharge, what should the assignment say? There is no magic language. And the courts, as of yet, have not given any guidance. But an assignment must clearly articulate the parties' goals for the assignment. In addition to assigning the right to recover benefits (the provider's medical charges) due and owing to the patient, the assignment should also demonstrate the patient assigns his right to recover penalties available under the no-fault act, namely, penalty interest and attorney's fees. To perfect the language of an assignment, a medical provider should consult its attorney.

#### V. ANTI-ASSIGNMENT PROVISIONS IN INSURANCE CONTRACTS

One of the developing areas post-*Covenant* has been litigation over anti-assignment clauses in insurance policies. Many insurers have attempted to wield these provisions to prevent providers from asserting assignment-based claims.

These efforts, however, have been met with limited success because Michigan law limits the power of insurance companies to limit their insureds' freedom of contract.

Many if not most insurance policies issued in Michigan include provisions stating that the insured's rights and duties are not assignable. These clauses have been upheld as valid insofar as they have protected insurers from covering individuals they did not bargain to cover.<sup>ix</sup> But once an insured performs her obligations to the point that the contract is no longer executory, the situation changes. In that case, the assignment of the claim under the policy is viewed no differently than any other assignment of an accrued cause of action.<sup>x</sup> In this way, Michigan follows the majority rule.

The seminal Michigan case adopting the rule is *Roger Williams Insurance Co v Carrington*.<sup>xi</sup> In *Roger Williams*, the Michigan Supreme Court recognized the distinction between pre-loss assignments, which can be prohibited, and post-loss assignments, which cannot be prohibited, in that a pre-loss assignment involves a transfer of a contractual relationship, while a post-loss assignment is a transfer of a right to a money claim. The court in *Roger Williams* refused to enforce the insurer's anti-assignment provision, "so far as it applies to the transfer of an accrued cause of action."

More recently, the Michigan Court of Appeals re-affirmed Michigan's commitment to the rule in *Roger Williams*. In *Jawad A Shah, MD, PC v State Farm Mutual Automobile Insurance Co*<sup>xii</sup> the court refused to enforce an anti-assignment provision in the no fault insurer's policy as it related to the insured's post-loss assignment of no fault benefits to his medical provider. The court held that the insurer's anti-assignment clause was "unenforceable to prohibit the assignment that occurred here – an assignment after the loss occurred or an accrued claim to payment – because such a prohibition of assignment

violates Michigan public policy that is part of our common law as set forth by our Supreme Court.<sup>xxiii</sup>

The rationale for the rule is that an anti-assignment clause is only intended to prevent an insurance company from taking on a risk for which it did not bargain. If an insurance policy could be bought by one individual and then assigned to a riskier individual, the carrier would be on the hook for an outsized risk it could not price into its policy premium.<sup>xiv</sup>

But where the loss has already occurred, the carrier's exposure is not increased if the injured party's right to payment under the policy is assigned to someone else. In that case, the assignee simply acquires exactly what the assignor was entitled to do: the right to prosecute a claim for money damages.<sup>xv</sup>

Put another way, a post-loss assignment is not an assignment of contract rights under the policy but is instead an assignment of the right to a claim for money. As the Michigan Supreme Court stated in *Roger Williams*, "[i]t is the absolute right of every person . . . to assign such claims, and such a right cannot be thus prevented [by an anti-assignment provision]." Importantly, section 3143 of the no-fault act recognizes the assignability of the right to recover benefits, giving providers a direct cause of action under the act.

## VI. DEALING WITH REPRESENTED AND UNREPRESENTED PATIENTS

Absent a legislative fix, *Covenant* is and will remain the law in Michigan. Therefore, we do not intend this paper to offer an opinion of the merits of *Covenant*'s legal analysis. Our concerns are more practical.

The fundamental flaw in *Covenant*'s holding, however, is that, for all intents and purposes, it is the medical providers that are more often than not left holding the bag. That was true in the *Covenant* decision itself: the provider was never paid and the patient obtained a windfall at the hospital's expense. That problem has been amplified in a post-*Covenant* world. Even responsible individuals effectively ask their providers to shoulder the financial burden of treating them because, more often than not, those providers go unpaid while the no-fault claim is litigated. And of course, the less scrupulous patients continue to abscond with money that rightfully should go to pay for the care they received.

What is a provider to do?

The most common approach, and the answer we offer, is to obtain assignments from patients. A well-drafted assignment is enforceable and should adequately protect the provider's interest. But what happens where the patient or, more commonly, his counsel refuses the assignment? In such a case, it is important for a provider to understand its rights.

Our Supreme Court's decision in *Miller v. Citizens Insurance Co*<sup>xvi</sup> provides some guidance, as well as a warning to patients and the attorneys counseling them.

*Miller* is no-fault decision issued before *Covenant*. In *Miller*, the Detroit Medical Center (DMC) appealed an order granting attorney fees to attorneys for its patient, Ryan Miller.

Miller's guardian had sued Citizens Insurance on an unpaid no-fault claim. Citizens responded by rescinding its policy on an alleged misrepresentation. Citizens and Miller ultimately reached a settlement and a dismissal was filed, except that the trial court retained jurisdiction to resolve any attorney liens.

At a subsequent court conference, Miller's attorneys claimed a  $\frac{1}{3}$  fee from the proceeds payable to the DMC for its care of Miller. Counsel for the DMC appeared and objected. Following an evidentiary hearing, the trial court issued an order holding that Miller's attorneys were "entitled to their reasonable percentage of the DMC's recovery, which was  $\frac{1}{3}$  of that recovery." The order had the effect of proportionately reducing the amount the DMC recovered on its bills for Miller's care.

The DMC appealed. On appeal, the DMC argued that the trial court had improperly allowed Miller's attorneys to have attorney fees deducted from the payment the DMC earned by providing services to Miller. The Court of Appeals disagreed and affirmed the reduction in payment to the DMC.

The DMC appealed further. Our Supreme Court granted leave and subsequently issued an order clarifying that, regardless of whether Miller's attorney could claim a fee from the proceeds of the settlement with Citizens, any fee taken by Miller's counsel did nothing to extinguish Miller's liability to the DMC for the services he received. The Court explained:

Of concern to this Court is that the circuit court's order, and the Court of Appeals' affirmance, could be mistakenly interpreted as extinguishing the DMC's contractual right to payment for its services. We wish to make clear that this is not the case. No-fault benefits are "payable to or for the benefit of an injured person . . . ." MCL 500.3112. In this case, through settlement, the benefits were paid to plaintiff, and her attorney asserted an attorney's charging lien over the settlement proceeds. Thus, the effect of this was only to settle claims as between the insurer, plaintiff, and her attorney. The circuit court's order of dismissal pursuant to the settlement agreement did not have the effect of extinguishing the DMC's right to collect the remainder of its bill from plaintiff. Such a result could not have been achieved without an explicit waiver, or at least unequivocal acquiescence, by the DMC, which was not obtained.

The *Miller* order is a warning to patients and their attorneys alike. Contingency fee settlements on the backs of providers will always expose patients to residual, contractual liability. The warning is particularly poignant where the provider requests an assignment from the patient to pursue its own no-fault claim independently, and the patient refuses. In such a case, providers can reasonably advise their patients: *“Do not expect your debt to us be forgiven when your attorney claims a 1/3 fee, and you have to pay that 1/3 balance left to us out of your pocket because you refused to let us pursue the no-fault claim on our own, and with counsel of our choosing.”*

## VII. ETHICAL LANDMINES FOR THE PATIENT’S COUNSEL

Given this reality facing patients, why might an individual refuse an assignment? In a word, self-interest. Not of the patient, but of her counsel.

Together, *Covenant* and *Miller* lay bare a conflict that exists between patients and their attorneys in first-party, no-fault cases. In many, if not most cases, the disputed medical bills provide the most lucrative opportunity for an attorney to make a fee. Absent those bills, many patients have little if no damages that would make contingency litigation worthwhile. Nor could most fund litigation on their own, on an hourly basis. This creates the conflict.

This conflict is made more acute by a provider who insists on protecting its own interests, through counsel of its own choosing. If a provider requests an assignment to pursue its own claim, in effect relieving the patient of any obligation to the provider or for its bills, what is the objection? Or more accurately, what is the basis for the attorney’s recommendation to his client that she refuse the assignment?

The simplest answer: his fee.

In this conflict, the Michigan Rules of Professional Conduct give clear guidance. Rule 1.7 prohibits a lawyer from undertaking representation if that representation would be “materially limited” by the “lawyer’s own interests,” unless the lawyer reasonably believes that the representation would not be affected and the client consents. Rule 2.1 imposes a duty of candor upon the lawyer toward his client. Simply put, if he advises his client not to consent to a provider’s request for an assignment, the lawyer must reasonably conclude that in doing so he is not materially limiting his client’s interest in service to his own. And he must candidly advise his client the reason for his recommendation is so that he may obtain his fee, with the corresponding potential his client may be left with a significant residual liability as a consequence.

## CONCLUSION

*Covenant* has remade Michigan's no-fault litigation landscape. Michigan providers have historically borne the brunt of treating Michigan citizens traumatically injured in motor vehicle accidents, but have correspondingly had the ability to mitigate that significant expense through litigation directly against no-fault carriers. That is no longer absolutely true.

Providers must be proactive to protect their interests post-*Covenant*. In a post-*Covenant* world, the unwary provider risks leaving itself at the mercy of insurance carrier and personal injury attorney alike. With proper contractual agreements and planning, providers can still enforce their right to payment of reasonable charges for care and treatment rendered after their patients' motor vehicle accident injuries.

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<sup>i</sup> 500 Mich 191; 895 NW2d 490 (2017).

<sup>ii</sup> *Wyoming Chiropractic Health Clinic, PC v Auto-Owners Ins Co*, 308 Mich App 389, 401-02; 864 NW2d 598 (2014), overruled by *Covenant*.

<sup>iii</sup> MCL 500.3105.

<sup>iv</sup> In this regard, it is the carrier's receipt of reasonable proof, not its provenance, which matters. MCL 500.3142.

<sup>v</sup> MCL 500.3145.

<sup>vi</sup> This paper will not address alternate theories of relief potentially available to providers, of which there are several.

<sup>vii</sup> *Grand Traverse Convention & Visitor's Bureau v Park Place Motor Inn, Inc*, 176 Mich App 445, 448; 440 NW2d 28 (1989); *Joos v Drillock*, 127 Mich App 99, 102; 338 NW2d 736 (1983).

<sup>viii</sup> *Aetna Cas & Sur Co v Starkey*, 116 Mich App 640, 646; 323 NW2d 325 (1982).

<sup>ix</sup> *Employers Mut Liab Ins Co v Mich Mut Auto Ins Co*, 101 Mich App 697, 702; 300 NW2d 682 (1980).

<sup>x</sup> *Action Auto Stores, Inc v United Capitol Ins Co.*, 845 F Supp. 417, 423 (WD Mich 1993).

<sup>xi</sup> 43 Mich 252, 254; 5 NW 303 (1880). See also *Benson v Assurity Life Ins Co*, 2004 U.S. Dist. LEXIS 18953, \*10 n3, 2004 WL 2106637 (WD Mich, June 16, 2004); *Watertown Fire Ins Co v Grover & Baker Sewing Machine Co*, 41 Mich 131, 136-37; 1 NW 961 (1879).

<sup>xii</sup> \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (2018 WL 2121787) (Decided May 8, 2018).

<sup>xiii</sup> *Id* at 6.

<sup>xiv</sup> See, e.g., *McHugh v Manhattan Fire & Marine Ins Co*, 363 Mich 324, 328; 109 NW2d 842 (1961).

<sup>xv</sup> See, e.g., *Globecon Group, LLC v Hartford Fire Ins Co*, 434 F3d 165, 170 (CA 2, 2006); *Ocean Acc & Guar Corp v Sw Bell Tel Co*, 100 F2d 441, 446 (CA 8, 1939).

<sup>xvi</sup> 490 Mich 905, 804 NW2d 740 (2011).