



THE ANDARY CASE:

Civil Justice for Some of Michigan's Most Vulnerable



By: *Lauren E. Kissel and Stephen H. Sinas, Sinas Dramis Law Firm*



The Original Michigan No-Fault Promise

The Michigan Auto No-Fault Insurance Law was originally enacted in 1973. Over the next 46 years, Michigan motorists were subject to criminal penalties if they failed to purchase lifetime no-fault medical expense coverage that obligated auto insurers to pay all reasonable and customary charges "... incurred for products, services and accommodations reasonably necessary" for an injured person's "care, recovery, or rehabilitation."¹ This created the original Michigan no-fault promise. Auto insurers were prohibited from imposing any further limitations on the payment of auto-related medical care. In turn, auto insurers charged premiums to Michigan motorists that covered

the risks and liabilities associated with this unique and comprehensive form of no-fault medical expense coverage.

Unfortunately, since 1973, thousands of people across Michigan have sustained catastrophic injuries in motor vehicle accidents that have rendered them forever vulnerable and dependent on others. However, in large part because of the comprehensive coverage available under Michigan no-fault insurance that assured medical providers would be paid a reasonable charge for their services, Michigan developed a robust medical economy capable of servicing the specialized post-acute care and rehabilitation needs of catastrophically injured people. In this respect, over the past few decades, many post-acute medical providers emerged across Michigan, capable of providing critically important services and accommodations, such as institutional and residential programs for people with brain and spinal cord injuries, comprehensive nursing and home care services, various inpatient and outpatient rehabilitation therapies, case management services, medical transportation services, etc. Ultimately, for over four decades, Michigan's comprehensive no-fault medical expense coverage provided catastrophically injured people with access to the care and services they need for their care and rehabilitation.

PAs 21 AND 22 AND THE NEW LIMITATIONS ON CARE

In 2019, the Michigan Legislature identified changing Michigan's no-fault insurance law as a top priority. The major justification for changing the law was to bring down the high insurance rates auto insurers were charging people in various areas of Michigan. Throughout the first few months of 2019, the Michigan Senate and the House of Representatives held hearings on general issues related to Michigan's no-fault insurance system, but none of these hearings focused on the bills that would ultimately be voted on later in the spring. The bills that ultimately became Public Acts of 21 and 22 of 2019 ("PAs 21 and 22") were not released until the day the bills were voted on and passed by the Michigan Legislature at a special legislative session on May 24, 2019. After being passed by the Legislature, these bills were signed into law by Governor Gretchen Whitmer and became effective law on June 11, 2019.

PAs 21 and 22 amended the Michigan No-Fault Law in many significant ways. A centerpiece of the amendments was eliminating the requirement that Michigan motorists purchase lifetime no-fault medical expense coverage. In this regard, by July 2, 2020, Michigan motorists would be allowed to purchase no-fault medical expense coverage in limited amounts, and some motorists were even given the option to opt-out from this coverage entirely.² Critics of the reforms were concerned these limited forms of medical expense coverage would result in people not having enough coverage for their care and rehabilitation needs following a serious injury in a motor vehicle accident.

There were two other major aspects of PAs 21 and 22 that caused further concerns regarding patient access to care. One of these aspects was the drastic reduction on the rates of payment for auto-related medical care and rehabilitation services. These provisions, which are outlined in MCL 500.3157(2) – (7), are commonly referred to as "fee schedules." However, these provisions are more like fee caps because they set forth a maximum reimbursement that a provider can be paid. Under MCL 500.3157(2), for services that would be payable under Medicare, a provider is capped at reimbursement of 200% of the amount payable to the person for the treatment or training under Medicare. This is reduced to 195% on July 2, 2022, and 190% on July 2, 2023. Moreover, for services not payable under Medicare, MCL 500.3157(7) imposes a cap on reimbursement starting at 55% of what a provider was charging for those services as of January 1, 2019. This is reduced to 54% on July 2, 2022, and 52.5% on July 2, 2023. Notably, these payment limitations did not exist in any form under the original Michigan No-Fault Law.

Immediately following the passage of PAs 21 and 22, the post-acute medical community let it be known that these payment limitations would likely jeopardize their ability to provide good-quality care to people catastrophically injured in the future.

The other significant way in which PAs 21 and 22 restricted access to care was by placing a limitation of 56 hours per week on attendant care services provided by an individual who is related to the injured person, domiciled in the household of the injured person, or who had a business or social relationship with the injured person prior to his/her injury. Essentially, under these limitations, insurance companies do not have to pay for any more than 56 hours of weekly care provided to an injured person by any people who knew the injured person, in any capacity, before the person was injured. This limitation applies collectively to all attendant care providers, so all family and friend providers are capped at a combined amount of 56 hours per week. These new limitations effectively restrict an injured person's right to develop care arrangements with their family and friends and avoid hiring strangers or commercial nursing companies to provide home care.

THE RETROACTIVITY ISSUE— A FIGHT TO KEEP THE ORIGINAL PROMISE

In passing PAs 21 and 22, it was clear that the Legislature intended for these new medical payment limitations and attendant care limitations to apply to people injured in motor vehicle accidents occurring after June 11, 2019. However, there was no clear indication in PAs 21 and 22 that the Michigan Legislature intended for these new limitations to apply to people injured in motor vehicle accidents that occurred prior to June 11, 2019. This issue has been commonly referred to as the "retroactivity issue."

Soon after the passage of PAs 21 and 22, even though many believed it would be unjust and wrong to allow insurers to apply the new limitations to those injured prior to June 11, 2019, auto insurers quickly let it be known that by July 2, 2021, they intended to apply these limitations to all injured people, regardless of when they were injured. The insurers' position on the retroactivity issue spread fear and panic amongst the most severely injured no-fault claimants and their medical providers. Many of these injured people were scared that any home care arrangements they had with their friends and family would now be subject to the new attendant care limitations. Medical providers fretted that all their catastrophically injured patients they had been servicing for several years would now be subject to a payment rate cut, up to 45% for services or accommodations rendered

after July 2, 2021. These providers knew these drastically reduced payment rates would jeopardize their ability to provide quality care and services to these patients.

As fear and panic spread amongst catastrophically injured people and their medical providers, it was clear a contentious legal battle over the retroactivity issue was inevitable. In that regard, on October 3, 2019, led by the legal vision of Michigan Association for Justice Past President, George T. Sinas, the Sinas Dramis Law Firm filed a lawsuit on behalf of two patients and the Eisenhower Center, a rehabilitation center located in Ann Arbor, alleging that the non-Medicare fee schedule and 56 hour per week attendant care limitation was unconstitutional based on the Contracts Clause of the Michigan Constitution, and that it violated plaintiffs' equal protection and due process rights. The case, *Andary et al v USAA Casualty Insurance Company et al*, was initially filed in the Ingham County Circuit Court. The team of attorneys at the Sinas Dramis Law Firm also joined forces with appellate law specialist and long-time Michigan Association for Justice member, Mark Granzotto, as a co-counsel to the case.

The plaintiffs in *Andary* primarily focused their arguments in the trial court on the Contracts Clause issue. The Contracts Clause of the Michigan Constitution states, "No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted." Const. 1963, art. 1, 10. Plaintiffs argued that their right to all reasonable charges for reasonably necessary products, services, and accommodations for their care, recovery, or rehabilitation, without regard to any fee schedules or limitations on the identity of attendant care providers, vested as of the date of their respective motor vehicle accidents under the contracts they entered into with their no-fault insurers to provide no-fault benefits. The *Andary* plaintiffs further argued that they paid valuable premium dollars to secure those benefits, and those premiums were priced upon the right to payment without these limitations. Thus, any right to now apply these limitations was a violation of the Contracts Clause, in that it impaired the obligations of the contracts entered into between plaintiffs and their insurers and resulted in a windfall to the insurers.

After extensive briefing and oral argument, the Ingham County Circuit Court granted Defendants' Motion to Dismiss the case on November 13, 2020. Plaintiffs' subsequent Motion for Reconsideration and Motion to Amend were denied and, thus, plaintiffs appealed to the Court of Appeals in March 2021. As the implementation of the fee schedules and attendant care limitations was rapidly approaching on July 2, 2021, plaintiffs attempted to expedite the case by filing a Motion to Expedite with the Court of Appeals, and a Bypass Application to the Michigan Supreme Court, both of which were denied. Thus, the case proceeded in the ordinary course of business. Notably, the

fact the *Andary* case would not be expedited through the appellate courts caused further distress to patients and providers, as they knew it would take so much longer to receive any clarification on the retroactivity issue.

ANDARY GOES TO THE MICHIGAN COURT OF APPEALS

In the Court of Appeals, briefing by all parties and amicus curiae groups were filed by August 2021. The groups that submitted amicus curiae briefs in support of Plaintiffs-Appellants in the Court of Appeals were as follows: Coalition Protecting Auto No-Fault, Michigan Brain Injury Provider Council, Brian Injury Association of Michigan, and State Representatives Julie Brixie (D-Meridian Township) and Andrea Schroeder (R-Clarkston). The amicus brief filed by Representatives Brixie and Schroeder was highly unusual, but also highly powerful. In this brief, Representatives Brixie and Schroeder stated that they, as individuals who voted on the 2019 reforms, never intended them to apply retroactively to individuals who purchased coverage and were injured in a motor vehicle accident before the No-Fault Act was amended. This brief was accompanied by a Memorandum of Support that was signed by a total of 73 Legislators.

As the case was appealed to the Court of Appeals and began to evolve, it became more focused on whether the amendments could be applied retroactively to patients who purchased policies and were injured before the changes went into effect, and whether the Legislature even intended the 2019 amendments to apply retroactively to individuals who were injured prior to the amendments in the first place. In this regard, plaintiffs focused their arguments on the four retroactivity factors outlined in the case of the Michigan Supreme Court in *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26 (2014), and further reaffirmed in the 2021 published Supreme Court case of *Buhl v City of Oak Park*, 507 Mich 236 (2021). The Court in *Buhl* summarized these factors as follows:

"First, we consider whether there is specific language providing for retroactive application. Second, in some situations, a statute is not regarded as operating retroactively merely because it relates to an antecedent event. Third, in determining retroactivity, we must keep in mind that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past. Finally, a remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment of the statute."

Buhl, 507 Mich at 244, quoting *LaFontaine*, 496 Mich at 38 – 39.

Plaintiffs-Appellants argued that based on these four factors, coupled with the amicus curiae brief filed by

Representatives Brixie and Schroeder, it was abundantly clear the Legislature never intended these amendments to apply retroactively and take away their vested right to no-fault benefits for which they previously paid a substantial premium to secure.

While eagerly awaiting the Court of Appeals' decision in the *Andary* case, many patients and providers across Michigan experienced the devastating effects of the medical payment and attendant care limitations that went into effect on July 2, 2021. Many patients struggled to get the lifesaving care they needed, and many providers could not stay in business under the harsh non-Medicare fee schedule. Accordingly, there were many lawsuits filed in trial courts across the state on behalf of individual patients and providers. Each individual trial court judge had to decide on a case-by-case basis whether these amendments could be applied retroactively. During this time, at least five trial court judges ruled that the benefit limitations set forth in the new 2019 no-fault law could not be retroactively enforced as to patients who purchased auto insurance policies and were injured prior to June 11, 2019. These judges included Genesee County Circuit Court Judge F. Kay Behm in the case of *Melrose v Nationwide Mutual Ins Co*, Case No. 19-113455-NF; Kent County Circuit Court Judge Mark A. Trusock in the case of *Advisacare Healthcare Solutions, Inc v Progressive Marathon Ins Co*, Case No. 21-1118-NF; Calhoun County Circuit Judge Sarah S. Lincoln in the case of *Thomason v Allstate Ins Co*, Case No. 2011-281-NF; Washtenaw County Circuit Court Judge Archie C. Brown in the case of *Gedda v State Farm Mutual Automobile Ins Co*, Case No. 22-152-NF; and Clinton County Circuit Court Judge Shannon L.W. Schlegel in the case of *Kuhlgert (Ostendorf) v State Farm Ins Co*, Case No. 21 12102-NF. Furthermore, numerous trial court judges issued injunctions, temporarily preventing the 2019 amendments from being enforced against patients while the issue was being fully litigated in other cases.

VICTORY FOR THE INJURED

Oral argument in *Andary* was finally held on June 7, 2022 in front of Judges Jane Markey, Douglas Shapiro, and Sima Patel. On August 25, 2022, the Court of Appeals issued a published, 2-1 decision, written by Judge Douglas Shapiro, joined by Judge Sima Patel, ruling that the 2019 amendments could not be retroactively applied to individuals who purchased policies and whose right to no-fault benefits vested before the amendments were enacted. In so ruling, the Court specifically reached three specific holdings: (1) the 2019 amendments did not contain any language whatsoever evidencing an intent by the legislature to apply these amendments retroactively to individuals injured prior to their enactment and, therefore, the longstanding legal principle that new legislation is presumed to have prospective application only could not be overcome; (2) even if the amendments had contained

sufficient provisions confirming that the Legislature had intended to apply these benefit reductions retroactively to persons who purchased policies and were injured before the changes went into effect, such an attempt at retroactive application would be an unconstitutional violation of the Contracts Clause; and (3) the trial court improperly dismissed plaintiffs' constitutional equal protection and due process challenges, for the reason that those constitutional challenges required factual development in order to properly determine their validity.

In elaborating on its conclusions, the majority opinion stated in pertinent part:

"On the date of the accidents, the recovery of PIP benefits for an injured person's care, recovery or rehabilitation was limited only by the reasonableness and necessity of the provider's customary charges. These statutory provisions were expressly referenced or incorporated into the pre-amendment no-fault policies. Therefore, insureds and those whose benefits are provided by their policies had a legitimate expectation that should they be injured in a motor vehicle accident, they would receive unlimited lifetime benefits, so long as the charges were reasonable and the care reasonably necessary. These individuals 'did not bargain for or contemplate,' that limits would be placed on the amount of attendant care family members can provide an injured person, or that treatment not compensable by Medicare would be limited to 55 percent reimbursement from the insurer. And these new limitations do not create minor or collateral effects on those settled expectations; to the contrary, they directly and drastically limit the ability of motor vehicle accident victims to continue to obtain the care they require. Indeed, accident victims and those who care for them have relied on these benefits for nearly 50 years... [S]ince the insurers have already been paid for the benefits promised under those policies, retroactive application would permit insurers to retain all the premiums paid prior to the 2019 amendments while allowing them to provide only a fraction of the benefits set out in those policies. Giving a windfall to insurance companies who received premiums for unlimited benefits is not a legitimate public purpose, nor a reasonable means to reform the system... the lifetime unlimited benefits that the insurers were paid for will be severely impaired if the amendments are given retroactive effect. Defendants have not shown that retroactive application of the amendments is necessary to accomplish the goal of lowering no-fault policy premiums. Nor have defendants explained how applying the amendments to those

continued on pg. 16 >

injured before the amendments' effective date is reasonable, especially considering that the relevant premiums have already been paid in full."

Andary et al. v USAA Casualty Ins Co et al., __ Mich App __ (2022) (Docket No. 356487); slip op at 6 – 7, 13 (internal citations omitted).

Judge Markey dissented, asserting that there was sufficient indication of a legislative intent to apply the benefit limitations retroactively and that any interference with existing contracts was not substantial enough to violate the Contracts Clause. Moreover, Judge Markey believed that reducing the benefits of accident victims injured before the recent legislative amendments was reasonably related to the premium reduction objectives of the new law.

Importantly, this is a published opinion, which, pursuant to MCR 7.215(C)(2), means it has immediate, binding, precedential effect on all other cases, unless and until it is overturned by the Michigan Supreme Court.

JOY AND HOPE FOR THE INJURED... INSURERS APPEAL TO SUPREME COURT

The *Andary* decision brought joy, relief, and hope to those catastrophically injured prior to June 11, 2019, and their medical providers. These people felt the judicial system reached a fair and just outcome on the retroactivity issue. Moreover, the decision gave them hope that their unique rights under the original Michigan no-fault law would be preserved, which would, in turn, protect their access to care. George T. Sinas, who is also lead counsel in the *Andary* litigation, recently gave the Michigan Association for Justice his reaction to the recent Court of Appeals' decision:

"It's important for the public to understand the terrible injustice that this court decision so appropriately addresses. The insurance industry's attempt to retroactively apply the medical benefit cuts contained in Michigan's new auto no-fault insurance law to those patients who sustained severe injury years before the law went into effect, has been devastating. Thousands of Michigan families who purchased auto insurance policies that did not contain these severe benefit reductions have been subjected to a cruel rule change that has deprived them of the essential care that they had been receiving; that they were depending upon; and that they had previously paid premiums to secure. It is indeed uplifting to see our court system protect Michigan consumers and disabled people by not allowing their vested legal rights to be taken away by inappropriately applied legislation.

Unfortunately, the insurance industry has announced its intent to appeal the Court of

Appeals' decision to the Supreme Court in furtherance of its totally baseless claim that this decision will interfere with the premium-reducing objectives of the new auto insurance law. The fact of the matter is that the insurance industry has never come close to proving that stripping existing patients of their medical benefits has anything whatsoever to do with significantly reducing premiums for consumers in the future. In reality, there is no such connection. Whether or not the new law will achieve meaningful premium reductions going forward, will depend upon how well it performs with respect to future consumers and future patients. Moreover, the recent \$400 MCCA premium rebate, touted by the insurance industry in the *Andary* case as a product of the new law, was not anything that was mandated by that legislation. Rather, it was likely the result of an independent decision by the insurance executives who run the MCCA to better leverage the industry's position regarding the legal issues raised in the *Andary* litigation. In truth, such a rebate could have been made years ago, when knowledgeable observers warned that the MCCA was overfunded as a result of years of collecting unnecessarily high premiums.

In the end, the real significance of the Court of Appeals' decision in *Andary* is its affirmation of the principle that it is not appropriate, in the name of lowering insurance costs for all, to take away from a few, those healthcare benefits they paid hard earned money to purchase. Simply stated, "*robbing Peter to pay Paul*" is not justice—it is fundamental injustice.

We are hopeful that the Michigan Supreme Court will, as did the Court of Appeals, embrace these important legal principles and affirm the landmark *Andary* decision."

The defendant insurance companies have appealed this decision to the Michigan Supreme Court. The Supreme Court does not have to take the case. If the Court takes the case, the case will likely remain in the Supreme Court for at least a year or two before all briefs are filed, oral argument is held, and an opinion by the Supreme Court is rendered. However, the decision from the Court of Appeals is certainly a step in the right direction towards restoring benefits and civil justice for some of Michigan's most vulnerable people.

1. See MCL 500.3107 and MCL 500.3157 (prior to Amendments through Public Acts 21 and 22 of 2019).

2. See MCL 500.3107c.