PLUNKETT COONEY

Covenant: What's Next

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The talk of the no-fault world has been the Michigan Supreme Court's decision in *Covenant Medical Center, Inc. v State Farm Mutual Automobile Ins. Co., 2017 WL 2303337 (Mich. May 25, 2017),* eliminating medical providers' independent cause of action against no-fault insurers for the payment of Michigan no-fault benefits.

The decision has left a great deal of uncertainty as to what is next or what a no-fault insurer can expect as these providers will not go quietly. Plunkett Cooney's Transportation Law Practice Group is prepared to handle all potential tactics brought by these medical providers in their efforts to keep these actions alive. Some issues we are now seeing in the post-*Covenant* era:

Is the Covenant decision retroactive?

The short answer is: yes. Unless the Supreme Court opinion indicates otherwise, the general rule is full retroactive application, unless prospective application is somehow justified. The Covenant court applied its holding retroactively to the plaintiff in that case, ordering the case remanded to the trial court for entry of an order granting summary disposition in favor of the defendant. This is significant because the Covenant court decided the case on an issue that was never argued at the trial or appellate level.

The Supreme Court raised the question of whether a provider had a statutory cause of action *sua sponte* and asked the parties to brief that issue. Thus, there was no indication that any party had preserved that argument for appeal at any level, yet the decision was still applied retroactively to the plaintiff in *Covenant*. This is a clear indication from the opinion itself that the Supreme Court intended its decision to be applied retroactively.

Additionally, the Supreme Court went out of its way in that opinion to show that it was not overruling well-established, existing law. The Supreme Court analyzed the cases most frequently cited by plaintiffs claiming a direct cause of action and found that none of them had ever actually decided that issue. Thus, any reference to a statutory cause of action was mere dicta and not binding law.

It was not until the case of *Wyoming Chiropractic Health Clinic, PC v Auto-Owners Ins Co*, 308 Mich App 389, 396-397; 864 NW2d 598 (2014) that the Michigan Court of Appeals was actually asked to answer the question as to whether or not a provider had a statutory cause of action. The Supreme Court in *Covenant* discussed that opinion and found that the appellate court engaged in no statutory analysis and merely relied on the dicta of prior opinions to conclude that providers had a statutory cause of action. Thus, *Covenant* clearly asserted that it was not overturning well-established prior law, further demonstrating its intent that this decision be applied retroactively.

Moreover, when a court finds that a cause of action is no longer valid, it would be nonsensical to apply the decision on a prospective basis only. To do so, the appellate court would allow both litigation and a transfer of property through a cause of action which the court has already recognized is invalid. It is likely the decision will apply to all pending cases in which the issue is presented, including cases on appeal. In fact, since the decision was issued, the Michigan Supreme Court and the Michigan Court of Appeals have both remanded other cases for further proceedings consistent with the Covenant decision, showing that both courts believe that the opinion is to be applied retroactively.

Further, it is unclear if cases already resolved could be resurrected under MCR 2.612 motion (motion for relief from judgment) where both the ruling and the monies paid under the previous case law would be reversed and returned, respectively.

Providers Arguing Third Party Beneficiary

This issue has yet to gain steam as medical providers would have quite an uphill battle arguing they are an intended third party beneficiary of the no-fault insurance contract between the insurer and the claimant. In many cases, there is no policy of no-fault insurance to which the claimant is a party such as for vehicle occupants, pedestrians, and those claiming benefits under the Michigan Assigned Claims Plan. In these cases, the claimant receives benefits by virtue of the No-Fault Act, MCL 500.3101 *et. seq*. rather than any policy. There is simply no contract of which the provider can claim to be an intended beneficiary.

Providers may try to make a third party beneficiary argument where the injured party is a policy-holding insured. However, they would have to show that they are an intended beneficiary of the policy rather than a mere incidental beneficiary. MCL 600.1405 governs third party beneficiary law in Michigan, and reads:

Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promisee.

> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.
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> (2) (a) The rights of a person for whose benefit a promise has been made, as defined in (1), shall be deemed to have become vested, subject always to such express or implied conditions, limitations, or infirmities of the contract to which the rights of the promisee or the promise are subject, without any act or knowledge on his part, the moment the promise becomes legally binding on the promisor, unless there is some stipulation, agreement or understanding in the contract to the contrary.

> (b) If such person is not in being or ascertainable at the time the promise becomes legally binding on the promisor then his rights shall become vested the moment he comes into being or becomes ascertainable if the promise has not been discharged by agreement between the promisor and the promisee in the meantime.
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> (c) If the promisee is indebted or otherwise obligated to the person for whose benefit the promise was made and the promise in question is intended when performed to discharge that debt or obligation, then the promisor and the promisee may, by mutual agreement, divest said person of his rights, if this is done without intent to hinder, delay or defraud said person in the collection or enforcement of the said debt or other obligation which the promisee owes him and before he has taken any legal steps to enforce said promise made for his benefit.
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> (3) Nothing herein contained shall be held to abridge, impair or destroy the rights which the promisee of a promise made for the benefit of another person would otherwise have as a result of such promise.
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> (4) The provisions of this section shall be construed to be applicable to contracts made prior to its enactment as well as to those made subsequent thereto, unless such construction is held to be unconstitutional, in which case they shall be held to be applicable only to contracts made subsequent to its enactment.

Under this statute, the insured would be the "intended beneficiary," not the medical provider as an "incidental beneficiary." Therefore, the medical provider would not have action under MCL 600.1405. The Michigan Supreme Court has ruled on similar issues involving insurance policies and have held that the named insured is the only intended beneficiary, not someone to whom the named insured may owe the insurance proceeds.

See for example *Schmalfeldt v North Pointe Ins. Co.* 469 Mich. 422 670 N.W.2d 651 (2003) (where the Supreme Court held that a bar patron who was injured in a bar fight could not bring suit against the bar's insurance carrier for his damages even if the policy's coverage included his damages because he was merely an incidental beneficiary and only the insured bar was the intended beneficiary).

Medical Providers Now Claiming Assignment

Some providers have been alleging that they have received assignments from injured parties to pursue payment for treatment rendered on behalf of the injured party. *Covenant* explicitly stated that it was not altering any ability the provider had to bring suit based on an assignment, but did not analyze what, if any, right that might be. The question then becomes whether or not these purported assignments allow a provider to bring suit against the insurer.

MCL 500.3143 simply provides "An agreement for assignment of a right to benefits payable in the future is void." The question then becomes when has the benefit been "incurred" by the insured or claimant? If the injured party assigns the provider the right to collect payment on his behalf prior to the treatment, under MCL 500.3143, the assignment is void.

Further, several no-fault carriers have prohibitions against assignments written in their policies that insurers will likely use to block attempted assignments by their insured. The right to assign contractual rights may be, and often is, limited by agreement. UCC 2-210(2); Restatement (Second) of Contracts §317(2)(c). Frequently, parties will mutually elect to include non-assignment provisions in agreements, although parties in such instances are usually far more interested in limiting the ability to delegate duties. The distinction between assignment and delegation is often not addressed, but rather, both are considered under "assignment clauses."

Michigan courts have held that assignments that are "clearly restricted" by contract are not enforceable. *Burkhardt v Bailey*, 260 Mich. App. 636, 653 (2004). "[T]hose who would compose a contractual bar against alienation must use 'The plainest words.'"See *Detroit Greyhound Employees Federal Credit Union v Aetna Life Ins. Co.*, 381 Mich. 683, 689-690 (1969). Like other contracts, the anti-assignment clauses in insurance policies are typically enforceable. *Kreindler v Waldman*, 2006 WL 859447, at *2 (Mich. Ct. App. Apr. 4, 2006); *Edwards v Concord Dev. Corp.*, 1996 WL 33358104, at * (Mich. Ct. App. Sept. 17, 1996).

Plaintiffs will likely rely on *Roger Williams Ins. Co. v Carrington*, 43 Mich. 252, 5 N.W. 303 (1880), which held that an anti-assignment clause in an insurance policy was void as a matter of public policy. However, in so holding, the Supreme Court in *Roger Williams* relied upon an uncited statute that does not apply to No-Fault benefits stating:

It is the absolute right of every person-**secured in this state by statute**-to assign such claims, and such a right cannot be thus prevented.

Although the *Roger Williams* case does not tell us what statute it is looking at, it certainly was not the Insurance Code of 1956 that was enacted 76 years later. There is no provision of the Insurance Code of 1956 that prohibits anti-assignment clauses in insurance policies. Therefore, the analysis of *Roger Williams* does not apply and the anti-assignment clauses should be enforced.

Will Providers Now Be Suing Their Patients?

While some plaintiff attorneys claim this will be the next step, we have yet to see many filings and it is unclear how this will play out. The plaintiff's bar has relied upon arguably outdated language from a 1992 bulletin issued by the Michigan Commissioner of Insurance.

The plaintiff's bar, in theory, will file suit against the insured claimant, and will rely upon the above language of the Insurance Commissioner in an attempt to force the insurer to come to the defense of their own insured. It is unclear if the bulletin still has any weight whatsoever in light of the decision in *Covenant* and other opinions issued subsequent to the bulletin.

Additionally, while insurance policies typically require the insurer to defend its insured from liability claims, they typically do not require the insurer to defend their insured from breach of contract actions. Clauses providing the insured with a defense typically defend against the errors, acts or omissions by the insured. They do not provide a defense to contracts into which the insured voluntarily entered.

It is even more unclear how a provider would use this bulletin when their patient is not a policyholder, but instead claims benefits under the statute. There certainly is no right to defense or indemnity under the No-Fault Act and the *Covenant* decision clearly stands for the proposition that a right under the No-Fault Act must be explicitly stated in the Act.

Finally, it is unclear what effect a judgment against the insured would have against the carrier. Collateral estoppel and *res judicata* would not apply and, even if they did, the elements of a breach of contract collection case are different than a No-Fault case. Providers would only have to show that the insured entered into a contract with them and that they provided the services. They would not have to show that the services are reasonably necessary as a result of a motor vehicle accident. Thus, obtaining a judgment against the insured would not involve litigating the issues that are necessary to resolve a No-Fault claim. It remains to be seen if this tactic will be widely used by the plaintiff's bar and if it will have any success.

What the Courts Are Doing

To start, all cases must be looked at on a case-by-case basis. The outcome of any motions may hinge upon what is being plead by the plaintiff provider: Do they simply rely upon MCL 500.3112 as the law existed prior to the new Covenant decision, or is their claim based upon assignment or third party beneficiary law? Each court is handling *Covenant* differently.

The week following the decision, Judge Burke of the 15th District Court (Ann Arbor) issued a general order dismissing all provider suits pursuant to *Covenant*/MCR 2.116(C)(8). Any provider wishing to be heard as to why their case should not be dismissed must file a motion prior to July 31, 2017. If no motion is filed, their case will be dismissed as of September 6, 2017. After initially taking this tactic, Judge Burke has now changed his tune and will be handling each case individually however, the General Order issued on May 31, 2017 will still be in effect.

Judge Hunt of the 19th District Court (Dearborn) followed similar action in setting a return pretrial date for all provider suits for July 27, 2017. If defendants wish to file a motion for summary disposition, they are to set the hearing date for July 27, 2017.

In the 44th District Court (Royal Oak), Judges Meineke and Wittenberg have set mass hearing dates for motions for summary disposition, without any firm rules prohibiting or allowing amendments to the pleadings.

The judges in the Wayne County Circuit Court have not reached any consensus. It appears that most or all of them have precluded providers from intervening and have dismissed and refused to hear all MCL 500.3112 motions.

The Next Step

• Filing motions for summary disposition Under MCR 2.116(C)(8) as providers now lack standing to bring action under the no-fault statute.

• If needed, amend affirmative defenses so that lack of standing can be plead as well as pleading anti assignment clauses.

• Should these motions be denied, send carefully tailored discovery to these providers relative to whether a valid assignment was secured from the claimant.

• Further, responding to plaintiffs' inevitable motions to amend complaints, arguing that any such amendment would be futile.

• Rejecting all case evaluation awards on provider matters and advising panels that they are to be issuing a non-unanimous award so as not to subject the rejecting party to sanctions