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

Plaintiffs - Appellants,

Court of Appeals No. 356487

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

v

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

Defendants - Appellees.

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PLAINTIFFS-APPELLANTS' BRIEF ON APPEAL

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STATEMENT OF JURISDICTION

Plaintiffs-Appellants, Ellen M. Andary, *et al*, appeal from the Ingham County Circuit Court's Order dated November 13, 2020, granting defendants' motion to dismiss. A copy of that Order is included in Plaintiff-Appellants' Appendix pp. 1a – 24a. That Order dismissed plaintiffs' claims in their entirety. Plaintiffs moved for reconsideration in the circuit court and also requested the right to amend their complaint to state an additional theory. The circuit court denied that motion in an Order dated February 18, 2021. A copy of that Order is included in Plaintiff-Appellants' Appendix pp. 25a – 28a. On March 4, 2021, plaintiffs filed their Claim of Appeal in this Court.

This appeal seeks review of a *"*Final Order*"* within the meaning of MCR 7.202(6). This Court, therefore, has jurisdiction over this appeal pursuant to the provisions of MCR 7.203(A)(1).

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STATEMENT OF QUESTIONS PRESENTED

I. DOES RETROACTIVE APPLICATION OF THE 2019 AMENDMENTS TO MCL 500.3157(7) AND (10) VIOLATE THE VESTED CONTRACT RIGHTS OF PLAINTIFFS AND THEREFORE IS UNCONSTITUTIONAL UNDER THE CONTRACT CLAUSE OF THE MICHIGAN CONSTITUTION?

Plaintiffs-Appellants say "Yes."

Defendants-Appellees say "No."

II. DOES RETROACTIVE APPLICATION OF THE 2019 AMENDMENTS TO MCL 500.3157(7) AND (10) TO PLAINTIFFS VIOLATE ESTABLISHED PRINCIPLES OF MICHIGAN CONTRACT LAW, INCLUDING THE SUPREME COURT'S DECISION IN LAFONTAINE SALINE, INC V CHRYSLER GROUP, LLC 496 MICH 26; 852 NW2d 78 (2014) AND AS A RESULT, DID THE CIRCUIT COURT ERR IN REFUSING PLAINTIFFS' REQUEST TO AMEND PLAINTIFFS' COMPLAINT AND ERR IN REJECTING THIS SPECIFIC CLAIM?

Plaintiffs-Appellants say "Yes."

Defendants-Appellees say "No."

III. DO THE 2019 AMENDMENTS TO MCL 500.3157(7) AND (10) VIOLATE THE DUE PROCESS AND EQUAL PROTECTION RIGHTS OF PLAINTIFFS AND MICHIGAN PATIENTS AND PROVIDERS AND THEREFORE ARE UNCONSTITUTIONAL UNDER THE MICHIGAN CONSTITUTION?

Plaintiffs-Appellants say "Yes."

Defendants-Appellees say "No."

IV. DO THE 2019 AMENDMENTS TO MCL 500.3157(7) AND (10) CONTAIN A SUFFICIENTLY SPECIFIC "EXPRESSION OF INTENT" TO HAVE THE STATUTE APPLY RETROACTIVELY TO PATIENTS AND PROVIDERS INJURED PRIOR TO THEIR EFFECTIVE DATE, THEREBY INVOKING THE COMMON LAW PRESUMPTION THAT THOSE PROVISIONS CAN ONLY BE APPLIED PROSPECTIVELY?

Plaintiffs-Appellants say "No."

Defendants-Appellees say "Yes."

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INTRODUCTION

In 2019, the Michigan Legislature enacted a number of changes to the no-fault act. Two of these changes, one altering the compensability of family-provided attendant care, MCL 500.3157(10), and the other establishing a fee schedule that caps reimbursement for non-Medicare compensable services to 55% of what a provider was charging for these services on January 1, 2019, MCL 500.3157(7), are the subject of this case. The changes to the no-fault act that are being challenged herein go into effect on July 1, 2021.

In this case, plaintiffs have alleged that the changes that soon go into effect cannot be retrospectively applied to them because they have vested contractual rights to no-fault benefits that are protected from legislative change by article 1, section 10 of the Michigan Constitution, the Contract Clause. The retroactivity question presented in this case will impact tens of thousands of Michigan auto accident victims who are in circumstances comparable to Ellen Andary and Philip Krueger. Such victims have been receiving contractually purchased no-fault benefits arising out of motor vehicle accidents that occurred prior to the 2019 changes to the no-fault law, which benefits will be substantially reduced if these new amendments are given retroactive application.

Plaintiffs also raised in their complaint challenges to the 2019 amendments to the no-fault act under the Michigan Constitution's Due Process Clause, Const. 1963, art. 1, §17, and Equal Protection Clause, Const. 1963, art. 1, §2.

The defendants moved for the dismissal of plaintiffs' constitutional claims in the circuit court. That motion was granted by the court in an order dated November 13, 2020. Plaintiffs moved for reconsideration of that order and for the right to amend their complaint to state an alternative claim for relief based on Michigan contract law. The circuit court denied that motion in an Order

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dated February 18, 2021. Plaintiffs timely appealed to this Court and are now timely submitting the instant brief in accordance with the court rules.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

I. FACTS OF THE CASE

On December 5, 2014, Ellen Andary was a passenger in a motor vehicle which was struck head-on by a drunk driver. *See* Plaintiffs' Complaint, ¶9, a copy of which is included in Plaintiff-Appellants' Appendix pp. 29a – 87a. As a result of that accident, Ms. Andary suffered severe injuries, including a catastrophic brain injury. *Id.*, ¶10. The injuries Ms. Andary sustained in the December 2014 accident have rendered her permanently disabled and incapable of caring for herself. *Id.*, ¶11.

Years before the December 5, 2014 accident, Ms. Andary and her husband, Dr. Michael Andary, purchased an automobile no-fault policy of insurance through USAA Casualty Insurance Company (hereinafter: "USAA"). At the time of her 2014 accident, Ms. Andary was insured under this USAA policy. *Id.*, ¶17. In accordance with the allowable expense provision of the no-fault act, this policy provided for reimbursement of "all reasonable charges incurred for reasonably necessary products, services and accommodations for [Ms. Andary's] care, recovery or rehabilitation" without regard to any government imposed fee schedule. The Andary policy further provided for all reasonably necessary attendant care regardless of the identity of the caregivers. Ms. Andary's right to these benefits vested as of the date of her 2014 accident. *Id.*, ¶¶61-62.

Due to Ms. Andary's severe brain injury, doctors have prescribed for her 36-hours of in-home attendant care services per day. *Id.*, ¶12. The majority of Ms. Andary's in-home attendant care has been provided by members of her family, including her children and her husband. *Id.*, ¶¶8, 13. The care that Ms. Andary requires is intimate and personal. Her caregivers must assist her

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with such things as dressing, bathing, and toileting. In particular, Ms. Andary is given a daily suppository and is assisted with completing a bowel program because of her accident-related injuries. Ms. Andary is prone to developing urinary tract infections so her in-home caregivers apply a vaginal cream to prevent these infections. Urinalysis tests must be regularly performed to check for these infections and other abnormalities.

While Ms. Andary has a severe brain injury, she is able to engage in superficial conversations. She enjoys being around her friends and family. Ms. Andary is aware of the care that is being provided to her and is further aware of the significant intrusions it imposes with regard to her sense of personal privacy. She has made comments that reflect that awareness. Consequently, she is more comfortable with the care rendered to her by family and friends as opposed to strangers.

On March 10, 1990, Philip Krueger was involved in a motor vehicle accident while a passenger in a pickup truck. *Id.*, ¶¶26-27. In that accident, Mr. Krueger sustained multiple injuries, including a severe traumatic brain injury which has left him permanently disabled and incapable of taking care of himself. *Id.*, ¶28. Prior to the March 1990 accident, Philip Krueger's father, Ronald Krueger, purchased an automobile no-fault policy of insurance through Citizens Insurance Company of America (hereinafter: "Citizens"). At the time of the accident, Philip Krueger was 18-years old and resided with his father. *Id.*, ¶29. Accordingly, he was insured under the Citizens no-fault insurance policy as a resident relative of his father.

In accordance with the allowable expense provision of the no-fault act, MCL 500.3107(1)(a), the Krueger policy provided for reimbursement of "all reasonable charges incurred for reasonably necessary products, services, and accommodations for [Philip Krueger's] care,

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recovery, or rehabilitation," without regard to any government imposed fee schedule. Mr. Krueger's right to these benefits vested as of the date of his March 1990 accident.

In November 1997, Philip Krueger became a resident of an Ann Arbor facility, the Eisenhower Center. *Id.*, ¶37. The Eisenhower Center specializes in providing rehabilitative products and services for individuals who have suffered traumatic brain injuries. *Id.*, ¶33. Among the services that the Eisenhower Center provides are inpatient living accommodations for individuals who have sustained brain injuries and who, like Mr. Krueger, are incapable of living independently. *Id.*, ¶¶34-35.

When Mr. Krueger became a resident of Eisenhower Center, the two entered into a contract under which Eisenhower Center agreed to provide the necessary services and accommodations for his recovery and rehabilitation. *Id.*, ¶38. At the time this contractual relationship was entered into and continuing through today, the funding for the services that the Eisenhower Center provides to Mr. Krueger comes from Citizens by virtue of the insurance policy that was in effect at the time of his March 1990 accident.

Mr. Krueger represents a typical Eisenhower Center patient. The vast majority of Eisenhower Center's residential patients have suffered disabilities, in particular brain injuries, as a result of motor vehicle accidents. *Id.*, ¶36. At the time the complaint in this case was filed, the Eisenhower Center had 156 residential patients. Of that number, approximately 130 are motor vehicle accident victims whose rehabilitation and care is funded by benefits payable under Michigan's no-fault act. *Id.* Most of the patients that the Eisenhower Center treats have severe behavioral issues as a result of brain injuries. The Eisenhower Center is one of the few residential centers in Michigan with the ability to treat such patients.

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On January 15, 2019, Senate Bill 1 (SB-1) to amend the insurance code of 1956 was introduced by Senator Aric Nesbitt and referred to the Committee on Insurance and Banking. The Committee held hearings prior to reporting out the bill, but there were no opportunities for the general public to testify on the bill's subject matter. Legislative testimony from parties interested in the proposed legislation was by invitation of the chair only and was on certain specific policy issues and/or questions. On the morning of May 7, 2019, the Senate Committee on Insurance and Banking scheduled a meeting to take up SB-1. The Committee did not take any public testimony. The Committee quickly adopted a substitute for SB-1 (S-1), and reported it out of Committee. No copies of this substitute bill were made available to the public.

Typically, committee reports are laid over for a day or two prior to further deliberations on the Senate floor. However, SB-1 was quickly taken up during the regularly scheduled Senate session, which began at 10 a.m. the same day it was reported out of Committee. The rules were suspended to allow SB-1 to be placed on the General Orders Calendar. The bill then moved to a third reading. The rules again were suspended and SB-1 was placed on immediate passage, which it did. SB-1 was transmitted to the House of Representatives that same day, May 7, 2019. SB-1 was read in and referred to the House Select Committee on Reducing Car Insurance Rates the next day. On May 15, 2019 the Select Committee met and reported out SB-1 (with a House Substitute H-1). Again, there was no public input at the hearing and no advance copies of the bill were made available to the public for review.

Private discussions with the Governor, Speaker of the House, and Senate Majority Leader culminated in a deal that was reached in the late evening of May 23, 2019. In the early morning of May 24, 2019, Kevin McKinney, Legislative Coordinator for one of the groups interested in the proposed legislation, the Coalition Protecting Auto No-Fault (CPAN), was called into the

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Governor's office to be "briefed" on the overall agreement. At that time, the agreement was in outline form only and was not fully drafted.

Following this May 24, 2019 meeting, the House Democratic Caucus was briefed by the Governor's office on the compromise. At this time, the Legislative Service Bureau was still working on drafting the final agreement, so the bill was still in outline form and the language was not shared during this briefing either.

Copies of the bill were finally made available and were online later that day. One of the key changes included in the bill was the imposition of MCL 500.3157(7)'s fee schedules for non-Medicare compensable services. The Governor along with Senate and House leadership took the position that this bill was to be passed that same day and, as such, no amendments would be supported. Therefore, most House members could not even offer corrective or clarifying amendments to the bill that was presented to them.

Later in the day on May 24, 2019, the House passed the bill and gave it immediate effect. Following this, in the late afternoon of May 24, 2019, the Senate concurred with the House Substitute to SB-1 and the Bill was passed. The bill was signed into law by Governor Whitmer and filed with the Secretary of State, becoming law on June 11, 2019.

As can be seen from this brief legislative history, this bill to amend portions of Michigan's no-fault act was passed with enormous speed, behind closed doors, and without public comment. Members of Legislature were not even given an opportunity to comment on the bill or to propose changes.

Among the changes contained in the final version of the bill was a limitation on in-home attendant care services that can be provided by anyone who has a family, business or social relationship with the injured party. This amendment of the act, now codified in MCL

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500.3157(10), provides that no-fault benefits are not payable for in-home attendant care beyond 56 hours per week if those services are provided by "[a]n individual who is domiciled in the household of the injured person," or "[a]n individual with whom the injured person had a business or social relationship before the injury." MCL 500.3157(10).[1]

This limitation on in-home family provided attendant care goes into effect on July 1, 2021. Importantly, the new limitation contained in §3157(10) will be applied to victims of motor vehicle accidents, such as Ms. Andary, who were injured prior to the date the 2019 amendments to the act take effect. This means that, as of July 2021, Ms. Andary will presumably no longer be entitled to receive reimbursement for in-home family provided attendant care beyond the 56-hours per week allowed by the amended §3157(10). Accordingly, this limitation fundamentally changes Ms. Andary's rights under the policy of insurance with USAA that was in effect as of the date of her motor vehicle accident.

The 2019 amendments to the no-fault act have also dramatically limited the reimbursement for a provider of medical services to motor vehicle accident victims. The 2019 amendments have accomplished this through the creation of fee schedules. These fee schedules, which are contained in §§3157(2) and (7), set out maximum amounts that a physician, hospital, clinic or other person may be reimbursed for the care and treatment of accident-related injuries.

The no-fault act fee schedules established for the first time through the 2019 amendments of the act are divided into two categories. If the treatment or services being provided are covered by Medicare, the maximum amount that a provider can be reimbursed for the services it provides

[1] The type of attendant care covered in §3157(10) is hereinafter referred to in this brief as "in-home family provided attendant care," even though the statute excludes more than just family members from providing such care.

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to motor vehicle accident victims after July 2021 is 200% of the amount payable under Medicare. MCL 500.3157(2). If, however, Medicare does not provide coverage for a particular service, beginning July 1, 2021, the maximum amount that the provider can be reimbursed for the services it provides to motor vehicle accident victims is 55% of the amount that the provider charged for the treatment as of January 1, 2019. MCL 500.3157(7).

The fee schedule for non-Medicare compensable services addressed in §3157(7) fundamentally changes the rights of Ms. Andary and Philip Krueger under their policies of no-fault insurance in effect as of the date of their accidents. These fee schedules also fundamentally impair the rights of Eisenhower Center, another named plaintiff in this case, to be reimbursed for all reasonable charges it renders to motor vehicle accident victims that it has been treating before these fee schedules were enacted, as well as patients it will treat in the future.

On October 3, 2019, Ellen Andary, Philip Krueger, and the Eisenhower Center filed this action in the Ingham County Circuit Court against USAA and Citizens. In its original form, plaintiffs' complaint included only claims grounded on the Michigan Constitution. Plaintiffs sought a declaration that the limitation on in-home family-provided attendant care in §3157(10) and the non-Medicare fee schedule limitations of §3157(7) cannot be constitutionally enforced in derogation of the vested contractual rights the plaintiffs possess under the insurance policies defendants sold to them prior to the enactment of the 2019 legislation. Plaintiffs alleged in their complaint that application of these amendments would be a violation of their constitutional rights under the Contract Clause of the Michigan Constitution, Const. 1963, art. 1, §10.

Ms. Andary and Mr. Krueger further sought a declaration that application of the changes to the no-fault act contained in §§3157(7) and (10) would deprive them of their due process rights to privacy in violation of article 1, §17 of the Michigan Constitution, by limiting their access to

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care and their ability to choose medical providers who render intimate and personal care. Eisenhower Center also sought a declaration that its due process right to property would be violated by the imposition of unsustainable price controls in the form of §3157(7)'s fee schedules that will force Eisenhower Center to go out of business.

Eisenhower Center also sought a declaration that its equal protection rights are violated by §3157(7) by dramatically reducing its right to reimbursement as a provider of non-Medicare compensable services, in contrast to other providers that render Medicare compensable services.

II. PROCEEDINGS BELOW

In January 2020, in lieu of filing an answer to plaintiffs' complaint, the defendants filed a motion to dismiss based on MCR 2.116(C)(8). In that motion, the defendants presented various arguments in support of their contention that all of plaintiffs' constitutional claims should be dismissed. Plaintiffs filed a response to the defendants' motion and ten amicus curiae briefs were filed in the circuit court in support of or in opposition to defendants' motion. The circuit court held a hearing on the defendants' motion and took the matter under advisement.

On November 13, 2020, the circuit court issued a written opinion granting the defendants' motion to dismiss. *See* Plaintiff-Appellants' Appendix pp. 1a – 24a. The circuit court concluded in that opinion that all of the constitutional theories alleged by plaintiffs failed to state claims on which relief could be granted.

In their response to the defendants' motion to dismiss, plaintiffs had invoked MCR 2.116(I)(5), requesting that they be given the opportunity to amend their complaint to state an additional nonconstitutional claim – that the application of the 2019 legislative alterations of the no-fault act to plaintiffs would constitute a breach of their insurance contracts with the defendants. In its November 13, 2020 decision dismissing plaintiffs' constitutional claims, the circuit court did

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not address plaintiffs' request to amend to add a contract-based theory. As a result, following the issuance of the circuit court's November 13, 2020 decision, plaintiffs filed in the circuit court a motion seeking reconsideration and they also moved to amend their complaint to allege a breach of contract claim.

The circuit court addressed this motion in an order dated February 18, 2021. *See* Plaintiff-Appellants' Appendix pp. 25a – 28a. The circuit court denied plaintiffs' request to amend, concluding that this amendment would be futile, because "the purportedly 'new contract claim' has already been addressed in the Court's prior ruling on the motion for summary disposition, and the Defendant's [sic] current brief does not alter that position." *See* Plaintiff-Appellants' Appendix p. 27a.

On March 4, 2021, plaintiffs filed a Claim of Appeal in this Court, appealing both the November 13, 2020 and the February 18, 2021 orders.

LAW AND ARGUMENT

This appeal raises significant questions regarding the constitutionality of the in-home family provided attendant care limitations and the 55% non-Medicare fee schedule that are part of the 2019 amendments to the no-fault act, §§3157(7) and (10). These amendments are scheduled to take effect on July 1, 2021. The primary concern raised by this legislation is whether it can be retroactively applied to persons who purchased no-fault policies and were injured before these new provisions are to take effect. Plaintiffs alleged in this case that such a retroactive application is a violation of their constitutional rights under the Contract Clause of the Michigan Constitution, Const. 1963, art. 1, §10. Plaintiffs further alleged that both retroactive and prospective application of these provisions is a violation of due process and equal protection under Article 1, §2 and Article 1, §17 of the Michigan Constitution.

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The question of whether these provisions can be applied retroactively to individuals who bought no-fault policies and were injured in motor vehicle accidents prior to the 2019 amendments is of enormous importance to Michigan citizens and will impact tens of thousands of Michigan auto accident victims who are in circumstances comparable to Ellen Andary and Philip Krueger. These accident victims have been receiving contractually-based no-fault benefits arising out of motor vehicle accidents that occurred prior to the 2019 changes to the no-fault law, and those benefits will be substantially reduced if these new amendments are given retroactive application.

Allowing retroactive application of the attendant care provisions of the new law to patients in the position of Ellen Andary will result in a substantial disruption of the daily care of those who receive family provided attendant care exceeding the number of hours of reimbursable family provided attendant care authorized under the new law. These patients will now be forced to dramatically alter the nature of the daily attendant care they require and the people providing that care.

Furthermore, the retroactive application of the fee schedule provisions of the new law to patients who were injured prior to the passage of the 2019 legislation could fundamentally impair access to medical care if providers, such as the Eisenhower Center, conclude that they will not be able to continue providing care to motor vehicle accident victims due to the unsurvivable nature of the new fee schedules. Imposition of the fee schedules would result in a disruption of care for tens of thousands of catastrophically injured accident victims. The thousands of accident victims who will be negatively impacted by the retroactive application of the attendant care and fee schedule changes that are scheduled to go into effect on July 1, 2021 will almost certainly begin filing lawsuits to preserve the benefits that they have been receiving.

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Moreover, the 55% non-Medicare fee schedule will have a significant detrimental effect on Michigan medical providers. Many of these providers will be unable to sustain their operations if they are forced to take a 45% reduction on payments. These providers will go out of business, resulting in a loss of jobs and a significant negative impact on a significant portion of Michigan's healthcare economy. Furthermore, patients' access to medical care will be substantially reduced with the closure of these providers. Patients that reside in long-term care facilities, such as Philip Krueger, will be forced to leave their places of residence where many of them have lived for decades.

The importance of the issues presented in this case is further reflected by the fact that even at the circuit court level, there were ten amicus curiae briefs filed by a diverse group of parties interested in the outcome.[2]

Accordingly, the issue of whether these very significant changes to the No-Fault Act impacting the healthcare of catastrophically injured auto accident victims can be applied retroactively to those victims and their providers is a question of both societal and jurisprudential importance. To permit such retroactive application would substantially reduce benefits under auto no-fault contracts purchased by consumers long ago, change the rules of patient care, and allow insurance companies to reap a financial windfall from premiums they collected for risks they would no longer be required to underwrite.

[2] The parties filing amicus curiae briefs in the circuit court included: Coalition Protecting Auto No-Fault; Michigan State Medical Society; Michigan Brain Injury Provider Council; Brain Injury Association of Michigan; Michigan Osteopathic Association; Michigan Association of Chiropractors; Michigan Department of Insurance and Financial Services; Michigan Catastrophic Claims Association; City of Detroit; Insurance Alliance of Michigan; National Association of Mutual Insurance Companies; and American Property Casualty Insurance Company.

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I. RETROACTIVE APPLICATION OF THE 2019 AMENDMENTS TO MCL 500.3157(7) AND (10) VIOLATES THE VESTED CONTRACT RIGHTS OF PLAINTIFFS AND THEREFORE IS UNCONSTITUTIONAL UNDER THE CONTRACT CLAUSE OF THE MICHIGAN CONSTITUTION.

Each of the plaintiffs have asserted claims based on the Contract Clause of the Michigan Constitution, Const. 1963, art 1, §10. That provision states: "No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted." Const. 1963, art. 1, 10. "[T]he purpose of the Contract Clause is to protect bargains reached by parties by prohibiting states from enacting laws that interfere with preexisting contractual arrangements." *In re Certified Question,* 447 Mich 765, 777; 527 NW2d 468 (1994) citing *Allied Structural Steel Co v Spannaus*, 438 US 234, 242 (1978); *Health Care Ass'n Workers Comp Fund v Director of the Bureau of Workers Comp,* 265 Mich App 236, 240; 694 NW2d 761 (2005). The Supreme Court has also noted that the Contract Clause was designed to ensure that "[v]ested rights acquired under contract may not be destroyed by subsequent State legislation or even by amendment of the State Constitution." *Campbell v Michigan Judges Retirement Board*, 378 Mich 169, 180; 143 NW2d 755 (1966); *In re Certified Question*, 447 Mich 765, 776; 527 NW2d 468 (1994) ("the purpose of the contract clause is to protect bargains reached by parties by prohibiting states from enacting laws that interfere with preexisting contractual arrangements.").

A. Decades of established Michigan appellate case law confirm that plaintiffs are entitled to be reimbursed for: (1) all reasonably necessary attendant care without regard to the identity of the provider or the number of attendant care hours rendered; and (2) all reasonable charges for reasonably necessary medical treatment without the imposition of government fee schedules.

One of the unique features of Michigan's no-fault act when it was originally passed in 1973 is that it allowed unlimited lifetime benefits for all "reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery, or

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rehabilitation." MCL 500.3107. When the Michigan Legislature adopted the no-fault act, it required that every auto no-fault insurance policy provide specific insurance benefits described in the statute. As a result, no-fault insurance contracts could never be more restrictive than what the act required, although such contracts could be more generous than what was statutorily mandated. *See e.g. Cruz v State Farm Mutual Auto Ins Co*, 466 Mich 588, 598; 648 NW2d 591 (2002); *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 531, n10; 502 NW2d 310 (1993). Therefore, since the adoption of the Michigan auto no-fault act, interpretive appellate case law has defined what a no-fault insurance contract covered.

With these concepts in mind, Ms. Andary's insurance policy with USAA, a copy of which is included in Plaintiffs-Appellants' Appendix pp. 88a – 133a, requires the payment of "personal injury protection coverage," which includes the payment of "medical expenses." USAA Policy, p. 10, Plaintiffs-Appellants' Appendix p. 111a. The policy in effect at the time of Ms. Andary's accident defines "medical expenses" with language virtually identical to the allowable expense benefit defined in MCL 500.3107(1)(a). USAA Policy, p. 9, Plaintiffs-Appellants' Appendix p. 110a. Because the payment of "allowable expenses" under her policy is a statutorily mandated requirement, the interpretation and definition of that statutory term as set forth in Michigan appellate law defines its meaning.

At the time that the Andary and Krueger insurance policies were purchased, there was a substantial body of law defining the meaning of "allowable expenses." Equally important is the fact that Ms. Andary's policy with USAA contains language that further confirms the expansive nature of the allowable expense benefit set out in that policy. Thus, the USAA policy specifically provides that it is not subject to any dollar limits:

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> "There is no maximum dollar amount for reasonable and necessary medical expenses incurred for a covered person's care, recovery, or rehabilitation."
>
> USAA Policy, p. 10, Plaintiffs-Appellants' Appendix p. 111a.

Since the USAA policy specifically provides that Ms. Andary's benefits under that policy are not subject to any maximum dollar amounts, it is axiomatic that USAA (and other insurers similarly situated) could not employ fee schedules to determine reimbursement for its insured's medical expenses. In addition, and for these same reasons, USAA (and other insurers similarly situated) could not limit reimbursement for family provided attendant care by any hourly rationing of such care.

It is indisputable that prior to the 2019 legislative amendments to the no-fault act which are at issue in this case, the allowable expense benefits in any qualified no-fault policy included, among many other things, two distinct benefits at the center of this litigation: (1) full reimbursement for any and all reasonable charges for in-home attendant care rendered to victims without regard to the identity of the provider or the number of hours; and (2) full reimbursement for all reasonable charges for reasonably necessary medical care without regard to any governmental or third party fee schedule limitations.

It is also indisputable that the 2019 amendments to the no-fault act substantially changed what was compensable as an allowable expense in two material ways which, if applied to them, would adversely affect the plaintiffs in this case: (1) capping reimbursement for in-home family provided attendant care at 56 hours per week; and (2) capping reimbursement for non-Medicare compensable services at 55% of what a provider was charging for those services as of January 1, 2019. In doing so, the 2019 legislation fundamentally conflicts with the allowable expense benefits

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that were provided under the terms of the policy purchased by the plaintiffs prior to the enactment of that legislation.

The contractual rights of insurance consumers, such as Ms. Andary and Mr. Krueger, became legally vested when two things happened: (1) the premium was paid; and (2) the party covered by the policy sustained a qualifying injury triggering payment of benefits under the purchased policy. *See, e.g. Henry L. Meyers Moving and Storage, Inc. v Michigan Life and Health Ins Guaranty Assoc*, 222 Mich App 675, 691; 566 NW2d 632 (1997); ("A vested right is a present or future right to do or possess certain things not dependent upon a contingency."), quoting *Wylie v Grand Rapids City Comm*, 293 Mich 571, 586–587; 292 NW2d 668 (1940).

1. Prior legal right to unrestricted attendant care

A review of Michigan appellate law prior to the enactment of the 2019 amendments establishes that the limitations imposed by the 2019 amendments regarding in-home family provided attendant care were not permitted under prior Michigan law. The following case law decided over a number of years confirms that the statutorily mandated allowable expense benefit included the right to be reimbursed for any and all reasonable charges for in-home attendant care rendered to victims without regard to the identity of the provider or the number of hours of care required and rendered:

a. *Visconti v DAIIE*, 90 Mich App 477; 282 NW2d 360 (1979) – Plaintiff could recover benefits from his no-fault insurer for personal care services rendered by his wife.

b. *Van Marter v American Fidelity Fire Ins Co*, 114 Mich App 171; 318 NW2d 679 (1982) – A stepmother was entitled to be compensated for the attendant care services that she provided to her stepson, regardless of the fact that she was a family member and she had no formal medical training.

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c. *Sharp v Preferred Risk Mutual Ins Co*, 142 Mich App 499; 370 NW2d 619 (1985) – A mother was entitled to reimbursement for attendant care services she provided to her adult son.

d. *Manley v DAIIE*, 425 Mich 140; 388 NW2d 216 (1986) – Family members are entitled to be compensated for all reasonably necessary attendant care services that they provide to an injured family member and accordingly, the parents of injured children are not precluded from recovering compensation for attendant care simply because they are legally obligated to support their minor children.

e. *Booth v Auto-Owners Ins Co*, 224 Mich App 724; 569 NW2d 903 (1997) – Family members who rendered attendant care to their catastrophically injured relative who was also entitled to receive attendant care under the workers compensation act, were entitled to recover compensation under §3107(1)(a) for attendant care rendered by the family above and beyond that which was compensable under the workers compensation statute. In other words, the workers compensation limitations on attendant care are not a cap on attendant care payable under the no-fault law.

f. *Douglas v Allstate Ins Co*, 492 Mich 241; 821 NW2d 472 (2012) – Plaintiff's husband was entitled to compensation for attendant care services he provided to injured wife.

2. Prior legal right to medical expense reimbursement without fee schedule application

Similarly, following case law confirms that the statutorily mandated allowable expense benefit included the right to be reimbursed for all reasonable charges for reasonably necessary medical care without regard to any governmental or third party fee schedule limitations:

a. *Johnson v Michigan Mutual Ins Co*, 180 Mich App 314; 446 NW2d 899 (1989) – The court rejected the no-fault insurer's argument that it was only obligated to pay hospital charges that would have been paid by Medicaid.

b. *Nassar v Auto Club Ins Ass'n*, 435 Mich 33; 457 NW2d 637 (1990) – A no-fault insurer is liable for medical expenses that are a reasonable charge for reasonably necessary products, services, and accommodations.

c. *Auto Club Ins Assn v New York Life Ins*, 440 Mich 126; 485 NW2d 695 (1992) – A no-fault insurer cannot place dollar limits on the amounts it will pay for particular services. The only limit is that the charges for such services are reasonable.

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d. *Botsford General Hospital and Noel v Citizens Ins Co*, 195 Mich App 127; 489 NW2d 137 (1992) – A no-fault insurer is not entitled to limit reimbursement to a medical provider to only that which is paid by Medicaid.

e. *Hicks v Citizens Ins Co of America*, 204 Mich App 142; 514 NW2d 511 (1994) – An insurance company cannot limit reimbursement to the amount that would be reimbursed by Medicaid.

f. *Hofmann v Auto Club Ins Ass'n,* 211 Mich App 55; 535 NW2d 529 (1995) – The court rejected the no-fault insurer's argument that a reasonable charge is the amount the provider would have received if private health insurance existed.

g. *Munson Medical Center v Auto Club Ass'n*, 218 Mich App 375; 554 NW2d 49 (1996) – An insurer could not apply the workers' compensation fee schedules to determine its liability to pay allowable medical expenses.

This body of appellate case law makes it clear that the benefits that plaintiffs purchased when they signed policies with the defendants would be substantially reduced by the 2019 amendments to §§3157(7) and (10) if those legislative changes apply to them. Allowing defendants to take away plaintiffs' vested contractual rights that they bought and paid valuable premium dollars for would result in an unfair and unjust windfall to insurers. The question of whether these changes that are scheduled to go into effect in July 2021 can be applied to individuals such as Ms. Andary and Mr. Krueger is at the heart of the plaintiffs' Contract Clause claim.

3. Statutory alteration of patient and provider contract rights

Finally, the complaint alleges that Eisenhower Center has contractual rights that are being violated by the recent amendments to §3157. Specifically, Eisenhower Center entered into a contract, express or implied, with Mr. Krueger when he became a resident in its facility in 1997. That contract obligated Mr. Krueger to pay all of Eisenhower Center's reasonable charges for reasonably necessary products, services and accommodations for his care, recovery or rehabilitation. Under Mr. Krueger's no-fault insurance policy, Citizens is contractually obligated to reimburse Mr. Krueger for the reasonable charges he incurs from Eisenhower Center without

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regard to any fee schedule. Therefore, Eisenhower Center has a vested contractual right and entitlement to reimbursement for all reasonable charges for reasonably necessary accommodations it supplies to Mr. Krueger without regard to any fee schedules.

B. In determining if retroactive impairment of contractual obligations violates the Contracts Clause, courts have developed a three part test that involves an intermediate level of judicial scrutiny beyond mere rational basis.

In assessing constitutional challenges based on the Contract Clause, Michigan Courts have adopted a three-pronged test:

> The first prong considers whether the state law has operated as a substantial impairment of a contractual relationship. The second prong requires that legislative disruption of contractual expectancies be necessary to the public good. The third prong requires that the means chosen by the Legislature to address the public need be reasonable.

Health Care Ass'n Workers Comp Fund, 265 Mich App at 241.

In interpreting the Contract Clause of the Michigan Constitution, Michigan Courts have adopted precedents from the United States Supreme Court which have recognized what might be described as a sliding scale in applying this three part test: "The severity of the impairment determines the height of the hurdle the act must clear." *VanSlooten v Larsen*, 410 Mich 21, 39; 299 NW2d 704 (1980), *citing Spannaus*, 438 US at 244-245; *see also Blue Cross and Blue Shield v Milliken*, 422 Mich 1, 21; 367 NW2d 1 (1985) ("The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected.").

Here, the first prong of the three point test is satisfied. Application of the 2019 amendments to Ms. Andary and Mr. Krueger will directly impact contractual rights that have been vested for years. Where, as here, the legislative impairment of a contract is severe, "then to be upheld it must be affirmatively shown that (1) there is a significant and legitimate public purpose for the regulation and (2) that the means adopted to implement the legislation are reasonably related to

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the public purpose." *Health Care Ass'n Workers Comp Fund*, 265 Mich App at 241 (citing *Wayne Co Bd of Comm'rs v Wayne Co Airport Auth*, 253 Mich App 144, 163–164; 658 NW2d 804 (2002), citing *Blue Cross & Blue Shield v Milliken*, 422 Mich 1, 23; 367 NW2d 1 (1985).

It is important to note that the test for a Contract Clause claim differs substantially from the rational basis test that is often employed in challenges to legislation predicated on the Constitution's Due Process or Equal Protection Clauses, that will be considered in a later section of this brief. The rational basis test for due process and equal protection challenges, "does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with "mathematical nicety. . ." *Crego v Coleman*, 413 Mich 248, 260; 615 NW2d 218 (2000). The same is not true of a challenge based on the Contract Clause.

Properly understood, a Contract Clause claim in which legislation directly impacts a vested contractual interest calls for a higher level of judicial scrutiny. Where legislation directly impacts on a contractual relationship, the defendant must show that the law is "necessary" and that it is reasonably tailored to the achievement of that "necessary" goal. Michigan appellate courts have expressed this point in various ways. For example in *Selk v Detroit Plastic Products*, 419 Mich 1; 345 NW2d 184 (1984), the Supreme Court indicated that the direct legislative alteration of a contractual obligation "is permissible if the legislation is necessary to meet a broad and pressing social need and is reasonably related to that goal." *Id.*, at 13; *see also Health Care Association*, 265 Mich App at 241 ("The second prong requires that legislative disruption of constitutional expectancies be necessary to the public good."); *County of Ingham v Michigan County Road Commission Self-Insurance Pool*, 321 Mich App 574, 583; 909 NW2d 533 (2017) ("A statute that substantially impairs a contractual relationship is unconstitutional unless the statutory impairment

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serves 'a significant and legitimate public purpose and . . . the means adopted to implement the legislation are reasonably related to the public purpose.'").

The enhanced level of judicial scrutiny in a Contract Clause claim is aptly reflected in the Supreme Court's most recent decision with respect to that constitutional provision. In *AFT Michigan v State of Michigan (On Remand)*, 315 Mich App 602; 904 NW2d 417 (2017), a panel of this Court considered a Contract Clause challenge to an amendment of the Public School Employees Retirement Act (PERA), MCL 38.1301, *et seq*. That amendment required all current public school employees to contribute 3% of their salaries to the Michigan Public School Employees' Retirement System. This mandatory salary reduction was at odds with the contracts that individual employees had signed with their employers. The plaintiffs in *AFT Michigan* challenged the mandatory contributions called for by the PERA amendment as unconstitutional under the Michigan Constitution's Contract Clause.

This Court agreed with the plaintiffs and concluded that the amendment was unconstitutional under the Contract Clause. The panel in *AFT Michigan* recognized that the mandatory contribution was not a regulation "that impinges on certain contractual obligations by happenstance or as a collateral matter. Rather, the statute directly and purposefully required that certain employers not pay contracted-for wages." 315 Mich App at 616. The same is true here. The 2019 amendments of the no-fault act, if applied to Ms. Andary and Mr. Krueger, do not alter their existing contractual rights "by happenstance or as a collateral matter." Rather, if applied to the plaintiffs, they would "directly and purposely" alter their vested contractual rights and result in an unfair and unjust windfall to their insurers.

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Under these circumstances, this Court held in *AFT Michigan* that the State of Michigan had to make the following showing to save the PERA amendment from a Contract Clause challenge:

> In order to determine whether that impairment violates the Contracts Clause, we must determine whether the state has shown that it did not: "(1) 'consider impairing the ... contracts on par with other policy alternatives' or (2) 'impose a drastic impairment when an evident and more moderate course would serve its purpose equally well,' nor (3) act unreasonably 'in light of the surrounding circumstances[.]

315 Mich App at 617.

This Court in *AFT Michigan* proceeded to find that the state could not meet its burden under the Contract Clause as it concluded that the PERA amendments violated Const. 1963, art. 1, §10. *Id*., at 618-621. The defendants in *AFT Michigan* sought leave to appeal in the Supreme Court. The Supreme Court granted leave to appeal and, after further briefing and oral argument, it Court issued an order disposing of the case on December 20, 2017. *AFT Michigan v State of Michigan*, 501 Mich 939; 904 NW2d 417 (2017). In that order, the Court unanimously affirmed this Court's conclusion that the PERA amendment violated the Contract Clause:

> Further, we affirm the holding that 2010 Public Act 75 violated the respective Contract Clauses of both the federal and state constitutions, U.S. Const., art. 1, § 10; Mich. Const. 1963, art. 1, § 10, because it substantially impaired the plaintiffs' employment contracts by involuntarily reducing the plaintiffs' wages by 3%, and *the state failed to demonstrate that this measure was reasonable and necessary to further a legitimate public purpose.*

501 Mich at 939 (emphasis added).

The Court's decision in *AFT Michigan* is significant in that, after demonstrating that the PERA amendment substantially impaired the plaintiffs' employment contracts, the duty to demonstrate that the measure was "reasonable and necessary" rested with the state, not the

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plaintiffs. And, the statute was found unconstitutional by this Court because the state failed to carry that burden.

For the same reasons expressed by this Court in *AFT Michigan*, the circuit court should have denied the defendants' motion to dismiss plaintiffs' Contract Clause claims. The reasons offered by the circuit court for concluding that this aspect of plaintiffs' constitutional claim should have been dismissed as a matter of law were erroneous.

C. The trial court erred in its application of the three part test to determine if retroactive application of the 2019 amendments would violate the Contract Clause and improperly relied upon on *Bronson* and *Romein* in dismissing plaintiffs' case.

The circuit court in its November 13, 2020 decision granting defendants' motion to dismiss first erroneously concluded that plaintiffs could not establish an essential ingredient of a Contract Clause claim – the existence of a contract. Relying on the Court of Appeals decision in *Bronson Health Care Group, Inc v State Auto Property & Casualty Ins Co*, 330 Mich App 338; 948 NW2d 115 (2019), the circuit court suggested that the relationship between plaintiffs and their insurers was governed exclusively by the provisions of the no-fault act and, as such, was in no way contractual. *See* Plaintiffs-Appellants' Appendix p. 6a. In *Bronson*, the Court of Appeals ruled:

> PIP benefits are mandated by the no-fault act, and a claimant's entitlement to PIP benefits is therefore based in statute, not in contract. . . "Because [PIP] benefits are mandated by the no-fault statute, the statute is the 'rule-book' for deciding the issues involved in questions regarding awarding those benefits." *Id*. (citation omitted). Therefore, "our task is to interpret the statute and not the policy. Where insurance policy coverage is directed by the no-fault act and the language in the policy is intended to be consistent with that act, the language should be interpreted in a consistent fashion, which can only be accomplished by interpreting the statute, rather than individual policies.
>
> 330 Mich App at 342-343.

In its decision granting defendants' motion to dismiss, the circuit court found this language to be "controlling" on plaintiffs' Contract Clause claim, since "a challenge to the constitutionality

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of the no-fault act based on the language of the contract rather than the Act itself must fail." *See* Plaintiffs-Appellants' Appendix p. 6a.

The circuit court seriously erred in rejecting plaintiffs' Contract Clause claim on the basis of this language from the Court of Appeals decision in *Bronson*. The fact is that there were policies of insurance in existence between the plaintiffs and the defendants at the time Ms. Andary and Mr. Krueger sustained their accident-related injuries. And it is axiomatic that, if there had been no auto insurance policy in existence between Ms. Andary and USAA when she was injured, *USAA would have no obligation to pay any of the no-fault benefits that it has paid on her behalf over the last five years*. The same holds true for Mr. Krueger. If he was not covered by a Citizens insurance policy as of March 10, 1990 when he sustained his injuries, *Citizens would not have paid any of the no-fault benefits it has been obligated to pay for the last thirty years*. Thus, contrary to the circuit court's conclusion, the existence of contracts of insurance between Ms. Andary and Mr. Krueger and their insurer is absolutely essential to the benefits that they are claiming herein.

There is without question a relationship between no-fault insurance policies issued in this state and the no-fault act; that act prescribes the minimum no-fault coverage that each Michigan automobile insurance policy must provide. *See Rohlman*, 442 Mich at 530, fn. 10. But, with certain exceptions not applicable here, for a party to claim no-fault benefits against an insurer, there *must* be a contractual relationship between that insurer and the insured.

The circuit court in its November 13, 2020 opinion also seriously misapplied the three part test that this Court had adopted in Contract Clause cases. The first part of that test calls for consideration of whether there is a substantial impairment of contractual relationship through the challenged legislation.

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The circuit court, relying on the Supreme Court's decision in *Romein v General Motors Corp*, 436 Mich 515; 462 NW2d 555 (1990), concluded that plaintiffs could not establish the element of substantial interference with a contractual interest. *See* Plaintiffs-Appellants' Appendix pp. 7a – 8a. *Romein* does not support such a conclusion. *Romein* rejected the defendant auto manufacturers' constitutional challenges to 1987 amendments to the Workers' Disability Compensation Act, MCL 418.534(17)-(20). Those amendments prohibited the coordination of workers' compensation benefits for employees injured before its effective date and required the repayment plus interest of all benefits withheld as a result of coordinating benefits between 1982 and 1987 from disabled employees who were injured before 1982. 436 Mich at 520.

The auto manufacturers in *Romein* challenged these amendments on several constitutional grounds, including a claim based on the Contract Clause. First and foremost, it should be noted that *Romein* involves a situation that is entirely different than plaintiffs' situation in the case at bar. *Romein* involves workers' compensation benefits, which are not payable to accident victims pursuant to insurance policies that those victims purchased. Rather, workers' compensation benefits are paid based on policies bought by an employer, not the accident victim. An individual who is entitled to workers' compensation benefits does not have a contract with the workers' compensation insurer, and thus does not have a constitutional right to be protected from the impairment of contractual obligations owing to that individual. In the instant case, Ms. Andary and Mr. Krueger personally purchased no-fault insurer contracts from defendants and therefore they have a constitutional right to be protected from the impairment of the contractual obligations owed to them by the insurers who sold those contracts. Accordingly, any reliance on *Romein* that equates workers' compensation policies with no-fault insurance policies is misplaced.

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Even if the Court is not persuaded by this fundamental difference between workers' compensation policies and no-fault policies, the trial court's reliance on *Romein* is still misplaced. In *Romein*, this Court rejected the defendants' challenge under the Contract Clause of the Michigan and United States Constitutions but noted that "[o]ne factor in determining the extent of the impairment [of contract] is the degree of regulation in the industry the complaining party has entered." And, pointing to the fact that "the legislative resolution in early 1982 purporting to interpret §354 put the [employer] on notice that the Legislature might seek to prevent the coordination of benefits for pre-1982 injuries if efforts to achieve this result failed in the courts," this Court determined in *Romein* that "[s]ince the [defendant] employer was aware of the likely alteration of the coordination of benefits provision, the [contractual] impairment cannot be deemed substantial." 436 Mich at 535. Thus, the Court in *Romein* tied the "substantial interference" prong of the defendants' Contract Clause claim to the defendants' expectancy associated with the legislative amendments that they were challenging.

By contrast, in the instant case, plaintiffs did not have years of notice that the Legislature would, for the first time, severely diminish attendant care benefits or, for the first time in the history of the no-fault act, impose fee schedules. In fact, previous efforts to restrict no-fault benefits had been resoundingly defeated in ballot initiatives and valid questions rejected by the voters in 1992 (Proposal B) and in 1994 (Proposal C), both of which were defeated by margins of 62% to 38%. Moreover, as noted previously, the 2019 amendments to the no-fault act were passed swiftly, behind closed doors, and with no opportunity for public comment. Members of the Legislature were not even given the opportunity to comment on the bill and the proposed changes. For this reason, this Court's somewhat vague approach to the Contract Clause claim raised in *Romein* has no application here.

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The circuit court also seriously erred in its application of the second factor that is to be considered in a Contract Clause challenge. That factor involves whether there is a significant and legitimate public purpose for the regulation at issue. The circuit court, citing the Supreme Court's description of the no-fault act in *Shavers v Kelly*, 402 Mich 554; 267 NW2d 72 (1978), concluded that the no-fault act, in general, satisfied this aspect of the Contract Clause test. *See* Plaintiffs-Appellants' Appendix pp. 7a – 8a. But the issue here for purposes of the plaintiffs' Contract Clause claim is not whether the no-fault act in general meets the threshold, but whether the regulation that infringes on an established contractual interest, *i.e.* the 2019 amendments to the no-fault act that are challenged here, meets this test.

Finally, the third part of the test that the circuit court employed in dismissing plaintiffs' Contract Clause claim eliminated what has been an intermediate level of judicial scrutiny in the case law addressing constitutional challenges under the provision. As noted previously, the Contract Clause analysis calls for an intermediate level of scrutiny beyond the rational basis test employed in the context of equal protection and due process analysis. Moreover, the circuit court failed to heed the Supreme Court's recent ruling in *AFT Michigan* regarding the burden that rested with the defendants in this case. *AFT Michigan*, 501 Mich at 939. What the circuit court did in this case was to apply the more deferential test of reasonableness and place the burden on plaintiffs to prove unreasonableness, citing the Court's decision in *Romein* for the principle that "in reviewing economic and social regulation . . . we properly defer to legislative judgment." *See* Plaintiffs-Appellants' Appendix p. 9a.

In their Complaint, plaintiffs have alleged ample facts regarding the unreasonableness of the 55% non-Medicare fee schedule and 56 hour per week limitation on in-home family provided attendant care and the devastating effect these provisions will have on Michigan patients and

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providers. Furthermore, allowing retroactive application of the attendant care provisions of the new law to patients who were injured prior to the 2019 amendments will result in a disruption of the daily care of those patients who receive family provided attendant care exceeding the number of hours of reimbursable family provided attendant care authorized by the new law. This limitation will cause many of these patients to lose access to vital attendant care services and be forced to receive commercial care that is often not as effective or beneficial. Furthermore, the 55% fee schedule will cause many commercial providers to go out of business, causing a shortage of attendant care providers and leaving catastrophically injured patients unable to get the care they need.

D. The trial court improperly granted defendants' motion to dismiss pursuant to MCR 2.116(C)(8) and in doing so, disregarded the sufficient factual evidence alleged by plaintiffs in their complaint.

Finally, in applying the tests that have been developed for the review of either a Contract Clause challenge or a challenge based on the Equal Protection or Due Process Clauses discussed in Section III of this brief, it is also important to consider the procedural posture of this case and the basis of the defendant's motion.

The defendants' motion to dismiss was predicated exclusively on MCR 2.116(C)(8). It was filed at the very earliest stage of these proceedings, before any discovery had been conducted. A motion filed under MCR 2.116(C)(8) "tests the legal sufficiency of the complaint on the basis of the pleadings alone." *Corley v District Board of Education*, 470 Mich 274, 277; 681 NW2d 342 (2004). The Supreme Court in its recent decision in *El-Khalil vs Oakwood Healthcare, Inc*, 504 Mich 152; 934 NW2d 665 (2019), outlined the standards that govern a court's review of a motion filed under MCR 2.116(C)(8). In considering such a motion, "a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone." 504 Mich at 160. The Court must

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also construe the allegations contained in the complaint in the light most favorable to the plaintiffs. *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d 121 (2008). Dismissal of a case under MCR 2.116(C)(8) is proper only if plaintiffs' claims are "so clearly unenforceable that no factual development could possibly justify recovery." *El-Khalil*, 504 Mich at 160. *Kuznar*, 481 Mich at 176; *Haynes v Neshewat*, 477 Mich 29, 34; 729 NW2d 488 (2012).

Thus, at this early stage in this litigation, the sole question presented to the circuit court was whether the allegations in plaintiffs' complaint are legally sufficient, not whether there are sufficient facts to support these claims. Plaintiffs have alleged more than ample facts that establish the clear merits of plaintiffs' claims and the devasting effects that §§3157(7) and (10) will have on seriously injured motor vehicle accident victims and Michigan providers. For all of these reasons, this Court should hold that the changes to the no-fault act that go into effect on July 1, 2021 will violate the Michigan Constitution's contract clause.

II. THE 2019 AMENDMENTS TO MCL 500.3157(7) AND (10) CHALLENGED IN THIS CASE CANNOT BE RETROACTIVELY APPLIED TO PLAINTIFFS UNDER ESTABLISHED PRINCIPLES OF MICHIGAN CONTRACT LAW, AND THEREFORE THE CIRCUIT COURT ERRED IN REFUSING PLAINTIFFS REQUEST TO AMEND THEIR COMPLAINT AND ERRED IN REJECTING THAT SPECIFIC CLAIM.

Plaintiffs' original complaint was confined solely to claims based on the Michigan Constitution. In responding to the defendants' motion for summary disposition, plaintiffs requested the right to amend their complaint to allege another cause of action. Plaintiffs sought to raise a claim under Michigan contract law. Plaintiffs argued in responding to the defendants' motion that, quite apart from the constitutional claims they were raising based on the Contract Clause, basic principles of Michigan contract law as developed by the Supreme Court precluded

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application of the legislative changes to the no-fault act that will go into effect in July 2021 to the plaintiffs, whose contractual rights vested long before those legislative changes take effect.

The circuit court granted the defendants' motion and dismissed plaintiffs' constitutional claims in its November 13, 2020 opinion. In doing so, the circuit court did not address plaintiffs' request to amend their complaint to allege a purely contract-law based theory. As a result, following the issuance of the circuit court's November 13, 2020 decision, plaintiffs moved for reconsideration and further moved to amend their complaint under the authority of MCR 2.116(I)(5).

The circuit court denied that motion in its February 18, 2021 order. *See* Plaintiffs-Appellants' Appendix pp. 25a – 28a. The circuit court denied plaintiffs' request to amend on the ground that adding the non-constitutional claim would be futile. The circuit court determined that the proposed amendment was futile for the reasons the court had given in its November 13, 2020 ruling: "The Court finds that the purportedly 'new contract claim' has already been addressed in the Court's prior ruling. . ." *See* Plaintiffs-Appellants' Appendix p. 27a.

The circuit court's rationale for rejecting plaintiffs' proposed amendment was obviously wrong. In its original decision granting defendants' motion to dismiss, the circuit court was addressing the question of whether applying the 2019 changes to the no-fault law to the plaintiffs would violate their rights under the Contract Clause of the Michigan Constitution. As discussed earlier, the circuit court ruled that the plaintiffs' constitutional claim failed because, in the circuit court's view, plaintiffs could not meet the three-part test applicable to a claim of unconstitutionality based on the Contract Clause. The circuit court, in its November 13, 2020 opinion granting defendants' motion to dismiss, was not called upon to address the question of

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whether Michigan contract law would prohibit application of the 2019 amendments to the no-fault act to the plaintiffs.

Plaintiffs' proposed contract claim theory which they sought to add to this case by amendment was primarily based on legal principles developed by the Supreme Court in *Lafontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26; 852 NW2d 78 (2014). In that case, the plaintiff was an authorized dealer of vehicles manufactured by Chrysler under a contract that the parties signed in 2007. At the time the parties' contract was entered into, a provision in a Michigan statute, the Motor Vehicle Dealer Act (MVDA), MCL 445.1566(1)(a), prohibited a vehicle manufacturer from contracting with another dealer to sell its vehicles within a six mile radius of an existing dealership. In 2010, the MVDA was amended and the distance between an existing dealership and a potential new dealership was extended to nine miles.

Following the 2010 amendment of the MVDA, Chrysler sought to enter into an agreement with a new dealership that was to be located more than six miles from the plaintiff's dealership, but less than nine miles from where plaintiff's dealership was located. Plaintiff sued Chrysler to block the new dealership, arguing that the nine mile radius reflected in the 2010 amendment of the MVDA precluded the proposed new dealership location.

As in the instant case, *Lafontaine* involved parties who were in a contractual relationship that was governed in part by a statutory overlay. The issue presented to this Court in *Lafontaine* was which version of the MVDA would apply to plaintiff's claim, the six-mile radius provided in the pre-2010 MVDA or the nine-mile radius contained in the statute in its amended form.

The Supreme Court held in *Lafontaine* that the parties' interests were governed by the contract that they entered into in 2007. The Court concluded that the six-mile radius in effect at

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the time the parties entered into that contract would control based on a principle of law that the Court characterized as "well settled":

> "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*." The doctrine asserted in that case . . . applies to laws in reference to which the contract is made, and forming a part of the contract.
>
> 496 Mich at 35-36 (emphasis in original), quoting *Crane v Hardy*, 1 Mich 56, 62-63 (1848); *see also VonHoffman v City of Quincy*, 71 US 535, 540 (1866).

Particularly pertinent to this case, the Court in *Lafontaine* found that application of the 2010 amendments of the MVDA would constitute the inappropriate retroactive application of that statute. Thus, the Court noted in *Lafontaine* that retroactive application of a statute, "presents problems of unfairness . . . because it can deprive citizens of legitimate expectations and upset settled transactions," *Id.*, at 38, as well as "impair vested rights acquired under existing laws. . ." *Id.*, at 39. These are precisely the same concerns that are presented to the plaintiffs in this case.

Lafontaine teaches that the contracts that plaintiffs had with their insurers prior to their accidents *must be read in conjunction with the law as it existed at the time those contracts were entered into*. *cf Rohlman*, 442 Mich at 525, fn. 3 (in construing a case based on the no-fault act, "[t]he policy and the statutes relating thereto must be read and construed together as though the statutes were a part of the contract."). This means that, under the holding of the Supreme Court in *Lafontaine*, the policies that the plaintiffs entered into with the defendants have to be read as incorporating the provisions of the no-fault act as they existed as of the date those contracts were entered into. Pursuant to *Lafontaine*, plaintiffs' contractual rights are not to be interpreted as incorporating legislative changes made years after the plaintiffs sustained their injuries. To allow

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otherwise would be permitting defendants to take away plaintiffs' vested contractual rights that they bought and paid for and would result in an unfair and unjust windfall to their insurers.

Plaintiffs' contract-based theory that they sought to add by amendment represented a significant non-constitutional claim that should have been allowed to be pleaded in this case. Contrary to the Circuit Court's conclusion, the amendment of plaintiffs' complaint to add such a contract theory would not be futile.

III. THE 2019 AMENDMENTS TO MCL 500.3157(7) AND (10) VIOLATE THE DUE PROCESS AND EQUAL PROTECTION RIGHTS OF PLAINTIFFS AND MICHIGAN PATIENTS AND PROVIDERS UNDER THE MICHIGAN CONSTITUTION.

In their complaint, the plaintiffs also challenged the 2019 amendments to §§3157(7) and (10) based on the Michigan Constitution's Due Process Clause, Const. 1963, art. 1, §17, and the Equal Protection Clause, Const. 1963, art. 1, §2.

The Michigan Constitution's Equal Protection Clause is coextensive with the federal clause. *Doe v Dep't of Soc Servs*, 439 Mich 650, 670–71; 487 NW2d 166 (1992). Strict scrutiny applies to equal protection challenges when the challenged legislation creates a classification scheme that impinges upon the exercise of a fundamental right. *Id.*, at 662.

> [I]n two situations the equal protection guarantee is less tolerant of legislation that creates a classification scheme—when the classification is based upon suspect factors (such as race, national origin, or ethnicity), or when the legislation that creates the classification impinges upon the exercise of a fundamental right. *Plyler v. Doe*, 457 U.S. 202, 216–217, 102 S. Ct. 2382, 2394–2395, 72 L. Ed. 2d 786 (1982). In these situations, a higher standard of review, strict scrutiny, is applied. A statute reviewed under this strict standard will be upheld only if the state demonstrates that its classification scheme has been precisely tailored to serve a compelling governmental interest. *Id*.
>
> *Doe*, 439 Mich at 662.

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Where the classification at issue is not based on suspect factors such as race, national origin, ethnicity, or a "fundamental right," or on such bases as illegitimacy and gender, rational basis review applies. *Phillips v Mirac, Inc*, 470 Mich 415, 432–33; 685 NW2d 174 (2004). "Under this test, 'courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose.'" *Id*. "This highly deferential standard of review requires a challenger to show that the legislation is arbitrary and wholly unrelated in a rational way to the objective of the statute." *Id*.

Counts II and III of plaintiffs' complaint alleged that application of the attendant care limitations set out in §3157(10) to Ms. Andary violated her fundamental due process and equal protection right to privacy, as it forces her to bring strangers into her home to provide her with very personal and intimate care, such as bathing, dressing, and assisting with using the bathroom. *See* Plaintiffs' Complaint ¶¶66, 72, 75, Plaintiffs-Appellants' Appendix pp. 29a – 87a. Count III further alleges that §3157(10) creates two different classes of motor vehicle accident victims that require in-home attendant care: a) persons who receive in-home family provided attendant care and b) persons that receive in-home commercial attendant care, and discriminates against persons that receive in-home family provided attendant care, such as Ms. Andary, by putting a 56 hour per week cap on the amount of reimbursement, whereas persons who receive in-home commercial attendant care are not subject to any such limitation. *Id.*, ¶73. Counts II and III allege that the State of Michigan has no compelling interest to infringe upon Ellen Andary's fundamental right to privacy and no compelling interest to treat her more harshly than other similarly situated motor vehicle accident victims by restricting her right to receive reasonably necessary in-home family provided attendant care. *Id.*, ¶¶ 69, 76.

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Count V alleged that Ellen Andary's fundamental due process right to privacy is violated by the fee schedule limitation of §3157(7) because the dramatic reduction in the amount her insurer is obligated to reimburse her providers will deter providers from wanting to treat her, thereby impairing her access to medical care. *Id.*, ¶ 86. Count V alleged that the State of Michigan has no compelling interest to infringe upon Ms. Andary's fundamental right to privacy and no compelling interest to impair her access to care. *Id.*, ¶ 86. Count VII alleged the same violations as Count V, but as to Mr. Krueger. *Id.*, ¶¶ 98, 99.

Count VI alleged that Ellen Andary's fundamental equal protection right to privacy is violated by the fee schedule limitations of §§3157(2) and (7) in that they treat similarly situated motor vehicle accident victims in a dissimilar manner, thereby imposing a substantial disadvantage on those who receive reasonably necessary products, services, and accommodations for their care, recovery, or rehabilitation that are not compensable by Medicare, such as Ms. Andary. *Id.*, ¶¶91, 93. Count VI alleged that the State of Michigan has no compelling interest to infringe upon Ms. Andary's fundamental right to privacy and no compelling interest to treat her more harshly than other similarly situated motor vehicle accident victims with respect to provider reimbursement rates for reasonably necessary products, services, and accommodations under MCL 500.3157(7). Complaint, ¶94. Count IX alleged the same violations as Count VI, but as to Mr. Krueger. *Id.*, ¶¶109-113.

Count XII alleged that application of the fee schedule limitations of §§3157(2) and (7) discriminates against medical providers, such as Eisenhower Center, that render reasonably necessary products, etc., to motor vehicle accident victims that are not compensable under the Medicare laws, i.e., it is reimbursed at a rate of 52.5% - 55% of the amount charged for those products, etc., on January 1, 2019, whereas medical providers that render reasonably necessary

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products, etc., that would be compensable under the Medicare laws are reimbursed at a rate of 190% - 200% of the amount compensable by Medicare. *Id.*, ¶ 128. MCL 500.3157(2) and (7) create two classes and treat similarly situated Michigan medical providers in a dissimilar manner. *Id.*, ¶129. Count XII further alleges that the State of Michigan has no rational basis for treating plaintiff Eisenhower Center more harshly than medical providers that render reasonably necessary products, etc., that are compensable by Medicare. *Id.*, ¶130.

Count XI alleges that Eisenhower Center's due process right to property, including the right to own a business, is violated by §3157(7) as the application of oppressive, unsustainable, government imposed fee schedules will cause it go out of business. *Id.*, ¶120. Count XI further alleges that the State of Michigan has no rational basis for imposing such overbroad, overreaching, and unsurvivable fee schedules. *Id.*, ¶125.

A. The attendant care and fee schedule limitations violate Plaintiff Andary and Plaintiff Krueger's fundamental right to privacy and thus should be analyzed using strict scrutiny.

Counts II, III, V, VI, VII, and IX assert violations of Ms. Andary's and Mr. Krueger's fundamental right to privacy. Plaintiffs acknowledge that none of their equal protection claims implicate a suspect classification. However, plaintiffs have alleged that these claims do involve a fundamental right – the right to privacy. Strict scrutiny is required in an equal protection claim that involves *either* suspect classification *or* a fundamental right. *Doe*, 439 Mich at 662. Accordingly, plaintiffs have alleged that their equal protection rights are being violated by the infringement upon fundamental rights, which will be discussed further in the next section of this brief, must be analyzed under strict scrutiny.

A "fundamental" privacy right is an "individual's right to make 'personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.'" *Id.*,

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quoting *Lawrence v Texas*, 539 US 558, 574 (2003); *People v Jensen*, 231 Mich App 439, 457; 586 NW2d 748 (1998). The second type of privacy right is "an individual's 'interest in avoiding disclosure of personal matters.'" *Jenkins*, 513 F3d at 590 (quoting *Whalen*, 429 US at 599). Only the first type of privacy right is at issue here, specifically, the fundamental privacy right of Ellen and Michael Andary to make personal decisions relating to family relationships in the context of the in-home attendant care provided to Ellen Andary by family members as opposed to strangers.

Courts are required "to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect." *Obergefell v Hodges*, 576 US 644 (2015). In *Obergefell*, a substantive due process and equal protection challenge to Michigan's prohibition of same sex marriages, the Supreme Court overruled prior decisions and held that the right to marry is a fundamental right inherent in the liberty of the person, and that under the Fourteenth Amendment's Due Process and Equal Protection Clauses, couples of the same-sex may not be deprived of that right and that liberty. *Id*., 135 S Ct at 2604-2605.

There are a number of cases on the subject of due process rights associated with family relationships. These cases include *Troxel v Granville*, 530 US 57 (2000), in which the United States Supreme Court held that the state of Washington's nonparent visitation statute was unconstitutional because it allowed the trial court to order visitation without granting deference to the parents' decisions, contrary to the parents' fundamental right and liberty interest in managing the care, custody, and control of their children. *Id.*, at 70–74. Another significant case in this area is *Moore v City of East Cleveland*, 431 U.S. 494 (1977), in which the Supreme Court held that a local zoning ordinance violated fundamental rights to family relationships by prohibiting a grandmother from residing with two grandsons who were cousins.

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In *Brinkley v Brinkley*, 277 Mich App 23; 742 NW2d 629 (2007), the Court of Appeals addressed whether a statute that denied the plaintiff grandparents' rights to visitation with their grandchild, where the parents of the child did not consent, violated their fundamental substantive due process right to maintain a familial relationship. The court held that strict scrutiny did not apply because the statute "does not authorize governmental interference into a family relationship. Instead, it restricts a court's authority to interfere with parental decisions concerning grandparenting time." *Id.*, at 29-31.

In the instant case, Count II of plaintiffs' complaint clearly states a viable claim that the attendant-care limitations imposed by §3157(10) constitute governmental interference in the Andarys' familial relationship rights by capping the amount of hours that family members may provide Ms. Andary with in-home attendant care at 56 hours per week. *See* Plaintiffs' Complaint, ¶¶21, 41, 42-45, 67-70, Plaintiffs-Appellants' Appendix pp. 29a – 87a.

Defendants should not have been awarded judgment as a matter of law on Counts II, V, and VIII. These Counts state viable claims that plaintiffs' rights to privacy are burdened by the attendant-care limitations, §3157(10), and the fee schedule limitations, §3157(7).

B. Even if rational basis applies, defendants were still not entitled to the dismissal of plaintiffs' equal protection and due process claims, especially at this early stage in the litigation.

Even if the Court were to ultimately determine that the constitutionality of the 2019 amendments to the no-fault act was to be governed by a rational basis test, summary disposition on the basis of MCR 2.116(C)(8) should not have been granted at this early stage of the case. Again, in addressing such a motion, all well-pleaded factual allegations in plaintiffs' complaint must be accepted as true. *El-Khalil*, 504 Mich at 160. Under the rational basis standard, the constitutionality of a statute will be upheld where it is "rationally related to a legitimate

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government purpose." *Phillips*, 470 Mich at 432. But, as the Supreme Court recognized in *Shavers*, "the facts upon which the existence of a rational basis for the legislative judgment are predicated 'may properly be made the subject of judicial inquiry.'" 402 Mich at 615.

Judicial inquiry into whether the 2019 amendments to the no-fault act are "rationally related to a legitimate government purpose" is particularly important in this case in light of the process by which these amendments came to be. These amendments were adopted with extraordinary speed, without deliberation into the implications of the changes being made to the no-fault act and without public input.[3] This case presents the unique situation where it can be said in light of the manner in which the 2019 amendments to the no-fault act took place that the Legislature had no time to acknowledge whether the changes they were making were "rationally related to a legitimate government purpose." Since the Legislature failed to do so, it is particularly important that the courts perform the role that the *Shavers* Court outlined and allow factual development of the plaintiffs' equal protection and due process claims under a rational basis test.

Indeed, the defendants own analysis of the equal protection arguments in their own motion to dismiss appears to emphasize the lack of reasoned support for the choices made by the Legislature in passing the 2019 amendments. Defendants asserted in their motion to dismiss that the rational basis test was satisfied on two grounds; the Legislature acted to either cut the cost of automobile insurance or to remove fraud from the no-fault system. The suggestion that cutting the cost of insurance could serve as a rational basis for the limitation on in-home family-provided

[3] Judicial deference to legislative judgments in the constitutional setting is in part based on the fact that "the Legislature possesses superior tools and means for gathering facts, data, and opinion and assessing the will of the public." *Wells Fargo Bank NA v Cherryland Mall Ltd Partnership*, 300 Mich App 361, 375; 835 NW2d 593 (2013). The deliberative resources available to the Legislature, however, had no role to play in the passage of the 2019 legislation at issue in this case.

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attendant care is difficult to sustain since the professional care that would replace family members would likely be more expensive than that provided by family and friends. Defendants in their motion to dismiss seemed to grasp this fact when the best they can offer is that "[t]here is certainly *a possibility*" that . . . limiting family provided attendant care could reduce the cost of insurance and its abuse." Defs' Brf., at 13 (emphasis added).

The defendants were similarly less-than-assured that the other rationale for the 2019 changes to the act that they offer – cutting the cost of medical care covered by the no-fault act – will be achieved. At another point in their brief they acknowledged that this long-term goal "cannot yet be fully assessed . . ." Defs' Brf., at 17.

Furthermore, the abundance of facts alleged by plaintiffs in their complaint shows that even if rational basis governs, the sheer unreasonableness of these draconian provisions and devastating effect they will have on Michigan patients and providers demonstrates that there is no rational basis for implementing such provisions. Surely there are better ways to reduce the cost of no-fault insurance than forcing hundreds of providers out of business and taking away vital and life-saving care for thousands of catastrophically injured patients. Thus, even if plaintiffs' allegations of fundamental rights were disregarded, and their equal protection and due process challenges were governed solely under the rational basis test, the defendants were still not entitled to the dismissal of those claims, especially at this early stage in the litigation.

C. Plaintiffs have standing to bring allegations of a Due Process and Equal Protection violations on behalf of all Michigan patients and providers.

Counts XIII through XVIII of plaintiffs' complaint alleged that the future application of the attendant care limitations imposed in §3135(10) and the fee schedules of §3135(7) should be found unconstitutional under the various constitutional provisions that the plaintiffs have named in this case. The trial court held that plaintiffs lack standing to raise these issues.

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MCR 2.605 governs declaratory judgments and provides that a court may grant declaratory relief "in a case of actual controversy within its jurisdiction . . . whether or not other relief is or could be sought or granted." MCR 2.605(A). "The existence of an actual controversy is a condition precedent to invocation of declaratory relief and this requirement prevents a court from deciding hypothetical issues." *Detroit v Michigan*, 262 Mich App 542, 550; 686 NW2d 514 (2004).

The Michigan Supreme Court defined the test for standing in *Lansing Schools Education Association v Lansing Board of Education*, 487 Mich 349; 729 NW2d 686 (2010). Prior to its decision in *Lansing Schools*, the Court had issued two decisions that interpreted the concept of standing rigidly and vested that doctrine with a constitutional component. *See Lee v Macomb County Board of Commissioners*, 464 Mich 726; 629 NW2d 900 (2001); *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004). In *Lansing Schools*, the Supreme Court overruled *Lee* and *Cleveland Cliffs*, and restored the standing to its traditional "limited, prudential approach." 487 Mich at 355.

The Supreme Court explained in *Lansing Schools* that the purpose of the standing requirement is "to assess whether the litigant's interest in the issue is sufficient to 'assure sincere and vigorous advocacy." *Id.*, *quoting Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629, 633; 537 NW2d 436 (1995). In returning standing to its prudential, as opposed to constitutional, roots, the Court in *Lansing Schools* emphasized that the traditional application of this doctrines was "one of discretion and not of law." 487 Mich at 355. The Court in *Lansing Schools* reached the following holding with respect to standing:

> We hold that Michigan standing jurisprudence should be restored to a limited, prudential doctrine that is consistent with Michigan's long-standing historical approach to standing. Under this approach, a litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion,

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> determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.
>
> *Id*. at 372.

Plaintiffs can satisfy the standing requirements outlined in *Lansing Schools* to bring the claims stated in the last six counts of their complaint. There is, without question, a "legal cause of action," raised in these counts premised on the claims that application of the 2019 amendments to §§3135(7) and (10) violate various provisions of the Michigan Constitution. Moreover, plaintiffs have an interest in these issues that is distinct from the "category at large."

Under the limited, prudential approach to standing adopted by the Supreme Court in *Lansing Schools*, the trial court's ruling that plaintiffs did not have standing the bring these claims was improper.

IV. APPELLATE CASE LAW DECIDED SUBSEQUENT TO THE TRIAL COURT'S RULINGS IN THIS CASE STRONGLY INDICATES THAT THE PROVISIONS OF THE 2019 LEGISLATIVE AMENDMENTS, SUCH AS MCL 500.3157(7) AND (10) SHOULD NOT BE RETROACTIVELY APPLIED BECAUSE THESE PROVISIONS CONTAIN NO SUFFICIENTLY SPECIFIC "EXPRESSION OF INTENT" TO HAVE THE STATUTE APPLY RETROACTIVELY, THEREBY INVOKING THE COMMON LAW PRESUMPTION THAT THOSE PROVISIONS CAN ONLY BE APPLIED PROSPECTIVELY.

After this case was briefed and argued in the trial court, a panel of this Court issued the first appellate decision dealing with whether a provision of the 2019 amendments to the no-fault act could be applied retroactively. That issue was presented and decided by the Court of Appeals in its unpublished decision in *Jones v Esurance Ins Co*, Court of Appeals No. 351772; 2021 WL 745509 (2021) (Plaintiffs-Appellants' Appendix pp. 134a – 140a). In that case, the Court held that the newly added amendment to MCL 500.3145, which added a statutory tolling provision to the

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one-year-back rule, ***could not*** be applied retroactively to claims that existed prior to the enactment of the 2019 amendments because the legislature did not specifically express its intent that the 2019 statutory amendments be applied retroactively.

Even though this issue was not specifically raised in the court below because *Jones* had not been decided, the principle embraced by the Court in *Jones* is clearly implicated in the case at bar and therefore should be considered by this Court in connection with the retroactivity claims raised by plaintiffs in this case. This is particularly true because if the statutory changes that are at issue in this case are interpreted to not have retroactive application because the legislature did not express such an intent as noted in *Jones*, then the Article 1 Section §10 constitutional Contact Clause claims made by plaintiffs in this case can be avoided. This Court clearly has the authority to consider claims that were not adjudicated before "when necessary to a proper determination of a case." *Klooster v City of Charlevoix*, 488 Mich 289, 310, 795 NW2d 578 (2011) (quoting *Prudential Ins Co of America v Cusick*, 369 Mich 269, 290, 120 NW2d 1 (1963). In the context of the case at bar, this Court should thoroughly examine the retroactivity question under all relevant legal principles so that the decision that emanates from this Court is ultimately based upon the most thorough and complete legal analysis.

In *Jones*, the Court held that the 2019 amendment to §3145 could not be applied retroactively because the legislature did not specifically state it had retroactive effect, thereby triggering the long standing presumption that statute and amendments are presumed to operate prospectively unless the legislature expresses a clear intent in the statute that it applies retroactively. Specifically, the court stated:

> Statutes and statutory amendments are presumed to operate prospectively. Indeed, statutes and amended statutes are to be applied prospectively unless the Legislature manifests an intent to the contrary. The Legislature's expression of an intent to have

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> a statute apply retroactively must be clear, direct, and unequivocal as appears from the context of the statute itself.
>
> *Id.* at p 6 (quoting *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 155-156; 725 NW2d 56 (2006)).

Similarly to the provision of the 2019 amendments at issue in *Jones*, the attendant care limitations and non-Medicare fee schedule provisions of §§3517(7) and (10) do not specifically state a legislative intent to give those provisions retroactive application to motor vehicle accident victims who sustained injuries and whose contractual right to no-fault benefits vested prior to their enactment. Because these amendments do not specify that they are to be applied retroactively, under prevailing Michigan appellate precedent they are presumed to only have prospective effect. Therefore, these provisions cannot be applied to plaintiffs in this case, and other motor vehicle accident victims injured prior to their enactment, to limit attendant care and medical expense reimbursement. This Court should hold consistently with *Jones* that the sections of the new statute which are at issue in the case at bar are not intended to be applied retroactively.

The question of whether to retroactively apply a legislative change to an existing statute is one that the Supreme Court is currently reviewing in *Buhl v City of Oak Park*, 505 Mich 1023, 941 NW2d 58 (2020). In *Buhl*, the statute in question altered the plaintiff's statutory tort cause of action permitting recovery for injuries sustained as a result of defective public sidewalks. This existing cause of action was the subject of a subsequent statutory amendment specifically applying the open and obvious defense. In finding that this subsequent statute could be retroactively applied, the Court noted the previous existence of the open and obvious defense and the legislature's implied intent that it be available to governmental defendants. Therefore, the Court permitted retroactive application of this remedial statute. However, and more importantly, the Court emphasized that the analysis is different when the statute in question purports to alter existing contractual and

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property rights. In those situations, the presumption of prospectivity is very strong. Specifically, the Court stated: "the United States Supreme Court has noted that '[t]he largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance.'" *Id.*, citing *Landgraf v USI Film Products,* 511 US 244, 271 (1994).

The case at bar clearly involves existing contracts that were bought and paid for by plaintiffs that are now being materially altered. Plaintiffs have a settled expectation to continue receiving these vested contractual benefits protected by law. When evaluating whether MCL §§3157(7) and (10) should be applied retroactively to those patients whose contractual rights vested prior to the 2019 amendments, a heightened level of scrutiny should be applied.

The fact that the specific issue dealing with the "presumption against retroactivity" was not explicitly raised in the trial court below, given the potentially dispositive relevance of that issue, this Court should now give it full consideration. In fact, in a previous published opinion by this Court in *Health Care Ass'n Workers Comp Fund*, 265 Mich App at 240, this Court held that the failure to raise, in the trial court, the question of whether a statute could be retroactively applied, should not result in the appellate court refusing to fully consider that issue when its resolution is particularly significant to fully and properly adjudicating the case. In that regard, the Court stated: "[d]espite the error in presentation [of the retroactivity issue], we will consider the merits of the issue because we have all the facts and law before us, and it is a significant issue." *Id.* at 243. Similarly, in order for this Court to thoughtfully and completely adjudicate the critically important retroactivity issue presented in the case at bar, it is only logical that the Court would first address whether the "presumption against retroactivity" should be applied. If it does, that would then avoid the necessity to consider the constitutional and other common law challenges raised below. As

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stated by this Court in *Health Care Ass'n Workers Comp Fund*, the failure to raise an issue dealing with statutory retroactivity is properly considered by an appellate court even if it was not raised in this case, as long as the appellate court has received proper briefing of the applicable facts and law. That certainly is the case in this litigation and therefore, this important issue must be fully addressed by this Court.

Accordingly, this Court should hold consistently with appellate precedent that the 55% non-Medicare fee schedule and 56 hour per week limitation on in-home family provided attendant care cannot be applied retroactively to patients injured prior to the 2019 amendments because these provisions contain no sufficiently specific expression of intent to apply the statute retroactively.

CONCLUSION AND RELIEF REQUESTED

Based on the foregoing, plaintiffs-appellants, Ellen Andary, *et al*, request that the Court reverse the trial court and hold that: (A) MCL 500.3157(7) and (10) cannot be retroactively applied to the plaintiffs in this case for the reasons stated herein; and (B) those provisions cannot be constitutionally applied to victims injured in the future because to do so would violate the equal protection and due process rights of those victims.

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Dated: May 23, 2021

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

Plaintiffs - Appellants,

Court of Appeals No. 356487

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

v

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

Defendants - Appellees.

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PLAINTIFFS-APPELLANTS' APPENDIX OF EXHIBITS TO BRIEF ON APPEAL

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Description	Appendix Pages
Order Regarding Defendants' Motion to Dismiss dated November 13, 2020	1a – 24a
Order Regarding Defendants' [sic] Motion for Reconsideration and Motion to Amend Complaint dated February 18, 2021	25a – 28a
Complaint for Declaratory Judgment dated October 3, 2019	29a – 87a
Plaintiff Ellen M. Andary's No-Fault Insurance Policy from Defendant USAA	88a – 133a
Jones v Esurance Ins Co, Court of Appeals No. 351772; 2021 WL 745509 (2021)	134a – 140a

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STATE OF MICHIGAN
IN THE 30TH JUDICIAL CIRCUIT FOR INGHAM COUNTY

ELLEN M. ANDARY, a legally-incapacitated adult, by and through her Guardian and Conservator, MICHAEL T. ANDARY, M.D., and 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,

v

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

Defendants.

ORDER REGARDING DEFENDANTS' MOTION TO DISMISS

CASE NO. 19-738-CZ

HON. WANDA M. STOKES

At a session of said Court
held in the city of Mason, county of Ingham,
this 13 day of November, 2020.

PRESENT: HON. WANDA M. STOKES

This case comes before the Court for a hearing on Defendants USAA Casualty Insurance Company and Citizens Insurance Company of America's Motion to Dismiss Plaintiffs Complaint for Declaratory Relief pursuant to MCR 2.116(C)(8) for failure to state a claim for which relief can be granted. The Plaintiffs complaint, with Counts I through XVIII, seeks a declaration under MCR 2.605 that MCL 500.3157(2), (7), and (10), as amended by Public Acts 21 and 22 of 2019, implicate constitutionally protected fundamental rights in violation of the Michigan Constitution.

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Plaintiffs ask that Defendants be prohibited from enforcing these new provisions as to any Michigan medical provider.

The Court received nine briefs of Amicus Curiae submitted by various interested Michigan entities and their unique arguments are addressed herein.

FACTS/BACKGROUND

This action is being brought by Plaintiffs Ellen M. Andary ("Andary") and Philip Krueger ("Kruger") represented by their Guardians Michael Andary, MD and Ronald Krueger, respectively. Andary and Krueger are legally incapacitated adults who suffered traumatic brain injuries arising from separate motor vehicle accidents in 2014 and 1990 respectively. They were both passengers in a motor vehicle and sustained serious injuries which implicates the Michigan No-Fault Statute. Andary receives in-home attendant care administered by her physician-husband, family, and friends. Krueger resides at the Eisenhower Center, where he receives long-term care and rehabilitation services. Moriah, Inc., d/b/a Eisenhower Center is also a Plaintiff in this case.

The Eisenhower Center is a care facility that provides inpatient living accommodations to individuals suffering from traumatic brain injuries. Approximately 130 of the facility's 156 patients are motor vehicle accident victims whose care is funded by no-fault personal protection insurance ("PIP") benefits under 3107(1)(a) of the Michigan No-Fault Act. The specifics of the care provided by Eisenhower are detailed in Plaintiff's brief.

The Defendants in this action are USAA Casualty Insurance Company ("USAA") and Citizens Insurance Company of America ("Citizens"). USAA and Citizens are the insurers providing automobile coverage and required benefits to the various plaintiff's under the Michigan No-Fault Act.

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The Michigan No-Fault Act ("No-Fault Act" or "the Act") MCL 500.3101 *et seq.*, was originally adopted on October 1, 1973. On May 30, 2019, the Michigan Legislature enacted amendments to the Act as Public Act 21 ("PA 21") and 22 ("PA 22"), which became effective on June 11, 2019. Some of the changes went into effect on June 11, 2019 and additional changes, which are the subject of this dec action, will go into effect on July 1, 2021. The new changes include limitations in family provided attendant care services rendered by family-members and limitations on no-fault insurer's obligation to reimburse rehabilitation centers' and other care providers' expenses rendered for the care, recovery, or rehabilitation of motor vehicle accident victims by adopting fee schedules. The fee schedules are based on Medicare compensation rates, or, where Medicare does not cover a service, a minimum 45% reduction from the rate the provider charged for the service as of January 1, 2019. These limitations are expected to apply to individuals injured in motor vehicle accidents prior to June 11, 2019.

PROCEDURAL POSTURE

Plaintiff's eighteen-count Complaint for Declaratory Judgment alleges that the statutory changes to the No-Fault Act violate the Michigan constitution by interfering with rights vested under contracts that became executory before the amendments were enacted, by depriving insured parties of their privacy and bodily integrity rights without due process of law, and by treating patients and providers differently based on whether Medicare covers the service at issue, in violation of the Michigan constitution's equal protection guarantees.

In lieu of an answer, Defendants filed the instant motion to dismiss under MCR 2.116(C)(8) asserting that Plaintiffs have failed to state a claim for which relief can be granted. Defendants four primary arguments are: (1) that the No-Fault reform is constitutional because it bears a

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reasonable relationship to a permissible legislative objective; (2) that Plaintiffs' claims related to the Right to Privacy, Right to Bodily Integrity, Liberty Interest in Providers' Fees, and Property Interests fail as fundamental rights; (3) that the purported constitutional violations related to the Contract Clause are invalid because PIP benefits are governed by the No-Fault Act, rather than by contract; and (4) that Plaintiffs lack standing to assert the constitutional rights of others.

In addition to the parties' motions, the Court reviewed the nine briefs of Amicus Curiae submitted by various interested Michigan entities. The five briefs in support of Defendants' motion were submitted by the American Property and Casualty Insurance Association, National Association of Mutual Insurance Companies, Director of the Department of Insurance and Financial Services (DIFS), City of Detroit, and Michigan Catastrophic Claims Association. DIFS also requested oral argument, which was granted by the Court. The four briefs filed in opposition to Defendants' motion were submitted by the Michigan State Medical Society with the Michigan Osteopathic Association and Michigan Association of Chiropractors, the Brain Injury Association of Michigan; the Michigan Brain Injury Provider Counsel, and the Coalition Protecting Auto No-Fault.

STANDARD

A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the claim on the pleadings alone," taking as true "all well-plead facts and reasonable inferences drawn therefrom," so as "to determine whether the plaintiff has stated a claim on which relief may be granted." *Spiek v DOT*, 456 Mich 331, 337; 572 NW2d 201, 204 (1998); *Markis v Grosse Pointe Park*, 180 Mich App 545, 551; 448 NW2d 352, 355 (1989). Such motions denounce a claim's legal sufficiency and require the court to consider evidence only from the pleadings. MCR 2.116(G)(5); *Maiden v*

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Rozwood, 461 Mich 109, 120 (1999). Further, the factual allegations are construed in a light most favorable to the nonmoving party. *Haywood v Fowler*, 190 Mich App 253, 256; 475 NW2d 458, 460 (1991). "The motion must be granted if no factual development could justify the plaintiffs' claim for relief." *Spiek v DOT*, 456 Mich 331, 337; 572 NW2d 201, 204 (1998) Stated in the alternative, the motion should be denied unless the claims are "so clearly unenforceable that no factual development could possibly justify recovery." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152; 934 NW2d 665 (2019); *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004) (Emphasis added).

ANALYSIS

Th Plaintiffs have filed an eighteen-count complaint which comprises three constitutional arguments that the Court will be addresses separately. Counts II, V, VIII, XI, XIII, and XV assert substantive due process violations. Counts III, VI, IX, XII, XIV, XVI, and XVIII assert equal protection violations, and Counts I, IV, VII, X, and XVII allege contract clause claims in violations of the Michigan constitution. Additionally, the Court will address the issues of standing as it relates and ripeness as they relate to Counts XIII through XVIII.

I. CONSTITUTIONAL CLAIMS

When legislation is challenged in courts on the basis that they are unconstitutional, courts have a duty to presume constitutionality. *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 6; 658 NW2d 127(2003). Further,

> [e]very reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity.

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Phillips v Mirac, Inc, 470 Mich 415, 423; 685 NW2d 174, 179 (2004)(citing *Cady v Detroit*, 289 Mich 499, 505, 286 NW 805 (1939)). While constitutionality is presumed, the Court must determine whether the claims as alleged in the Complaint meet the appropriate standard of review.

A. CONTRACT CLAUSE

Counts I, IV, VII, X, and XVII of the complaint claim that the contract rights of Plaintiffs are impaired by the changes made to the No-Fault Act.

As an initial matter,

> PIP benefits are mandated by the no-fault act, and a claimant's entitlement to PIP benefits is therefore based in statute, not in contract. Because [PIP] benefits are mandated by the no-fault statute, the statute is the 'rule-book' for deciding the issues in questions regarding awarding those benefits. Therefore, our task is to interpret the statute and not the policy. Where insurance policy coverage is directed by the no-fault act and the language in the policy is intended to be consistent with that act, the language should be interpreted in a consistent fashion, which can only be accomplished by interpreting the statute, rather than individual policies.

Bronson Health Care Group, Inc v State Auto Prop & Cas Ins Co, No. 345332, 2019 WL 5849013, at *2 (Mich Ct App, November 7, 2019). This case is controlling and holds that a challenge to the constitutionality of the no-fault act based on the language of the contract rather than the Act itself must fail. The No-Fault Act is the "rule-book" by which conflicts between the Act and insurance policy contract must be resolved. If there are changes to the rule-book itself, in the context of the contract clause, the appropriate interpretive analysis is required.

Echoing the same section of the Federal Constitution, the Michigan Constitution provides that "[n]o bill of attainder, ex post facto law or law impairing the obligation of contract shall be

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enacted." Const 1963, art 1, § 10. The Michigan Supreme Court has adopted a three-pronged test to assist in analysis of claims alleging a violation of the contract clause has occurred:

> The first prong is to determine "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship."
>
> * * *
>
> To the extent, if any, that contractual interests are impaired, the second prong of the Contract Clause test requires that there be a legitimate public purpose for the regulation. This requirement guarantees that rather than merely providing a benefit to special interests, the state is validly exercising its police power.
>
> * * *
>
> The final prong of the Contract Clause test examines the means by which the contracting parties' rights and responsibilities are adjusted.

Romein v Gen Motors Corp, 436 Mich 515, 534–36; 462 NW2d 555, 565–66 (1990)(citing *Allied Structural Steel Co v Spannaus*, 438 US 234, 244; 98 SCt 2716, 2722; 57 LEd2d 727 (1978). In all of the contract-clause-based claims, Plaintiffs allege that the Michigan Legislature's amendments to the No-Fault Act unreasonably altered Plaintiffs' vested contractual rights, "jeopardizing and diminishing" the quality of care they would receive, or the amount of compensation the medical service provider would receive. Each of those arguments will be addressed.

i. SUBSTANTIAL IMPAIRMENT OF CONTRACTUAL RELATIONSHIP

The Michigan Supreme Court has made clear that:

> One factor in determining the extent of the impairment is the degree of regulation in the industry the complaining party has entered. The party to a contract who has entered into a highly regulated industry may not remove their contract from state restrictions merely by making a contract purportedly immune from legal limitation.

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Romein, at 534–35; 565 (citing *Energy Reserves Group, Inc v Kansas Power & Light Co*, 459 US 400, 411; 103 S Ct 697, 704; 74 L Ed 2d 569 (1983)).

As part of the substantial impairment analysis, the Court must consider the degree of regulation in the industry at issue. The *Romein* case involved changes to the workers' compensation system in the late 1980's which substituted recovery through the workers' compensation system for previously available tort remedies. Like in this case, the statutory changes were retroactive and applied to claims that accrued even before the statutory amendments. Workers' compensation and no-fault are obviously separate and distinct areas of law; yet they have undergone similar changes and have similar statutory and contractual schemes. For purposes of the contract clause analysis each presents a statutory regime enacted by the Michigan legislature to largely do away with tort remedies, and instead regulate the industry comprehensively.

The Court in *Romein* essentially held that parties to a contract involving a highly-regulated industry cannot contractually immunize their agreement from changes in the underlying law. Thus, even supposing *ad arguendo* that Plaintiffs' contractual relationship is impaired, their agreement must yield to the State's statutory restrictions.

ii. LEGITIMATE PUBLIC PURPOSE FOR REGULATION

The No-Fault Act's legitimate public purpose has been outlined by the Michigan Supreme Court on another occasion on which the Act faced constitutional scrutiny:

> The [no-fault] act's personal injury protection insurance scheme, with its comprehensive and expeditious benefit system, reasonably relates to the evidence . . . that under the tort liability system the doctrine of contributory negligence denied benefits to a high percentage of motor vehicle accident victims, minor injuries were overcompensated, serious injuries were under-compensated, long payment delays were commonplace, the court system was

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> overburdened, and those with low income and little education suffered discrimination.

Shavers v Kelley, 402 Mich 554, 579–80; 267 NW2d 72, 77 (1978). This analysis still prevails and the Court has long concluded that a rational basis review the standard. This Court sees no need to mount any further interpretive effort where the Michigan Supreme Court has already spoken.

iii. MEANS BY WHICH PARTIES' RIGHTS AND RESPONSIBILITIES ARE ADJUSTED

"The final prong of the Contract Clause test examines the means by which the contracting parties' rights and responsibilities are adjusted. The means chosen [in *Romein*] are reasonable in the light of deference given to legislative action. 'As is customary in reviewing economic and social regulation . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.' " *Romein*, at 536; 566 (1990)(quoting *United States Trust Co v New Jersey*, 431 US 1, 22–23; 97 SCt 1505, 1518; 52 LEd2d 92 (1977).

The means chosen to address high auto insurance rates and fraud and abuse are a matter of public policy well within the purview of the Legislature. Here, the means chosen by the legislature were adoption of fee schedules to define what costs are "reasonable," and limitation on the number of hours that may be claimed for in-home family-provided attendant care. As in *Romein*, here the legislature adopted changes to a statutory scheme that retroactively altered what benefits were available to those affected. Also similar to *Romein*, this Court defers to the Legislature's judgment as to the necessity and reasonableness of the measure. The Court made clear in *Romein* that the Plaintiffs "cannot rely on the level of benefits existing at the time of an injury as a legitimate contractual expectation protected by the Contract Clause." While the Legislature's changes to the

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Act may be, and have been subjected to criticism on policy grounds, the question before the Court here is whether the changes violate the contract clause of the Michigan Constitution. The Court finds that no such violation is apparent.

The Court will note Plaintiffs argument that the amendments are not reasonable and necessary based on *AFT Mich v State of Mich,* 501 Mich 939; 904 NW2d 417 (2017). (Pl's Brief, p. 21.) In *AFT,* the state employees had contracts that specified the exact amount they would be paid, which the Legislature changed. Plaintiffs here cannot point to any similar provision. The Legislature always left the No-Fault Act general, referring to a reasonable fee, which parties have argued the meaning of for the last 40 years. It is not unconstitutional for the Legislature to bring meaning to these terms by specifying what a reasonable fee means. The Court agrees with Defendants that *AFT* does not apply here.

B. DUE PROCESS

Counts II, V, VIII, XI, XIII, and XV of Plaintiffs' Complaint allege substantive due process violations for infringing fundamental rights at issue in amendments to the Act found at MCL 500.3157(2), (7) and (10). Contrary to Plaintiff's contention, there is no fundamental right to have medical providers paid at a certain rate, or to pay family members at a certain rate for attendant care for more than 56 hours per week. In the absence of a fundamental right, the statute is reviewable under the rational basis test, and it is presumed to be constitutional. The Michigan Supreme Court holding in *Shavers*, *supra*, makes clear that this is socioeconomic legislation and it's subject to review under the rational basis standard. *Shavers* defined the relevant test for determining the legitimacy of such claims:

> The test to determine whether legislation enacted pursuant to the police power comports with due process is whether the legislation bears a reasonable relation to a permissible legislative objective.

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> The test to determine whether a statute enacted pursuant to the police power comports with equal protection is essentially the same.
>
> * * *
>
> In the application of these tests, it is axiomatic that the challenged legislative judgment is accorded a presumption of constitutionality. What this "presumption of constitutionality" means, in terms of challenged police power legislation, is that in the face of a due process or equal protection challenge, "where the legislative judgment is drawn in question", a court's inquiry "must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it". A corollary to this rule is that where the legislative judgment is supported by "any state of facts either known or which could reasonably be assumed", although such facts may be "debatable", the legislative judgment must be accepted.
>
> In accord with this axiomatic rule and its corollary a court may uphold the constitutionality of police power legislative judgments in the face of due process or equal protection challenge by taking judicial notice of indisputable, generally known or easily ascertainable facts. And, because the "presumption of constitutionality" is a rebuttable presumption, a party challenging the legislative judgment may attack its constitutionality in terms of purely legal arguments (if the legislative judgment is so arbitrary and irrational as to render the legislation unconstitutional on its face) or may show, by bringing to the court's attention facts which the court can judicially notice, that the legislative judgment is without rational basis.

Shavers, supra at 612–15 (citations omitted).

i. WHETHER A FUNDAMENTAL RIGHT IS IMPLICATED

As a threshold matter, this Court must determine whether there is a fundamental right at issue. This is important because the standard of review varies depending on whether such a right is present.[1] Plaintiffs argue that both privacy and bodily integrity rights are at issue.

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[1] 'Substantive due process' analysis must begin with a careful description of the asserted right," for there has "always been reluctan[ce] to expand the concept of substantive due process" given that "[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." Where the right asserted is not fundamental, the government's interference with that right need only be reasonably

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> The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, has not been reduced to any formula. Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present.

Obergefell v Hodges, 135 S Ct 2584, 2598; 192 L Ed 2d 609 (2015).

If a fundamental right is implicated, the party asserting the substantive due process violation must show that deprivation of the right is so arbitrary that it shocks the conscience. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 201; 761 NW2d 293, 306 (2008); see also *Mays v Snyder,* 323 Mich App 1, 104; 916 NW2d 227 (2018) (explaining that in order to survive dismissal, the alleged "violation of the right to bodily integrity must be so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.") (citations and quotation marks omitted). "Conduct that is merely negligent does not shock the conscience, but conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Mays,* 323 Mich App at-104. Proof of at least "deliberate indifference is required." *Id.* While this seemly creates a fact question that would require discovery, the legislature acted within the scope of its legal authority, police power, so there is no basis for further inquiry. The Court will not second-guess the wisdom, need, or appropriateness of the legislation. *O'Donnell v State Farm Mut Auto Ins Co*, 404 Mich 524; 273 NW2d 829, 832 (1979)

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related to a legitimate governmental interest. *Bonner v City of Brighton*, 495 Mich 209, 226–27; 848 NW2d 380, 391 (2014)(citations omitted).

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a. PRIVACY INTEREST

"The 'guarantee of personal privacy' has been 'exten[ded] to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education.'" *People v Jensen*, 231 Mich App 439, 456; 586 NW2d 748, 756 (1998)(emphasis added).

Plaintiffs argue that the amendments to the No-Fault Act would interfere with the right of Plaintiff Andary "to make personal decisions relating to family relationships in the context of the in-home attendant care provided . . . by family members as opposed to strangers." Plaintiffs cite several cases which established certain familial relationships as fundamental privacy rights. *Troxel v Granville*, 530 US 57 (2000)(parents' fundamental right to manage the care of their children); *Moore v City of East Cleveland*, 431 US 494 (1977)(ordinance prohibiting grandmother from living with her two grandchildren who were cousins violated her privacy right); *Brinkley v Brinkley*, 277 Mich App 23; 742 NW2d 629 (2007)(statute permitting fit parents to completely deny grand parenting time was constitutional).

However, no authority is cited for the proposition that the same services that family members currently provides to an individual would become a violation of the individual's fundamental constitutional rights if required to be performed by someone else. In support of this portion of the complaint, Plaintiffs ask the Court to permit discovery because this would necessarily require a factual determination. The Court does not agree.

The United States Supreme Court has held that residents of a nursing home which had its license revoked had no right to continued residency there. *O'Bannon v Town Court Nursing Ctr*, 447 US 773, 785; 100 S Ct 2467, 2475; 65 L Ed 2d 506 (1980). Rather, residents had a right to choose among a range of qualified providers without government interference. *Id.* The case applies

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persuasively here, where Plaintiffs do not have a right to continue to receive compensation for family members' care services in the home after the 56-hour limit per week is reached.

In the Court's reasoned judgment, there is no fundamental privacy right implicated here.

b. BODILY INTEGRITY

Plaintiffs next assert that forcing individuals to receive care from strangers rather than family members amounts to a violation of the privacy right to bodily integrity, because the services provided might involve bathing and using the bathroom. Further, Plaintiffs assert that providers of such services receive insufficient compensation to be sustainable.

"Violation of the right to bodily integrity involves 'an egregious, nonconsensual entry into the body which was an exercise of power without any legitimate governmental objective.'" *Mays, supra* at 60, app gtd sub nom *Mays v Governor of Michigan*, 503 Mich 1030; 926 NW2d 803 (2019)(quoting *Rogers v Little Rock, Arkansas*, 152 F3d 790, 797 (CA 8, 1998)). In *Mays* the Court of Appeals held that the plaintiffs alleged sufficient facts to support their bodily integrity claim based on allegations of ingesting poisons through contaminated water. Under this definition, it may be a violation of Plaintiff Andary's bodily integrity if the State statute compelled her to be touched by a service provider by force or a provider who was not qualified to provide the appropriate service. The very fact of the amendment does not mean that such egregious conduct will occur. The Court notes that any services rendered to Ms. Andary in her home are necessarily rendered with her consent, or that of her guardian. By definition, there can be no violation of a fundamental bodily integrity right where the individual, or the guardian of a legally incapacitated individual, consents to the touching.

Further, Plaintiff argues that provision of bathing and bathroom services by attendants not previously known to the individual constitutes an "egregious . . . entry into the body." The Court

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finds no legal support for this contention. As noted above, cases citing such egregious entries contemplated incidents in which police forcibly pumped a man's stomach to obtain evidence, or where prison guards beat a man to death. *Rochin v California*, 342 US 165; 72 SCt 205; 96 LEd 183 (1952); *Screws v United States*, 325 US 91; 65 SCt 1031; 89 LEd 1495 (1945). Plaintiffs' inability to continue to receive needed services from the provider of their choice is not on the same level of egregious conduct as these examples.

Finally, Plaintiffs argue that Plaintiff Eisenhower Center would be forced to discontinue Plaintiff Krueger's care. The Court finds this argument unpersuasive and speculative. Plaintiffs Krueger and Andary do not have a bodily integrity right to continue to receive services from their preferred provider. Likewise, the service provider does not have a constitutionally-protected right to continue to be compensated at its preferred rate for those services. Nor does the Michigan Constitution require insurers to continue to pay the provider of the insured's preference at a rate higher than that provided by statute, or for which the parties have contracted[2]. Indeed, under the amended statute, the insurer may choose to pay family members to provide care instead of a medical service provider, and the insured may choose to purchase additional attendant-care benefits in excess of the statutory minimum. MCL 500.3157(11).

In the Court's reasoned judgment, there is no fundamental bodily integrity right implicated here.

[2] The contract-related claims are discussed in Section I. A. The amendments to statute provide a definition of reasonableness, upon which contracts including terms such as "reasonable cost" or similar may rely. Any specific rates contracted for could still be honored, as long as the contract term does not controvert the amended statute.

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ii. APPLICATION OF CONSTITUTIONAL STANDARD

Under the circumstances of this case, the applicable constitutional question is whether "the government's interference with that right . . . [is] reasonably related to a legitimate government interest." *Bonner v City of Brighton*, 495 Mich 209, 227; 848 NW2d 380 (2014).

As is broadly known, and confirmed by the legislative history of Public Acts 21 and 22 of 2019, among the goals of the amendments to the No-Fault Act was to reduce insurance premiums (among the highest in the nation at the time). The legislature chose to define "reasonable amount" in the statute by adopting a fee schedule related to either the Medicare rates or the providers' own rates as of January 1, 2019. To the extent this regime interferes with any rights of Plaintiffs, the interference is reasonably related to the legitimate government interest of reducing the cost of insurance, and to some extent also the cost of healthcare.

Plaintiffs argue that the fee schedules interfere with the practice of medicine by providers. There is no such fundamental right and this argument fails for the same reasons set forth above. The argument also ignores the fact that the Michigan constitution obligates the legislature to pass laws to provide for the public health and general welfare – the legislature's "police power."[3] The Michigan Supreme Court has previously held that compulsory purchase of no-fault insurance is a valid exercise of this police power, and this Court sees no reason why the amendments to the Act should require a departure from that analysis. *Shavers*, *supra* at 596. This Court also holds that the Michigan Legislature has authority under its police power to compel the purchase of no-fault insurance").

[3] "The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health." Const 1963, art 4, § 51.

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No substantive due process violation is apparent from these pleadings. Thus, Counts II, V, VIII, XI, XIII and XV of the Plaintiffs Complaint are dismissed.

C. EQUAL PROTECTION

Counts III, VI, IX, XII, XIV, XVI and XVIII of Plaintiffs' Complaint allege the respective No-Fault amendments implicate equal protection violations.

> [u]nder traditional equal protection analysis, a legislative classification must be sustained, if the classification itself is rationally related to a legitimate governmental interest.
>
> * * *
>
> If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality'. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations.
> If it be said, the law is unnecessarily severe, and may sometimes do injustice, without fault in the sufferer under it, our reply is: these are considerations that may very properly be addressed to the legislature, but not to the judiciary they go to the expediency of the law, and not to its constitutionality.

O'Donnell v State Farm Mut Auto Ins Co, 404 Mich 524, 542; 273 NW2d 829, 834 (1979)(citations omitted).

Further,

> The test to determine whether legislation enacted pursuant to the police power comports with due process is whether the legislation bears a reasonable relation to a permissible legislative objective.
> The test to determine whether a statute enacted pursuant to the police power comports with equal protection is essentially the same.

Shavers at 612–15 (citations omitted).

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Plaintiffs' equal protection claims are founded on the assertion that the two fee schedules created in the amendments to the No-Fault Act create two classes – a class of motor vehicle accident victims who receive products and services that are compensable by Medicare, and another class of such victims which receives products and services not compensable under Medicare. Plaintiffs argue the latter group would receive lower compensation through the Act, and would therefore be "second-class patients." This status would likely result in patients being treated differently and possibly harshly by providers who would receive less compensation for treating them.

Plaintiffs identify no suspect or quasi-suspect class into which they would fit, therefore the rational basis standard is applicable. In addressing the equal protection challenge to the No-Fault Act in *O'Donnell* the Michigan Supreme Court opined that:

> [t]he Legislature's judgment that the recipients of private benefits should be treated differently from the recipients of government benefits is supported by a rational basis and should therefore be sustained. This distinction rationally promotes the legitimate legislative objectives of enabling persons with economic needs and/or wages exceeding the maximum benefits permitted under the No-Fault Act to obtain the supplemental coverage they need and of placing the burden of such extra coverage directly on the shoulders of those persons, instead of spreading it throughout the ranks of no-fault insureds.

O'Donnell, 404 Mich at 537–38. While the statutory scheme at issue here is different, the Court's essential holding that the legislature may treat recipients of private benefits differently from recipients of government benefits applies. The same private/government-provided difference distinguishes the two fee schedules at issue.

Likewise in *Shavers, supra,* the Michigan Supreme Court ruled that the constitutional test for both due process and equal protection claims where no fundamental right is implicated, use

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essentially the same test. Since no fundamental right is implicated, the rational basis/reasonable relation test is again the appropriate standard.

The amendments to the No-Fault act are reasonably related to the government's legitimate public interest in reducing auto insurance costs, addressing fraud, and in providing for the general welfare of its citizens. Therefore, the Due Process challenges asserted in Plaintiffs complaint fail and must be dismissed.

II. STANDING

Counts XIII through XVI of the complaint seek relief "on behalf of all motor vehicle accident victims, past, present, or future." Counts XVII and XVIII similarly seek relief for "all Michigan medical providers who treat motor vehicle accident victims in this State." Defendants argue that Plaintiffs lack standing to vindicate the rights of third parties. This Court agrees.

The law in Michigan is clear that "constitutional rights are personal, and a person generally cannot assert the constitutional rights of others." *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825, 842 (2005)(citing *In re Chmura*, 461 Mich 517, 530, 608 NW2d 31 (2000)); *Fieger v Comm'r of Ins*, 174 Mich App 467, 471; 437 NW2d 271 (1988). "A plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.*

Plaintiff's rely on *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010) to support their claims in this case on behalf of other victims and medical providers. This case concerns whether the litigant before the court had a cause of action, special injury, right, or substantial interest that would be affected differently from the general public, or had been impliedly granted standing by the legislature. It does not stand for the proposition that Plaintiffs may represent the claims of an emerging class of others who are not presently before the Court.

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While *Lansing Sch Ed Ass'n* permits courts in their discretion to make prudential determinations regarding standing, this Court finds that it must not ignore the *Reed* and *Fieger* cases cited *supra*.

In *Fieger*, attorney Geoffrey Fieger and his law clerk sought declaratory judgment and brought an action challenging portions of a medical malpractice law as unconstitutional. *Fieger*, 174 Mich App at 468-469. The Michigan Court of Appeals held that Fieger lacked standing to secure or adjudicate his clients' constitutional rights and further noted that, "[a] plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.* Fieger also claimed economic injuries as a result of the time he was required to spend counseling his new medical-malpractice plaintiffs due to the unconstitutional provisions. To this argument, the Court held that such expenses incurred in litigation are not unique or uncommon, and such an "alleged economic injury does not create a justiciable actual controversy." *Id.* at 472. Lastly, and perhaps most notably, the Court held that, in order to avoid deciding "abstract questions on hypothetical issues . . . regardless of the liberal declaratory judgment rule, a plaintiff must still allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Id.*

Reed and *Fieger* both stand for the same proposition – that litigants generally may only assert their own interest or causes of action. *Lansing Sch Ed Ass'n* criticizes the *Reed* era for applying a mistaken standing doctrine. Yet, *Fieger*, which long preceded *Reed*, remains good law and stands for the identical proposition. Again, the Court notes that the reforms to the No-Fault Act are not in effect until July 1, 2021, and therefore, no actual controversy exists as to the hypothetical injuries of future Michigan medical providers and motor vehicle victims, past, present, and future. See *Fieger*, 174 Mich App at 472 (rejecting claims based on hypothetical issues).

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While it may be argued that dismissal of these claims would leave unnamed accident victims and medical providers without a legal remedy, the relief sought by Plaintiffs in this case would be available to any specific individual when an alleged violation occurs. Since Counts XIII through XVIII seek relief on behalf of others not before the Court, Plaintiffs lack standing to raise them, and these Counts are dismissed.

III. RIPENESS

While not raised by the parties, amicus curiae raise the issue of ripeness. The Department of Insurance and Financial Services (DIFS) argues that the issues presented in Plaintiff's complaint cannot be properly adjudicated at this time because there is no case or controversy. DIFS argues that not only are these potential claims asserted on behalf of unnamed other parties, they are mere hypotheticals and speculation of what might occur in the future. MCR 2.605(A) provides the following:

> (1) In a case of *actual controversy* within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.
> (2) For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief *other than a declaratory judgment*.

MCR 2.605(A). (Emphasis added.)

Generally courts cannot review the constitutionality of a government action unless and until there is an "actual injury." However, "facial challenges to regulation are generally ripe the moment the challenged regulation or ordinance is passed." *Suitum v Tahoe Regl Planning Agency*, 520 US 725, 736; 117 S Ct 1659, 1666; 137 L Ed 2d 980 (1997)(quoting *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 495; 107 S Ct 1232, 1247; 94 L Ed 2d 472 (1987)(state statute facially challenged as a taking); see also *Paragon Properties Co v City of Novi*, 452 Mich

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568, 576; 550 NW2d 772, 775 (1996). Since the statutory sections at issue have not yet taken effect as stated above, the challenge here is a 'facial challenge', and became ripe as soon as the statute was passed.

IV. FACTUAL DEVELOPMENT

Plaintiff argues that a factual development of the record is necessary for the very reason that the impact of the amendments raised in their complaint need to be explored and vetted to determine the legislative intent and whether the process engaged by the Legislature was appropriate. Defendants and the Amici supporting dismissal of the Complaint raised several arguments and cited binding precedent that a facial challenge to constitutionality "can be decided without reviewing the facts considered by the Legislature, as the wisdom of the Legislature is not open to debate." (Citations omitted.) The Court will not regurgitate all those arguments here. However, the Court agrees that Plaintiffs complaint seeks declaratory relief regarding alleged future actions of insurers, patients, and providers after July 1, 2021. Defendants said it best in their Reply Brief in Opposition to the Motion to Dismiss at page 1, that "... there are no "facts" that are relevant to the determination of the constitutionality of the statute. Under Michigan law, challenges to future actions are facial challenges decided as a question of law, and not an "as applied" challenge as to which factual development might be considered."

Finally, Defendant's Motion to Dismiss is premised on MCR 2.116(C)(8), which permits consideration only of the pleadings. As this complaint presents a facial challenge of the statute itself – any facts which could reasonably be assumed are to be considered[4] (at least as to the due

[4] *United States v Carolene Products Co*, 304 US 144, 154; 58 S Ct 778, 784; 82 L Ed 1234 (1938)(explaining that due process and equal protection challenges "must be restricted to the issue whether any state of facts . . . affords support for [the challenge]").

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process and equal protection arguments), vitiating the need for any further factual development of the record.

V. CONCLUSION

The No Fault statute was enacted in service to the needs of the public, as a valid exercise of the State's police power and serves multiple purposes for the public good. The 2019 amendments are a method of limiting costs and fraud in the no-fault system to make insurance more affordable, and such cost containment measures have been upheld principally in *Shavers*, *Romein* and *Health Care Ass'n Workers Compensation Fund*. (Citations omitted.) The arguments advance by Plaintiffs are asking this Court to invalidate the long standing presumption of constitutionality that has been afforded this legislation which it finds no basis for doing. Having found that the contract clause does not protect the parties' agreements from changes to the underlying statute, and that neither due process nor equal protection principles can meet the high standard required to rebut that presumption;

IT IS ORDERED that Defendants USAA Casualty Insurance Company and Citizens Insurance Company of America's Motion to Dismiss is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiffs' complaint is **DISMISSED**.

In accordance with MCR 2.602(A)(3), the Court finds that this order resolves the last pending claim and closes the case.

11/13/2020
Date

Wanda M. Stokes
Hon. Wanda M. Stokes
Circuit Court Judge

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PROOF OF SERVICE

I hereby certify that I provided a copy of the above ORDER to each attorney of record, or to the parties, by hand delivery, email, or by placing a true copy in a sealed envelope, addressed to each, with full postage prepaid and placing said envelope in the United States mail, on November 13, 2020.

Courtney Ware
Law Clerk

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STATE OF MICHIGAN
IN THE 30TH JUDICIAL CIRCUIT FOR INGHAM COUNTY

ELLEN M. ANDARY, a legally-incapacitated adult, by and through her Guardian and Conservator, MICHAEL T. ANDARY, M.D., and 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,

v

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

Defendants.

ORDER REGARDING DEFENDANT'S MOTION FOR RECONSIDERATION AND TO AMEND COMPLAINT

CASE NO. 19-738-CZ

HON. WANDA M. STOKES

At a session of said Court
held in the city of Mason, county of Ingham,
this 18 day of February, 2021.

PRESENT: HON. WANDA M. STOKES

This matter comes before the Court on Plaintiffs Motion for Reconsideration and Motion to Amend the Complaint. The Plaintiffs complaint, with Counts I through XVIII, seeks a declaration under MCR 2.605 that MCL 500.3157(2), (7), and (10), as amended by Public Acts 21 and 22 of 2019, implicate constitutionally protected fundamental rights in violation of the

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Michigan Constitution. Plaintiffs ask this Court to reconsider its Order and Opinion granting summary disposition and allow Plaintiffs to amend its complaint.

Generally, and without restricting the discretion of the Court, a motion for reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted under MCR 2.119(F)(3). However, the Court has discretion to review its rulings even when the same arguments are presented to ensure that its holdings are not "found to be outside the range of reasonable and principled outcomes." *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). Upon review of the record, Plaintiff's motion and response from Defendant, this Court finds that Plaintiff failed to demonstrate a palpable error by which the Court and the parties have been misled and show that a different disposition of the motion must result from correction of the error. The arguments regarding the ruling of the Court seem to ignore some of the very arguments that the Court addressed regarding the standard for review of the contract and equal protection constitutional issues. The Court did not find the Plaintiff's arguments necessarily new or compelling. The Defendant's briefs and responses on these issues, including amici briefs submitted in opposition to the Plaintiff's motion accurately reflect the law governing the issues in this case.

Regarding Plaintiff's motion to amend the complaint, while MCR 2.118(A)(2) requires a party to seek leave of court or obtain the defendants' written consent to amend its complaint and Plaintiffs did neither until after summary disposition had been granted, this Court allowed the motion, and it was fully briefed by all parties. More critical to this Court's review of the arguments presented by Plaintiff is the fact that MCR 2.118 requires that a motion to amend should be denied when it is futile. *Darman v Twp of Clinton*, 269 Mich App 638, 654; 714

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NW2d 350 (2006) ("leave to amend should be denied where amendment would be futile"); and *PT Today, Inc v Comm'r of the Office of Fin & Ins Servs*, 270 Mich App 110, 143; 715 NW2d 388 (2006)(amendment is futile if it is legally insufficient on its face, it merely restates allegations already made, or adds a claim over which the court lacks jurisdiction). Under the current record, Plaintiffs' motion cannot overcome this hurdle. Further, Plaintiff has failed to provide a copy of the proposed amended complaint for the Court's review. The Court finds that the purportedly 'new contract claim' has already been addressed in the Court's prior ruling on the motion for summary disposition, and the Defendant's current brief does not alter that position.

The Court has reviewed the relevant case law and the briefs presented and find that Plaintiff has failed to meet its burden under the law and the court rules, and its motions are denied.

THEREFORE, IT IS ORDERED that Plaintiff's Motion for Reconsideration and Motion to Amend the Complaint are **DENIED**.

In accordance with MCR 2.602(A)(3), the Court finds that this order resolves the last pending claim and closes the case.

February 18, 2021
Date

Wanda M. Stokes
Hon. Wanda M. Stokes
Circuit Court Judge

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PROOF OF SERVICE

I hereby certify that I provided a copy of the above ORDER to each attorney of record, or to the parties, by hand delivery, or by placing a true copy in a sealed envelope, addressed to each, with full postage prepaid and placing said envelope in the United States mail, on February 18, 2021.

Diane C. Chillers, Judicial Assistant to
Judge Wanda M. Stokes

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

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

Plaintiffs,

v

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

Defendants.

Case No. 19-738-CZ

Hon. WANDA M. STOKES

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COMPLAINT FOR DECLARATORY JUDGMENT

THERE IS NO OTHER PENDING OR RESOLVED CIVIL ACTION ARISING OUT OF THE SAME TRANSACTION OR OCCURRENCE AS ALLEGED IN THE COMPLAINT.

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NOW COMES Plaintiff Ellen M. Andary, a legally incapacitated adult, by and through her Guardian and Conservator, Michael T. Andary, M.D., Plaintiff Philip Krueger, a legally incapacitated adult, by and through his Guardian, Ronald Krueger, and Plaintiff Moriah Inc., d/b/a Eisenhower Center, by and through their attorneys, **Sinas, Dramis, Larkin, Graves & Waldman, P.C.** and **Mark Granzotto, P.C.**, and by way of their Complaint for Declaratory Judgment against Defendant USAA Casualty Insurance Company, a foreign corporation, and Defendant Citizens Insurance Company of America, a Michigan corporation, state the following:

This Complaint for Declaratory Judgment contains the following Counts:

Count I – Application of the Attendant Care Limitations set forth in MCL 500.3157(10) to Ellen M. Andary Violates her Constitutional Contract Rights Under Article 1 Section 10 of the Michigan Constitution

Count II – Application of the Attendant Care Limitations set forth in MCL 500.3157(10) to Ellen M. Andary Violates her Constitutional Due Process Rights Under Article 1 Section 17 of the Michigan Constitution

Count III – Application of the Attendant Care Limitations set forth in MCL 500.3157(10) to Ellen M. Andary Violates her Constitutional Equal Protection Rights Under Article 1 Section 2 of the Michigan Constitution

Count IV – Application of the Fee Schedule Limitations set forth in MCL 500.3157(7) to Ellen M. Andary Violates her Constitutional Contract Rights Under Article 1 Section 10 of the Michigan Constitution

Count V – Application of the Fee Schedule Limitations set forth in MCL 500.3157(7) to Ellen M. Andary Violates her Constitutional Due Process Rights Under Article 1 Section 17 of the Michigan Constitution

Count VI – Application of the Fee Schedule Limitations set forth in MCL 500.3157(7) to Ellen M. Andary Violates her Constitutional Equal Protection Rights Under Article 1 Section 2 of the Michigan Constitution

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Count VII – Application of the Fee Schedule Limitations set forth in MCL 500.3157(7) to Philip Krueger for Treatment Rendered to Him by Plaintiff Eisenhower Center Violates his Constitutional Contract Rights Under Article 1 Section 10 of the Michigan Constitution

Count VIII – Application of the Fee Schedule Limitations set forth in MCL 500.3157(7) to Philip Krueger for Treatment Rendered to Him by Plaintiff Eisenhower Center Violates his Constitutional Due Process Rights Under Article 1 Section 17 of the Michigan Constitution

Count IX – Application of the Fee Schedule Limitations set forth in MCL 500.3157(7) to Philip Krueger Violates his Constitutional Equal Protection Rights Under Article 1 Section 2 of the Michigan Constitution

Count X – Application of the Fee Schedule Limitations set forth in MCL 500.3157(7) to Plaintiff Eisenhower Center for Services it Renders to Plaintiff Philip Krueger Violates its Constitutional Contract Rights Under Article 1 Section 10 of the Michigan Constitution

Count XI - Application of the Fee Schedule Limitations set forth in MCL 500.3157(7) to Plaintiff Eisenhower Center Regarding Services it Renders to all Motor Vehicle Accident Victims Past, Present, or Future, Violates its Constitutional Due Process Rights Under Article 1 Section 17 of the Michigan Constitution

Count XII - Application of the Fee Schedule Limitations set forth in MCL 500.3157(7) to Plaintiff Eisenhower Center Regarding Services it Renders to all Motor Vehicle Accident Victims Past, Present, or Future Violates its Constitutional Equal Protection Rights Under Article 1 Section 2 of the Michigan Constitution

Count XIII – Future Application of the Attendant Care Limitations set forth in MCL 500.3157(10) to all Motor Vehicle Accident Victims Past, Present, or Future, Violates the Constitutional Due Process Rights of Those Persons Under Article 1 Section 17 of the Michigan Constitution

Count XIV – Future Application of the Attendant Care Limitations set forth in MCL 500.3157(10) to all Motor Vehicle Accident Victims Past, Present, or Future, Violates the Constitutional Equal Protection Rights of Those Persons Under Article 1 Section 2 of the Michigan Constitution

Count XV - Future Application of the Fee Schedule Limitations set forth in MCL 500.3157(7) to all Motor Vehicle Accident Victims, past, Present, or Future, Violates the Constitutional Due Process Rights of Those Persons Under Article 1 Section 17 of the Michigan Constitution

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Count XVI - Future Application of the Fee Schedule Limitations set forth in MCL 500.3157(7) to all Motor Vehicle Accident Victims Past, Present, or Future, Violates the Constitutional Equal protection Rights of Those Persons Under Article 1 Section 2 of the Michigan Constitution

Count XVII - Future Application of the Fee Schedule Limitations set forth in MCL 500.3157(7) to any Michigan Medical Provider Violates the Constitutional Due Process Rights of Those Providers Under Article 1 Section 17 of the Michigan Constitution

Count XVIII – Future Application of the Fee Schedule Limitations set forth in MCL 500.3157(7) to any Michigan Medical Provider Violates the Constitutional Equal Protection Rights of Those Providers Under Article 1 Section 2 of the Michigan Constitution

In support of these Counts, Plaintiffs say as follows:

GENERAL ALLEGATIONS

1. Plaintiffs bring this action requesting declaratory relief from this Honorable Court, pursuant to MCR 2.605, for the purpose of defining the rights of said parties under the respective insurance contracts identified in this lawsuit and in connection therewith to declare that MCL 500.3157(2), MCL 500.3157(7) and MCL 500.3157(10) are unconstitutional pursuant to the Contracts Clause of the Michigan Constitution, Const 1963, art 1 § 10, the Due Process Clause of the Michigan Constitution, Const 1963, art 1 § 17, and the Equal Protection Clause of the Michigan Constitution, Const 1963, art 1 § 2, thereby preventing Defendant USAA Casualty Insurance Company and Defendant Citizens Insurance Company of America from enforcing said unconstitutional provisions with respect to the Plaintiffs and others similarly situated.

2. Defendant USAA Casualty Insurance Company (hereinafter "*Defendant USAA*") is a foreign insurance company authorized to transact the business of no-fault

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insurance in the State of Michigan, and does, in fact, regularly and systematically conduct business in Ingham County, Michigan.

3. Defendant Citizens Insurance Company of America (hereinafter "*Defendant Citizens*") a Michigan insurance company authorized to transact the business of no-fault insurance in the State of Michigan, and does, in fact, regularly and systematically conduct business in Ingham County, Michigan.

4. Venue is proper pursuant to MCR 600.1621(1).

5. Ellen M. Andary was born on February 1, 1957.

6. At all times pertinent hereto, Ellen M. Andary, and Michael T. Andary, M.D. have been husband and wife and have resided together, and continue to reside at, 1461 Foxcroft Road, East Lansing, Ingham County, Michigan.

7. Michael T. Andary, M.D. is a physician in good standing licensed to practice medicine in the State of Michigan and has been so licensed since 1983.

8. On March 19, 2015, Michael T. Andary, M.D. was appointed Guardian and Conservator for Ellen M. Andary, a legally incapacitated adult, pursuant to Orders issued by the Ingham County Probate Court. A copy of these Orders is attached ***Exhibit 1***.

9. On December 5, 2014, Ellen M. Andary was a passenger in a motor vehicle traveling southbound on US-127 near Mount Pleasant when said vehicle was struck head-on by a drunk driver proceeding in the wrong direction on the roadway.

10. As a result of the head-on motor vehicle accident described above, Ellen M. Andary suffered nearly fatal injuries, including, but not limited to, a catastrophic brain injury, multiple internal injuries, numerous fractures, and other assorted traumatic

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bodily injuries. These injuries required prolonged in-patient hospitalization from December 5, 2014 to approximately June 5, 2015, multiple surgeries, and extensive rehabilitative training.

11. At the conclusion of Ellen M. Andary's in-patient hospitalization, she was discharged to her home, and was, at that time, and continues to be, totally and permanently disabled and incapable of taking care of herself.

12. Since her discharge from Sparrow Hospital on approximately June 5, 2015, Ellen M. Andary has been prescribed, and continues to receive, 36 hours of in-home attendant care services per day, consisting of approximately 24 hours of unskilled attendant care and 12 hours of skilled attendant care.

13. The majority of Ellen M. Andary's in-home attendant care services are provided by members of her family, including her children, Catherine Andary, Caroline Andary, William Andary, Michelle Andary, and Steven Andary. These in-home attendant care services are supervised by her physician husband, Michael T. Andary, M.D.

14. Since her hospital discharge, the in-home attendant care required by Ellen M. Andary has been provided by her family in accordance with a program that is designed to maximize her rehabilitation and her re-integration into her pre-accident life, to the extent possible. Participation of Ellen M. Andary's family members in this in-home attendant care program has been, and continues to be, essential to maximizing her quality of care.

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15. If Ellen M. Andary were forced to have attendant care services rendered to her by strangers rather than her family members, she would likely suffer serious and deleterious consequences to her overall health status and rehabilitation.

16. Ellen M. Andary continues to require regular medical treatment from various physicians and therapists for her ongoing injuries and related disabilities. This includes, but is not limited to, care and treatment rendered by Rebecca Wyatt, D.O. of Origami Brain Injury Rehabilitation Center; James Sylvian, D.O. of MSU Rehabilitation; John Siano, M.D. of Lansing Internal Medicine; Eric Eggenberger, D.O., Andrew Saxe, M.D., and David Young, D.O. of Sparrow Health System; Mounzer Yassin-Kassab, M.D. and Daniel Havlicheck, M.D. of MSU Clinical Center; Timothy Heilman, D.O. and Charles Bill, M.D. of Lansing Neurosurgery; Rafid Yousif, M.D. of Lansing Institute of Urology; Joseph Conrad, M.S. of Eyecare Associates of DeWitt; Charles Taunt, D.O. of Michigan Orthopedic Center; Daniel Langhosrt, O.D. of Eyecare Associates of Haslett; Beth Spitzley, RPT of the Center for Integrative Medicine of Okemos; Mary Hunt, D.O.; and various therapists at Assessment Rehab Management.

17. At the time of her December 5, 2014 motor vehicle accident, Ellen M. Andary and Michael T. Andary, M.D. were insured under a policy of automobile no-fault insurance issued by Defendant USAA, bearing policy number 00278 70 84C 7102 3. A copy of this policy and declaration sheet is attached as ***Exhibit*** 2.

18. As a result of the aforementioned catastrophic injuries sustained by Ellen M. Andary, she has been, and continues to be, entitled to receive certain no-fault personal protection ("*PIP*") benefits under § 3107(1)(a) of the Michigan No-Fault Act and her no-

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fault insurance policy with Defendant USAA, which benefits include, but are not limited to, allowable expenses defined as all "*reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery, or rehabilitation.*"

19. At the time of the December 5, 2014 motor vehicle accident, the allowable expense benefits set forth in § 3107(1)(a) of the Michigan No-Fault Act, and in Ellen M. Andary's policy with Defendant USAA, entitled her to recover payment for all reasonable charges for all reasonably necessary in-home attendant care services, without regard to the identity of the attendant care service provider, or the number of hours of attendant care services rendered to her by any particular service provider.

20. At the time of the December 5, 2014 motor vehicle accident, the allowable expense benefits set forth in § 3107(1)(a) of the Michigan No-Fault Act and Ellen M. Andary's policy with Defendant USAA entitled her to recover payment for all reasonable charges for all reasonably necessary products, services, and accommodations for her care, recovery, or rehabilitation without regard to any form of government or private fee schedules.

21. The premium paid by Ellen M. Andary, and her husband, Michael T. Andary, M.D., for her aforesaid auto insurance policy with Defendant USAA was priced and sold based upon the fact that said policy entitled her to full in-home attendant care services without regard to the identity of the service provider, and further entitled her to reimbursement for all reasonable charges for all reasonably necessary products, services, and accommodations for her care, recovery, or rehabilitation without regard to any government or private fee schedules. That premium had been fully paid by Ellen M.

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Andary, and Michael T. Andary, M.D. as of the date of Ellen M. Andary's December 5, 2014 accident, and therefore all rights Ellen M. Andary had as of that date were fully vested.

22. Philip Krueger was born on January 25, 1972.

23. At all times pertinent hereto, Philip Krueger has been a resident of Ann Arbor, Washtenaw County, Michigan.

24. Ronald Krueger is the father of Philip Krueger.

25. In 1997, Ronald Krueger was appointed Guardian for Philip Krueger, a legally incapacitated adult, pursuant to an Order issued by the Genesee County Probate Court.

26. On March 10, 1990, Philip Krueger was a passenger in a pickup truck that was involved in a serious motor vehicle accident.

27. As a result of the motor vehicle accident described above, Philip Krueger suffered injuries, including, but not limited to, a traumatic brain injury, a collapsed lung, a broken pelvis, and a neurological injury to his left foot.

28. Since the March 10, 1990 accident, Philip Krueger has been, and continues to be, totally and permanently disabled and incapable of taking care of himself.

29. At the time of his March 10, 1990 motor vehicle accident, Philip Krueger was insured under a policy of automobile no-fault insurance issued by Defendant Citizens.

30. As a result of the aforementioned catastrophic injuries sustained by Philip Krueger, he has been, and continues to be, entitled to receive certain PIP benefits under §

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3107(1)(a) of the Michigan No-Fault Act and his no-fault insurance policy with Defendant Citizens, which benefits include, but are not limited to, allowable expenses defined as all "*reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery, or rehabilitation.*"

31. At the time of the March 10, 1990 motor vehicle accident, the allowable expense benefits set forth in § 3107(1)(a) of the Michigan No-Fault Act and Philip Krueger's policy with Defendant Citizens entitled him to recover payment for all reasonable charges for all reasonably necessary products, services, and accommodations for his care, recovery, or rehabilitation without regard to any form of government or private fee schedules. Since the March 10, 1990 accident, these benefits have been paid pursuant to Defendant Citizens' claim number 25-90-000439.

32. The premium paid on behalf of Philip Krueger, for his aforesaid auto insurance policy with Defendant Citizens, was priced and sold based upon the fact that said policy entitled him to reimbursement for all reasonable charges for all reasonably necessary products, services, and accommodations for his care, recovery, or rehabilitation without regard to any government or private fee schedules. That premium had been fully paid on behalf of Philip Krueger as of the date of his March 10, 1990 accident, and therefore all rights Philip Krueger had as of that date were fully vested.

33. Plaintiff Moriah, Inc., d/b/a Eisenhower Center (hereafter referred to as "*Plaintiff Eisenhower Center*"), is a Michigan corporation engaged in the profession of providing products, services, and accommodations for the care, recovery, or rehabilitation of individuals suffering traumatic brain injuries.

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34. Plaintiff Eisenhower Center has facilities in Ann Arbor, Washtenaw County, Michigan, where it provides inpatient living accommodations to individuals with traumatic brain injuries who are not able to live independently and who require a structured environment due to their disabilities.

35. Plaintiff Eisenhower Center also provides comprehensive neuro-rehabilitation programs and related services to its patients, including, but not limited to, occupational therapy, psychology, program coordination, health education/nursing, supported employment, behavior analysis, supervision, recreation, transportation, substance abuse prevention services, supported apartment living, sustained care, transitional care, social work services, case management services, neuropsychological testing, physical therapy, speech and language pathology, community activities, room and board, and all of the other related and cognate services typically provided by a comprehensive, accredited, and certified neuro-rehabilitation program.

36. The vast majority of Plaintiff Eisenhower Center's patients, like Philip Krueger, have suffered their disabilities as a result of motor vehicle accidents. Presently, of the 156 residential patients at Plaintiff Eisenhower Center's Ann Arbor facility, approximately 130 of those patients are motor vehicle accident victims whose care, recovery, or rehabilitation is funded by no-fault PIP benefits payable under § 3107(1)(a) of the Michigan No-Fault Act.

37. Following the March 10, 1990 motor vehicle accident, in approximately November 1997, Philip Krueger began receiving residential accommodations and other

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reasonably necessary products, services, and accommodations for his care, recovery, or rehabilitation from Plaintiff Eisenhower Center.

38. Philip Krueger and Plaintiff Eisenhower Center entered into a contractual relationship (express or implied) in which Plaintiff Eisenhower Center agreed to provide reasonably necessary products, service, and accommodations to Philip Krueger for his care, recovery, or rehabilitation. These parties entered into this contractual relationship relying upon the ability of Philip Krueger to fund his financial obligations to Plaintiff Eisenhower Center. At the time these parties entered into these contractual relationships, Philip Krueger had funding under § 3107(1)(a) of the No-Fault Act, through his insurance policy contract with Defendant Citizens, that enabled him to obtain reimbursement for all reasonably necessary products, services, and accommodations he was receiving from Plaintiff Eisenhower Center. This right to funding vested at the time of Philip Krueger's March 10, 1990 accident and was vested when he entered into the contract with Plaintiff Eisenhower Center. Had Philip Krueger not had this funding source, Plaintiff Eisenhower Center would not have been able to enter into a contractual relationship with Philip Krueger to provide him the reasonably necessary products, services, and accommodations he has been receiving from Plaintiff Eisenhower Center ever since he became a patient.

39. Plaintiff Eisenhower Center also entered into similar contracts (express or implied) with its other motor vehicle accident patients prior to June 11, 2019.

40. On May 25, 2019, the Michigan Legislature passed Enrolled Senate Bill No. 1 (hereinafter "*SB 1*") which was signed into law by Governor Whitmer on May 30, 2019.

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On June 4, 2019, the Legislature passed Enrolled House Bill No. 4397 (hereinafter "*HB 4397*"), which included some modifications and clarifications to SB 1, and was signed by Governor Whitmer on June 11, 2019. On June 11, 2019, SB 1 and HB 4397 were filed with the Michigan Secretary of State's Office of the Great Seal and assigned Public Act number 21 of 2019 and Public Act number 22 of 2019 (hereinafter referred to as "*PA 21*" and "*PA 22*"). A copy of PA 21 is attached as ***Exhibit 3***. A copy of PA 22 is attached as ***Exhibit 4***.

41. PA 21 and PA 22 enacted sweeping changes to the existing Michigan No-Fault Act (MCL 500.3101 *et seq.*), many of which went into effect on June 11, 2019. In some circumstances these changes purport to apply to persons injured in motor vehicle accidents that occurred prior to June 11, 2019.

42. Among the many changes, PA 21 enacted significant limitations on the right of an injured person to receive reimbursement for in-home attendant care services rendered by members of the injured person's family. Essentially, PA 21 provides that no-fault benefits are not payable for in-home family provided attendant care services that exceed a 56 hour per week (8 hours per day) limitation. This limitation is contained in MCL 500.3157(10), which states in pertinent part:

> *(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.*

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

43. The limitation on in-home family provided attendant care set forth in § 3157(10) does not go into effect until July 1, 2021. However, this limitation will supposedly apply to seriously injured motor vehicle accident victims, like Ellen M. Andary, that were injured prior to June 11, 2019.

44. Pursuant to the provisions of PA 21, beginning on July 1, 2021 Ellen M. Andary will presumably no longer be entitled to receive reimbursement for in-home family provided attendant care rendered to her in excess of 56 hours per week (8 hours per day). If this limitation is enforceable, Ellen M. Andary's health and welfare may be adversely affected by the requirement that she receive care from strangers and other non-family members.

45. Moreover, if the aforementioned in-home family provided attendant care limits were to apply to Ellen M. Andary, she would be denied the full benefits under her insurance contract policy with Defendant USAA, which she and her husband, Michael T. Andary, M.D., purchased and which were in full force and effect on the date of her December 5, 2014 accident.

46. In addition to the limitation on in-home family provided attendant care, PA 21 also enacted fee schedules that dramatically limit a no-fault insurer's obligation to reimburse expenses for reasonably necessary products, services, and accommodations rendered for the care, recovery, or rehabilitation of motor vehicle accident victims. These limitations are contained in MCL 500.3157(2) and (7), which state in pertinent part:

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(2) Subject to subsections (3) to (14), a physician, hospital, clinic, or other person that renders treatment or rehabilitative occupational training to an injured person for an accidental bodily injury covered by personal protection insurance is not eligible for payment or reimbursement under this chapter for more than the following:

> *(a) For treatment or training rendered after July 1, 2021 and before July 2, 2022, 200% of the amount payable to the person for the treatment or training under Medicare.*
>
> *(b) For treatment or training rendered after July 1, 2022 and before July 2, 2023, 195% of the amount payable to the person for the treatment or training under Medicare.*
>
> *(c) For treatment or training rendered after July 1, 2023, 190% of the amount payable to the person for the treatment or training under Medicare.*

. . . .

(7) If Medicare does not provide an amount payable for a treatment or rehabilitative occupational training under subsection (2), (3), (5), or (6), the physician, hospital, clinic, or other person that renders the treatment or training is not eligible for payment or reimbursement under this chapter of more than the following, as applicable:

> *(a) For a person to which subsection (2) applies, the applicable following percentage of the amount payable for the treatment or training under the person's charge description master in effect on January 1, 2019 or, if the person did not have a charge description master on that date, the applicable following percentage of the average amount the person charged for the treatment on January 1, 2019:*
>
> > *(i) For treatment or training rendered after July 1, 2021 and before July 2, 2022, 55%.*
> >
> > *(ii) For treatment or training rendered after July 1, 2022 and before July 2, 2023, 54%.*
> >
> > *(iii) For treatment or training rendered after July 1, 2023, 52.5%.*

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47. The fee schedules set forth in §§ 3157(2) and (7) do not apply until July 1, 2021. However, these fee schedules will presumably apply to motor vehicle accident victims, like Ellen M. Andary and Philip Kruger, that were injured prior to June 11, 2019.

48. The fee schedules set forth in § 3157(7) will supposedly apply to any patients of Plaintiff Eisenhower Center, like Philip Krueger, that were injured prior to June 11, 2019 and were receiving reasonably necessary products, services, and accommodations for their care, recovery, or rehabilitation from Plaintiff Eisenhower Center prior to June 11, 2019. Presently, that number of patients is 130.

49. The fee schedules set forth in § 3157(7) that are applicable to non-Medicare compensable products, services, and accommodations are oppressive, confiscatory, and grossly inadequate and, as a result, those fee schedules pose a threat to the ability of many medical providers, who render products, services, and accommodations to motor vehicle accident victims, to remain in business.

50. For the most part, Plaintiff Eisenhower Center's services are not compensable under Medicare, as referenced in § 3157(2). Therefore, the fee schedules set forth in § 3157(7) dictate the amount that Plaintiff Eisenhower Center can be reimbursed for its services rendered to motor vehicle accident victims, such as Philip Krueger.

51. Beginning on July 1, 2021, for motor vehicle accident victims that receive reasonably necessary products, services, and accommodations for their care, recovery, or rehabilitation from Plaintiff Eisenhower, including Philip Krueger, Plaintiff Eisenhower Center will only be able to be reimbursed at 55% of the rate at which it charged for such products, services, and accommodations on January 1, 2019. Beginning on July 1, 2022,

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Eisenhower Center will only be able to be reimbursed at 54% of the rate at which it charged for such products, services, and accommodations on January 1, 2019. Beginning on July 1, 2023, Eisenhower Center will only be able to be reimbursed at 52.5% of the rate at which it charged for such products, services, and accommodations on January 1, 2019.

52. If the fee schedules set forth in § 3157(7) apply to the reasonably necessary products, services, and accommodations that Philip Krueger is receiving from Plaintiff Eisenhower Center and to all of Plaintiff Eisenhower Center's patients that are injured in motor vehicle accidents, there exists a substantial likelihood that Plaintiff Eisenhower Center will be unable to continue providing those reasonably necessary products, services, and accommodations to Philip Krueger and these other patients for the reason that the reimbursement rates set forth in the fee schedule contained in § 3157(7) are less than Plaintiff Eisenhower Center's cost of providing said care. Therefore, this creates an unsustainable situation regarding the ability of Plaintiff Eisenhower Center to survive as a viable business, and thus threatens and jeopardizes access to reasonably necessary products, services, and accommodations for the care, recovery, or rehabilitation of Philip Krueger and other motor vehicle accident patients.

53. The fee schedules contained in §§ 3157(2) and (7) will also purportedly apply to medical providers who are or will be providing reasonably necessary products, services, and accommodations for Ellen M. Andary's care, recovery, or rehabilitation.

54. If the fee schedules set forth in §§ 3157(2) and (7) apply to Ellen M. Andary's medical providers who are or will be providing reasonably necessary products, services, and accommodations for her care, recovery, or rehabilitation, her ability to continue

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receiving that care is at risk if the statutory reimbursement rates contained in those sections are deemed by her providers to be inadequate to enable them to continue caring for her.

55. If the aforementioned fee schedule provisions were to apply, Ellen M. Andary would be denied the full benefits of her insurance contract policy with Defendant USAA, which she and her husband, Michael T. Andary, M.D., purchased and which was in full force and effect on the date of her December 5, 2014 accident.

56. The Michigan Constitution prohibits laws that impair the obligation of contracts. Specifically, the Michigan Constitution states: "*No . . . law impairing the obligation of contract shall be enacted.*" Const 1963, art 1 § 10.

57. The Michigan Constitution contains a substantive due process protection that protects individuals from arbitrary exercise of governmental power. Specifically, the Michigan Constitution States, "*no person shall . . . be deprived of life, liberty, or property, without due process of law.*" Const 1963, art 1 § 17.

58. The Michigan Constitution contains an equal protection clause that protects similarly situated persons and entities from being treated dissimilarly. Specifically, the Michigan Constitution states: "*[n]o person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin.*" Const 1963, art 1 § 2.

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COUNT I – APPLICATION OF THE ATTENDANT CARE LIMITATIONS SET FORTH IN MCL 500.3157(10) TO ELLEN M. ANDARY VIOLATES HER CONSTITUTIONAL CONTRACT RIGHTS UNDER ARTICLE 1 SECTION 10 OF THE MICHIGAN CONSTITUTION

59. Plaintiffs incorporate by reference paragraphs 1 - 58.

60. The attendant care limitations set forth in § 3157(10) limiting in-home family provided attendant care to 56 hours per week, operates as a substantial impairment of the contractual obligations owed to Ellen M. Andary pursuant to her aforementioned auto insurance policy with Defendant USAA. Ellen M. Andary's auto insurance policy with Defendant USAA, as of the date of her injury, did not contain any limitations on the identity of attendant care providers and allowed her to be reimbursed for in-home family provided attendant care that was rendered to her 24 hours per day, seven days per week, without regard to the identity of her caregivers, as long as such attendant care services were reasonably necessary for her care, recovery, or rehabilitation and that the charges were reasonable.

61. The premium paid by Ellen M. Andary and her husband, Michael T. Andary, M.D. for their aforesaid auto insurance policy with Defendant USAA was priced and sold based upon that fact that said policy entitled Ellen M. Andary to full in-home attendant care services without regard to the identity of the service provider. Ellen M. Andary's right to all reasonably necessary in-home family provided attendant care became vested on the date she was injured. Section 3157(10) divests her of that vested contract right, denies her the benefit of the premiums she and Michael T. Andary, M.D. paid to secure it, and, in the process, jeopardizes and diminishes her quality of care.

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62. The State of Michigan has no significant and legitimate public purpose behind the enactment of § 3157(10) to justify the retroactive interference with Ellen M. Andary's vested contractual right to uncapped in-home family provided attendant care between private parties, in that there is no credible evidence that in-home family provided attendant care is somehow fraudulent, or in some other way inappropriate. Moreover, there is no logical support for the proposition that forcing injured persons to hire in-home commercial attendant care agencies will bring down the cost of no-fault insurance.

63. The State of Michigan cannot divest Ellen M. Andary of contractual rights that vested at the time she was injured and cannot retroactively dictate the identity of her in-home attendant care providers. Moreover, the means the State of Michigan chose to alter the contractual rights between Ellen M. Andary and Defendant USAA are clearly unreasonable. In that regard, it is unreasonable for the State of Michigan to dramatically diminish the reimbursement for the in-home family provided attendant care that Ellen M. Andary has been receiving by two-thirds of that care, with no legitimate justification for such a dramatic alteration of her contractual rights.

64. For the reasons stated herein and otherwise, the in-home family provided attendant care limitations set forth in § 3157(10) violate Ellen M. Andary's constitutional contract rights under the Michigan Contracts Clause, Const 1963 Article 1 § 10.

WHEREFORE, Plaintiff Ellen M. Andary, a legally incapacitated adult, by and through her Guardian and Conservator, Michael T. Andary, M.D., prays that this Court

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will enter a declaratory judgment, pursuant to MCR 2.605, in favor of Plaintiff Ellen M. Andary, declaring the following:

a. That the in-home family provided attendant care provisions of § 3157(10) are unconstitutional because they violate Article 1 § 10 of the Michigan Constitution.

b. That Defendant USAA is prohibited from enforcing the provisions of § 3157(10) as to Plaintiff Ellen M. Andary.

COUNT II – APPLICATION OF THE ATTENDANT CARE LIMITATIONS SET FORTH IN MCL 500.3157(10) TO ELLEN M. ANDARY VIOLATES HER CONSTITUTIONAL DUE PROCESS RIGHTS UNDER ARTICLE 1 SECTION 17 OF THE MICHIGAN CONSTITUTION

65. Plaintiffs incorporate by reference paragraphs 1 - 64.

66. Ellen M. Andary, through her Guardian and Conservator Michael T. Andary, M.D., has a fundamental due process right, pursuant to the Michigan Constitution Article 1 § 17, to privacy and bodily integrity.

67. Ellen M. Andary, through her Guardian and Conservator Michael T. Andary, M.D., has a liberty interest, pursuant to the Michigan Constitution Article 1 § 17, in being able to choose the in-home caregivers that she or her Guardian selects, and who provide care that is most efficacious and beneficial for her.

68. The 56 hour per week in-home family provided attendant care limitation of § 3157(10) is a violation of Ellen M. Andary's fundamental right to privacy and bodily integrity, as it forces her to bring strangers into her home to provide her with very personal and intimate care, such as bathing, dressing, and assisting with using the bathroom. In addition, § 3157(10) is a violation of Ellen M. Andary's liberty interests, as

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it restricts her right to be able to choose the in-home caregivers that she or her Guardian selects, and who provide the care that is most efficacious and beneficial for her.

69. The State of Michigan has no compelling interest to infringe upon Ellen M. Andary's fundamental right to privacy and bodily integrity and her liberty interest in choosing her in-home caregivers by restricting her right to obtain reasonably necessary in-home family provided attendant care. Furthermore, the drastic limitations imposed by § 3157(10) regarding Ellen. M. Andary's ability to obtain in-home family provided attendant care are overbroad, overreaching, and not narrowly tailored.

70. For the reasons stated herein and otherwise, the in-home family provided attendant care limitations set forth in § 3157(10) violate Ellen M. Andary's constitutional substantive due process rights under the Michigan Due Process Clause, Const 1963 Article 1 § 17.

WHEREFORE, Plaintiff Ellen M. Andary, a legally incapacitated adult, by and through her Guardian and Conservator, Michael T. Andary, M.D., prays that this Court will enter a declaratory judgment, pursuant to MCR 2.605, in favor of Plaintiff Ellen M. Andary, declaring the following:

a. That the in-home family provided attendant care provisions of § 3157(10) are unconstitutional because they violate Article 1 § 17 of the Michigan Constitution.

b. That Defendant USAA is prohibited from enforcing the provisions of § 3157(10) as to Plaintiff Ellen M. Andary.

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COUNT III – APPLICATION OF THE ATTENDANT CARE LIMITATIONS SET FORTH IN MCL 500.3157(10) TO ELLEN M. ANDARY VIOLATES HER CONSTITUTIONAL EQUAL PROTECTION RIGHTS UNDER ARTICLE 1 SECTION 2 OF THE MICHIGAN CONSTITUTION

71. Plaintiffs incorporate by reference paragraphs 1 - 70.

72. Ellen M. Andary, through her Guardian and Conservator Michael T. Andary, M.D., has a fundamental equal protection right, pursuant to the Michigan Constitution Article 1 § 2, to privacy and bodily integrity.

73. Section 3157(10) creates two different classes of motor vehicle accident victims that require in-home attendant care: (a) persons that receive in-home family provided attendant care and, (b) persons that receive in-home commercial attendant care. Section 3157(10) discriminates against persons that receive in-home family provided attendant care, such as Ellen M. Andary, by putting a cap on the amount of reimbursement for such care at 56 hours per week, whereas persons who receive in-home commercial attendant care are not subject to any such limitation.

74. In creating the two classes referenced above, § 3157(10) treats similarly situated motor vehicle accident victims in a dissimilar manner, thereby imposing a substantial disadvantage upon motor vehicle accident victims who receive in-home family provided attendant care, such as Ellen M. Andary, who has in reality, benefitted more from the nature and extent of the in-home family provided attendant care she has been receiving since her discharge from the hospital.

75. The 56 hour per week in-home family provided attendant care limitation of § 3157(10) is a violation of Ellen M. Andary's fundamental right to privacy and bodily

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integrity, as it forces her to bring strangers into her home to provide her with very personal and intimate care, such as bathing, dressing, and assisting with using the bathroom. In addition, § 3157(10) violates Ellen M. Andary's liberty interests by restricting her right to be able to choose the in-home caregivers that she or her Guardian selects and who provide the care that is most efficacious and beneficial for her.

76. The State of Michigan has no compelling interest to infringe upon Ellen M. Andary's fundamental right to privacy and bodily integrity and no compelling interest to treat her more harshly than other similarly situated motor vehicle accident victims by restricting her right to receive reasonably necessary in-home family provided attendant care. Furthermore, the significant limitations imposed by § 3157(10) are overbroad, overreaching, and not narrowly tailored.

77. For the reasons stated herein and otherwise, the in-home family provided attendant care limitations set forth in § 3157(10) violate Ellen M. Andary's constitutional equal protection rights under the Michigan Equal Protection Clause, Const 1963 Article 1 § 2.

WHEREFORE, Plaintiff Ellen M. Andary, a legally incapacitated adult, by and through her Guardian and Conservator, Michael T. Andary, M.D., prays that this Court will enter a declaratory judgment, pursuant to MCR 2.605, in favor of Plaintiff Ellen M. Andary, declaring the following:

a. That the in-home family provided attendant care provisions of § 3157(10) are unconstitutional because they violate Article 1 § 2 of the Michigan Constitution.

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b. That Defendant USAA is prohibited from enforcing the provisions of § 3157(10) as to Plaintiff Ellen M. Andary.

COUNT IV – APPLICATION OF THE FEE SCHEDULE LIMITATIONS SET FORTH IN MCL 500.3157(7) TO ELLEN M. ANDARY VIOLATES HER CONSTITUTIONAL CONTRACT RIGHTS UNDER ARTICLE 1 SECTION 10 OF THE MICHIGAN CONSTITUTION

78. Plaintiffs incorporate by reference paragraphs 1 - 77.

79. The fee schedules set forth in § 3157(7) limiting the amount Ellen M. Andary's providers can be reimbursed from Defendant USAA operate as a substantial impairment of the contractual obligations owed to Ellen M. Andary pursuant to her aforementioned auto insurance policy with Defendant USAA. Ellen M. Andary's auto insurance policy with Defendant USAA, as of the date of her injury, did not contain any such limitations on the reimbursement of her medical providers as long as such reimbursement was for reasonable charges for reasonably necessary products, services, and accommodations for her care, recovery, or rehabilitation.

80. The premium paid by Ellen M. Andary and her husband, Michael T. Andary, M.D. for their aforesaid auto insurance policy with Defendant USAA was priced and sold based upon the fact that said policy entitled Ellen M. Andary to reimbursement for all reasonable charges for all reasonably necessary products, services, and accommodations for her care, recovery, or rehabilitation. Ellen M. Andary's right to have her medical providers reimbursed for all for reasonable charges for reasonably necessary products, services, and accommodations for her care, recovery, or rehabilitation became vested on the date she was injured. Section 3157(7) divests her of that vested contract

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right, denies her the benefit of the premiums she and Michael T. Andary, M.D. paid to secure it, and in the process, jeopardizes and diminishes her quality of care.

81. The State of Michigan has no significant and legitimate public purpose behind the enactment of § 3157(7) to justify the retroactive interference with Ellen M. Andary's vested contractual right to have her medical providers reimbursed without regard to any government or private fee schedules. Moreover, the means the State of Michigan chose to alter those contractual rights between Ellen M. Andary and Defendant USAA are clearly unreasonable. The State of Michigan cannot divest Ellen M. Andary of contractual rights that vested at the time she was injured and cannot dictate the amount her medical providers can be reimbursed to treat her, and such a divestment could jeopardize and diminish her quality of care.

82. For the reasons stated herein and otherwise, the fee schedule limitations set forth in § 3157(7) violate Ellen M. Andary's constitutional contract rights under the Michigan Contracts Clause, Const 1963 Article 1 § 10.

WHEREFORE, Plaintiff Ellen M. Andary, a legally incapacitated adult, by and through her Guardian and Conservator, Michael T. Andary, M.D., prays that this Court will enter a declaratory judgment, pursuant to MCR 2.605, in favor of Plaintiff Ellen M. Andary, declaring the following:

a. That the fee schedule provisions of § 3157(7) are unconstitutional because they violate Article 1 § 10 of the Michigan Constitution.

b. That Defendant USAA is prohibited from enforcing the provisions of § 3157(7) as to Plaintiff Ellen M. Andary.

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COUNT V – APPLICATION OF THE FEE SCHEDULE LIMITATIONS SET FORTH IN MCL 500.3157(7) TO ELLEN M. ANDARY VIOLATES HER CONSTITUTIONAL DUE PROCESS RIGHTS UNDER ARTICLE 1 SECTION 17 OF THE MICHIGAN CONSTITUTION

83. Plaintiffs incorporate by reference paragraphs 1 - 82.

84. Ellen M. Andary, through her Guardian and Conservator Michael T. Andary, M.D., has a fundamental due process right, pursuant to the Michigan Constitution Article 1 § 17, to privacy and bodily integrity.

85. Ellen M. Andary, through her Guardian and Conservator Michael T. Andary, M.D., has a liberty interest, pursuant to the Michigan Constitution Article 1 § 17, in being able to make personal medical decisions and in being free from governmental interference with the ability to access reasonably necessary products, services, and accommodations for her care, recovery, or rehabilitation by limiting the amount her providers can be reimbursed by her insurer under a private insurance contract.

86. The fee schedules set forth in § 3157(7) interfere with Ellen M. Andary's current patient-provider relationships and threaten the continuity of those relationships. Ellen M. Andary's fundamental right to privacy and bodily integrity and her liberty interest in her ability to access to reasonably necessary products, services, and accommodations for her care, recovery, or rehabilitation is threatened by the implementation of the aforementioned fee schedules.

87. The fee schedules set forth in § 3157(7) interfere with Ellen M. Andary's fundamental right to privacy and bodily integrity and liberty interest in her ability to access reasonably necessary products, services, and accommodations for her care,

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recovery, or rehabilitation. The reimbursement rates under the fee schedules set forth in § 3157(7) are unsustainable for many Michigan medical providers. Therefore, those providers will be unable or unwilling to treat Ellen M. Andary at such dramatically reduced reimbursement rates, thereby impairing her access to reasonably necessary products, services, and accommodations for her care, recovery, or rehabilitation.

88. The State of Michigan has no compelling interest to infringe upon Ellen M. Andary's fundamental right to privacy and bodily integrity and her liberty interest by the imposition of price fixing rules, applicable to private insurance contracts, that interfere with her ability to access reasonably necessary products, services, and accommodations for her care, recovery, or rehabilitation. Furthermore, the significant limitations imposed by § 3157(7) are overbroad, overreaching, and not narrowly tailored.

89. For the reasons stated herein and otherwise, the fee schedule limitations set forth in §§ 3157(2) and (7) violate Ellen M. Andary's constitutional substantive due process rights under the Michigan Due Process Clause, Const 1963 Article 1 § 17.

WHEREFORE, Plaintiff Ellen M. Andary, a legally incapacitated adult, by and through her Guardian and Conservator, Michael T. Andary, M.D., prays that this Court will enter a declaratory judgment, pursuant to MCR 2.605, in favor of Plaintiff Ellen M. Andary, declaring the following:

a. That the fee schedule provisions of § 3157(7) are unconstitutional because they violate Article 1 § 17 of the Michigan Constitution.

b. That Defendant USAA is prohibited from enforcing the provisions of § 3157(7) as to Plaintiff Ellen M. Andary.

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COUNT VI – APPLICATION OF THE FEE SCHEDULE LIMITATIONS SET FORTH IN MCL 500.3157(7) TO ELLEN M. ANDARY VIOLATES HER CONSTITUTIONAL EQUAL PROTECTION RIGHTS UNDER ARTICLE 1 SECTION 2 OF THE MICHIGAN CONSTITUTION

90. Plaintiffs incorporate by reference paragraphs 1 - 89.

91. Ellen M. Andary, through her Guardian and Conservator Michael T. Andary, M.D., has a fundamental equal protection right, pursuant to the Michigan Constitution Article 1 § 2, to privacy and bodily integrity.

92. Sections 3157(2) and (7) create two different fee schedules that discriminate between motor vehicle accident victims that require reasonably necessary products, services, and accommodations for their care, recovery, or rehabilitation. The first of these classes consists of motor vehicle accident victims that require and receive reasonably necessary products, services, and accommodations that would be compensable under the Medicare laws. Providers rendering such products, services, and accommodations to patients in this class are reimbursed under § 3157(2) at a rate of 190% - 200% of the amount that is compensable by Medicare. The second of these classes consists of motor vehicle accident victims that require and receive reasonably necessary products, services, and accommodations that are not compensable under the Medicare laws. Providers rendering such products, services, and accommodations to patients in this class are reimbursed under § 3157(7) only at a rate of 52.5% - 55% of the amount these providers charged for those products, services, and accommodations on January 1, 2019. As such, the fee schedules under § 3157(7) reimburse a patient's providers at a substantially reduced rate in comparison to § 3157(2), thereby restricting the ability of patients, such as

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Ellen M. Andary, to access reasonably necessary products, services, and accommodations for her care, recovery, or rehabilitation.

93. In creating the two classes referenced above, §§ 3157(2) and (7) treat similarly situated motor vehicle accident victims in a dissimilar manner, thereby imposing a substantial disadvantage upon motor vehicle accident victims who receive reasonably necessary products, services, and accommodations for their care, recovery, or rehabilitation that are not compensable by Medicare, such as Ellen M. Andary. Stated differently, motor vehicle accident victims controlled by § 3157(7), such as Ellen M. Andary, become second class patients.

94. The State of Michigan has no compelling interest to infringe upon Ellen M. Andary's fundamental right to privacy and bodily integrity and no compelling interest to treat her more harshly than other similarly situated motor vehicle accident victims with respect to provider reimbursement rates for reasonably necessary products, services, and accommodations. Furthermore, the significant limitations imposed by § 3157(7) are overbroad, overreaching, and not narrowly tailored.

95. For the reasons stated herein and otherwise, the fee schedule limitations set forth in § 3157(7) violate Ellen M. Andary's constitutional equal protection rights under the Michigan Equal Protection Clause, Const 1963 Article 1 § 2.

WHEREFORE, Plaintiff Ellen M. Andary, a legally incapacitated adult, by and through her Guardian and Conservator, Michael T. Andary, M.D., prays that this Court will enter a declaratory judgment, pursuant to MCR 2.605, in favor of Plaintiff Ellen M. Andary, declaring the following:

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a. That the fee schedule provisions of § 3157(7) are unconstitutional because they violate Article 1 § 2 of the Michigan Constitution.

b. That Defendant USAA is prohibited from enforcing the provisions of § 3157(7) as to Plaintiff Ellen M. Andary.

COUNT VII – APPLICATION OF THE FEE SCHEDULE LIMITATIONS SET FORTH IN MCL 500.3157(7) TO PHILIP KRUEGER FOR TREATMENT RENDERED TO HIM BY PLAINTIFF EISENHOWER CENTER VIOLATES HIS CONSTITUTIONAL CONTRACT RIGHTS UNDER ARTICLE 1 SECTION 10 OF THE MICHIGAN CONSTITUTION

96. Plaintiffs incorporate by reference paragraphs 1 - 95.

97. The fee schedules set forth in § 3157(7) limiting the amount Philip Krueger's provider, Plaintiff Eisenhower Center, can be reimbursed from Defendant Citizens operate as a substantial impairment of the contractual obligations owed to Philip Krueger pursuant to his aforementioned auto insurance policy with Defendant Citizens. Philip Krueger's auto insurance policy with Defendant Citizens, as of the date of his injury, did not contain any such limitations on the reimbursement of his medical providers as long as such reimbursement was for reasonable charges for reasonably necessary products, services, and accommodations for his care, recovery, or rehabilitation.

98. The premium paid on behalf of Philip Krueger for his aforesaid auto insurance policy with Defendant Citizens was priced and sold based upon the fact that said policy entitled him to reimbursement for all reasonable charges for reasonably necessary products, services, and accommodations for his care, recovery, or rehabilitation. Philip Krueger's right to have his medical provider, Plaintiff Eisenhower Center, reimbursed for all for reasonable charges for reasonably necessary products, services, and accommodations for his care, recovery, or rehabilitation became vested on

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the date he was injured. Section 3157(7) divests him of that vested contract right, denies him the benefit of the premiums paid on his behalf to secure it, and in the process, jeopardizes and diminishes his quality of care.

99. The State of Michigan has no significant and legitimate public purpose behind the enactment of § 3157(7) to justify the retroactive interference with Philip Krueger's vested contractual right to have his medical provider, Plaintiff Eisenhower Center, reimbursed without regard to any government or private fee schedules. Moreover, the means the State of Michigan chose to alter the contractual rights between Philip Krueger and Defendant Citizens are clearly unreasonable. The State of Michigan cannot divest Philip Krueger of contractual rights that vested at the time he was injured and cannot dictate the amount his medical providers can be reimbursed to treat him, and such a divestment could jeopardize and diminish his quality of care.

100. For the reasons stated herein and otherwise, the fee schedule limitations set forth in § 3157(7) violates Philip Krueger's constitutional contract rights under the Michigan Contracts Clause, Const 1963 Article 1 § 10.

WHEREFORE, Plaintiff Philip Krueger, a legally incapacitated adult, by and through his Guardian, Ronald Krueger, prays that this Court will enter a declaratory judgment, pursuant to MCR 2.605, in favor of Plaintiff Philip Krueger, declaring the following:

a. That the fee schedule provisions of § 3157(7) are unconstitutional because they violate Article 1 § 10 of the Michigan Constitution.

b. That Defendant Citizens is prohibited from enforcing the provisions of § 3157(7) as to Plaintiff Philip Krueger for reasonably necessary

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products, services, and accommodation for his care, recovery, or rehabilitation rendered to him by Plaintiff Eisenhower Center.

COUNT VIII – APPLICATION OF THE FEE SCHEDULE LIMITATIONS SET FORTH IN MCL 500.3157(7) TO PHILIP KRUEGER FOR TREATMENT RENDERED TO HIM BY PLAINTIFF EISENHOWER CENTER VIOLATES HIS CONSTITUTIONAL DUE PROCESS RIGHTS UNDER ARTICLE 1 SECTION 17 OF THE MICHIGAN CONSTITUTION

101. Plaintiffs incorporate by reference paragraphs 1 - 100.

102. Philip Krueger, through his Guardian Ronald Krueger, has a fundamental due process right, pursuant to the Michigan Constitution Article 1 § 17, to privacy and bodily integrity.

103. Philip Krueger, through his Guardian Ronald Krueger, has a liberty interest, pursuant to the Michigan Constitution Article 1 § 17, in being able to make personal medical decisions and in being free from governmental interference with his ability to access reasonably necessary products, services, and accommodations for his care, recovery, or rehabilitation by limiting the amount his providers, such as Plaintiff Eisenhower Center, can be reimbursed by his insurer under a private insurance contract.

104. The fee schedules set forth in § 3157(7) interfere with Philip Krueger's fundamental right to privacy and bodily integrity and liberty interest in his ability to access reasonably necessary products, services, and accommodations for his care, recovery, or rehabilitation. The reimbursement rates under the fee schedules set forth in § 3157(7) are unsustainable for Plaintiff Eisenhower Center. Therefore, Plaintiff Eisenhower Center will be unable or unwilling to treat Philip Krueger at such dramatically reduced reimbursement rates, thereby impairing his access to reasonably

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necessary products, services, and accommodations for his care, recovery, or rehabilitation.

105. The fee schedules set forth in § 3157(7) interfere with Philip Krueger's current patient-provider relationship with Plaintiff Eisenhower Center, and threaten the continuity of this relationship. Philip Krueger's fundamental right to privacy and bodily integrity and his liberty interest in his ability to access reasonably necessary products, services, and accommodations for his care, recovery, or rehabilitation with a medical provider that he has been seeing since 1997 is threatened by the implementation of the aforementioned fee schedules.

106. The State of Michigan has no compelling interest to infringe upon Philip Krueger's fundamental right to privacy and bodily integrity and his liberty interest by the imposition of price fixing rules, applicable to private insurance contracts, that interfere with his ability to access reasonably necessary products, services, and accommodations for his care, recovery, or rehabilitation. Furthermore, the significant limitations imposed by § 3157(7) are overbroad, overreaching, and not narrowly tailored.

107. For the reasons stated herein and otherwise, the fee schedule limitations set forth in § 3157(7) violate Philip Krueger's constitutional substantive due process rights under the Michigan Due Process Clause, Const 1963 Article 1 § 17.

WHEREFORE, Plaintiff Philip Krueger, a legally incapacitated adult, by and through his Guardian, Ronald Krueger, prays that this Court will enter a declaratory judgment, pursuant to MCR 2.605, in favor of Plaintiff Philip Krueger, declaring the following:

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a. That the fee schedule provisions of § 3157(7) are unconstitutional because they violate Article 1 § 17 of the Michigan Constitution.

b. That Defendant Citizens is prohibited from enforcing the provisions of § 3157(7) as to Plaintiff Philip Krueger for treatment rendered to him by Plaintiff Eisenhower Center.

COUNT IX – APPLICATION OF THE FEE SCHEDULE LIMITATIONS SET FORTH IN MCL 500.3157(7) TO PHILIP KRUEGER VIOLATES HIS CONSTITUTIONAL EQUAL PROTECTION RIGHTS UNDER ARTICLE 1 SECTION 2 OF THE MICHIGAN CONSTITUTION

108. Plaintiffs incorporate by reference paragraphs 1 - 107.

109. Philip Krueger, through his Guardian Ronald Krueger, has a fundamental equal protection right, pursuant to the Michigan Constitution Article 1 § 2, to privacy and bodily integrity.

110. Sections 3157(2) and (7) create two different fee schedules that discriminate between motor vehicle accident victims that require reasonably necessary products, services, and accommodations for their care, recovery, or rehabilitation. The first of these classes consists of motor vehicle accident victims that require and receive reasonably necessary products, services, and accommodations that would be compensable under the Medicare laws. Providers rendering such products, services, and accommodations to patients in this class are reimbursed under § 3157(2) at a rate of 190% - 200% of the amount that is compensable by Medicare. The second of these classes consists of motor vehicle accident victims that require and receive reasonably necessary products, services, and accommodations that are not compensable under the Medicare laws. Providers rendering such products, services, and accommodations to patients in this class are

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reimbursed under § 3157(7) only at a rate of 52.5% - 55% of the amount these providers charged for those products, services, and accommodations on January 1, 2019. As such, the fee schedules under § 3157(7) reimburse a patient's providers at a substantially reduced rate in comparison to § 3157(2), thereby restricting the ability of patients, such as Philip Krueger, to access reasonably necessary products, services, and accommodations for his care, recovery, or rehabilitation.

111. In creating the two classes referenced above, §§ 3157(2) and (7) treat similarly situated motor vehicle accident victims in a dissimilar manner, thereby imposing a substantial disadvantage upon motor vehicle accident victims who receive reasonably necessary products, services, and accommodations for their care, recovery, or rehabilitation that are not compensable by Medicare, such as Philip Krueger. Stated differently, motor vehicle accident victims controlled by § 3157(7), such as Philip Krueger, become second class patients.

112. The State of Michigan has no compelling interest to infringe upon Philip Krueger's fundamental right to privacy and bodily integrity and no compelling interest to treat him more harshly than other similarly situated motor vehicle accident victims with respect to provider reimbursement rates for reasonably necessary products, services, and accommodations. Furthermore, the significant limitations imposed by § 3157(7) are overbroad, overreaching, and not narrowly tailored.

113. For the reasons stated herein and otherwise, the fee schedule limitations set forth in § 3157(7) violate Philip Krueger's constitutional equal protection rights under the Michigan Equal Protection Clause, Const 1963 Article 1 § 2.

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WHEREFORE, Plaintiff Philip Krueger, a legally incapacitated adult, by and through his Guardian, Ronald Krueger, prays that this Court will enter a declaratory judgment, pursuant to MCR 2.605, in favor of Plaintiff Philip Krueger, declaring the following:

a. That the fee schedule provisions of § 3157(7) are unconstitutional because they violate Article 1 § 2 of the Michigan Constitution.

b. That Defendant Citizens is prohibited from enforcing the provisions of § 3157(7) as to Plaintiff Philip Krueger.

COUNT X – APPLICATION OF THE FEE SCHEDULE LIMITATIONS SET FORTH IN MCL 500.3157(7) TO PLAINTIFF EISENHOWER CENTER FOR SERVICES IT RENDERS TO PLAINTIFF PHILIP KRUEGER VIOLATES ITS CONSTITUTIONAL CONTRACT RIGHTS UNDER ARTICLE 1 SECTION 10 OF THE MICHIGAN CONSTITUTION

114. Plaintiffs incorporate by reference paragraphs 1 - 113.

115. The fee schedules set forth in § 3157(7) limiting the amount that Plaintiff Eisenhower Center can be reimbursed from Defendant Citizens for reasonably necessary products, services, and accommodations it renders for the care, recovery, or rehabilitation of Philip Krueger operate as a substantial impairment of the contractual relationship between Plaintiff Eisenhower Center and Philip Krueger. In that regard, § 3157(7) prevents Plaintiff Eisenhower Center from being reimbursed for reasonably necessary products, services, and accommodations it renders for the care, recovery, or rehabilitation of Philip Krueger greater than 52.5% - 55% of the rate it charged for such products, services, and accommodations on January 1, 2019. The contract between Plaintiff Eisenhower Center and Philip Kruger, as of the date Philip Kruger began receiving

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products, services, and accommodations from Plaintiff Eisenhower Center, did not contain any such limitations on the reimbursement of Plaintiff Eisenhower Center as long as such reimbursement was for reasonable charges for reasonably necessary products, services, and accommodations it rendered for the care, recovery, or rehabilitation of Philip Krueger.

116. The State of Michigan has no significant and legitimate public purpose behind the enactment of § 3157(7) to justify the retroactive interference with Plaintiff Eisenhower Center's vested contractual right to be reimbursed for all reasonable charges for reasonably necessary products, services, and accommodations it renders for the care, recovery, or rehabilitation of Philip Krueger.

117. The means the State of Michigan chose to alter the contractual rights between Plaintiff Eisenhower Center and Philip Krueger are clearly unreasonable. The fee schedules set forth in § 3157(7) dramatically reduce the amount Plaintiff Eisenhower Center can be reimbursed for the reasonably necessary products, services, and accommodations it renders to Philip Krueger to a level not to exceed 52.5% - 55% of the rate at which it rendered such products, services, and accommodations on January 1, 2019, with no legitimate reasoning for such a dramatic reduction.

118. For the reasons stated herein and otherwise, the fee schedule limitations set forth in § 3157(7) violate Plaintiff Eisenhower Center's constitutional contract rights under the Michigan Contracts Clause, Const 1963 Article 1 § 10.

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WHEREFORE, Plaintiff Eisenhower Center prays that this Court will enter a declaratory judgment, pursuant to MCR 2.605, in favor of Plaintiff Eisenhower Center, declaring the following:

a. That the fee schedule provisions of § 3157(7) are unconstitutional because they violate Article 1 § 10 of the Michigan Constitution.

b. That Defendant Citizens is prohibited from enforcing the provisions of § 3157(7) as to Plaintiff Eisenhower Center for reasonably necessary products, services, and accommodations it renders for the for care, recovery, or rehabilitation of Philip Krueger.

COUNT XI - APPLICATION OF THE FEE SCHEDULE LIMITATIONS SET FORTH IN MCL 500.3157(7) TO PLAINTIFF EISENHOWER CENTER REGARDING SERVICES IT RENDERS TO ALL MOTOR VEHICLE ACCIDENT VICTIMS PAST, PRESENT, OR FUTURE, VIOLATES ITS CONSTITUTIONAL DUE PROCESS RIGHTS UNDER ARTICLE 1 SECTION 17 OF THE MICHIGAN CONSTITUTION

119. Plaintiffs incorporate by reference paragraphs 1 – 118.

120. Plaintiff Eisenhower Center has a property interest, pursuant to the Michigan Constitution Article 1 § 17, in the survival of its business and the perpetuation of its financial operations without government interference in the form of oppressive price control legislation that threatens the survivability of Plaintiff Eisenhower Center.

121. The fee schedules set forth in § 3157(7) violate Plaintiff Eisenhower Center's property rights by dramatically and unreasonably reducing the amount Plaintiff Eisenhower Center can be reimbursed for providing reasonably necessary products, services, and accommodations for care, recovery, or rehabilitation to all motor vehicle accident victims, past, present, or future, including, but not limited to, Philip Krueger, under the provisions of the No-Fault Act. In that regard, § 3157(7) prevents Plaintiff

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Eisenhower Center from being reimbursed more than 52.5% - 55% of the rate Plaintiff Eisenhower Center charged for those products, services, and accommodations on January 1, 2019.

122. Plaintiff Eisenhower Center's ability to stay in business at such patently unreasonable reimbursement rates is effectively destroyed by § 3157(7). As such, Plaintiff Eisenhower Center will be unable to provide reasonably necessary products, services, and accommodations for care, recovery, or rehabilitation to all motor vehicle accident victims, past, present, or future, including, but not limited to, Philip Krueger, at the confiscatory and unconscionable reimbursement rates set forth by § 3157(7).

123. Accordingly, § 3157(7) violates Plaintiff Eisenhower Center's substantive due process rights by taking away Plaintiff Eisenhower Center's property and rendering it unable to continue its business of providing reasonably necessary products, services, and accommodations for care, recovery, or rehabilitation of all motor vehicle accident victims, past, present, or future, including, but not limited to, Philip Krueger.

124. The infringement upon Plaintiff Eisenhower Center's substantive due process rights is particularly egregious given the fact that the government's enactment of the Michigan No-Fault Act in 1973 codified and embraced the clear public policy that motor vehicle accident victims, such as Philip Krueger, should have uncapped lifetime care for all reasonably necessary products, services, and accommodations for their care, recovery, or rehabilitation. In enacting that law, the State of Michigan fostered and encouraged the birth and development of a significant sector of the Michigan health care industry. People and businesses throughout Michigan invested substantial funds and

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resources in order to create specialized medical treatment facilities to serve the population of catastrophically injured motor vehicle accident victims that the State had decreed should be fully served under the No-Fault Act. The enactment of the fee schedules set forth in § 3157(7) has sabotaged that sector of Michigan's health care industry which the State of Michigan encouraged to be developed and will likely destroy the substantial financial investment that providers, like Plaintiff Eisenhower Center, have made in their businesses.

125. The limitations imposed by § 3157(7) are overbroad, overreaching, and not rationally related to any legitimate government purpose.

126. For the reasons stated herein and otherwise, the fee schedule limitations set forth in § 3157(7) violate Plaintiff Eisenhower Center's constitutional substantive due process rights under the Due Process Clause, Const 1963 Article 1 § 17, with regard to reasonably necessary products, services, and accommodations for care, recovery, or rehabilitation it renders to all motor vehicle accident victims, past, present, or future, including, but not limited to, Philip Krueger.

WHEREFORE, Plaintiff Eisenhower Center prays that this Court will enter a declaratory judgment, pursuant to MCR 2.605, in favor of Plaintiff Eisenhower Center, declaring the following:

a. That the fee schedule provisions of § 3157(7) are unconstitutional because they violate Article 1 § 17 of the Michigan Constitution.

b. That Defendant Citizens is prohibited from enforcing the provisions of § 3157(7) as to Plaintiff Eisenhower Center.

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COUNT XII - APPLICATION OF THE FEE SCHEDULE LIMITATIONS SET FORTH IN MCL 500.3157(7) TO PLAINTIFF EISENHOWER CENTER REGARDING SERVICES IT RENDERS TO ALL MOTOR VEHICLE ACCIDENT VICTIMS PAST, PRESENT, OR FUTURE VIOLATES ITS CONSTITUTIONAL EQUAL PROTECTION RIGHTS UNDER ARTICLE 1 SECTION 2 OF THE MICHIGAN CONSTITUTION

127. Plaintiffs incorporate by reference paragraphs 1 – 126.

128. Sections 3157(2) and (7) create two different fee schedules that discriminate between Michigan medical providers that render reasonably necessary products, services, and accommodations for the care, recovery, or rehabilitation of motor vehicle accident victims. The first of these classes consists of Michigan medical providers that render reasonably necessary products, services, and accommodations that would be compensable under the Medicare laws. Providers rendering such products, services, and accommodations to patients in this class are reimbursed under § 3157(2) at a rate of 190% - 200% of the amount that is compensable by Medicare. The second of these classes consists of Michigan medical providers that render reasonably necessary products, services, and accommodations that are not compensable under the Medicare laws. Providers rendering such products, services, and accommodations to patients in this class are reimbursed under § 3157(7) only at a rate of 52.5% - 55% of the amount these providers charged for those products, services, and accommodations on January 1, 2019. As such, the fee schedules under § 3157(7) reimburse Michigan medical providers at a substantially reduced rate in comparison to § 3157(2).

129. In creating the two classes referenced above, §§ 3157(2) and (7) treat similarly situated Michigan medical providers in a dissimilar manner, thereby imposing

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a substantial disadvantage upon Michigan medical providers that render reasonably necessary products, services, and accommodations for the care, recovery, or rehabilitation of motor vehicle accident victims that are not compensable by Medicare, such as Plaintiff Eisenhower Center.

130. The State of Michigan has no rational basis for treating Plaintiff Eisenhower Center more harshly than other medical providers that render reasonably necessary products, services, and accommodations that are compensable by Medicare. Furthermore, the significant limitations imposed by § 3157(7) are overbroad, overreaching, and not rationally related to any legitimate government purpose.

131. For the reasons stated herein and otherwise, the fee schedule limitations set forth in § 3157(7) violate Plaintiff Eisenhower Center's constitutional equal protection rights under the Equal Protection Clause, Const 1963 Article 1 § 2.

WHEREFORE, Plaintiff Eisenhower Center prays that this Court will enter a declaratory judgment, pursuant to MCR 2.605, in favor of Plaintiff Eisenhower Center, declaring the following:

a. That the fee schedule provisions of § 3157(7) are unconstitutional because they violate Article 1 § 2 of the Michigan Constitution.

b. That Defendant Citizens is prohibited from enforcing the provisions of § 3157(7) as to Plaintiff Eisenhower Center.

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COUNT XIII – FUTURE APPLICATION OF THE ATTENDANT CARE LIMITATIONS SET FORTH IN MCL 500.3157(10) TO ALL MOTOR VEHICLE ACCIDENT VICTIMS PAST, PRESENT, OR FUTURE, VIOLATES THE CONSTITUTIONAL DUE PROCESS RIGHTS OF THOSE PERSONS UNDER ARTICLE 1 SECTION 17 OF THE MICHIGAN CONSTITUTION

132. Plaintiffs incorporate by reference paragraphs 1 – 131.

133. Pursuant to MCR 2.605, Plaintiffs in the case have standing to bring this declaratory judgment action on behalf of all motor vehicle accident victims, past, present, or future, alleging that § 3157(10) is unconstitutional as applied to all motor vehicle accident victims, past, present, or future, for the reason that the § 3157(10) limitations on in-home family provided attendant care involve an actual controversy that, if not immediately resolved, present the threat of imminent harm to any Michigan citizens seriously injured in a motor vehicle accident.

134. All Michigan citizens, including motor vehicle accident victims, past, present, or future, have a fundamental due process right, pursuant to the Michigan Constitution Article 1 § 17, to privacy and bodily integrity.

135. All Michigan citizens, including motor vehicle accident victims, past, present, or future, have a liberty interest, pursuant to the Michigan Constitution Article 1 § 17, in being able to select the in-home caregivers that are most appropriate for their individual needs and in being able to choose the in-home caregivers that provide the care that is most efficacious and beneficial for them.

136. The 56 hour per week in-home family provided attendant care limitation of § 3157(10) is a violation of the fundamental right to privacy and bodily integrity of all

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seriously injured motor vehicle accident victims, past, present, or future as it forces them to bring strangers into their homes to provide them with very personal and intimate care, such as bathing, dressing, and assisting with using the bathroom. In addition, § 3157(10) is a violation of the liberty interests of all seriously injured motor vehicle accident victims, past, present, or future, as it restricts their right to be able to choose the in-home caregivers that they select, and who provide the care that is most efficacious and beneficial for them.

137. The State of Michigan has no compelling interest to infringe upon the fundamental right to privacy and bodily integrity of all seriously injured motor vehicle accident victims, past present, and future by restricting their right to obtain reasonably necessary in-home family provided attendant care. Furthermore, the drastic limitations imposed by § 3157(10) regarding the ability of all motor vehicle accident victims, past, present, and future, to obtain in-home family provided attendant care are overbroad, overreaching, and not narrowly tailored.

138. For the reasons stated herein and otherwise, the in-home family provided attendant care limitations set forth in § 3157(10) violate the constitutional substantive due process rights of all motor vehicle accident victims, past, present, or future, under the Due Process Clause, Const 1963 Article 1 § 17.

WHEREFORE, Plaintiff Ellen M. Andary, a legally incapacitated adult, by and through her Guardian and Conservator, Michael T. Andary, M.D., Plaintiff Philip Krueger, a legally incapacitated adult, by and through his Guardian Ronald Krueger, and

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Plaintiff Eisenhower Center pray that this Court will enter a declaratory judgment, pursuant to MCR 2.605, in favor of Plaintiffs, declaring the following:

a. That the in-home family provided attendant care provisions of § 3157(10) are unconstitutional because they violate Article 1 § 17 of the Michigan Constitution.

b. That Defendant USAA and Defendant Citizens are prohibited from enforcing the provisions of § 3157(10) as to all motor vehicle accident victims, past, present, or future.

COUNT XIV – FUTURE APPLICATION OF THE ATTENDANT CARE LIMITATIONS SET FORTH IN MCL 500.3157(10) TO ALL MOTOR VEHICLE ACCIDENT VICTIMS PAST, PRESENT, OR FUTURE, VIOLATES THE CONSTITUTIONAL EQUAL PROTECTION RIGHTS OF THOSE PERSONS UNDER ARTICLE 1 SECTION 2 OF THE MICHIGAN CONSTITUTION

139. Plaintiffs incorporate by reference paragraphs 1 – 138.

140. Pursuant to MCR 2.605, Plaintiffs in the case have standing to bring this declaratory judgment action on behalf of all motor vehicle accident victims, past, present, or future, alleging that § 3157(10) is unconstitutional as applied to all motor vehicle accident victims, past, present, or future, for the reason that the § 3157(10) limitations on in-home family provided attendant care involve an actual controversy that, if not immediately resolved, presents the threat of imminent harm to any Michigan citizens seriously injured in a motor vehicle accident.

141. All Michigan citizens, including motor vehicle accident victims, past, present, or future, have a fundamental equal protection right, pursuant to the Michigan Constitution Article 1 § 2, to privacy and bodily integrity.

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142. Section 3157(10) creates two different classes of motor vehicle accident victims that require in-home attendant care: (a) persons that receive in-home family provided attendant care and, (b) persons that receive in-home commercial attendant care. Section 3157(10) discriminates against persons that receive in-home family provided attendant by putting a cap on the amount of reimbursement for such care at 56 hours per week, whereas persons who receive in-home commercial attendant care are not subject to any such limitation.

143. In creating the two classes referenced above, § 3157(10) treats similarly situated motor vehicle accident victims in a dissimilar manner, thereby imposing a substantial disadvantage upon motor vehicle accident victims who receive in-home family provided attendant care.

144. The 56 hour per week in-home family provided attendant care limitation of § 3157(10) is a violation of the fundamental right to privacy and bodily integrity of all seriously injured motor vehicle accident victims, past, present, or future, as it forces them to bring strangers into their homes to provide them with very personal and intimate care, such as bathing, dressing, and assisting with using the bathroom. In addition, § 3157(10) violates the liberty interests of all seriously injured motor vehicle accident victims, past, present, or future by restricting their right to be able to choose the in-home caregivers that they select and who provide the care that is most efficacious and beneficial for them.

145. The State of Michigan has no compelling interest to infringe the fundamental right to privacy and bodily integrity of all seriously injured motor vehicle accident victims past, present, or future that receive in-home family provided attendant

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care, and no compelling interest to treat them dissimilarly than other similarly situated seriously injured motor vehicle accident victims by restricting their right to obtain reasonably necessary in-home family provided attendant care. Furthermore, the drastic limitations imposed by § 3157(10) regarding the ability of all seriously injured motor vehicle accident victims, past, present, and future, to obtain in-home family provided attendant care are overbroad, overreaching, and not narrowly tailored.

146. For the reasons stated herein and otherwise, the in-home family provided attendant care limitations set forth in § 3157(10) violate the constitutional equal protection rights of all motor vehicle accident victims, past, present, or future under the Michigan Equal Protection Clause, Const 1963 Article 1 § 2.

WHEREFORE, Plaintiff Ellen M. Andary, a legally incapacitated adult, by and through her Guardian and Conservator, Michael T. Andary, M.D., Plaintiff Philip Krueger, a legally incapacitated adult, by and through his Guardian Ronald Krueger, and Plaintiff Eisenhower Center pray that this Court will enter a declaratory judgment, pursuant to MCR 2.605, in favor of Plaintiffs, declaring the following:

a. That the in-home family provided attendant care provisions of § 3157(10) are unconstitutional because they violate Article 1 § 2 of the Michigan Constitution.

b. That Defendant USAA and Defendant Citizens are prohibited from enforcing the provisions of § 3157(10) as to all motor vehicle accident victims, past, present, or future.

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COUNT XV - FUTURE APPLICATION OF THE FEE SCHEDULE LIMITATIONS SET FORTH IN MCL 500.3157(7) TO ALL MOTOR VEHICLE ACCIDENT VICTIMS, PAST, PRESENT, OR FUTURE, VIOLATES THE CONSTITUTIONAL DUE PROCESS RIGHTS OF THOSE PERSONS UNDER ARTICLE 1 SECTION 17 OF THE MICHIGAN CONSTITUTION

147. Plaintiffs incorporate by reference paragraphs 1 – 146.

148. Pursuant to MCR 2.605, Plaintiffs in the case have standing to bring this declaratory judgment action on behalf of all motor vehicle accident victims, past, present, or future, alleging that § 3157(7) is unconstitutional as applied to all motor vehicle accident victims, past, present, or future, for the reason that the fee schedules set forth in § 3157(7) involve an actual controversy that, if not immediately resolved, present the threat of imminent injury to any Michigan citizens involved in a motor vehicle accident.

149. All Michigan citizens, including motor vehicle accident victims, past, present, or future, have a fundamental due process right to privacy and bodily integrity, pursuant to the Michigan Constitution Article 1 § 17.

150. All Michigan citizens, including motor vehicle accident victims, past, present, or future, have a liberty interest, pursuant to the Michigan Constitution Article 1 § 17, in being free from governmental interference with the ability to access reasonably necessary products, services, and accommodations for their care, recovery, or rehabilitation, by limiting the amount their providers can be reimbursed by their insurers under a private insurance contract.

151. The fee schedules set forth in § 3157(7) interfere with the patient-provider relationships of all motor vehicle accident victims, past, present, or future. The

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fundamental right to privacy and bodily integrity and liberty interests of all motor vehicle accident victims, past, present, or future, in their ability to access reasonably necessary products, services, and accommodations for their care, recovery, or rehabilitation is threatened by the implementation of the aforementioned fee schedules. The reimbursement rates under the fee schedules set forth in § 3157(7) are unsustainable for many Michigan medical providers. Therefore, those providers will be unable or unwilling to treat motor vehicle accident victims at such dramatically reduced reimbursement rates, thereby impairing their access to reasonably necessary products, services, and accommodations for their care, recovery, or rehabilitation.

152. The State of Michigan has no compelling interest to infringe upon the fundamental right to privacy and bodily integrity and the liberty interests of all motor vehicle accident victims, past, present, or future, by the imposition of price fixing rules, applicable to private contracts, that interfere with the ability to access reasonably necessary products, services, and accommodations for their care, recovery, or rehabilitation. Furthermore, the significant limitations imposed by § 3157(7) are overbroad, overreaching, and not narrowly tailored.

153. For the reasons stated herein and otherwise, the fee schedule limitations set forth in § 3157(7) violate the constitutional substantive due process rights of all motor vehicle accident victims, past, present, or future, under the Due Process Clause, Const 1963 Article 1 § 17.

WHEREFORE, Plaintiff, Ellen M. Andary, a legally incapacitated adult, by and through her Guardian and Conservator, Michael T. Andary, M.D., and Plaintiff Philip

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Krueger, a legally incapacitated adult, by and through his Guardian, Ronald Krueger, and Plaintiff Eisenhower Center pray that this Court will enter a declaratory judgment, pursuant to MCR 2.605, in favor of Plaintiffs, declaring the following:

a. That the fee schedule provisions of § 3157(7) are unconstitutional because they violate Article 1 § 17 of the Michigan Constitution.

b. That Defendant USAA and Defendant Citizens are prohibited from enforcing the provisions of § 3157(7) as to all motor vehicle accident victims, past, present, or future.

COUNT XVI - FUTURE APPLICATION OF THE FEE SCHEDULE LIMITATIONS SET FORTH IN MCL 500.3157(7) TO ALL MOTOR VEHICLE ACCIDENT VICTIMS PAST, PRESENT, OR FUTURE, VIOLATES THE CONSTITUTIONAL EQUAL PROTECTION RIGHTS OF THOSE PERSONS UNDER ARTICLE 1 SECTION 2 OF THE MICHIGAN CONSTITUTION

154. Plaintiffs incorporate by reference paragraphs 1 – 153.

155. Pursuant to MCR 2.605, Plaintiffs in the case have standing to bring this declaratory judgment action on behalf of any such all motor vehicle accident victims, past, present, or future, alleging that § 3157(7) is unconstitutional as applied to all motor vehicle accident victims, past, present, or future, for the reason that the fee schedules set forth in § 3157(7) involve an actual controversy that, if not immediately resolved, present the threat of imminent injury to any Michigan citizens involved in a motor vehicle accident.

156. All Michigan citizens, including motor vehicle accident victims, past, present, or future, have a fundamental equal protection right to privacy and bodily integrity pursuant to the Michigan Constitution Article 1 § 2.

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157. Sections 3157(2) and (7) create two different fee schedules that discriminate between motor vehicle accident victims who require reasonably necessary products, services, and accommodations for their care, recovery, or rehabilitation. The first of these classes consists of motor vehicle accident victims that require and receive reasonably necessary products, services, and accommodations that would be compensable under the Medicare laws. Providers rendering such products, services, and accommodations to patients in this class are reimbursed under § 3157(2) at a rate of 190% - 200% of the amount that is compensable by Medicare. The second of these classes consists of motor vehicle accident victims that require and receive reasonably necessary products, services, and accommodations that are not compensable under the Medicare laws. Providers rendering such products, services, and accommodations to patients in this class are reimbursed under § 3157(7) only at a rate of 52.5% - 55% of the amount these providers charged for those products, services, and accommodations on January 1, 2019. As such, the fee schedules under § 3157(7) reimburse a patient's providers at a substantially reduced rate in comparison to § 3157(2), thereby restricting the ability of patients to access reasonably necessary products, services, and accommodations for their care, recovery, or rehabilitation.

158. In creating the two classes referenced above, §§ 3157(2) and (7) treat similarly situated motor vehicle accident victims in a dissimilar manner, thereby imposing a substantial disadvantage upon all motor vehicle accident victims, past, present, or future, who receive reasonably necessary products, services, and accommodations for their care, recovery, or rehabilitation that are not compensable by

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Medicare. Stated differently, motor vehicle accident victims controlled by § 3157(7) become second class patients.

159. The State of Michigan has no compelling interest to infringe upon the fundamental right to privacy and bodily integrity of all motor vehicle accident victims, past, present, or future, who receive reasonably necessary products, services, and accommodations for their care, recovery, or rehabilitation that are not compensable by Medicare and no compelling interest to treat these motor vehicle accident victims more harshly than other similarly motor vehicle accident victims with respect to provider reimbursement rates for reasonably necessary products, services, and accommodations. Furthermore, the significant limitations imposed by § 3157(7) are overbroad, overreaching, and not narrowly tailored.

160. For the reasons stated herein and otherwise, the fee schedule limitations set forth in § 3157(7) violate the constitutional equal protection rights of all motor vehicle accident victims, past, present, or future, under the Equal Protection Clause, Const 1963 Article 1 § 2.

WHEREFORE, Plaintiff, Ellen M. Andary, a legally incapacitated adult, by and through her Guardian and Conservator, Michael T. Andary, M.D., and Plaintiff Philip Krueger, a legally incapacitated adult, by and through his Guardian, Ronald Krueger, and Plaintiff Eisenhower Center pray that this Court will enter a declaratory judgment, pursuant to MCR 2.605, in favor of Plaintiffs, declaring the following:

a. That the fee schedule provisions of § 3157(7) are unconstitutional because they violate Article 1 § 2 of the Michigan Constitution.

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b. That Defendant USAA and Defendant Citizens are prohibited from enforcing the provisions of § 3157(7) as to all motor vehicle accident victims, past, present, or future.

COUNT XVII - FUTURE APPLICATION OF THE FEE SCHEDULE LIMITATIONS SET FORTH IN MCL 500.3157(7) TO ANY MICHIGAN MEDICAL PROVIDER VIOLATES THE CONSTITUTIONAL DUE PROCESS RIGHTS OF THOSE PROVIDERS UNDER ARTICLE 1 SECTION 17 OF THE MICHIGAN CONSTITUTION

161. Plaintiffs incorporate by reference paragraphs 1 – 160.

162. Pursuant to MCR 2.605, Plaintiffs in this case have standing to bring this declaratory judgment action on behalf of all Michigan medical providers who treat motor vehicle accident victims in this State, alleging that § 3157(7) is unconstitutional as applied to such Michigan medical providers for the reason that the fee schedules set forth in § 3157(7) involve an actual controversy that, if not immediately resolved, present the threat of imminent injury to all Michigan medical providers that treat motor vehicle accident victims.

163. All Michigan medical providers that render reasonably necessary products, services, and accommodations for the care, recovery, or rehabilitation of motor vehicle accident victims have a property interest, pursuant to the Michigan Constitution Article 1 § 17, in the survival of their business and the perpetuation of their financial operations without government interference in the form of oppressive price control legislation that threatens the survivability of those businesses.

164. The fee schedules set forth in § 3157(7) violate the property rights of all Michigan medical providers that render products, services, and accommodations for the care, recovery, or rehabilitation of motor vehicle accident victims by dramatically and

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unreasonably reducing the amount they can be reimbursed for providing such products, services, and accommodations that are payable to motor vehicle accident victims under the provisions of the No-Fault Act. In that regard, § 3157(7) prevents all Michigan medical providers from being reimbursed more than 52.5% - 55% of the rate at which these providers charged for such products, services, and accommodations on January 1, 2019.

165. The ability of Michigan medical providers to stay in business at such patently unreasonable reimbursement rates is effectively destroyed by § 3157(7). As such, those medical providers will be unable to provide reasonably necessary products, services, and accommodations for the care, recovery, or rehabilitation to motor vehicle accident victims at the confiscatory and unconscionable reimbursement rates set forth by § 3157(7).

166. Accordingly, § 3157(7) violates the substantive due process rights of all Michigan medical providers that treat motor vehicle accident victims by taking away their property and rendering them unable to continue their business of providing reasonably necessary products, services, and accommodations for the care, recovery, and rehabilitation of motor vehicle accident victims.

167. The infringement upon the substantive due process rights of these Michigan medical providers is particularly egregious given the fact that the government's enactment of the Michigan No-Fault Act in 1973 codified and embraced the clear public policy that motor vehicle accident victims should have uncapped lifetime care for all reasonably necessary products, services, and accommodations for their care, recovery, or

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rehabilitation. In enacting that law, the State of Michigan fostered and encouraged the birth and development of a significant sector of the Michigan health care industry. People and businesses throughout Michigan invested substantial funds and resources in order to create specialized medical treatment facilities to serve the population of catastrophically injured motor vehicle accident victims that the State had decreed should be fully served under the No-Fault Act. The enactment of the fee schedules set forth in § 3157(7) has sabotaged that sector of Michigan's health care industry which the State of Michigan encouraged to be developed and will likely destroy the substantial financial investment that Michigan medical providers have made in their businesses.

168. The limitations imposed by § 3157(7) are overbroad, overreaching, and not rationally related to any legitimate government purpose.

169. For the reasons stated herein and otherwise, the fee schedule limitations set forth in § 3157(7) violate the constitutional substantive due process rights of Michigan medical providers under the Due Process Clause, Const 1963 Article 1 § 17, with regard to reasonably necessary products, services, and accommodations for care, recovery, or rehabilitation they render to motor vehicle accident victims.

WHEREFORE, Plaintiff, Ellen M. Andary, a legally incapacitated adult, by and through her Guardian and Conservator, Michael T. Andary, M.D., and Plaintiff Philip Krueger, a legally incapacitated adult, by and through his Guardian, Ronald Krueger, and Plaintiff Eisenhower Center pray that this Court will enter a declaratory judgment, pursuant to MCR 2.605, in favor of Plaintiffs, declaring the following:

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a. That the fee schedule provisions of § 3157(7) are unconstitutional because they violate Article 1 § 17 of the Michigan Constitution.

b. That Defendant USAA and Defendant Citizens are prohibited from enforcing the provisions of § 3157(7) as to any Michigan medical provider.

COUNT XVIII – FUTURE APPLICATION OF THE FEE SCHEDULE LIMITATIONS SET FORTH IN MCL 500.3157(7) TO ANY MICHIGAN MEDICAL PROVIDER VIOLATES THE CONSTITUTIONAL EQUAL PROTECTION RIGHTS OF THOSE PROVIDERS UNDER ARTICLE 1 SECTION 2 OF THE MICHIGAN CONSTITUTION

170. Plaintiffs incorporate by reference paragraphs 1 – 169.

171. Pursuant to MCR 2.605, Plaintiffs in this case have standing to bring this declaratory judgment action on behalf of all Michigan medical providers who treat motor vehicle accident victims in this State, alleging that § 3157(7) is unconstitutional as applied to such Michigan medical providers for the reason that the fee schedules set forth in § 3157(7) involve an actual controversy that, if not immediately resolved, present the threat of imminent injury to all Michigan medical providers that treat motor vehicle accident victims.

172. Sections 3157(2) and (7) create two different fee schedules that discriminate between Michigan medical providers that render reasonably necessary products, services, and accommodations for the care, recovery, or rehabilitation of motor vehicle accident victims. The first of these classes consists of Michigan medical providers that render reasonably necessary products, services, and accommodations that would be compensable under the Medicare laws. Providers rendering such products, services, and accommodations to patients in this class are reimbursed under § 3157(2) at a rate of 190%

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- 200% of the amount that is compensable by Medicare. The second of these classes consists of Michigan medical providers that render reasonably necessary products, services, and accommodations that are not compensable under the Medicare laws. Providers rendering such products, services, and accommodations to patients in this class are reimbursed under § 3157(7) only at a rate of 52.5% - 55% of the amount these providers charged for those products, services, and accommodations on January 1, 2019. As such, the fee schedules under § 3157(7) reimburse Michigan medical providers at a substantially reduced rate in comparison to § 3157(2).

173. In creating the two classes referenced above, §§ 3157(2) and (7) treat similarly situated Michigan medical providers in a dissimilar manner, thereby imposing a substantial disadvantage upon Michigan medical providers that render reasonably necessary products, services, and accommodations for the care, recovery, or rehabilitation of motor vehicle accident victims that are not compensable by Medicare.

174. The State of Michigan has no rational basis for treating Michigan medical providers that render products, services, and accommodations that are not compensable by Medicare more harshly than the Michigan medical providers that render products, services, and accommodations that are compensable by Medicare. Furthermore, the significant limitations imposed by § 3157(7) are overbroad, overreaching, and not rationally related to any legitimate government purpose.

175. For the reasons stated herein and otherwise, the fee schedule limitations set forth in § 3157(7) violate the constitutional equal protection rights of all Michigan medical providers that render products, services, and accommodations for the care, recovery, or

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rehabilitation of motor vehicle accident victims that are not compensable by Medicare under the Equal Protection Clause, Const 1963 Article 1 § 2.

WHEREFORE, Plaintiff, Ellen M. Andary, a legally incapacitated adult, by and through her Guardian and Conservator, Michael T. Andary, M.D., and Plaintiff Philip Krueger, a legally incapacitated adult, by and through his Guardian, Ronald Krueger, and Plaintiff Eisenhower Center pray that this Court will enter a declaratory judgment, pursuant to MCR 2.605, in favor of Plaintiffs, declaring the following:

a. That the fee schedule provisions of § 3157(7) are unconstitutional because they violate Article 1 § 2 of the Michigan Constitution.

b. That Defendant USAA and Defendant Citizens are prohibited from enforcing the provisions of § 3157(7) as to any Michigan medical provider.

Respectfully submitted:

SINAS, DRAMIS, LARKIN, GRAVES & WALDMAN, P.C.

Attorneys for Plaintiffs

By: _____

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Dated: October 3, 2019

MARK GRANZOTTO, P.C.

Attorneys for Plaintiffs

By: _____

Mark R. Granzotto (P31492)
2684 11 Mile Road, Suite 100
Berkley, MI 48072-3050
(248) 546-4649

Dated: October 3, 2019

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DR MICHAEL T ANDARY MD
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EAST LANSING MI 48823-2192

CIC 00276 70 84 7102 3

POLICY PERIOD: EFFECTIVE OCT 21 2014 TO APR 21 2015

IMPORTANT MESSAGES

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Name
MICHAEL T ANDARY

1461 FOXCROFT RD
EAST LANSING MI 48823-2192

Policy Number 00276 70 84C7102 3
Effective Date 10/21/14 **Expiration Date** 04/21/15
Year **Make/Model**
2003 CHEV
Vehicle Identification Number
1GNFK16Z13J260784

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Vehicle Identification Number
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EAST LANSING MI 48823-2192

Policy Number 00276 70 84C7102 3
Effective Date 10/21/14 **Expiration Date** 04/21/15
Year **Make/Model**
2003 BUICK
Vehicle Identification Number
1G4CU541334146435

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Policy Number 00276 70 84C7102 3
Effective Date 10/21/14 **Expiration Date** 04/21/15
Year **Make/Model**
2003 BUICK
Vehicle Identification Number
1G4CU541334146435

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STATE OF MICHIGAN
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Name
MICHAEL T ANDARY
ELLEN M ANDARY
1461 FOXCROFT RD
EAST LANSING MI 48823-2192

Policy Number 00276 70 84C7102 3
Effective Date 10/21/14 **Expiration Date** 04/21/15
Year Make/Model
2004 FORD
Vehicle Identification Number
1FAFP55U44A130089

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STATE OF MICHIGAN
CERTIFICATE OF NO FAULT INSURANCE

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WARNING: KEEP THIS CERTIFICATE IN YOUR VEHICLE AT ALL TIMES. If you fail to produce it upon a police officer's request, you will be responsible for a civil infraction.

A person who supplies false information to the secretary of state under this section or who issues or uses an invalid certificate of insurance is guilty of a misdemeanor punishable by imprisonment for not more than 1 year, or a fine of not more than $1,000.00, or both.

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SECRETARY OF STATE'S COPY

USAA

9800 Fredericksburg Road
San Antonio, Texas 78288

STATE OF MICHIGAN
CERTIFICATE OF NO FAULT INSURANCE

This certifies that an authorized Michigan insurer has issued a policy complying with ACT 294, P.A. 1972, as amended for the described motor vehicle.

Name
MICHAEL T ANDARY

1461 FOXCROFT RD
EAST LANSING MI 48823-2192

Policy Number 00276 70 84C7102 3
Effective Date 10/21/14 **Expiration Date** 04/21/15
Year Make/Model
2007 BUICK
Vehicle Identification Number
2G4WC582571143380

USAA CASUALTY INSURANCE COMPANY
25968

CONTACT US: 210-531-USAA(8722)
OR 800-531-USAA
Additional copies available at **usaa.com**

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Certificate of No Fault Insurance

We've issued two certificates of no fault insurance as evidence of insurance for your vehicle(s). These certificates are valid only as long as insurance remains in force.

You may be required to produce your certificate at vehicle registration or inspection, when applying for a driver's license, following an accident, and upon a law enforcement officer's request.

For your convenience, additional copies are available on usaa.com.

583MI4 Rev. 6-13 54157-0513_01

INSURED'S COPY

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Name
MICHAEL T ANDARY

1461 FOXCROFT RD
EAST LANSING MI 48823-2192

Policy Number 00276 70 84C7102 3
Effective Date 10/21/14 **Expiration Date** 04/21/15
Year **Make/Model**
2009 GMC
Vehicle Identification Number
1GKFKD6249R233115

USAA CASUALTY INSURANCE COMPANY
25968

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RENEWAL OF

USAA CASUALTY INSURANCE COMPANY

(A Stock Insurance Company)
9800 Fredericksburg Road - San Antonio, Texas 78288

MICHIGAN AUTO POLICY RENEWAL DECLARATIONS (ATTACH TO PREVIOUS POLICY)

State	09	10	12	13	Veh	POLICY NUMBER
MI	125	125	125	125	Terr	00276 70 84C 7102 3

POLICY PERIOD: (12:01 A.M. standard time)
EFFECTIVE OCT 21 2014 TO APR 21 2015

Named Insured and Address

DR MICHAEL T ANDARY MD
1461 FOXCROFT RD
EAST LANSING MI 48823-2192

OPERATORS
01 DR MICHAEL T ANDARY MD
03 ELLEN M ANDARY
05 CAROLINE M ANDARY
06 WILLIAM M ANDARY
07 MICHELLE L ANDARY
08 STEVEN ANDARY

Description of Vehicle(s)

VEH	YEAR	TRADE NAME	MODEL	BODY TYPE	ANNUAL MILEAGE	IDENTIFICATION NUMBER	VEH USE* SYM		WORK/SCHOOL Miles One Way	WORK/SCHOOL Days Per Week
09	03	CHEV	SUBRBN 1500	4 DOOR	7000	1GNFK16Z13J260784		P		
10	03	BUICK	PARK AVENUE	4 DOOR	10000	1G4CU541334146435		P		
12	04	FORD	TAURUS	4 DOOR	7000	1FAFP55U44A130089		P		
13	07	BUICK	LACROSSE	4 DOOR	7000	2G4WC582571143380		P		

The Vehicle(s) described herein is principally garaged at the above address unless otherwise stated. * W/C=Work/School; B=Business; F=Farm; P=Pleasure

VEH 09 EAST LANSING MI 48823-2192 VEH 12 EAST LANSING MI 48823-2192
VEH 10 EAST LANSING MI 48823-2192 VEH 13 EAST LANSING MI 48823-2192

This policy provides ONLY those coverages where a premium is shown below. The limits shown may be reduced by policy provisions and may not be combined regardless of the number of vehicles for which a premium is listed unless specifically authorized elsewhere in this policy.

COVERAGES / LIMITS OF LIABILITY ("ACV" MEANS ACTUAL CASH VALUE)	VEH 09 D=DED AMOUNT	VEH 09 6-MONTH PREMIUM $	VEH 10 D=DED AMOUNT	VEH 10 6-MONTH PREMIUM $	VEH 12 D=DED AMOUNT	VEH 12 6-MONTH PREMIUM $	VEH 13 D=DED AMOUNT	VEH 13 6-MONTH PREMIUM $
PART A - LIABILITY								
BODILY INJURY EA PER $ 500,000								
EA ACC $ 500,000		51.30		54.28		103.81		53.72
PROPERTY DAMAGE EA ACC $ 100,000		11.67		11.04		17.60		11.32
PART B - PERSONAL INJURY PROTECTION								
NO DEDUCTIBLE		70.45		104.84		109.94		104.33
PART B - PROPERTY PROTECTION INS		6.60		6.23		10.13		6.40
PART C - UNINSURED MOTORISTS								
BODILY INJURY EA PER $ 500,000								
EA ACC $ 500,000		4.34		5.48		4.57		4.80
PART C - UNDERINSURED MOTORISTS								
EA PER $ 500,000								
EA ACC $ 500,000		7.94		10.03		8.36		8.78
PART D - PHYSICAL DAMAGE COVERAGE								
COMPREHENSIVE LOSS ACV LESS	D 200	36.36	D 200	72.77	D 200	46.65	D 200	67.22
BROAD COLL COV ACV LESS	D 500	113.38	D 500	218.56	D 500	228.00	D 500	199.69
TOWING AND LABOR		7.00		7.00		7.00		7.00
VEHICLE TOTAL PREMIUM		309.04		490.23		536.06		463.19

TOTAL PREMIUM - SEE FOLLOWING PAGE(S)

ENDORSEMENTS: ADDED 10-21-14 - NONE
REMAIN IN EFFECT(REFER TO PREVIOUS POLICY)- ACCFOR(01) A402(01) 5100MI(06)
INFORMATION FORMS: 342MI(08)

F2 000 000 000 000

VEH 09 RMF57D0100 | VEH 10 RSF26L0100 | VEH 12 RSM18T0000 | VEH 13 RSM24T0000

In WITNESS WHEREOF, we have caused this policy to be signed by our President and Secretary at San Antonio, Texas, on this date SEPTEMBER 13, 2014

Steven Alan Bennett, Secretary

Alan W. Krapf, President

5000 C 05-12
53383-05-12

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USAA CASUALTY INSURANCE COMPANY

(A Stock Insurance Company)
9800 Fredericksburg Road - San Antonio, Texas 78288

MICHIGAN AUTO POLICY
RENEWAL DECLARATIONS
(ATTACH TO PREVIOUS POLICY)

State	Veh	POLICY NUMBER
MI 125	Terr	00276 70 84C 7102 3

POLICY PERIOD: (12:01 A.M. standard time)
EFFECTIVE OCT 21 2014 TO APR 21 2015

Named Insured and Address

DR MICHAEL T ANDARY MD
1461 FOXCROFT RD
EAST LANSING MI 48823-2192

Description of Vehicle(s)

VEH	YEAR	TRADE NAME	MODEL	BODY TYPE	ANNUAL MILEAGE	IDENTIFICATION NUMBER	VEH USE SYM		WORK/SCHOOL Miles One Way	WORK/SCHOOL Days Per Week
14	09	GMC	YKN XL 1500	4 DOOR	15000	1GKFKD6249R233115		P		

The Vehicle(s) described herein is principally garaged at the above address unless otherwise stated. * W/C=Work/School; B=Business; F=Farm; P=Pleasure
VEH 14 EAST LANSING MI 48823-2192

This policy provides ONLY those coverages where a premium is shown below. The limits shown may be reduced by policy provisions and may not be combined regardless of the number of vehicles for which a premium is listed unless specifically authorized elsewhere in this policy.

COVERAGES / LIMITS OF LIABILITY ("ACV" MEANS ACTUAL CASH VALUE)	VEH 14 6-MONTH D=DED AMOUNT	VEH 14 6-MONTH PREMIUM $	VEH D=DED AMOUNT	VEH PREMIUM $	VEH D=DED AMOUNT	VEH PREMIUM $	VEH D=DED AMOUNT	VEH PREMIUM $
PART A - LIABILITY								
BODILY INJURY EA PER $ 500,000								
EA ACC $ 500,000		55.43						
PROPERTY DAMAGE EA ACC $ 100,000		12.16						
PART B - PERSONAL INJURY PROTECTION								
NO DEDUCTIBLE		60.36						
PART B - PROPERTY PROTECTION INS		6.90						
PART C - UNINSURED MOTORISTS								
BODILY INJURY EA PER $ 500,000								
EA ACC $ 500,000		4.71						
PART C - UNDERINSURED MOTORISTS								
EA PER $ 500,000								
EA ACC $ 500,000		8.61						
PART D - PHYSICAL DAMAGE COVERAGE								
COMPREHENSIVE LOSS ACV LESS	D 200	77.96						
BROAD COLL COV ACV LESS	D 500	141.61						
RENTAL REIMBURSEMENT								
MULTIPASSENGER/TRUCK CLASS		37.00						
TOWING AND LABOR		7.00						

VEHICLE TOTAL PREMIUM 411.74

6 MONTH PREMIUM $ 2267.10
PREMIUM DUE AT INCEPTION. THIS IS NOT A BILL, STATEMENT TO FOLLOW.

ADDITIONAL MESSAGE(S) - SEE FOLLOWING PAGE(S)

000
VEH 14 RSF2000000 VEH VEH VEH

In WITNESS WHEREOF, we have caused this policy to be signed by our President and Secretary at San Antonio, Texas, on this date SEPTEMBER 13, 2014

Steven Alan Bennett, Secretary
Alan W. Krapf, President

5000 C 05-12
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USAA CASUALTY INSURANCE COMPANY

(A Stock Insurance Company)
9800 Fredericksburg Road - San Antonio, Texas 78288

MICHIGAN AUTO POLICY
RENEWAL DECLARATIONS
(ATTACH TO PREVIOUS POLICY)

State	Veh	POLICY NUMBER
MI	Terr	00276 70 84C 7102 3

POLICY PERIOD: (12:01 A.M. standard time)
EFFECTIVE OCT 21 2014 TO APR 21 2015

Named Insured and Address

DR MICHAEL T ANDARY MD
1461 FOXCROFT RD
EAST LANSING MI 48823-2192

Description of Vehicle(s)

VEH	YEAR	TRADE NAME	MODEL	BODY TYPE	ANNUAL MILEAGE	IDENTIFICATION NUMBER	VEH USE* SYM	WORK/SCHOOL Miles One Way	WORK/SCHOOL Days Per Week

The Vehicle(s) described herein is principally garaged at the above address unless otherwise stated. * W/C=Work/School; B=Business; F=Farm; P=Pleasure

This policy provides ONLY those coverages where a premium is shown below. The limits shown may be reduced by policy provisions and may not be combined regardless of the number of vehicles for which a premium is listed unless specifically authorized elsewhere in this policy.

COVERAGES / LIMITS OF LIABILITY ("ACV" MEANS ACTUAL CASH VALUE)	VEH D=DED AMOUNT	VEH PREMIUM $	VEH D=DED AMOUNT	VEH PREMIUM $	VEH D=DED AMOUNT	VEH PREMIUM $	VEH D=DED AMOUNT	VEH PREMIUM $
$ 56.84 IS INCLUDED IN YOUR 6 MONTH PREMIUM FOR ACCIDENT FORGIVENESS.								
$ 64.41 INCLUDED IN PREMIUM FOR VEH 10 AS A RESULT OF AN ACCIDENT(S).								
$ 19.41 INCLUDED IN PREMIUM FOR VEH 13 AS A RESULT OF A CONVICTION(S).								
MCCA ASSESSMENT PREMIUM $ 471.00								
THE FOLLOWING COVERAGE(S) DEFINED IN THIS POLICY ARE NOT PROVIDED FOR:								
VEH 09 - RENTAL REIMBURSEMENT								
VEH 10 - RENTAL REIMBURSEMENT								
VEH 12 - RENTAL REIMBURSEMENT								
VEH 13 - RENTAL REIMBURSEMENT								

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Steven Alan Bennett, Secretary

Alan W. Krapf, President

5000 C 05-12
53383-05-12

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SUPPLEMENTAL INFORMATION

EFFECTIVE OCT 21 2014 TO APR 21 2015

The following approximate premium discounts or credits have already been applied to reduce your policy premium costs.

NOTE: Age or **senior citizen** status, if allowed by your state/location, was taken into consideration when your rates were set and your premiums have already been adjusted.

VEHICLE 09		
ANNUAL MILEAGE DISCOUNT	-$	13.33
ANTI-THEFT DISCOUNT	-$	7.71
DAYTIME RUNNING LIGHTS DISCOUNT	-$	2.92
MULTI-CAR DISCOUNT	-$	5.16
PASSIVE RESTRAINT DISCOUNT	-$	9.19
VEHICLE 10		
DAYTIME RUNNING LIGHTS DISCOUNT	-$	6.18
MULTI-CAR DISCOUNT	-$	8.85
PASSIVE RESTRAINT DISCOUNT	-$	15.26
VEHICLE 12		
GOOD STUDENT DISCOUNT	-$	51.94
OPERATOR 08		
MULTI-CAR DISCOUNT	-$	9.80
PASSIVE RESTRAINT DISCOUNT	-$	16.16
VEHICLE 13		
DAYTIME RUNNING LIGHTS DISCOUNT	-$	5.59
MULTI-CAR DISCOUNT	-$	8.32
PASSIVE RESTRAINT DISCOUNT	-$	15.17
VEHICLE 14		
DAYTIME RUNNING LIGHTS DISCOUNT	-$	3.80
DRIVER TRAINING DISCOUNT	-$	16.09
OPERATOR 07		
GOOD STUDENT DISCOUNT	-$	33.98
OPERATOR 07		
MULTI-CAR DISCOUNT	-$	6.53
OCCASIONAL OPERATOR DISCOUNT	-$	53.97
OPERATOR 07		
PASSIVE RESTRAINT DISCOUNT	-$	7.41
STUDENT AWAY AT SCHOOL W/O A CAR	-$	76.44
OPERATOR 07		

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ACCIDENT FORGIVENESS

When a premium for Accident Forgiveness is shown on the Declarations:

1. If **you** or any **family member** shown as an operator on the Declarations:

   a. Is involved in an at-fault accident that occurs after the effective date of this endorsement, **we** will waive any premium increase under this policy that would otherwise be applied for the first such at-fault accident.

   b. Was involved in an at-fault accident forgiven in a policy written by **us** or one of **our** affiliates and such operator was removed from that policy and added to this policy without any gap in coverage, **we** will continue to forgive the accident on this policy for the remainder of the period of time the premium increase would have occurred under this policy if there are no other at-fault accidents for which premium is waived under this policy.

   We will waive the premium increase for only one at-fault accident per policy period, regardless of the number of operators shown on the Declarations.

2. **We** will waive the premium increase for the at-fault accident in Section I for the period of time during which:

   a. This endorsement is in effect; and

   b. A premium increase for such at-fault accident would have otherwise applied to this policy.

The Accident Forgiveness Endorsement must remain in effect during any renewal period of this policy over the full accident forgiveness period for the premium increase waiver to remain in effect.

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AMENDATORY ENDORSEMENT

The coverage provided by this Endorsement is subject to all the provisions of the policy and amendments except as they are modified as follows.

PART D - PHYSICAL DAMAGE COVERAGE

INSURING AGREEMENT

Paragraph A. is replaced in its entirety by the following:

A. Comprehensive Coverage (excluding **collision**).

1. Physical damage. **We** will pay for **loss** caused by other than **collision** to **your covered auto**, including its equipment, and personal property contained in **your covered auto**, minus any applicable deductible shown on the Declarations. The deductible will be waived for **loss** to window glass that can be repaired rather than replaced. In cases where the repair proves unsuccessful and the window glass must be replaced, the full amount of the deductible, if any, must be paid.

2. Transportation expenses. **We** will also pay:

   a. The reasonable amount for transportation expenses incurred by **you** or any **family member**, but no more than the cost of renting an Economy Class vehicle, as defined under Rental Reimbursement Coverage. This applies only in the event of a total theft of **your covered auto**. **We** will pay only transportation expenses incurred during the period beginning 48 hours after the theft and ending when **your covered auto** is returned to use or, if not recovered or not **repairable**, up to seven days after **we** have made a settlement offer.

   b. If Rental Reimbursement Coverage is afforded, the vehicle class for transportation expenses is the vehicle class shown on the Declarations for Rental Reimbursement for that vehicle.

LIMIT OF LIABILITY

Paragraph A of the Limit of Liability section is amended to add the following:

3. If Car Replacement Assistance is shown on the Features Declarations for this **your covered auto**, **we** will pay an additional 20% of the **actual cash value** of the vehicle at the time of a total loss. This additional amount:

   a. Is separate from the limit available for **loss** to **your covered auto** under Comprehensive Coverage or Collision Coverage; and

   b. Is available if the total loss is paid:

      (1) Under this policy's Comprehensive Coverage or Collision Coverage; or

      (2) Because of the **PD** by or on behalf of persons or organizations who may be legally responsible.

   However, Car Replacement Assistance does not apply to total loss to any **nonowned vehicle**.

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Paragraph D. is replaced in its entirety by the following:

D. Under Rental Reimbursement Coverage, **our** maximum limit of liability is the reasonable amount necessary to reimburse **you** for expenses incurred to rent a vehicle in the applicable class shown on the Declarations:

1. Economy Class. For purposes of this endorsement, Economy Class means "mini," small or compact 2- and 4-door cars, including convertibles, that are not considered sports or luxury vehicles and are not the station wagon type.

2. Standard Class. For purposes of this endorsement, Standard Class means standard and full size 2- and 4-door cars, including convertibles, that are not considered sports or luxury vehicles and are not the station wagon type.

3. Multipassenger/Truck Class. For purposes of this endorsement, Multipassenger/Truck Class means:

   a. Sports and luxury cars of any size;

   b. Station wagons;

   c. Minivans;

   d. Mid-size cargo and passenger **vans**;

   e. Pickup trucks; and

   f. "Mini," small and midsize sport utility vehicles (SUVs) that are not considered luxury SUVs.

4. Large SUV Class. For purposes of this endorsement, Large SUV Class means luxury SUVs of any size, large SUVs and large cargo or passenger **vans**.

PART E - GENERAL PROVISIONS

OUR RIGHT TO RECOVER PAYMENT

The Our Right to Recover Payment section is amended to add the following:

Our rights in this section do not apply with respect to amounts paid in excess of the **actual cash value** of **your covered auto** because of Car Replacement Assistance.

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USAA
9800 Fredericksburg Road
San Antonio, Texas 78288

MICHIGAN AUTO POLICY

READ YOUR POLICY, DECLARATIONS AND ENDORSEMENTS CAREFULLY

The automobile insurance contract between the named insured and the company shown on the Declarations page consists of this policy plus the Declarations page and any applicable endorsements. The Quick Reference section outlines essential information contained on the Declarations and the major parts of the policy.

The policy provides the coverages and amounts of insurance shown on the Declarations for which a premium is shown.

This is a participating policy. You are entitled to dividends as may be declared by the company's board of directors.

If this policy is issued by United Services Automobile Association ("USAA"), a reciprocal interinsurance exchange, the following apply:

- By purchasing this policy you are a member of USAA and are subject to its bylaws.
- This is a non-assessable policy. You are liable only for the amount of your premium as USAA has a free surplus in compliance with Article 19.03 of the Texas Insurance Code of 1951, as amended.
- The board of directors may annually allocate a portion of USAA's surplus to Subscriber's Accounts. Amounts allocated to such accounts remain a part of USAA's surplus and may be used as necessary to support the operations of the Association. A member shall have no right to any balance in the member's account except until following termination of membership, as provided in the bylaws.

QUICK REFERENCE

(Quick Reference continued on Page 2)

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MICHIGAN AUTO POLICY

AGREEMENT

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.

DEFINITIONS

The words defined below are used throughout this policy. They are in **boldface** when used.

A. "**You**" and "**your**" refer to the "named insured" shown on the Declarations and spouse if a resident of the same household.

If the spouse ceases to be a resident of the same household during the policy period or prior to the inception of this policy, the spouse will be considered **you** and **your** under this policy but only until the earlier of:

1. The effective date of another policy listing the spouse as the named insured; or

2. The end of the policy period.

B. "**We**," "**us**," and "**our**" refer to the Company providing this insurance.

C. "**Auto business**" means the business of altering, customizing, leasing, parking, repairing, road testing, delivering, selling, servicing, towing, repossessing or storing vehicles.

D. "**Bodily injury**" (referred to as **BI**).

1. "**Bodily injury**" means bodily harm, sickness, disease or death.

2. "**Bodily injury**" does not include mental injuries such as emotional distress, mental anguish, humiliation, mental distress, or any similar injury unless it arises out of physical injury to some person.

E. "**Driving contest or challenge**" includes, but is not limited to:

1. A competition against other people, vehicles, or time; or

2. An activity that challenges the speed or handling characteristics of a vehicle or improves or demonstrates driving skills, provided the activity occurs on a track or course that is closed from non-participants.

F. "**Family member**" means a person related to **you** by blood, marriage or adoption who resides primarily in **your** household. This includes a ward or foster child.

G. "**Fungi**" means any type or form of fungi, including mold or mildew, and includes any mycotoxins, spores, scents or byproducts produced or released by fungi.

H. "**Miscellaneous vehicle**" means the following motorized vehicles: motor home; golf cart; snowmobile; all-terrain vehicle; or dune buggy.

I. "**Moped**" means a 2- or 3-wheeled vehicle which is equipped with a motor that does not exceed 50 cubic centimeters piston displacement, produces 2.0 brake horsepower or less, and cannot propel the vehicle at a speed greater than 30 miles per hour on a level surface. The power drive system shall not require the operator to shift gears.

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J. "**Motorcycle**" means a vehicle having a saddle or seat for the use of the rider, designed to travel on not more than 3 wheels in contact with the ground, which is equipped with a motor that exceeds 50 cubic centimeters piston displacement. The wheels on any attachment to the vehicle shall not be considered as wheels in contact with the ground. "**Motorcycle**" does not include a **moped**.

K. "**Newly acquired vehicle.**"

1. "**Newly acquired vehicle**" means a vehicle, not insured under another policy, that is acquired by **you** or any **family member** during the policy period and is:

   a. A private passenger auto, pickup, **trailer**, or **van**;

   b. A **miscellaneous vehicle** that is not used in any business or occupation; or

   c. A **motorcycle**, but only if a **motorcycle** is shown on the current Declarations.

2. **We** will automatically provide for the **newly acquired vehicle** the broadest coverages as are provided for any vehicle shown on the Declarations. If **your** policy does not provide Comprehensive Coverage or Collision Coverage, **we** will automatically provide these coverages for the **newly acquired vehicle** subject to a $500 deductible for each loss.

3. Any automatic provision of coverage under K.2. will apply for up to 30 days after the date **you** or any **family member** becomes the owner of the **newly acquired vehicle**. If **you** wish to continue coverage for the **newly acquired vehicle** beyond this 30-day period, **you** must request it during this 30-day period, and **we** must agree to provide the coverage **you** request for this vehicle. If **you** request coverage after this 30-day period, any coverage that **we** agree to provide will be effective at the date and time of **your** request unless **we** agree to an earlier date.

L. "**Occupying**" means in, on, getting into or out of.

M. "**Property damage**" (referred to as **PD**).

1. "**Property damage**" means physical injury to, destruction of, or loss of use of tangible property.

2. For purposes of this policy, electronic data is not tangible property. Electronic data means information, facts or programs:

   a. Stored as or on;

   b. Created or used on; or

   c. Transmitted to or from;

   computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

N. "**Reasonably necessary products and services**" are those services or supplies provided or prescribed by a licensed hospital, licensed physician, or other licensed medical provider that are required to identify or treat **BI** caused by an auto accident and sustained by a **covered person** and that are:

1. Consistent with the symptoms, diagnosis, and treatment of the **covered person's** injury and appropriately documented in the **covered person's** medical records;

2. Provided in accordance with recognized standards of care for the **covered person's** injury at the time the charge is incurred;

3. Consistent with published practice guidelines and technology, and assessment standards of national organizations or multi-disciplinary medical groups;

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4. Not primarily for the convenience of the **covered person**, his or her physician, hospital, or other health care provider;

5. The most appropriate supply or level of service that can be safely provided to the **covered person**; and

6. Not excessive in terms of scope, duration, or intensity of care needed to provide safe, adequate, and appropriate diagnosis and treatment.

However, "**reasonably necessary products and services**" do not include the following:

1. Nutritional supplements or over-the-counter drugs;

2. Experimental services or supplies, which means services or supplies that have not been scientifically proven as safe and effective for treatment of the condition for which its use is proposed; or

3. Inpatient services or supplies provided to the **covered person** when these could safely have been provided to the **covered person** as an outpatient.

O. "**Trailer**" means a vehicle designed to be pulled by a private passenger auto, pickup, **van**, or **miscellaneous vehicle**. It also means a farm wagon or implement while towed by such vehicles.

P. "**Van**" means a four-wheeled land motor vehicle of the van type with a load capacity of not more than 2,000 pounds.

Q. "**Your covered auto**," except as modified in Part B - Property Protection Insurance Coverage (PPI), means:

1. Any vehicle shown on the Declarations.

2. Any **newly acquired vehicle**.

3. Any **trailer you** own.

PART A - LIABILITY COVERAGE

DEFINITIONS

"**Covered person**" as used in this Part means:

1. **You** or any **family member** for the ownership, maintenance, or use of any auto or **trailer**.

2. Any person using **your covered auto.**

3. Any other person or organization, but only with respect to legal liability imposed on them for the acts or omissions of a person for whom coverage is afforded in 1. or 2. above. With respect to an auto or **trailer** other than **your covered auto**, this provision only applies if the other person or organization does not own or hire the auto or **trailer**.

The following are not **covered persons** under Part A:

1. The United States of America or any of its agencies.

2. Any person with respect to **BI** or **PD** resulting from the operation of an auto by that person as an employee of the United States Government. This applies only if the provisions of Section 2679 of Title 28, United States Code as amended, require the Attorney General of the United States to defend that person in any civil action which may be brought for the **BI** or **PD**.

INSURING AGREEMENT

A. **We** will pay compensatory damages for **BI** or **PD** for which any **covered person** becomes legally liable because of an auto accident. **We** will settle or defend, as **we** consider appropriate, any claim or suit asking for these damages. **Our** duty to settle or defend ends when **our** limit of liability for these coverages has been paid or tendered. **We** have no duty to defend any suit or settle any claim for **BI** or **PD** not covered under this policy.

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(PART A Cont'd.)

B. **We** will pay, for auto accidents in Michigan, only as set forth in Section 500.3135 of the Michigan Insurance Code, up to $1,000 for damages to a motor vehicle for which a **covered person** becomes legally responsible, to the extent that the damages are not covered by insurance.

LIMIT OF LIABILITY

For **BI** sustained by any one person in any one auto accident, **our** maximum limit of liability for all resulting damages, including, but not limited to, all direct, derivative or consequential damages recoverable by any persons, is the limit of liability shown on the Declarations for "each person" for **BI** Liability. Subject to this limit for "each person," the limit of liability shown on the Declarations for "each accident" for **BI** Liability is **our** maximum limit of liability for all damages for **BI** resulting from any one auto accident. The limit of liability shown on the Declarations for "each accident" for **PD** Liability is **our** maximum limit of liability for all damages to all property resulting from any one auto accident.

These limits are the most **we** will pay regardless of the number of:

1. **Covered persons**;
2. Claims made;
3. Vehicles or premiums shown on the Declarations; or
4. Vehicles involved in the auto accident.

However, if a policy provision that would defeat coverage for a claim under this Part is declared to be unenforceable as a violation of the state's financial responsibility law, **our** limit of liability will be the minimum required by the state's financial responsibility law.

SUPPLEMENTARY PAYMENTS

In addition to **our** limit of liability, **we** will pay on behalf of a **covered person**:

1. Premiums on appeal bonds and bonds to release attachments in any suit **we** defend. But **we** will not pay the premium for bonds with a face value over **our** limit of liability shown on the Declarations.
2. Prejudgment interest awarded against the **covered person** on that part of the judgment **we** pay. If **we** make an offer to pay the applicable limit of liability, **we** will not pay any prejudgment interest based on that period of time after the offer.
3. Interest accruing, in any suit **we** defend, on that part of a judgment that does not exceed **our** limit of liability. **Our** duty to pay interest ends when **we** offer to pay that part of the judgment that does not exceed **our** limit of liability.
4. Up to $250 a day for loss of wages because of attendance at hearings or trials at **our** request.
5. The amount a **covered person** must pay to the United States Government because of damage to a government-owned private passenger auto, pickup, or **van** which occurs while the vehicle is in the care, custody, or control of a **covered person**. The most **we** will pay is an amount equal to one month of the basic salary of the **covered person** at the time of a loss. Only Exclusions A.1. and A.8. apply.
6. Other reasonable expenses incurred at **our** request.
7. All defense costs **we** incur.

EXCLUSIONS

A. **We** do not provide Liability Coverage for any **covered person**:

1. Who intentionally acts or directs to cause **BI** or **PD**, or who acts or directs to cause with reasonable expectation of causing **BI** or **PD**. This exclusion (A.1.) applies only to the extent that the limits of liability for this coverage for **BI** exceed $20,000 for each person or $40,000 for each accident and for **PD** exceed $10,000 for each accident.

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2. For **PD** to property owned or being transported by a **covered person**.

3. For **PD** to property rented to, used by, or in the care of any **covered person**. This exclusion (A.3.) does not apply to damage to a residence or garage.

4. For **BI** to an employee of that person which occurs during the course of employment. This exclusion (A.4.) does not apply to a domestic employee unless workers' compensation benefits are required or available for that domestic employee.

5. For that person's liability arising out of the ownership or operation of a vehicle while it is being used to carry persons for a fee. This exclusion (A.5.) does not apply to a share-the-expense car pool or for reimbursement of normal operating expenses when the vehicle is used for charitable purposes.

6. While employed or otherwise engaged in the **auto business**. This exclusion (A.6.) does not apply to the ownership, maintenance, or use of **your covered auto** by **you**, any **family member**, or any partner, agent, or employee of **you** or any **family member**.

7. Maintaining or using any vehicle while that person is employed or otherwise engaged in any business or occupation other than the **auto business**, farming, or ranching. This exclusion (A.7.) does not apply:

   a. To the maintenance or use of a private passenger auto; a pickup or **van** owned by **you** or any **family member**; or a **trailer** used with these vehicles; or

   b. To the maintenance or use of a pickup or **van** not owned by **you** or any **family member** if the vehicle's owner has valid and collectible primary liability insurance or self-insurance in force at the time of the accident.

8. Using a vehicle without expressed or implied permission.

9. For **BI** or **PD** for which that person is an insured under any nuclear energy liability policy. This exclusion (A.9.) applies even if that policy is terminated due to exhaustion of its limit of liability.

10. For **BI** or **PD** occurring while **your covered auto** is rented or leased to others, or shared as part of a personal vehicle sharing program.

11. For punitive or exemplary damages.

12. For **BI** sustained as a result of exposure to **fungi**, wet or dry rot, or bacteria.

13. For **BI** to a relative who resides primarily in that **covered person's** household. This exclusion (A.13.) applies only to the extent that the limits of liability for this coverage for **BI** exceed the minimum limits of liability required by the Michigan financial responsibility law.

B. **We** do not provide Liability Coverage for the ownership, maintenance, or use of:

   1. Any vehicle that is not **your covered auto** unless that vehicle is:

      a. A four- or six-wheel land motor vehicle designed for use on public roads;

      b. A moving van for personal use;

      c. A **miscellaneous vehicle**; or

      d. A vehicle used in the business of farming or ranching.

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2. Any vehicle, other than **your covered auto**, that is owned by **you**, or furnished or available for **your** regular use. This exclusion (B.2.) does not apply to a vehicle not owned by **you** if the vehicle's owner has valid and collectible primary liability insurance or self-insurance in force at the time of the accident.

3. Any vehicle, other than **your covered auto**, that is owned by or furnished or available for the regular use of, any **family member**. This exclusion (B.3.) does not apply:

   a. To **your** maintenance or use of such vehicle; or

   b. To a vehicle not owned by any **family member** if the vehicle's owner has valid and collectible primary liability insurance or self-insurance in force at the time of the accident.

4. Any vehicle while being operated in, or in practice for, any **driving contest or challenge**.

C. There is no coverage for liability assumed by any **covered person** under any contract or agreement.

OUT OF STATE COVERAGE

If an auto accident to which this policy applies occurs in any state or province other than the one in which **your covered auto** is principally garaged, **your** policy will provide at least the minimum amounts and types of liability coverages required by law. However, no one will be entitled to duplicate payments for the same elements of loss.

OTHER INSURANCE

If there is other applicable liability insurance, **we** will pay only **our** share of the loss. **Our** share is the proportion that **our** limit of liability bears to the total of all applicable limits. However, any insurance **we** provide to a **covered person** for a vehicle **you** do not own shall be excess over:

1. Any other applicable liability insurance; or

2. Any self-insurance in compliance with a state's financial responsibility law or mandatory insurance law.

PART B - PERSONAL INJURY PROTECTION COVERAGE (referred to as PIP Coverage)
PROPERTY PROTECTION INSURANCE COVERAGE (referred to as PPI Coverage)

DEFINITIONS

A. **"Covered person"** as used in this Part means:

1. **You** or any **family member**.

2. Any other person:

   a. While **occupying your covered auto**;

   b. While **occupying** a **motor vehicle** other than **your covered auto**, which is operated by **you** or any **family member** and to which Part A - Liability of this policy applies; or

   c. While not **occupying** any **motor vehicle** if the accident involves **your covered auto**.

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B. "**Funeral expenses**" means all reasonable funeral and burial expenses for a **covered person**.

C. "**Income loss**" means the contributions a deceased **covered person's** spouse and dependents would have received as dependents if the **covered person** had not died. The contributions must be tangible things of economic value, not including services.

D. "**Medical expenses**" means all reasonable fees for **reasonably necessary products and services** and accommodations for a **covered person's** care, recovery, or rehabilitation.

E. "**Motor vehicle**" as used in this Part means a vehicle or **trailer** operated or designed for use on public roads.

However, it does not include:

1. A **motorcycle** or **moped**;

2. A farm tractor or other implement of husbandry which is not subject to the registration requirements of the Michigan Vehicle Code; or

3. A vehicle operated by muscular power or with fewer than three wheels.

F. "**Motor vehicle accident**" means a loss involving the ownership, operation, maintenance, or use of a **motor vehicle** as a **motor vehicle** regardless of whether the accident also involves the ownership, operation, maintenance, or use of a **motorcycle** as a **motorcycle**.

G. "**Replacement services**" means services to replace those a **covered person** would have done without pay and for the benefit of the **covered person** or the **covered person's** dependents.

H. "**Survivor's loss**" means **income loss** and **replacement services**.

1. A deceased **covered person's** spouse must have either resided with or been dependent on the **covered person** at the time of death. The benefits end for a spouse at remarriage or death.

2. Any other person who was dependent upon the deceased **covered person** at the time of death qualifies for benefits if, and as long as that dependent is:

   a. Under age 18; or

   b. Physically or mentally unable to earn a living; or

   c. In a full time formal program of academic or vocational education or training.

I. "**Work loss**" means actual loss of income from work a **covered person** would have performed if that person had not been injured.

J. "**Your covered auto**" as used in this Part means a **motor vehicle** to which the Property Damage Liability Coverage of this policy applies and:

1. Which is owned by **you** or any **family member** and for which **you** are required to maintain security under Chapter 31 of the Michigan Insurance Code.

2. Which is operated, but not owned, by **you** or any **family member** and for which no security as required by Chapter 31 of the Michigan Insurance Code is in effect.

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(PART B Cont'd.)

INSURING AGREEMENT

A. PIP Coverage.

1. **We** will pay the following benefits to or for a **covered person** who sustains **BI** accidentally caused by a **motor vehicle accident**, as set forth in Chapter 31 of the Michigan Insurance Code:

   a. **Medical expenses**;

   b. **Funeral expenses**;

   c. **Work loss**;

   d. **Replacement services**; and

   e. **Survivor's loss**.

2. **We** or someone on **our** behalf will review, by audit or otherwise, claims for PIP Coverage. **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.

B. PPI Coverage.

We will pay only as set forth in Chapter 31 of the Michigan Insurance Code for accidental **PD** resulting from the ownership, maintenance, or use of **your covered auto** as a **motor vehicle**. These benefits apply only to accidents that occur in Michigan.

LIMIT OF LIABILITY

The following provisions represent the most **we** will pay regardless of the number of **covered persons**, claims made, vehicles or premiums shown on the Declarations, vehicles involved in the accident or insurers providing no-fault coverage.

A. PIP Coverage.

1. **Medical Expenses**.

   a. There is no maximum dollar amount for reasonable and necessary **medical expenses** incurred for a **covered person's** care, recovery, or rehabilitation. However, only semiprivate room charges will be paid unless special or intensive care is required.

   b. If Coordination of Benefits for **medical expenses** is indicated on the Declarations, **medical expenses** is not payable to **you** or any **family member** to the extent that similar benefits are paid or payable under any other insurance, service, benefit, or reimbursement plan, excluding Medicare benefits provided by the Federal Government.

2. **Funeral Expenses**. The maximum amount payable for **funeral expenses** shall not exceed $2,000 per **covered person**.

3. **Work Loss**.

   a. The maximum amount payable for **work loss** for any 30 day period shall not exceed the amount established under Chapter 31 of the Michigan Insurance Code.

   b. **We** will not pay more than 85% of a **covered person's work loss**. Any income a **covered person** earns during the 30 day period is included in determining the income benefit **we** will pay.

   c. This benefit is payable for loss sustained during the three years after the accident.

   d. This benefit does not apply after a **covered person** dies.

   e. **We** will prorate this benefit for any period less than 30 days.

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f. If Coordination of Benefits for **work loss** is indicated on the Declarations, **work loss** is not payable to **you** or any **family member** to the extent that similar benefits are paid or payable under any other insurance, service, benefit, or reimbursement plan.

g. **Work loss** is excluded if that exclusion is indicated on the Declarations for the named insured and/or **family member(s)** age 60 or older.

4. **Survivor's Loss.** The maximum amount payable for **survivor's loss** for any 30 day period due to death of a **covered person** shall not exceed the amount established under the Michigan Insurance Code. This amount includes **replacement services** to a maximum of $20 per day. These benefits are payable for loss sustained during the three years after the accident.

B. PPI Coverage.

1. **Our** maximum limit of liability under this Part for all **PD** resulting from any one **motor vehicle accident** is $1,000,000.

2. Subject to the maximum limit of liability in Paragraph 1. above, **we** will pay the lesser of reasonable repair costs or replacement costs minus depreciation and, if applicable, the value of loss of use.

C. Benefits payable under PIP Coverage shall be reduced by:

1. Any amounts paid, payable or required to be provided by state or federal law except any amounts paid, payable or required to be provided by Medicare, provided that the benefits:

a. Serve the same purpose as any of the PIP Coverages paid or payable to a **covered person** under this policy;

b. Are provided or required to be provided as a result of the same accident for which this insurance is payable. However, this insurance shall not be reduced by any amount of workers' compensation benefits, if workers' compensation benefits that are required to be provided are not available to the **covered person**; and

c. Are not subject to subrogation or reimbursement by the payer or provider.

2. The applicable deductible shown on the Declarations. However, the deductible applies only to **you** and any **family member**.

EXCLUSIONS

A. **We** do not provide PIP Coverage to any **covered person** for **BI**:

1. Intentionally caused by that person.

2. Sustained by that person using a **motor vehicle** or **motorcycle** which that person had taken unlawfully. However, this exclusion (A.2.) does not apply if the person had expressed or implied permission to use the **motor vehicle** or **motorcycle**.

3. Sustained by that person while **occupying**, or when struck by while not **occupying**, any **motor vehicle** other than **your covered auto** that is owned by or registered to **you** or any **family member**.

4. Sustained by the owner or registrant of a **motor vehicle** or **motorcycle** involved in the accident and for which the security required by the Michigan Insurance Code is not in effect.

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5. Sustained while that person is entitled to Michigan no-fault benefits as a named insured under another policy except while an operator or passenger of a **motorcycle** involved in the accident. However, this exclusion (A.5.) does not apply to the named insured under this policy.

6. Sustained while **occupying** a **motor vehicle** located for use as a residence or premises.

7. Sustained while a participant in, or in practice for, any **driving contest or challenge**.

8. Sustained as a result of a **covered person's** exposure to **fungi**, wet or dry rot, or bacteria.

9. Sustained while **occupying** a **motor vehicle** operated in the business of transporting passengers for which the security required by the Michigan Insurance Code is in effect. However, this exclusion (A.9.) does not apply to **BI** to **you** or any **family member** while a passenger in a:

   a. School bus;

   b. Certified common carrier;

   c. Bus operated under a government sponsored transportation program;

   d. Bus operated by or servicing a non-profit organization;

   e. Bus operated by a watercraft, bicycle, or horse livery used only to transport passengers to or from a destination point; or

   f. Taxicab.

10. Sustained by **you** or any **family member** while **occupying** a **motor vehicle** which is owned or registered by **your** employer or any **family member's** employer and for which the security required under the Michigan Insurance Code is in effect.

B. **We** do not provide PIP Coverage to any **covered person** who is not **you** or a **family member** for **BI** sustained:

   1. By that person while not **occupying** a **motor vehicle** if the accident takes place outside Michigan.

   2. While that person is entitled to Michigan no-fault benefits as a **family member** under another policy except while an operator or passenger of a **motorcycle** involved in the accident.

   3. While **occupying**, or when struck by while not **occupying**, a **motor vehicle** other than **your covered auto** if:

      a. Operated by **you** or any **family member**; and

      b. The owner or registrant has the security required by the Michigan Insurance Code.

C. **We** do not provide PIP Coverage for any **covered person** for **BI** arising out of the ownership, operation, maintenance or use of a parked **motor vehicle**. This exclusion (C.) does not apply if:

   1. The **motor vehicle** was parked in such a way as not to cause unreasonable risk of the **BI**; or

   2. The **BI** resulted from physical contact with:

      a. Equipment permanently mounted on the **motor vehicle** while the equipment was being used; or

      b. Property being lifted onto or lowered from the **motor vehicle**; or

   3. The **BI** was sustained while **occupying** the **motor vehicle**.

   However, exceptions 2. and 3. to this exclusion (C.) do not apply to any employee who has benefits available under any workers' compensation law or similar disability benefits law and who sustains **BI**

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in the course of employment while entering into, alighting from, loading, unloading or doing mechanical work on a **motor vehicle**, unless the injury arises from the use or operation of another **motor vehicle**.

As used above, "another **motor vehicle**" does not include a **motor vehicle** being loaded on, unloaded from, or secured to, as cargo or freight, a **motor vehicle**.

D. **We** do not provide PPI Coverage for any **PD**:

1. Intentionally suffered or caused by the claimant.

2. To the property of any person using **your covered auto** without **your** expressed or implied consent.

3. To **your covered auto** or its contents.

4. To any **motor vehicle** which is not **your covered auto** or its contents. This exclusion (D.4.) does not apply if the **motor vehicle** was:

   a. Damaged by **your covered auto**; and

   b. Parked in such a way as not to cause unreasonable risk of the **PD**.

5. To property owned by either **you** or any **family member** if **you** or any **family member** were the owner, operator, or registrant of a **motor vehicle** involved in the accident which caused the **PD**.

6. Resulting from an accident involving a **motor vehicle** not owned by, but used by, **you** or any **family member** to the extent the owner or registrant has the security required under Chapter 31 of the Michigan Insurance Code.

7. To utility transmission lines, wires or cables arising from the failure of a municipality, utility company or cable television company to comply with the requirements of Section 247.186 of the Michigan Compiled Laws.

8. Occurring within the course of the business of an **auto business**.

9. Sustained while a participant in, or in practice for, any **driving contest or challenge**.

10. Caused by **fungi**, wet or dry rot, or bacteria.

DUPLICATION OF BENEFITS

No one will be entitled to duplicate payments for the same elements of loss under this Part regardless of the number of:

1. **Motor vehicles** covered; or

2. Insurers (including self-insurers) providing security in accordance with the Michigan Insurance Code or any other similar law.

OTHER INSURANCE

The limit upon the amount of PIP Coverage available because of **BI** to one person arising from one **motor vehicle accident** shall be determined without regard to the number of policies applicable to the accident.

PRIORITY OF COVERAGE

A. PIP Coverage. A **covered person** who, while an operator or passenger of a **motorcycle**, sustains **BI** resulting from a **motor vehicle accident** shall claim PIP Coverage in the following order of priority:

1. The insurer of the owner or registrant of the **motor vehicle** involved in the accident.

2. The insurer of the operator of the **motor vehicle** involved in the accident.

3. The **motor vehicle** insurer of the operator of the **motorcycle** involved in the accident.

4. The **motor vehicle** insurer of the owner or registrant of the **motorcycle** involved in the accident.

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However, if priorities 1, 2, 3, or 4 do not apply, a passenger on a **motorcycle** shall claim PIP Coverage from that passenger's **motor vehicle** insurer.

B. PPI Coverage. If there is other applicable PPI Coverage, **we** will pay only **our** share of the loss. PPI Coverage shall be claimed in the following order of priority:

1. The insurer of the owner or registrant of the **motor vehicle** involved in the accident.
2. The insurer of the operator of the **motor vehicle** involved in the accident.

C. When two or more insurers are in the same order of priority to provide PIP Coverage or PPI Coverage, an insurer paying benefits due is entitled to partial recoupment from the other insurers in the same order of priority, together with a reasonable amount of partial recoupment of the expense of processing the claim, in order to accomplish equitable distribution of the loss among such insurers.

PART B - MEDICAL PAYMENTS COVERAGE

DEFINITIONS

"**Covered person**" as used in this Part means:

1. **You** or any **family member** while **occupying** any auto.
2. Any other person while **occupying your covered auto**.
3. **You** or any **family member** while not **occupying** a motor vehicle if injured by:
   a. A motor vehicle designed for use mainly on public roads;
   b. A **miscellaneous vehicle**; or
   c. A **trailer**.

INSURING AGREEMENT

A. **We** will pay only the reasonable fee for **reasonably necessary products and services** and the reasonable expense for funeral services. These fees and expenses must:

1. Result from **BI** sustained by a **covered person** in an auto accident; and
2. Be incurred for services rendered within one year from the date of the auto accident.

B. **We** or someone on **our** behalf will review, by audit or otherwise, claims for benefits under this coverage to determine if the charges are reasonable fees for **reasonably necessary products and services** or reasonable expenses for funeral services. A provider of medical or funeral services may charge more than the reasonable fees and reasonable expenses, but such additional charges are not covered.

C. **We** will not be liable for pending or subsequent benefits if a **covered person** or assignee of benefits under Medical Payments Coverage unreasonably refuses to submit to an examination as required in Part E - General Provisions, Duties After An Accident or Loss.

LIMIT OF LIABILITY

A. The limit of liability shown on the Declarations for Medical Payments Coverage is the maximum limit of liability for each **covered person** injured in any one accident. This is the most **we** will pay regardless of the number of:

1. **Covered persons**;
2. Claims made;
3. Vehicles or premiums shown on the Declarations; or
4. Vehicles involved in an auto accident.

B. No one will be entitled to receive duplicate payments for the same elements of loss under this coverage and Part A or Part C of this policy.

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C. In no event will a **covered person** be entitled to receive duplicate payments for the same elements of loss.

EXCLUSIONS

We do not provide benefits under this Part for any **covered person** for **BI**:

1. Sustained while **occupying** any vehicle that is not **your covered auto** unless that vehicle is:

   a. A four- or six-wheel land motor vehicle designed for use on public roads;

   b. A moving van for personal use;

   c. A **miscellaneous vehicle**; or

   d. A vehicle used in the business of farming or ranching.

2. Sustained while **occupying your covered auto** when it is being used to carry persons for a fee. This exclusion (2.) does not apply to a share-the-expense car pool or for reimbursement of normal operating expenses when the vehicle is used for charitable purposes.

3. Sustained while **occupying** any vehicle located for use as a residence.

4. Occurring during the course of employment if workers' compensation benefits are required or available.

5. Sustained while **occupying**, or when struck by, any vehicle, other than **your covered auto**, that is owned by **you**.

6. Sustained while **occupying**, or when struck by, any vehicle, other than **your covered auto**, that is owned by any **family member**. This exclusion (6.) does not apply to **you**.

7. Sustained while **occupying** a vehicle without expressed or implied permission.

8. Sustained while **occupying** a vehicle when it is being used in the business or occupation of a **covered person**. This exclusion (8.) does not apply to **BI** sustained while **occupying** a private passenger auto, pickup, or **van**, or a **trailer** used with these vehicles.

9. Caused by or as a consequence of war, insurrection, revolution, nuclear reaction, or radioactive contamination.

10. Sustained while **occupying your covered auto** while it is rented or leased to others, or shared as part of a personal vehicle sharing program.

11. Sustained while a participant in, or in practice for, any **driving contest or challenge**.

12. Sustained as a result of a **covered person's** exposure to **fungi**, wet or dry rot, or bacteria.

OTHER INSURANCE

If there is other applicable auto medical payments insurance, **we** will pay only **our** share of the loss. **Our** share is the proportion that **our** limit of liability bears to the total of all applicable limits. However, any insurance **we** provide with respect to a vehicle **you** do not own shall be excess over any other collectible auto insurance providing payments for medical or funeral expenses.

SPECIAL PROVISIONS

If **your covered auto** and every other motor vehicle **you** own are within the policy territory referred to in Part E - General Provisions, then coverage under Part B - Medical Payments Coverage will apply to **you** and any **family member** anywhere in the world.

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PART C - UNINSURED MOTORISTS COVERAGE (referred to as UM Coverage)
UNDERINSURED MOTORISTS COVERAGE (referred to as UIM Coverage)

DEFINITIONS

A. "**Covered person**" as used in this Part means:

1. **You** or any **family member**.

2. Any other person **occupying your covered auto**.

3. Any person for damages that person is entitled to recover because of **BI** to which this coverage applies sustained by a person described in 1. or 2. above.

However, "**covered person**" does not include the United States of America or any of its agencies.

B. "**Underinsured motor vehicle**" means a land motor vehicle or **trailer** of any type to which a liability bond or policy applies at the time of the accident but its limit for bodily injury liability is less than the limit of liability for UM Coverage under this policy.

However, "**underinsured motor vehicle**" does not include an **uninsured motor vehicle**.

C. "**Uninsured motor vehicle**" means a land motor vehicle or **trailer** of any type:

1. To which no liability bond or policy applies at the time of the accident.

2. To which a liability bond or policy applies at the time of the accident but its limit for bodily injury liability is less than the minimum limit for liability specified by the Michigan financial responsibility law.

3. That is a hit-and-run motor vehicle. This means a motor vehicle whose owner or operator cannot be identified and that hits:

   a. **You** or any **family member**;

   b. A vehicle **you** or any **family member** is **occupying**; or

   c. **Your covered auto**.

4. To which a liability bond or policy applies at the time of the accident but the bonding or insuring company denies coverage or is or becomes insolvent.

D. "**Uninsured motor vehicle**" and "**underinsured motor vehicle**" do not include any vehicle or equipment:

1. Owned by or furnished or available for the regular use of **you** or any **family member**.

2. Owned or operated by a self-insurer under any applicable motor vehicle law.

3. Owned by any governmental unit or agency.

4. Operated on rails or crawler treads, except for a snowmobile.

5. Designed mainly for use off public roads while not on public roads.

6. While located for use as a residence or premises.

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(PART C Cont'd.)

INSURING AGREEMENT

A. Uninsured Motorists Coverage.

1. **We** will pay compensatory damages which a **covered person** is legally entitled to recover from the owner or operator of an **uninsured motor vehicle** because of **BI** sustained by a **covered person** and caused by an auto accident if the claim for damages is made within three years of the date of the accident.

2. The owner's or operator's liability for these damages must arise out of the ownership, maintenance, or use of the **uninsured motor vehicle.** Any judgment for damages arising out of a suit brought without **our** written consent is not binding on **us** unless:

   a. **Our** consent was requested and **we** did not respond within a reasonable amount of time; or

   b. **Our** consent was unreasonably withheld.

3. **We** will pay under this coverage only after the limits of liability under any applicable liability bonds or policies have been exhausted by payment of judgments or settlements. This provision applies only to Definition C.2. under this Part.

B. Underinsured Motorists Coverage.

1. **We** will pay compensatory damages which a **covered person** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle** because of **BI** sustained by a **covered person** and caused by an auto accident if the claim for damages is made within three years of the date of the accident.

2. The owner's or operator's liability for these damages must arise out of the ownership, maintenance, or use of the **underinsured motor vehicle**.

3. **We** will pay under this coverage only after the limits of liability under any applicable liability bonds or policies have been exhausted by payment of judgments or settlements.

LIMIT OF LIABILITY

A. For **BI** sustained by any one person in any one accident, **our** maximum limit of liability for all resulting damages, including, but not limited to, all direct, derivative, or consequential damages recoverable by any persons, is the limit of liability shown on the Declarations for "each person" for UM Coverage or for UIM Coverage, whichever is applicable. Subject to this limit for "each person," the limit of liability shown on the Declarations for "each accident" for UM Coverage or for UIM Coverage is **our** maximum limit of liability for all damages for **BI** resulting from any one accident. These limits are the most **we** will pay regardless of the number of:

   1. **Covered persons;**

   2. Claims made;

   3. Vehicles or premiums shown on the Declarations;

   4. Premiums paid; or

   5. Vehicles involved in the accident.

B. The limit of liability (each person and each accident) under UM Coverage or UIM Coverage shall be reduced by all sums paid for the same elements of loss because of the **BI** by or on behalf of persons or organizations who may be legally responsible. This includes all sums:

   1. Paid under Part A - Liability Coverage and Part B - PIP Coverage of this policy;

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2. Paid or payable under any workers' compensation law or similar disability benefits law; or

3. Paid or payable under any automobile medical expense coverage.

EXCLUSIONS

A. **We** do not provide UM Coverage for **BI** sustained by any **covered person** while **occupying**, or when struck by, any motor vehicle owned by **you** or any **family member** which is not insured for UM Coverage under this policy. This includes a **trailer** of any type used with that vehicle.

B. **We** do not provide UIM Coverage for **BI** sustained by any **covered person** while **occupying**, or when struck by, any motor vehicle owned by **you** or any **family member** which is not insured for UIM Coverage under this policy. This includes a **trailer** of any type used with that vehicle.

C. **We** do not provide UM Coverage or UIM Coverage for **BI** sustained by any **covered person**:

1. If that person or the legal representative settles the **BI** claim without **our** consent.

2. While **occupying your covered auto** when it is being used to carry persons for a fee. This exclusion (C.2.) does not apply to a share-the-expense car pool or for reimbursement of normal operating expenses when the vehicle is used for charitable purposes.

3. Using a vehicle without expressed or implied permission.

4. While **your covered auto** is rented or leased to others, or shared as part of a personal vehicle sharing program.

5. While **occupying** any vehicle when it is being operated in, or in practice for, any **driving contest or challenge**.

D. UM Coverage or UIM Coverage shall not apply directly or indirectly to benefit any insurer or self-insurer under any workers' compensation law or similar disability benefits law.

E. **We** do not provide UM Coverage or UIM Coverage for punitive or exemplary damages.

OTHER INSURANCE

If there is other applicable insurance for UM Coverage or UIM Coverage available under one or more policies or provisions of coverage:

A. Any recovery for damages under all such policies or provisions of coverage may equal but not exceed the highest applicable limit for any one vehicle under any insurance providing coverage on either a primary or excess basis.

B. Any insurance **we** provide with respect to a vehicle **you** do not own or to a person other than **you** or any **family member** will be excess over any collectible insurance.

C. If the coverage under this policy is provided:

1. On a primary basis, **we** will pay only **our** share of the loss that must be paid under insurance providing coverage on a primary basis. **Our** share is the proportion that **our** limit of liability bears to the total of all applicable limits of liability for coverage provided on a primary basis.

2. On an excess basis, **we** will pay only **our** share of the loss that must be paid under insurance providing coverage on an excess basis. **Our** share is the proportion that **our** limit of liability bears to the total of all applicable limits of liability for coverage provided on an excess basis.

NON-DUPLICATION

No **covered person** will be entitled to receive duplicate payments under this coverage for the same elements of loss which were:

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1. Paid because of the **BI** by or on behalf of persons or organizations who may be legally responsible.

2. Paid or payable under any workers' compensation law or similar disability benefits law.

3. Paid under another provision or coverage in this policy.

4. Paid under any auto policy medical expense coverage.

PART D - PHYSICAL DAMAGE COVERAGE

DEFINITIONS

A. **"Actual cash value"** means the amount that it would cost, at the time of **loss**, to buy a comparable vehicle. As applied to **your covered auto**, a comparable vehicle is one of the same make, model, model year, body type, and options with substantially similar mileage and physical condition.

B. **"Collision"** means the impact with an object and includes upset of a vehicle. **Loss** caused by the following is covered under Comprehensive Coverage and is not considered **collision**: fire; missiles or falling objects; hail, water or flood; malicious mischief or vandalism; theft or larceny; riot or civil commotion; explosion or earthquake; contact with bird or animal; windstorm; or breakage of window glass. If breakage of window glass is caused by a **collision**, **you** may elect to have it considered a loss caused by **collision**.

C. **"Custom equipment."**

"Custom equipment" means equipment, furnishings and parts permanently installed in or upon **your covered auto**, other than:

1. Original manufacturer equipment, furnishings or parts;

2. Any replacement of original manufacturer equipment, furnishings or parts with other equipment, furnishings or parts of like kind and quality;

3. Equipment, furnishings or parts designed to assist disabled persons;

4. Anti-theft devices and devices intended to monitor or record driving activity; and

5. Tires of a substantially similar size as those installed by the manufacturer.

D. **"Loss"** means direct and accidental damage to the operational safety, function, or appearance of, or theft of, **your covered auto** or personal property contained in **your covered auto**. **Loss** includes a total loss, but does not include any damage other than the cost to **repair** or replace. **Loss** does not include any loss of use, or diminution in value that would remain after **repair** or replacement of the damaged or stolen property.

E. **"Nonowned vehicle."**

1. **"Nonowned vehicle"** means any private passenger auto, pickup, **van**, **miscellaneous vehicle**, or **trailer** not owned by, or furnished or available for the regular use of, **you** or any **family member**. This applies only when the vehicle is in the custody of or being operated by **you** or any **family member**.

2. A **nonowned vehicle** does not include any of the following vehicles used in any business or occupation other than farming or ranching:

   a. A pickup;

   b. A **van**; or

   c. A **miscellaneous vehicle**.

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(PART D Cont'd.)

F. "**Repair.**"

1. "**Repair**" means restoring the damaged property to its pre-**loss** operational safety, function, and appearance. This may include the replacement of component parts.

2. **Repair** does not require:

a. A return to the pre-**loss** market value of the property;

b. Restoration, alteration, or replacement of undamaged property, unless such is needed for the operational safety of the vehicle; or

c. Rekeying of locks following theft or misplacement of keys.

G. "**Substantially at fault**" means a person's action or inaction was more than 50% of the cause of the accident.

H. "**Your covered auto**" as used in this Part includes:

1. **Custom equipment**, up to a maximum of $5,000, in or on **your covered auto**.

2. A **nonowned vehicle**. If there is a **loss** to a **nonowned vehicle**, **we** will provide the broadest coverage shown on the Declarations.

INSURING AGREEMENT

A. Comprehensive Coverage (excluding **collision**).

1. Physical damage. **We** will pay for **loss** caused by other than **collision** to **your covered auto**, including its equipment, and personal property contained in **your covered auto**, minus any applicable deductible shown on the Declarations. The deductible will be waived for **loss** to window glass that can be repaired rather than replaced. In cases where the repair proves unsuccessful and the window glass must be replaced, the full amount of the deductible, if any, must be paid.

2. Transportation expenses. **We** will also pay:

a. Up to $30 a day, to a maximum of $900, for transportation expenses incurred by **you** or any **family member**. This applies only in the event of a total theft of **your covered auto**. **We** will pay only transportation expenses incurred during the period beginning 48 hours after the theft and ending when **your covered auto** is returned to use or, if not recovered or not **repairable**, up to seven days after **we** have made a settlement offer.

b. If Rental Reimbursement Coverage is afforded, limits for transportation expenses are the limits of liability shown on the Declarations for Rental Reimbursement for that vehicle.

B. Standard Collision Coverage. **We** will pay for **loss** caused by **collision** to **your covered auto**, including its equipment, and personal property contained in **your covered auto**, minus any applicable deductible shown on the Declarations.

C. Broadened Collision Coverage. **We** will pay for **loss** caused by **collision** to **your covered auto**, including its equipment, and personal property contained in **your covered auto**, regardless of fault, minus any applicable deductible shown on the Declarations. The deductible amount will be waived when the operator of **your covered auto** is not **substantially at fault** for the accident which resulted in the **collision** damage.

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D. Limited Collision Coverage. **We** will pay for **loss** caused by **collision** to **your covered auto** if the operator of **your covered auto** is not **substantially at fault** for the accident which resulted in the **collision** damage. No deductible will apply.

E. Rental Reimbursement Coverage (for **loss** other than total theft).

1. **We** will reimburse **you** for expenses **you** or any **family member** incurs to rent a substitute for **your covered auto**. This coverage applies only if:

   a. **Your covered auto** is withdrawn from use for more than 24 hours due to a **loss**, other than a total theft, to that auto; and

   b. The **loss** is covered under Comprehensive Coverage or caused by **collision**, and the cause of **loss** is not otherwise excluded under Part D of this policy.

2. **We** will reimburse **you** only for that period of time reasonably required to **repair** or replace **your covered auto**. If **we** determine **your covered auto** is a total loss, the rental period will end no later than seven days after **we** have made a settlement offer.

F. USAA Roadside Assistance. **We** will pay the reasonable costs **you** or any **family member** incurs for one of the following each time **your covered auto** is disabled:

1. Mechanical labor up to one hour at the place of breakdown.

2. Locksmith services to gain entry to **your covered auto**. This does not include the rekeying of locks following theft or misplacement of keys.

3. Towing, to the nearest place where necessary repairs can be made during regular business hours, if the vehicle will not run or is stranded on or immediately next to a public road.

4. Delivery of gas or oil to, or a change of tire on a disabled vehicle. However, **we** do not pay for the cost of these items.

LIMIT OF LIABILITY

A. Total loss to **your covered auto**. **Our** limit of liability under Comprehensive Coverage and Collision Coverage is the **actual cash value** of the vehicle, inclusive of any **custom equipment**.

1. The maximum amount **we** will include for **loss** to **custom equipment** in or on **your covered auto** is $5,000.

2. **We** will declare **your covered auto** to be a total loss if, in **our** judgment, the cost to **repair** it would be greater than its **actual cash value** minus its salvage value after the **loss**.

B. Other than a total loss to **your covered auto**:

1. **Our** limit of liability under Comprehensive Coverage and Collision Coverage is the amount necessary to **repair** the **loss** based on **our** estimate or an estimate that **we** approve, if submitted by **you** or a third party. Upon request, **we** will identify at least one facility that is willing and able to complete the **repair** for the amount of the estimate.

2. **Our** estimate may specify used, rebuilt, remanufactured, or non-Original Equipment Manufacturer (non-OEM) parts.

3. **You** may request that damaged parts be replaced with new Original Equipment Manufacturer (OEM) parts. **You** will be responsible, however, for any cost difference between the parts included in **our** estimate and the new OEM parts used in the **repair**.

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4. **We** will not take a deduction for depreciation. **We** will take a deduction if prior damage has not been **repaired**. Prior damage does not include wear and tear.

C. Personal property contained in **your covered auto**. The limits of liability described below are separate from the limits available for a **loss** to **your covered auto**.

1. **Our** limit of liability under Comprehensive Coverage and Collision Coverage is the lesser of:

   a. The amount necessary to replace the damaged or stolen property; or

   b. $250.

2. **We** will not take a deduction for depreciation.

D. Under Rental Reimbursement Coverage, **our** maximum limits of liability are the limits of liability shown on the Declarations for Rental Reimbursement Coverage for that vehicle.

E. Under USAA Roadside Assistance, **our** limit of liability is the reasonable price for the covered service.

PAYMENT OF LOSS

We may pay for **loss** in money, or **repair** or replace the damaged or stolen property. **We** may, at **our** expense, return any stolen property to **you** or to the address shown on the Declarations. If **we** return stolen property, **we** will pay for any damage resulting from the theft. **We** may keep all or part of the damaged or stolen property and pay **you** an agreed or appraised value for it. **We** cannot be required to assume the ownership of damaged property. **We** may settle a claim either with **you** or with the owner of the property.

LOSS PAYABLE CLAUSE

Loss or damage under this policy will be paid, as interest may appear, to the named insured and the loss payee shown on the Declarations. This insurance, with respect to the interest of the loss payee, will not become invalid because of your fraudulent acts or omissions unless the loss results from **your** conversion, secretion, or embezzlement of **your covered auto**. **We** may cancel the policy as permitted by policy terms and the cancellation will terminate this agreement as to the loss payee's interest. **We** will give the same advance notice of cancellation to the loss payee as **we** give to the named insured shown on the Declarations. **We** may send notices to the loss payee either by mail or by electronic means. However, if the loss payee requests in writing that **we** not send notices, including a notice of cancellation, **we** will abide by that request. When **we** pay the loss payee **we** will, to the extent of payment, be subrogated to the loss payee's rights of recovery.

WAIVER OF COLLISION DEDUCTIBLE

We will not apply the deductible to **loss** caused by **collision** with another vehicle if all of these conditions are met:

1. The **loss** to **your covered auto** is greater than the deductible amount; and

2. The owner and driver of the other vehicle are identified; and

3. The owner or driver of the other vehicle has a liability policy covering the **loss**; and

4. The driver of **your covered auto** is not legally responsible, in any way, for causing or contributing to the **loss**.

EXCLUSIONS

We will not pay for:

1. **Loss** to **your covered auto** which occurs while it is being used to carry persons for a fee. This exclusion (1.) does not apply to a share-the-expense car pool or for reimbursement of normal operating expenses when the vehicle is used for charitable purposes.

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(PART D Cont'd.)

2. Damage due and confined to:

   a. Road damage to tires;

   b. Wear and tear;

   c. Freezing; or

   d. Mechanical or electrical breakdown or failure, including such damage resulting from negligent servicing or repair of **your covered auto** or its equipment. **We** will pay for ensuing damage only to the extent the damage occurs outside of the major component (such as transmission/ transaxle, electrical system, engine including cooling and lubrication thereof, air conditioning, computer, suspension, braking, drive assembly, and steering) in which the initial mechanical or electrical breakdown or failure occurs.

   This exclusion (2.) does not apply if the damage results from the total theft of **your covered auto**, and it does not apply to USAA Roadside Assistance.

3. **Loss** due to or as a consequence of war, insurrection, revolution, nuclear reaction, or radioactive contamination.

4. **Loss** to a camper body or **trailer** owned by **you** or any **family member** that is not shown on the Declarations. This exclusion (4.) does not apply to one **you** or any **family member** acquires during the policy period and asks **us** to insure within 30 days after **you** or any **family member** becomes the owner.

5. **Loss** to any **nonowned vehicle** when used by **you** or any **family member** without a reasonable belief that **you** or that **family member** is entitled to do so.

6. **Loss** to equipment designed or used to evade or avoid the enforcement of motor vehicle laws.

7. **Loss** to any **nonowned vehicle** arising out of its use by **you** or any **family member** while employed or otherwise engaged in **auto business** operations.

8. **Loss** to **your covered auto** while it is rented or leased to others, or shared as part of a personal vehicle sharing program.

9. **Loss** to any vehicle while it is being operated in, or in practice for, any **driving contest or challenge**.

10. **Loss** resulting from:

    a. The acquisition of a stolen vehicle;

    b. Any legal or governmental action to return a vehicle to its legal owner; or

    c. Any confiscation or seizure of a vehicle by governmental authorities.

    This exclusion (10.) does not apply to innocent purchasers of stolen vehicles for value under circumstances that would not cause a reasonable person to be suspicious of the sales transaction or the validity of the title.

11. **Loss** resulting from use in any illicit or prohibited trade or transportation.

12. Any **loss** arising out of any act committed:

    a. By or at the direction of **you** or any **family member**; and

    b. With the intent to cause a **loss**.

13. **Loss** caused by **fungi**, wet or dry rot, or bacteria. This means the presence, growth, proliferation, spread, or any activity of **fungi**, wet or dry rot, or bacteria. This exclusion (13.) does not apply to damage directly resulting from a **loss** covered under Comprehensive Coverage or Collision Coverage.

NO BENEFIT TO BAILEE

This insurance shall not directly or indirectly benefit any carrier or other bailee for hire.

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(PART D Cont'd.)

OTHER SOURCES OF RECOVERY

If other sources of recovery also cover the **loss**, **we** will pay only **our** share of the **loss**. **Our** share is the proportion that **our** limit of liability bears to the total of all applicable limits. However, any insurance **we** provide with respect to a **nonowned vehicle** will be excess over any other collectible source of recovery including, but not limited to:

1. Any coverage provided by the owner of the **nonowned vehicle**.
2. Any other applicable physical damage insurance.
3. Any other source of recovery applicable to the **loss**.

This provision does not apply to USAA Roadside Assistance.

APPRAISAL

If **we** and **you** do not agree on the amount of **loss**, either may demand an appraisal. In this event, each party will select a competent appraiser. The two appraisers will select an umpire. The appraisers will state separately the **actual cash value** and the amount of **loss**. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will pay its chosen appraiser and share the expenses of the umpire equally. Neither **we** nor **you** waive any rights under this policy by agreeing to an appraisal.

PART E - GENERAL PROVISIONS

BANKRUPTCY

Bankruptcy or insolvency of the **covered person**, as defined in this policy, shall not relieve **us** of any obligations under this policy.

CHANGES

A. The premium is based on information **we** have received from **you** and other sources. **You** agree to cooperate with **us** in determining if this information is correct and complete. **You** agree that if this information changes, or is incorrect or incomplete, **we** may adjust **your** premiums accordingly during the policy period.

B. If, during the policy period, the risk exposure changes for any of the following reasons, **we** will make the necessary premium adjustments effective the date of change in exposure. Change in exposure means the occurrence of an event listed in B.1. through B.7. or in E. below, or a similar event that may increase or decrease the policy premium. **You** agree to give **us** notice of any exposure change as soon as is reasonably possible. Changes that may result in a premium adjustment include, but are not limited to, the following:

1. Change in location where any vehicle is garaged.
2. Change in description, equipment, purchase date, registration, cost, usage, miles driven annually, or operators of any vehicle.
3. Replacement or addition of any vehicle. A replacement or additional vehicle is a **newly acquired vehicle**.
4. Deletion of a vehicle. The named insured may request that a vehicle shown on the Declarations be deleted from this policy. The effective date of this change cannot be earlier than the date of the named insured's request unless **we** agree to an earlier date.
5. Change in date of birth, marital status, driver's license information, or driving record of any operator.
6. Addition or deletion of an operator.
7. Change, addition, or deletion of any coverage or limits.

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(PART E Cont'd.)

C. **We** will make any calculations or adjustments of **your** premium using the applicable rules, rates, and forms as of the effective date of the change.

D. If **we** make a change which broadens coverage under this edition of **our** policy without additional premium charge, that change will automatically apply to **your** insurance as of the date **we** implement that change in **your** location. This paragraph does not apply to changes implemented with a revision that includes both broadenings and restrictions in coverage. Otherwise, this policy includes all of the agreements between **you** and **us**. Its terms may not be changed or waived except by endorsement issued by **us**.

E. Deployment.

1. If, because of **your** active-duty deployment in one of the military services of the United States, **you** have reduced the coverage on **your covered auto** and placed the vehicle in storage, then, upon **your** return from the deployment, **we** will reinstate the coverage that was on the vehicle prior to the deployment-caused reduction beginning on the date the vehicle is removed from storage.

2. Any reinstatement of coverage under E.1. will apply for up to 60 days after the date **you** returned from deployment. If **you** wish to continue the reinstated coverage beyond the 60-day period, **you** must request it during the 60-day period. If **you** request reinstated coverage after this 60-day period, any coverage **we** agree to provide will be effective at the date and time of **your** request unless **we** agree to an earlier date.

3. **You** must pay an additional premium, as set out in Part E., Changes, B.7., for the reinstated coverage. However, if **you** return from deployment on furlough or emergency leave for a period of 30 days or less, **we** will waive any increase in the premium for the period of time **you** are on furlough or emergency leave, provided that no claim for coverage under this policy is made for a loss that occurs during that time period. If a loss occurs **we** will, as of the date of the loss, reinstate the coverage that was on the vehicle prior to the deployment-caused reduction, and **you** must pay an additional premium for that coverage.

CONFORMITY TO LAW

If any of the terms of this policy conflict with state or local law, state or local law will apply.

DUTIES AFTER AN ACCIDENT OR LOSS

We will not be required to provide coverage under this policy unless there has been full compliance with the following duties:

A. **We** must be notified promptly of how, when, and where an accident or loss happened. Notice should also include the names and addresses of any injured persons and of any witnesses.

Notice to **our** authorized representatives is considered notice to **us**. Failure to give any notice required by this policy shall not invalidate any claim made by a person seeking coverage if it shall be shown not to have been reasonably possible to give such notice promptly and that notice was given as soon as was reasonably possible. A claim under UM Coverage or UIM Coverage must be made to **us** within three years of the accident.

B. A person or entity seeking any coverage or payment of any benefits except payment under Part A - Liability must:

1. Cooperate with **us** in the investigation, settlement, or defense of any claim or suit.

2. Promptly send **us** copies of any notices or legal papers received in connection with a suit, accident, or loss.

3. Submit, as often as **we** reasonably require:

a. To physical exams by physicians **we** select. **We** will pay for these exams.

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b. To examination under oath, while not in the presence of any other **covered person**, as defined in this policy. The examination must be signed. This duty (B.3.b.) does not apply to Part B - PIP Coverage and PPI Coverage.

4. Authorize **us** to obtain medical reports and other pertinent records.

5. Submit a proof of loss when required by **us**.

6. Promptly notify the police if a hit-and-run driver is involved.

C. A person seeking coverage for **PD** under Part B - PIP Coverage and PPI Coverage must also:

1. Take reasonable steps after loss, at **our** expense, to protect the damaged property. Any loss due to failure to protect the property will not be paid under this insurance.

2. Permit **us** to inspect and appraise the damaged property before its repair or disposal.

D. A person seeking coverage under Part D - Physical Damage Coverage must also:

1. Take reasonable steps after loss to protect **your covered auto** and its equipment from further loss. **We** will pay reasonable expenses incurred to do this.

2. Promptly notify the police if **your covered auto** is stolen.

3. Permit **us** to inspect and appraise the damaged property before its repair or disposal.

LEGAL ACTION AGAINST US

A. No legal action may be brought against **us** until:

1. There has been full compliance with all the terms of this policy; and

2. With respect to Part A:

a. **We** agree in writing that the **covered person**, as defined in Part A, has an obligation to pay; or

b. The amount of that obligation has been finally determined by judgment after trial.

3. This paragraph (A.) does not apply:

a. If **we** fail to agree within a reasonable time after a written request:

(1) That the **covered person** has an obligation to pay; or

(2) To resolve a dispute.

b. If **we** have acted inappropriately in handling **your** claim.

B. No legal action may be brought against **us** under Part B - PIP Coverage and PPI Coverage after one year from the date of the accident causing the **BI** or **PD**.

However, this (B.) does not apply to PIP Coverage if:

1. Written notice of the **BI** has been given to **us** within one year from the date of the accident; or

2. **We** have already paid any PIP benefits for the injury.

Action must be brought within one year from the date the most recent allowable **medical expense**, **funeral expense**, **work loss** or **survivor's loss** was incurred. No one may recover benefits for any portion of the loss incurred more than one year before the date on which the action was begun.

C. No legal action can be brought against **us** under Part C - Uninsured Motorists Coverage and Underinsured Motorists Coverage:

1. For any claim involving an **uninsured motor vehicle** unless the action is brought within six years from the date of the accident.

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2. For any claim involving an **underinsured motor vehicle** unless the action is brought within:

   a. Six years from the date of the accident; or

   b. One year from the date that the **covered person** is aware or should have been aware of a claim for which coverage would apply;

   whichever is later.

D. No person or organization has any right under this policy to bring **us** into any action to determine the liability of a **covered person**, as defined in this policy.

E. Unless **we** agree otherwise, any legal action against **us** must be brought in a court of competent jurisdiction in the county and state where the **covered person** lived at the time of the accident.

MISREPRESENTATION

We do not provide any coverage under this policy for any person who has knowingly concealed or misrepresented any material fact or circumstance relating to this insurance:

1. At the time application was made; or

2. At any time during the policy period; or

3. In connection with the presentation or settlement of a claim.

NON-DUPLICATION OF PAYMENT

When a claim, or part of a claim, is payable under more than one provision of this policy, **we** will pay the claim only once under this policy.

OUR RIGHT TO RECOVER PAYMENT

A. If **we** make a payment under this policy and the person to or for whom payment was made has a right to recover damages from another, **we** will be subrogated to that right. The person to or for whom payment was made shall do whatever is necessary to enable **us** to exercise **our** rights, and shall do nothing after loss to prejudice them. However, **our** rights in this paragraph do not apply under Part D, against any person using **your covered auto** with a reasonable belief that that person is entitled to do so, nor under Part B - Medical Payments Coverage.

B. If **we** make a payment under this policy and the person to or for whom payment was made recovers damages from another, the person to or for whom payment was made shall hold in trust for **us** the proceeds of the recovery and reimburse **us** to the extent of **our** payment. **Our** right is subject to any applicable limitations stated in the Michigan Insurance Code.

C. If **we** make a payment under Part C - Uninsured Motorists Coverage and Underinsured Motorists Coverage, **we** shall be entitled to recovery under paragraphs A. and B. of this provision only after the person to or for whom payment was made has been fully compensated for damages by another party.

D. If the **covered person**, as defined in this policy, recovers from the party at fault and **we** share in the recovery, **we** will pay **our** share of the legal expenses. **Our** share is that percent of the legal expenses that the amount **we** recover bears to the total recovery. This does not apply to any amounts recovered or recoverable by **us** from any other insurer under any inter-insurer arbitration agreement.

E. If **we** make payment for a claim under Part A, and the **covered person**, as defined in Part A:

   1. Knowingly concealed or misrepresented any material fact or circumstance relating to this insurance; or

   2. Failed or refused to comply with the duties specified in this policy and prejudiced **our** defense of the liability claim by such failure or refusal;

   then, the **covered person** shall reimburse **us** to the extent of **our** payment and cost of defense.

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F. If **we** make payment for a claim under Part D and **you** or any **family member** has knowingly concealed or misrepresented any material fact or circumstance relating to this insurance, then **you** shall reimburse **us** to the extent of **our** payment.

OWNERSHIP

A. For purposes of Part A - Liability Coverage and Part B - PIP Coverage and PPI Coverage of this policy, "owner" means any of the following:

1. A person renting a motor vehicle or having the use thereof, under a lease for a period that is greater than 30 days.

2. A person who holds the legal title to a vehicle, other than a person engaged in the business of leasing motor vehicles, who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days.

3. A person who has the immediate right of possession of a motor vehicle under an installment sale contract.

B. For purposes of this policy, except those Parts listed in Paragraph A. above, a vehicle is deemed to be owned by a person if leased under a written agreement to that person for a continuous period of at least six months.

POLICY PERIOD AND TERRITORY

A. This policy applies only to accidents and losses which occur during the policy period as shown on the Declarations and within the policy territory. The policy territory is the United States of America (USA), its territories and possessions, Puerto Rico, and Canada, including transportation of **your covered auto** between any ports of these locations.

B. The policy territory also includes Mexico, subject to the following conditions:

1. All coverages afforded by the policy are extended to include coverage during trips into Mexico. This applies only to loss or accident that occurs within 75 miles of the USA border.

2. Any liability coverage afforded by the policy is extended to include the remainder of Mexico, but only if **you** have valid and collectible liability coverages from a licensed Mexican insurance company at the time of loss. This paragraph (B.2.) applies only if the original liability suit for **BI** or **PD** is brought in the USA.

3. Coverage under this policy does not extend:

a. To any **covered person**, as defined in this policy, who does not live in the USA.

b. To any **covered person**, as defined in this policy, **occupying** a vehicle which is not principally garaged and used in the USA.

c. To any vehicle which is not principally garaged and used in the USA.

4. The words "state or province" as used in the Out of State Coverage provision in Part A of the policy do not include a "state or province" of Mexico.

5. Losses payable under Part D of the policy will be paid in the USA. If the vehicle must be repaired in Mexico, **our** limit of liability will be determined at the nearest point in the USA where repairs can be made.

6. Any insurance **we** provide will be excess over any other similar valid and collectible insurance.

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(PART E Cont'd.)

PREMIUM RECOMPUTATION

The Michigan Insurance Code places certain limitations on a person's right to sue for damages. The premium for this policy reflects these limitations. A court from which there is no appeal can declare any of these limitations unenforceable. If this occurs, **we** will have the right to recompute the premium. **You** can choose to delete any coverage as the result of the court's decision. If **you** do, **we** will compute any refund or premiums on a pro rata basis.

REDUCING THE RISK OF LOSS AND OTHER BENEFITS

We may occasionally provide **you** with products or services that assist **you** in preventing or reducing the risk of loss, and may provide an incentive for **your** use of these items. We may also occasionally provide you with items, offers or services **we** think may benefit **you** or **your family members**. Such items, offers and services may be provided in any form **we** choose.

SPOUSE ACCESS

A. The named insured and **we** agree that the named insured and resident spouse are "customers" for purposes of state and federal privacy laws. The resident spouse will have access to the same information available to the named insured and may initiate the same transactions as the named insured.

B. The named insured may notify **us** that he/she no longer agrees that the resident spouse shall be treated as a "customer" for purposes of state and federal privacy laws, and **we** will not permit the resident spouse to access policy information.

TERMINATION

A. Cancellation. This policy may be cancelled during the policy period as follows:

1. **You** may cancel this policy at any time, but the effective date of cancellation cannot be earlier than the date of the request unless **we** agree to an earlier date.

2. **We** may cancel this policy by mailing a notice to the named insured shown on the Declarations at the most recent address **you** provided to **us** by giving:

   a. At least ten days notice by first class mail, if cancellation is for nonpayment of premium; or

   b. At least 20 days notice by first class mail, if notice is mailed during the first 55 days this policy is in effect and this is not a renewal policy; or

   c. At least 30 days notice by certified mail, return receipt requested, in all other cases.

3. After this policy is in effect for 55 days, or if this is a renewal policy, **we** will cancel only:

   a. For nonpayment of premium; or

   b. If **your** driver's license or that of any driver who lives with **you** or who customarily uses **your covered auto** has been suspended or revoked and the suspension or revocation has become final. This must have occurred:

      (1) During the policy period; or

      (2) Since the last anniversary of the original effective date if the policy period is other than one year.

4. **We** may cancel for any other reason not prohibited by law.

B. Nonrenewal. If **we** decide not to renew this policy, **we** will mail notice to the named insured shown on the Declarations at the most recent address **you** provided to **us**. Notice will be mailed at least 30 days before the end of the policy period.

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(PART E Cont'd.)

C. Automatic Termination.

1. If **we** offer to renew and **you** or **your** representative do not accept, this policy will automatically terminate at the end of the current policy period. Failure to pay the required renewal premium when due will mean that **you** have not accepted **our** offer.

2. If **you** obtain other insurance on **your covered auto**, any similar insurance provided by this policy will terminate as to that auto on the effective date of the other insurance. This does not apply to liability coverage purchased for travel in Mexico.

D. Other Termination Provisions.

1. Proof of mailing of any notice will be sufficient proof of notice.

2. If this policy is cancelled, the named insured shown on the Declarations may be entitled to a premium refund. The premium refund, if any, will be computed in accordance with Michigan law. However, making or offering to make the refund is not a condition of cancellation.

3. The effective date of cancellation stated in the notice will become the end of the policy period.

TRANSFER OF YOUR INTEREST IN THIS POLICY

Your rights and duties under this policy may not be assigned without **our** written consent. However, if the named insured shown on the Declarations dies, **we** will provide coverage until the end of the policy period for:

1. The surviving spouse at the time of death. Coverage applies to the spouse as if the named insured shown on the Declarations; and

2. The legal representative of the deceased person as if the named insured shown on the Declarations. This applies only with respect to the representative's legal responsibility to maintain or use **your covered auto**.

TWO OR MORE AUTO POLICIES

If this policy and any other auto insurance policy **we** issued to **you** apply to the same accident, the maximum limit of **our** liability under all the policies will not exceed the highest applicable limit of liability under any one policy.

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USAA Casualty Insurance Company

MICHIGAN PHYSICAL DAMAGE COVERAGES

The information in this form is a brief, general discussion. Coverages are subject to all the provisions and exclusions contained in your insurance policy. PLEASE READ YOUR POLICY FOR DETAILS OF COVERAGE.

Because Michigan law limits your right to sue for collision damage, to have adequate protection, we advise that you carry one of the three Collision Coverages available in Michigan.

Michigan law allows you to sue the driver of another insured vehicle for damage to your vehicle if your operator is not more than 50% at fault, and then, only for an amount up to $1,000 for damage which is not covered by insurance. This is commonly known as the "mini tort" law. We cannot file the suit for you. If you file suit against the other driver in civil court, the award to you may be reduced by the percentage of your negligence in the accident.

Here's an example. You're in an accident, and the other driver is at fault. Your car is a total loss of $4,500 and you have no Collision coverage. Even if you sued the other driver in small claims court and won, the maximum you could collect is $1,000. Who pays the remaining $3,500? **WITHOUT COLLISION COVERAGE, YOU DO!**

Your Michigan Collision Coverage options for each vehicle are:

Broadened Collision Coverage (BCC)

- BCC pays for damage to your vehicle anywhere in the policy territory, no matter who's at fault.
- If the operator of your vehicle is not more than 50% at fault, we will waive your deductible.**

Standard Collision Coverage (SCC)

- SCC pays for damage to your vehicle anywhere in the policy territory, no matter who's at fault, less your deductible.
- If you are not more than 50% at fault, you may sue for the amount of your deductible, up to $500.

Limited Collision Coverage (LCC)

- LCC pays for damage to your vehicle only if the operator of your vehicle is not more than 50% at fault.**
- There is no deductible for you to pay.
- If the operator of your vehicle is more than 50% at fault, LCC does not pay for damage to your vehicle.

**With BCC and LCC, if the other driver isn't identified, (hit-and-run, for example), you may be required to give evidence that you were not more than 50% at fault.

Comprehensive Coverage pays you, minus the deductible, for direct and accidental loss of, or damage to your vehicle caused by fire, theft, earthquake, hail, flood, windstorm, vandalism and other perils not specifically excluded in the policy. Breakage of glass is also covered.

Rental Reimbursement Coverage may be added for an additional premium charge. It is available only on private passenger automobiles when Comprehensive coverage is carried. Rental Reimbursement pays for you or a family member to rent a vehicle in the class you choose if you're without your automobile for more than 24 hours while it's being repaired after a loss caused by collision or due to a loss under Comprehensive coverage other than total theft. The available classes are: Economy; Standard; Multipassenger/Truck; and Large SUV. In Michigan, with few exceptions, even when the other driver is at fault in an accident, his insurance company will not pay for your rental car while you wait for repairs or shop for a new vehicle. For this reason, it is advisable that you carry Rental Reimbursement Coverage.

If you would like to add, revise or delete Collision Coverage for any of your vehicles, please check this box☐ and complete the back of this page.

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MICHIGAN COVERAGE SELECTION CHARTS

Your current coverages are stated on your Michigan Auto Policy Declarations.

To add, change, or delete a coverage on a particular vehicle, describe the vehicle and indicate your choice with an "X". Sign your name below.

Example: 1999 Ford Ranger with Broadened Collision Coverage and $200 deductible.

	MICHIGAN COLLISION COVERAGES																				
	Broadened Collision Coverage									Standard Collision Coverage									LCC	Reject ALL Coll. Covgs.
	Vehicles	DEDUCTIBLES								DEDUCTIBLES									*	
	Year	Make/Model	50	100	150	200	250	300	500	1000	50	100	150	200	250	300	500	1000		
EX	99	FORD RANGER				X														

* **There are no deductibles with Limited Collision Coverage (LCC).**

Rental Reimbursement Coverages: Rental Reimbursement (RR) may be carried only if Comprehensive Coverage (Comp.) is carried. Therefore, if you reject Comp., you also reject RR.

MICHIGAN COMPREHENSIVE and RENTAL REIMBURSEMENT COVERAGES

Vehicles		Comprehensive Coverage Deductibles									Reject Comp., & RR	Add RR (enter class)	Reject RR
Year	Make/Model	FULL	$50	$100	$150	$200	$250	$300	$500	$1000			

I have read and understand the explanations of all of the Michigan coverages stated on page 1 of this form and request that my Michigan coverage selections be revised as I have noted above.

If this form is sent by facsimile machine (fax), the sender adopts the document received by USAA as a duplicate original and adopts the signature produced by the receiving fax machine as the sender's original signature.

Signature of named insured _____ Date _____

USAA Number _____ Home Phone ( ) _____ Business Phone ( ) _____

Please return to:

USAA

9800 Fredericksburg Road, San Antonio, TX 78288-0508

Fax # 1-800-531-8877

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If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

STATE OF MICHIGAN

COURT OF APPEALS

S. BAXTER JONES,

Plaintiff-Appellant,

v

ESURANCE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED
February 25, 2021

No. 351772
Wayne Circuit Court
LC No. 19-007246-NF

Before: SWARTZLE, P.J., and MARKEY and TUKEL, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant. Plaintiff argues that the trial court erred when it granted defendant's motion for summary disposition based on the doctrine of res judicata, and argues that the case is not subject to the one-year-back rule set forth in MCL 500.3145. We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

On August 8, 2005, plaintiff was involved in a motor-vehicle accident in Shelbyville, Kentucky. On July 25, 2007, he sued defendant in Kentucky, in Shelby Circuit Court. In 2013, while the Kentucky lawsuit remained pending, plaintiff filed a complaint in Michigan, in Wayne Circuit Court, seeking recovery for the same motor-vehicle accident. In 2014, the Wayne Circuit Court dismissed plaintiff's complaint under MCR 2.116(C)(6), which permits dismissal of a claim because "[a]nother action has been initiated between the same parties involving the same claim."

On December 17, 2013, plaintiff filed a motion in the Shelby Circuit Court, asserting that Michigan law applied to plaintiff's claims and requesting that the Kentucky court "transfer" the litigation to Michigan. On April 17, 2014, the Shelby Circuit Court held a hearing on plaintiff's motion. More than one year after the hearing on the motion (and after the Wayne Circuit Court dismissed the 2013 complaint filed there), the Shelby Circuit Court entered an order applying Michigan law to plaintiff's claims and purporting to "transfer" the case to Wayne Circuit Court. Among other provisions, the "transfer" order purported to toll the operation of the one-year-back

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rule in Michigan by ordering that "all claims in the action shall be governed by and related back to the filing date in the Kentucky action; specifically, July 25, 2007."

In December 2015, the Wayne Circuit Court received the Kentucky court's "transfer" order. On May 1, 2017, defendant filed a motion for summary disposition, arguing that the Wayne Circuit Court's earlier order granting summary disposition in defendant's favor and dismissing the 2013 complaint barred plaintiff's claims in the subsequently "transferred" case, under the doctrine of res judicata. The Wayne Circuit Court granted defendant's motion, and plaintiff appealed to this Court.

In an unpublished decision, this Court vacated the trial court's grant of summary disposition in defendant's favor, based on its conclusion that plaintiff had "failed to properly invoke the trial court's jurisdiction by filing a complaint." *Jones v Esurance Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued October 25, 2018 (Docket No. 339410), p 1. "Because plaintiff did not file a proper complaint, he failed to invoke the circuit court's jurisdiction. Without jurisdiction, any order that the trial court entered was void." *Id*. at 8 (citations omitted). As this Court explained:

> We conclude that this case could not be "transferred" from a Kentucky state court to a Michigan state court, as there is no court rule or statute that would authorize this procedure. We further conclude that the 789-page Kentucky file, that was accepted by the trial court on December 4, 2015, could not constitute a "complaint" and, therefore, this case must be remanded to the trial court for further proceedings. [*Id.* at 3-4.]

This Court remanded the case to the Wayne Circuit Court "with instructions for the court to order plaintiff, within a reasonable time, to file a complaint that comports with the Michigan Court Rules." *Id*. at 7. This Court also stated: "If plaintiff seeks to toll the date of the complaint's filing, for instance by arguing that defendant agreed in Kentucky to consider the complaint as having been filed in Michigan at an earlier date, the trial court is directed to resolve those factual questions and make legal conclusions as necessary." *Id*.

On remand from this Court, plaintiff filed a new complaint in Wayne Circuit Court on May 16, 2019, and that complaint is the subject of the present appeal. Plaintiff also moved to transfer the case from Wayne Circuit Court to Washtenaw Circuit Court where a similar action was pending, but the Wayne Circuit Court denied plaintiff's motion. Thereafter, defendant once again moved for summary disposition, asserting that the Wayne Circuit Court's grant of summary disposition of plaintiff's 2013 complaint under MCR 2.116(C)(6) required dismissal of the claims alleged in plaintiff's newest complaint, under the doctrine of res judicata. Defendant also argued that the one-year-back rule applied to plaintiff's action, and that defendant's attorney in Kentucky did not waive defendant's right to assert this rule.

In response to defendant's motion, plaintiff argued that the doctrine of res judicata did not apply because the Wayne Circuit Court's dismissal of the 2013 case was not a decision on the merits. Furthermore, plaintiff argued that the one-year-back rule did not apply because plaintiff had claims within one year, and because the application of the one-year-back rule was tolled by agreement between the parties in Kentucky.

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At the hearing on defendant's motion, the Wayne Circuit Court found as follows:

> With respect to the one-year-back rule, the outcome of the motion turns on Plaintiff's allegations that Defendant, explicitly, agreed to waive such a defense, if the matter was dismissed in Kentucky and refiled in this case.
>
> * * *
>
> [W]hile it is clear that Esurance did not oppose the motion [to transfer], that fact alone would not authorize the Kentucky Court to order that Esurance waive statute of limitations defenses, if the that [sic] matter is refiled in Michigan. Rather, such authority would arise if, and only if, Esurance explicitly agreed to waive such a defense.
>
> Plaintiff of course alleges that Esurance, specifically, agreed to such a waiver, and even alleged that it did so in writing. The writing at issue, however, is merely the Kentucky Court's order transferring the case from Michigan and indicating that it must be treated as have [sic] been filed in 2006. And while the signature of Esurance's attorney appears on that document, this . . . in no way suggests that the attorney, in fact, agreed to the provision. Rather, the signature reflects only the fact that the attorney agreed that the order correctly or accurately reflects the judge's ruling.
>
> Plaintiff also claims that Esurance's attorney agreed to the waiver elsewhere during the proceedings, making reference to transcripts of certain proceedings. Plaintiff does not, however, provide any specific citations in these transcripts, nor does he . . . cite the specific statements on which the claim is based.
>
> In this context, the Court finds no basis for concluding that Esurance ever waived the statute of limitations defense. Rather, at most Esurance simply did not oppose the motion that Plaintiff filed. If so, then Esurance did not waive the statute of limitations defense.
>
> In light of the foregoing, the Court agrees that Esurance is entitled to invoke the one-year-back rule.

In addition to those findings regarding the one-year-back rule, the Wayne Circuit Court reiterated its prior ruling regarding the doctrine of res judicata. Based on these findings and conclusions, the Wayne Circuit Court granted defendant's motion and dismissed the lawsuit. This appeal followed.

II. ANALYSIS

A. RES JUDICATA

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Dell v Citizens Ins Co of America*, 312 Mich App 734, 739; 880 NW2d 280 (2015). In addition,

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the applicability of the doctrine of res judicata is a question of law that we review de novo. *Allen Park Retirees Ass'n, Inc v Allen Park*, 329 Mich App 430, 443; 942 NW2d 618 (2019).

Although defendant moved for summary disposition under MCR 2.116(C)(7), MCR 2.116(C)(8), and MCR 2.116(C)(10), the Wayne Circuit Court did not specify which rule it applied to defendant's motion, as it related to the issue of res judicata. "[W]here a court's opinion does not invoke the proper court rule supporting its ruling, we may look to the substance of the holding to determine which rule governs." *Williamstown Twp v Hudson*, 311 Mich App 276, 288; 874 NW2d 419 (2015). A motion for dismissal based on the doctrine of res judicata is decided under MCR 2.116(C)(7) (claim barred as a matter of law). *Garrett v Washington*, 314 Mich App 436, 439-440; 886 NW2d 762 (2016).

When deciding a motion under MCR 2.116(C)(7), the trial court must accept all well-pleaded allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. *Hutchinson v Ingham Co Health Dep't*, 328 Mich App 108, 123; 935 NW2d 612 (2019). The trial court must consider any evidence submitted to determine whether a genuine issue of material fact exists. *Id*. If no facts are in dispute, and if reasonable minds could not differ regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court; if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate. *Id*.

In the Wayne Circuit Court and in this Court, defendant asserted that plaintiff's complaint was barred by the doctrine of res judicata because the trial court had dismissed plaintiff's 2013 complaint under MCR 2.116(C)(6). The Wayne Circuit Court agreed and dismissed plaintiff's newest lawsuit on that ground. We conclude that the Wayne Circuit Court erred when it determined that the doctrine of res judicata barred plaintiff's claims based on the earlier grant of summary disposition under MCR 2.116(C)(6).

"The purpose of the doctrine of res judicata is to prevent multiple suits litigating the same cause of action." *King v Munro*, 329 Mich App 594, 600; 944 NW2d 198 (2019). "Under the doctrine of res judicata, a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action." *Id*. at 600-601 (cleaned up). "The doctrine bars a second, subsequent action when (1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Id*. at 601 (cleaned up). "The burden of proving the applicability of the doctrine of res judicata is on the party asserting it." *Garrett*, 314 Mich App at 441 (cleaned up).

We conclude that the doctrine of res judicata does not apply here. Defendant cites no authority for the proposition that the Wayne Circuit Court's dismissal of plaintiff's complaint under MCR 2.116(C)(6) was an adjudication on the merits of the claims raised. Instead, defendant argues that because the Wayne Circuit Court's 2014 order was an order granting summary disposition, it was a dismissal on the merits. This argument is unpersuasive in the context of the present case.

The Wayne Circuit Court dismissed plaintiff's 2013 complaint, stating:

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> Here, the action in Kentucky was initiated prior to the instant action, and is currently pending. Moreover, notwithstanding Plaintiff's assertion to the contrary, the Kentucky action involves the same parties and the same cause of action, as well as the same facts, allegations of wrongdoing, request for relief, and legal issues. Under the circumstances, the Court finds that summary disposition is proper under MCR 2.116(C)(6).

The Wayne Circuit Court did not address, let alone decide, the merits of plaintiff's claims. Instead, it dismissed them because of the then-pending action in Kentucky. While this order may have been on "on the merits" with respect to the sole question addressed by the trial court—whether another action had been initiated between the same parties involving the same claim in Kentucky—that is no longer a controlling question (or even a question) in the present case. It is uncontested that there is no longer a separate lawsuit involving these parties and these claims in Kentucky, and it is uncontested that the merits of plaintiff's claims have not been resolved by a court in a prior proceeding. Accordingly, the doctrine of res judicata does not apply to the Wayne Circuit Court's dismissal of the 2013 lawsuit, and the Wayne Circuit Court erred when it concluded that plaintiff's newest lawsuit was barred under that doctrine.

B. TOLLING

Plaintiff next argues that the parties agreed to toll the one-year-back rule when the case was "transferred" from Kentucky to Michigan, and that the Wayne Circuit Court erred in ruling otherwise. This argument is without merit.

A prior panel of this Court directed the Wayne Circuit Court to make factual findings and legal conclusions on remand. *Jones*, unpub op at 7. The Wayne Circuit Court did so. As set forth earlier, the trial court found, as a factual matter, that defendant's counsel in Kentucky did not agree to toll or waive the one-year-back rule in Kentucky. "This Court reviews a trial court's findings of fact for clear error." *Kuhlgert v Mich State Univ*, 328 Mich App 357, 368; 937 NW2d 716 (2019). "A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake has been made." *Berryman v Mackey*, 327 Mich App 711, 717-718; 935 NW2d 94 (2019). Based on our review of the record in this case, we cannot say that the trial court's factual conclusions on this point were clearly erroneous.

C. ONE-YEAR-BACK RULE

The Wayne Circuit Court also ruled, as a matter of law, that plaintiff's newest lawsuit is subject to the one-year-back rule, and plaintiff challenges that ruling on appeal.

Under MCL 500.3145, a "claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced." "The one-year-back rule is designed to limit the amount of benefits recoverable under the no-fault act to those losses occurring no more than one year before an action is brought." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 202; 815 NW2d 412 (2012).

Plaintiff argues that the 2019 amendment to MCL 500.3145, which added a statutory tolling provision to the one-year-back rule, prevents application of the rule in this case because

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"[i]n this matter the Defendant has not issued denials for any of the benefits for almost the last decade." Generally, an issue must be raised, addressed, and decided in the trial court to be preserved for appellate review. *Mouzon v Achievable Visions*, 308 Mich App 415, 419; 864 NW2d 606 (2014). Because plaintiff did not raise this argument in the Wayne Circuit Court, plaintiff has waived review of the issue on appeal. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008).

Even if we were to consider plaintiff's argument, we would conclude that it is without merit. The 2019 amendment to MCL 500.3145 added a tolling provision to the one-year-back rule wherein the "period of limitations applicable under subsection (2) to the commencement of an action and the recovery of benefits is tolled from the date of a specific claim for payment of the benefits until the date the insurer formally denies the claim." MCL 500.3145(3). As defendant correctly asserts, however, this amendment does not have retrospective application.

"Statutes and statutory amendments are presumed to operate prospectively." *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 155; 725 NW2d 56 (2006). "Indeed, statutes and amended statutes are to be applied prospectively unless the Legislature manifests an intent to the contrary." *Id*. "The Legislature's expression of an intent to have a statute apply retroactively must be clear, direct, and unequivocal as appears from the context of the statute itself." *Id*. at 155-156. And as relates more specifically to this case, "[t]he principle that statutes of limitations are to be applied prospectively parallels an accompanying well-accepted principle that the pertinent statute of limitations is the one in effect when the plaintiff's cause of action arose." *Id*. at 162-163 (cleaned up).

It is clear from the text of MCL 500.3145 that the Legislature did not intend the tolling provision of subsection (3) to have retroactive effect. 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. See *Davis*, 272 Mich App at 155-156. Plaintiff filed his lawsuit against defendant on May 16, 2019, before the amendment was effective. Thus, the tolling provision does not apply to plaintiff's complaint.

D. MOTION TO TRANSFER

Finally, we address plaintiff's motion to transfer the case from Wayne Circuit Court to Washtenaw Circuit Court.[1] This Court reviews for clear error a trial court's decision to grant or deny a motion to change venue. *Hills & Dales Gen Hosp v Pantig*, 295 Mich App 14, 19; 812 NW2d 793 (2011). "Clear error exists when some evidence supports the circuit court's finding, but a review of the entire record leaves this Court with the definite and firm conviction that the circuit court made a mistake." *Id*.

In his complaint, plaintiff alleges he "is a resident of the County of Wayne, State of Michigan." Plaintiff also alleges defendant "conducts a regular and systematic part of its business in the County of Wayne, State of Michigan." And he alleges he "has treating medical providers

[1] We note that plaintiff failed to provide this Court with the Wayne Circuit Court's order denying his motion to transfer or the transcript of the hearing regarding that motion.

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in the County of Wayne, State of Michigan." Under MCL 600.1621(a), venue was proper in Wayne County because it is a county "in which a defendant resides, has a place of business, or conducts business, or in which the registered office of a defendant corporation is located." Thus, we conclude the Wayne Circuit Court did not clearly err when it denied plaintiff's motion to transfer this case to Washtenaw Circuit Court.

III. CONCLUSION

We reverse the trial court's ruling dismissing plaintiff's action based on the doctrine of res judicata. We affirm the trial court's ruling that the one-year-back rule of MCL 500.3145 applies to plaintiff's action and affirm its denial of plaintiff's motion to transfer this case to Washtenaw Circuit Court. We remand for further proceedings. We do not retain jurisdiction.

/s/ Brock A. Swartzle
/s/ Jane E. Markey
/s/ Jonathan Tukel

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