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,	Case No. 19-738-CZ Hon. Wanda M. Stokes
Plaintiffs,	
v.	
USAA CASUALTY INSURANCE COMPANY, a foreign corporation, and CITIZENS INSURANCE COMPANY OF AMERICA, a Michigan corporation,	
Defendants.	

BRIEF OF AMICI CURIAE MICHIGAN OSTEOPATHIC ASSOCIATION AND MICHIGAN ASSOCIATION OF CHIROPRACTORS

KERR, RUSSELL AND WEBER, PLC
Jacquelyn A. Klima (P69403)
Attorney for Amici Curiae
Michigan Osteopathic Association and Michigan Association of Chiropractors
500 Woodward Avenue, Suite 2500
Detroit, MI 48226-3427
(313) 961-0200; FAX (313) 961-0388
E-mail: jklima@kerr-russell.com

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INTRODUCTION

Amici Curiae Michigan Osteopathic Association (MOA) and Michigan Association of Chiropractors (MAC)[1] join in the position of Plaintiffs Ellen M. Andary, by and through her Guardian and Conservator Michael T. Andary, M.D. (collectively, "Andary"), Philip Krueger (Krueger), by and through his Guardian Ronald Krueger & Moriah, Inc. d/b/a Eisenhower Center (Eisenhower Center), and Eisenhower Center, with respect to the non-Medicare fee schedules set forth in the 2019 amendments to the No-Fault Act. The Legislature made several amendments to Michigan's No-Fault Act, MCL 500.3101 *et seq*., for the professed purpose of lowering insurance premiums. Among those amendments are fee schedules that have no chance of achieving that purpose but will have devastating effects on patients as well as the providers of certain medical and chiropractic services.[2]

For services provided that do not have a Medicare code, the Legislature has arbitrarily set the fee for those services at 55 percent of the rate set forth in each individual provider's charge description master as of January 1, 2019. Therefore, only providers who set their rates at a profit margin *greater than* 45 percent will be able to continue providing such services. The result is that some services will no longer be available to victims of automobile accidents because some providers will go out of business or decline to treat patients at rates that only compensate at cost

[1] The MOA is the largest statewide osteopathic organization representing osteopathic physicians, interns, residents, and medical students in Michigan. Since 1898, the MOA has been dedicated to the promotion of quality patient care and to the educational, informational, and legislative needs of its members. The MAC is a professional association whose mission is to protect and enhance the chiropractic profession through organized leadership, education, and the promotion of the chiropractic discipline and practice.

[2] As set forth in the amicus brief of the Coalition Protecting Auto No-Fault (CPAN), the amendments are not likely to achieve lower premiums, and in fact, premiums will increase. MOA and MAC concur with CPAN's position and incorporate by reference the arguments in its brief.

or below cost. This means that numerous catastrophically injured patients will lose their homes as well as the quality care they need.

STATEMENT OF FACTS

Amici Curiae MOA and MAC rely on the facts stated by Plaintiffs in their Complaint and Response to Defendants' Motion to Dismiss.

ARGUMENT

I. The Non-Medicare Fee Schedules Violate the Due Process and Equal Protection Clauses of the United States and Michigan Constitutions.

The Legislature's 2019 amendments to the No-Fault Act ostensibly apply retroactively and prospectively. Prior to the amendments, MCL 500.3107(1)(a) provided for the recovery of personal injury protection (PIP) insurance benefits for "[a]llowable expenses consisting of *all* reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation. . . ." Among other revisions to the Act, the amendments deleted the word "all" from MCL 500.3107(1)(a) and added an entirely new provision, MCL 500.3157, which establishes fee schedules for services provided to accident victims. MCL 500.3157(1) provides:

> Subject to subsections (2) to (14), a physician, hospital, clinic, or other person that lawfully renders treatment to an injured person for an accidental bodily injury covered by personal protection insurance, or a person that provides rehabilitative occupational training following the injury, may charge a reasonable amount for the treatment or training. The charge must not exceed the amount the person customarily charges for like treatment or training in cases that do not involve insurance.

Subsections (2) through (14) then set limits to the amounts providers may recover based on criteria such as the Medicare rate for each particular type of treatment or training and the provider's indigent volume.

Subsection (7) sets the rate for services that do not have a Medicare code at a percentage of each provider's charge description master in effect on January 1, 2019. Specifically, MCL 500.3157(7)(a) sets the rate at 55 percent, with that rate decreasing to 54 and 52.5 percent over the following two years. Therefore, unless the provider had a markup of 45 to 47.5 percent as of January 1, 2019 for these types of services, the provider will not be able to provide such services at cost, let alone above cost. This means that accident victims may not be able to receive the types of treatments and therapy their physician prescribes. For providers of these types of treatments and therapy whose patients are primarily automotive accident victims, this fee schedule effectively puts them out of business.

A. The Legislature has Deprived Insureds and Service Providers of their Property Without Due Process of Law.

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

1. The Non-Medicare Fee Schedules Deprive Insureds of Vested Contract Rights.

Retroactive application of the Non-Medicare fee schedules deprives citizens who purchased their insurance policies prior to the amendments of their vested contract rights. "The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due

process, and the justifications for the latter may not suffice for the former." *Pension Benefit Guaranty Corp v RA Gray & Co*, 467 US 717, 730; 104 SCt 2709; 81 LEd2d 601 (1984) (citation omitted). Such burden is met "by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Id*.

"Contract rights are considered a species of property within the meaning of the Due Process Clause." *Mollett v Taylor*, 197 Mich App 328, 343; 494 NW2d 832 (1992), citing *Perry v Sindermann*, 408 US 593, 601–602; 92 S Ct 2694; 33 L Ed 2d 570 (1972) . A person's right to rely on a written contract is a bedrock principle of law in this country:

> The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable. It draws strength from common-law roots and can be seen in our fundamental charter, the United States Constitution, where government is forbidden from impairing the contracts of citizens, art. I, § 10, cl. 1. [*Id*. at 469.]

"[I]nsurance policies are subject to the same contract construction principles that apply to any other species of contract." *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). "Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract." *Id*. at 468.

"Rights created under an insurance policy become fixed as of the date of the accident." *Madar v League Gen Ins Co*, 152 Mich App 734, 742; 394 NW2d 90 (1986); see also *Clevenger v Allstate Ins Co*, 443 Mich 646, 656; 505 NW2d 553 (1993) ("The rights and obligations of the parties vested at the time of the accident."). "'The liability of the insurer with respect to insurance becomes absolute whenever injury or damage covered by such policy occurs. The policy may not be canceled or annulled as to such liability by agreement between the insurer and the insured after the occurrence of the injury or damage.'" *Detroit Auto Inter-Ins Exchange v Ayvazian*, 62 Mich App 94, 100; 233 NW2d 200 (1975), quoting 1 Long, The Law of Liability Insurance, s 3.25, pp

3-83-84. The insurable interest that entitles a person to personal protection benefits is the health and well-being of that person. *Madar*, 152 Mich App at 739.

Retroactive application of the amendments setting the fee schedule for services that do not have a Medicare code will deprive insureds who were in accidents prior to the amendments of vested contract rights. These insureds paid higher premiums and gave up tort remedies in exchange for unlimited, lifetime PIP benefits in the event of a catastrophic accident. *Shavers v Kelley*, 402 Mich 554, 579; 267 NW2d 72 (1978). Some accident victims, like Plaintiffs, have been collecting these benefits for years and have a legitimate expectation that they will continue to receive the benefits for which they paid such premiums. However, the amendments essentially eliminate an entire category of benefits that an accident victim can receive because providers will not be able to provide such benefits without profit or at a price below cost. These fee schedules deprive accident victims of the ability to obtain certain treatments and therapy, even if their physicians believe such treatments are necessary for their care, recovery or rehabilitation. Contrary to Defendants' assertions, this is not a matter of choosing a different provider. The affected products, services, and accommodations might no longer be available from *any* provider. This constitutes the loss of a property right for which these accident victims receive nothing in return.

This legislation also takes patients' homes. If residential rehabilitation providers go out of business, there will be nowhere for some patients to go. Nobody will take these types of patients for 55 percent of their fees. Those who qualify may be able to go to a Medicaid nursing home at the cost of the taxpayers. Those who do not qualify for Medicaid will have to rely on family, and the fate of those who do not have family is unclear.

Unprofitable and below cost fee schedules are an arbitrary exercise of power with no rational legislative purpose. These fee schedules violate the Due Process Clause because they

arbitrarily deprive insureds of property rights without accomplishing any rational legislative purpose.

2. The Non-Medicare Fee Schedules Deprive Service Providers of their Livelihood.

Both retroactive and prospective application of the Non-Medicare fee schedules violate Due Process by depriving certain providers of their livelihood and unreasonably interfering in the practice of their professions. "A property interest in a person's means of livelihood is one of the most significant that an individual may possess." *Mollett*, 197 Mich App at 343, citing *Cleveland Bd of Educ v Loudermill*, 470 US 532, 543; 105 S Ct 1487; 84 L Ed 2d 494 (1985). "[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." *Greene v McElroy*, 360 US 474, 492; 79 SCt 1400; 3 L Ed 2d 1377 (1959).

"It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition." *Dent v West Virginia*, 129 US 114, 121; 9 S Ct 231; 32 L Ed 623 (1889). "The interest, or, as it is sometimes termed, the 'estate,' acquired in them—that is, the right to continue their prosecution—is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken." *Id*. at 121-122. The requirement of due process is intended to secure citizens against arbitrary and capricious actions of the legislature that result in deprivation of their rights, whether relating to life, liberty, or property. *Id*. at 124.

> "A person's employment or occupation is a property right which is entitled to protection, and 'the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the (Fourteenth) Amendment to secure.'" [*Havens v Local 199 Detroit Motion Picture Projectionists*, 338 Mich 418, 423; 61 NW2d 790 (1953) (internal citations omitted).]

A number of service providers in the medical and chiropractic professions have built their practices around treating victims of automobile accidents. Those that provide a significant amount of services that do not have a Medicare code will not be able to survive a 45 to 47.5 percent cut in payment. For example, an industry of residential rehabilitation providers has developed in Michigan that focus their care on patients that have been catastrophically injured in automobile accidents. Due to the nature of their injuries, these types of patients require very specialized care. This industry is very competitive, which has driven rates to also remain competitive. The services provided are under physician orders. However, the vast majority of the services provided do not have a Medicare code, such as 24-hour supervision, specialty supervision for those with behavioral issues, activity programs, administration of cases, transportation services, and external case management services. No-fault insurance has typically paid for these services, and other than the occasional outlier, the reasonableness of the rates has not been an issue due to the competitive nature of the industry.

Where some health care providers might list higher rates on their charge masters for the purpose of negotiating a "discount" with insurance companies, others do not engage in those same billing practices. The amendments were meant to reign in those providers that charge an excess amount, but instead actually reward those providers, who will now be the only few who can stay in business and take the entire market. Now, those that charged reasonable fees will not be able to survive the amendments because they kept their rates well below a 45 percent profit margin. These amendments will deprive these providers of their livelihood and their patients of their homes and proper care.

Furthermore, the non-Medicare fee schedules interfere with the practice of medicine. If a medical service provider is limited to payment for a service at an amount below the cost of

providing that service, that service will not be available, even if the provider believes it is the best treatment option for the patient. Thus, a fee schedule that sets payment for certain services at an amount below cost or even at cost effectively eliminates the availability of such services and limits treatment options.

Victims of automobile accidents can benefit from a number of medically prescribed treatments that are not covered by Medicare. For example, the ultimate outcome for someone who has suffered from a severe, traumatic brain injury is not known for several months, and the treatment received during the initial months can have a life-altering effect on that outcome. Some doctors place such patients in a coma stimulation program immediately because such program has always been covered by no-fault insurance. There are examples of patients in such programs who have eventually walked again while others with identical injuries who did not receive this treatment have died within a year of their injuries. Some treating physicians may believe that other types of therapy are more effective than coma stimulation. However, this should be a decision by the treating physician, not the Michigan Legislature. The amendments have taken away the full range of options available to providers of no-fault accident victims. This constitutes an unreasonable governmental interference in the practice of medicine for those providers.

B. The Legislature has Deprived Providers of the Equal Protection of the Laws.

Both the United States and Michigan Constitutions forbid the State from depriving any person of "the equal protection of the laws." US Const, Am XIV, Sec 1; Const 1963, art 1, § 2**.**. The Equal Protection Clause is violated if the "statute is arbitrary and not rationally related to a legitimate governmental interest." *Landon Holdings*, 257 Mich App at 173. The fourteenth amendment "undoubtedly intended . . . that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property." *Templar v Michigan*

State Board of Examiners of Barbers, 131 Mich 254, 256; 90 NW 1058 (1902), citing *Barbier v Connolly*, 113 US 27, 31; 5 Sup Ct 357; 28 L Ed 923 (1884). Equal protection of the laws implies the "exemption from any greater burdens and charges than such as are equally imposed upon all others under like circumstances." *Id*.

As described above, the amendments to the No-Fault Act will put certain providers out of business. Plaintiffs' briefing shows that the fee schedules treat two classes of providers differently: those who provide services with a Medicare code and those who provide services without a Medicare code. However, the amendments also treat two classes of providers within that second group differently: those who provide non-Medicare services at a profit margin of over 45 percent, and those who provide non-Medicare services at a profit margin of less than 45 percent. By basing the current rate on each provider's individual charge master rate as of January 1, 2019, the Legislature is actually rewarding those whose charges may have been perceived as unreasonably high (and whose fees may have been the impetus for the fee schedule provisions) and punishing those who provided quality care at more reasonable rates. This unintended consequence completely undermines the ostensible premium savings objective of the fee schedules.

Further, a fee schedule is discriminatory if it does not set the fees at the same amount for all providers of the same service under the same conditions. Here, only those providers that charged excessive fees so they could then offer a discount to their payors, or perhaps with the intent of receiving the full excessive amount, will be able to continue to provide services above cost. Those providers who charged reasonable fees to begin with will be forced out of business. These fee schedules constitute an arbitrary and capricious action of the Legislature. The Legislature's 55 percent fee schedules deprives these providers of their livelihood without equal protection of the laws.

II. Retroactive Application of the Non-Medicare Fee Schedules in the Amendments to the No-Fault Act Constitutes an Impairment to Existing Contracts in Violation of the United States and Michigan Constitutions.

Amici Curiae MOA and MAC concur in and incorporate by reference the argument set forth in the Amicus Curiae Brief of Michigan State Medical Society (MSMS). As set forth in the MSMS brief, retroactive application of the non-Medicare fee schedules violates the Contracts Clauses of the United States and Michigan Constitutions because it will substantially impair contracts in place between insureds and insurers and accident victims and their providers. US Const, art I, § 10, cl 1; Const 1963, art I, § 1.

RELIEF REQUESTED

For the reasons set forth, Amici Curiae Michigan Osteopathic Association and Michigan Association of Chiropractors respectfully request that this Court deny Defendants' Motion to Dismiss.

Respectfully submitted,

KERR, RUSSELL AND WEBER, PLC

By: *Jacquelyn A. Klima*

Jacquelyn A. Klima (P69403)
Attorney for Amici Curiae
Michigan Osteopathic Association and
Michigan Association of Chiropractors
500 Woodward Avenue, Suite 2500
Detroit, MI 48226-3427
(313) 961-0200; FAX (313) 961-0388
E-mail: jklima@kerr-russell.com

Dated: April 27, 2020

CERTIFICATE OF SERVICE

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I hereby certify that on April 27, 2020, pursuant to this Court's Public Notice, I electronically filed the foregoing Brief of Amici Curiae with the Clerk of the Court by email to CircuitCourtRecords@ingham.org, and served a copy on counsel of record by email: LMcAllister@dykema.com, Georgesinas@sinasdramis.com, and MGranzotto@granzottolaw.com.

/s/ *Jacquelyn A. Klima*
Jacquelyn A. Klima (P69403)