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PATIENT ASSIGNMENTS: SHOULD PROVIDERS USE THEM IN THIS POST-*COVENANT* AUTO NO-FAULT WORLD?

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October 15, 2017

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INTRODUCTION

On May 25, 2017, the Michigan Supreme Court issued its landmark decision in the case of *Covenant Medical Center, Inc. v State Farm Mutual Automobile Insurance Company* (Docket No. 152758); ___ Mich ___ (2017). In this 5-1 decision, the Supreme Court rejected approximately 20 years of appellate case law precedent, and held that healthcare providers do not have an independent legal right of action that allows them to sue no-fault insurance companies who do not pay for services rendered by providers to auto accident patients. As the Court stated, *"We therefore hold that healthcare providers do not possess a statutory cause of action against no-fault insurers for recovery of personal protection insurance benefits under the no-fault act."*

The *Covenant* decision marks a radical departure from the prior holdings in several Court of Appeals cases which had repeatedly ruled that healthcare providers possessed a direct and independent legal cause of action against no-fault insurance companies who do not pay for services rendered to patients. In discarding that established body of case law, the Supreme Court focused on the fact that nowhere in the no-fault statute is there any specific language that gives healthcare providers the right to sue no-fault insurance companies. Therefore, the Court concluded that providers have no independent right to sue no-fault insurance companies under the language of the No-Fault Act. Rather, it is only the patient that has the direct legal right to sue the no-fault insurance company for non-payment of no-fault benefits. In so ruling, however, the Court made it clear that medical providers have a legal right to sue their patients for non-payment of the providers' services.

It is important to emphasize that the *Covenant* decision does not mean that medical providers never have a right to sue no-fault insurance companies. On the contrary, there is a procedure that has long been recognized in Michigan law referred to as an *"assignment of rights."* This means that a party who has a clearly established legal right to sue a particular defendant can assign that right to another party to pursue the claim. Therefore, it would appear that a patient can assign, to the patient's medical provider, the patient's legal right to sue a no-fault insurance company for non-payment of medical expenses. The no-fault statute seems to recognize the viability of the assignment mechanism. Section 3143 is the only provision in the No-Fault Act that speaks to the issue of assignments and it simply states that *"an agreement for assignment of a right to benefits payable in the future is void."* This statutory provision seems to imply that as long as an assignment is limited to enforcing the right to recover payment for services that were rendered in the past, the assignment would be valid. Indeed, in the case of *Prof Rehab Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167 (1998), the Court of Appeals held that an assignment of the right to be paid for past due or presently due no-fault PIP benefits is permitted under the

Michigan No-Fault Act. The Court held that it is only the assignment of a future right to PIP benefits that is prohibited. Nonetheless, questions will surely arise in the post-*Covenant* world regarding the extent to which patients can assign their rights to receive payment to their medical providers and what rules and procedures are applicable to such assignments. These issues will be discussed generally below.

I. PROVIDERS CAN BE PLAINTIFFS VIA PATIENT ASSIGNMENTS

A. *Covenant* Footnote #40

In Footnote 40 of the *Covenant* decision, the Michigan Supreme Court recognized the principle that, despite its decision eliminating a provider's direct cause of action against a no-fault insurance company, a patient's right to legally pursue payment of those benefits may properly be assigned by the patient to provide to the provider. Specifically, Footnote 40 states:

> *"Moreover, our conclusion today is not intended to alter an insured's ability to assign his or her right to past or presently due benefits to a healthcare provider. See MCL 500.3143; Professional Rehab Assoc v State Farm Mut Auto Ins Co, 228 Mich App 167, 172; 577 NW2d 909 (1998) (noting that only the assignment of future benefits is prohibited by MCL 500.3143)."*

Based upon this footnote in *Covenant*, it would appear that it is legally permissible for patients to assign their legal right to sue for past-due no-fault benefits to their medical providers, thereby giving those assignee providers the legal basis to exercise the rights of the assignor patient to pursue payment of unpaid medical expenses. However, there are a number of *"best practices"* that should be followed when drafting patient assignments so as to maximize their enforceability.

B. What is an Assignment?

Black's Law Dictionary defines an assignment as *"[a] transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein."* Thus, an assignment is the transfer of a *"thing"* from one person to another. The *"assignor"* is the person who transfers the *"thing,"* while the *"assignee"* is the person who receives the *"thing."* In the context of the assignment of a no-fault claim, the patient is the *"assignor,"* who transfers the right to collect PIP benefits to the healthcare provider, which is the *"assignee."*

To constitute a valid assignment there must be a perfected transaction between the parties which is intended to vest in the assignee a present right in the thing assigned. *Weston v Dowty*, 163 Mich App 238, 242 (1987). The assignor's intent to presently assign must be clearly manifested, and the assignor must not retain any control or any power of revocation. *Burkhardt v Bailey*, 260 Mich App 636 (2004).

Michigan statutory law recognizes that the legal viability of assignments in a specific provision of the Fraudulent Coverages Act, which states that the assignment of "*things in action,*" i.e. legal claims, be "*in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise . . . .*" MCL 566.132(f). Therefore, a written instrument, creates an assignment if it clearly reflects the intent of the assignor to presently transfer "*the thing*" to the assignee. *Burkhardt v Bailey*, 260 Mich App 636 (2004).

Courts frequently consider assignments to be contracts and, therefore, require some consideration. However, some courts have held that a lack of consideration does not necessarily render an assignment invalid. *Johnson v Wynn*, 38 Mich App 302, 306 (1972); *In re Estate of Flury*, 249 Mich App 222 (2002).

In general, all legitimate causes of action are assignable. *Grand Traverse Convention & Visitor's Bureau v Park Place Motor Inn, Inc*, 176 Mich App 445, 448 (1989). However, for public policy reasons, some causes of action, e.g. legal malpractice, are not assignable. *Joos v Drillock*, 127 Mich App 99 (1983). Like a contract, if an assignment is ambiguous it will be construed against the party that drafted it. *Mich Chandelier Co v Morse*, 297 Mich 41; 297 NW 64 (1941). An assignee stands in the position of the assignor, which means that not only does the assignee possess the same rights as the assignor, but it is also subject to the same defenses. *Prof Rehab Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167, 177 (1998).

II. BEWARE: ASSIGNMENTS MAY CAUSE SIGNIFICANT PROBLEMS

Even though providers can obtain assignments from patients and sue no-fault insurers, no provider should think that obtaining assignments from patients is the panacea and cure-all for all *Covenant*-related problems. This is simply not the case. Although obtaining an assignment from the patient may be a very effective strategy that providers can utilize, they should only do so, after considering some of the significant risks that patient assignments could pose—both for the provider and the patient. Some of these assignment-related problems are discussed below.

A. The Anti-Assignment Clause Issue

Some insurers have put providers and patients on notice that they will strictly enforce language contained in their insurance policies which prohibits an assignment of benefits. Typically, this policy language will state something to the effect that the policyholder (the patient) may not assign any benefits due under the policy and, in the event of such an assignment, the assignment becomes void. For the reasons previously stated, good arguments can be made that the courts should not enforce such anti-assignment language. Nevertheless, it is expected that insurance companies will fight the use of assignments in the context of no-fault benefits. Some insurance company attorneys have suggested that perhaps insurance companies may draft anti-assignment policy language that not only voids assignments given without consent, but voids all insurance coverages under the policy if a patient makes an assignment without consent of the insurance company. Would that type of draconian anti-assignment provision be enforceable? It is highly unlikely for the reasons previously stated. But only time will tell.

As previously indicated, the Supreme Court's decision in *Covenant* seems to imply that an assignment of benefits given by a patient to the provider is valid. However, it is important to recognize that the Court was not specifically asked to decide the issue of what would happen if the patient's insurance policy actually prohibited the execution of such assignments. In this regard, it is important to remember that the current Supreme Court has been consistent in its decisions that it will strictly enforce language in contracts in a "*textual*" manner. Accordingly, this issue needs to be carefully considered.

B. The *Res Judicata*/Collateral Estoppel Issue

1. The Issue

If a patient gives an assignment to a medical provider, and then that provider uses the assignment to file a lawsuit against a no-fault insurance company, and that lawsuit results in a victory for the insurance company, there may be certain negative consequences flowing from such an insurer victory. Whether these negative consequences will actually result, depends upon how our appellate courts apply the legal doctrines of *res judicata* and *collateral estoppel*. Simply stated, these legal doctrines prohibit the re-litigation of claims and issues that were previously decided in earlier lawsuits. Therefore, let us assume that a patient assigns his or her rights to recover no-fault benefits to a particular provider and the central issue regarding that claim is whether the patient is *legally entitled* to recover no-fault benefits. If the provider files a lawsuit based on the assignment and the insurance company wins that central issue,

then the insurance company may very well argue, in subsequently filed lawsuits, that the patient ***and all other medical providers*** are now barred from recovering *any* benefits because the earlier lawsuit resulted in a judicial determination that the plaintiff was not *legally entitled* for no-fault benefits. The same result could occur if *a specific factual issue* is litigated in the earlier lawsuit, such as whether the plaintiff actually sustained a traumatic brain injury in the subject motor vehicle collision. If the earlier lawsuit results in a factual determination that no brain injury was suffered by the patient in the subject accident, then the insurer will likely argue that, because of that factual determination, neither the patient ***nor any medical provider*** can recover benefits for brain injury related services.

2. The Law

One recent court decision that illustrates the problem is the case of ***Michigan Head & Spine Institute, PC v State Farm Mut Auto Ins Co.*** This is an unpublished court of Appeals decision that was decided on January 21, 2016 (Court of Appeals Docket No. 324245). In this case, the patient filed a lawsuit against State Farm seeking recovery of a number of unpaid PIP benefits, but not seeking recovery specifically for the unpaid charges of Michigan Head & Spine. However, during the trial, evidence was introduced regarding the nature of the medical services that were rendered by Michigan Head & Spine to the patient. The case went to a jury verdict, wherein the jury found against the patient, and ruled that *"all bills related to the accident had been paid and no more money is owed."* Michigan Head & Spine was not a direct participant in that particular lawsuit. Rather, Michigan Head & Spine had filed its own separate lawsuit against State Farm which was pending in a Michigan district court. After the jury verdict against the patient was entered, State Farm successfully argued that the verdict was binding on Michigan Head & Spine and foreclosed it from any further right to pursue payment of its unpaid charges. The Court primarily based its ruling on the Doctrine of *Res Judicata,* which the Court stated prevents multiple suits that litigate the same cause of action. Under this doctrine, the Court stated, *"a subsequent action is barred when (1) the prior action was decided on the merits, (2) the decree in the prior action was a final decision, (3) the matter contested in the second case was or could have been resolved in the first, and (4) both actions involved the same parties or their privies. . . . Res judicata has been broadly applied to bar not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not."* Therefore, because Michigan Head & Spine or the patient *could have litigated its claim in the context of the patient's lawsuit*, its failure to do so foreclosed it from any further pursuit of the claim. So consider the following Real World Cases referenced below.

3. The Real World Problems

The danger of patient assignments is illustrated by the following real cases:

a. ***Ken***—Ken suffered catastrophic brain injuries when he attempted to exit a moving vehicle during the course of an argument with his girlfriend. As a result of these injuries, he will be permanently disabled and likely to never return to gainful employment. He has incurred medical expenses over $1 million with a number of medical and rehabilitation providers. His insurance company has denied Ken's claim on the basis that he is disqualified from no-fault benefits under the intentional injury exclusion set forth in §3105(4) of the Act. If the defense is successful, Ken will be denied lifetime PIP coverage.

b. ***Cory***—Cory is a 16-year-old emotionally impaired, special education student who never had a driver's license. One day, he impulsively took his father's new car for a short drive and ran into a tree, suffering catastrophic brain damage. Cory's medical expenses are approaching $1 million. His father's no-fault insurance company has denied the claim on the basis that Cory is disqualified under the wrongful vehicular taking provisions of §3113 of the Act. If the defense is successful, Cory will be denied lifetime PIP coverage.

c. ***Shelly***—Shelly is a 22-year-old single mother of two children who sustained permanently disabling injuries in a single-car collision which occurred when Shelly was driving her vehicle at a high rate of speed, following an argument with her boyfriend. She incurred almost $1 million in medical and rehabilitation expenses. Her no-fault insurance company has denied the claim on the basis that Shelly is disqualified from no-fault coverage because her insurance policy was procured through fraudulent misrepresentations and that she intended her injury and is, therefore, disqualified under §3105(4) of the Act. If this defense is successful, Shelly will be denied lifetime PIP coverage.

d. ***Eileen*—** Eileen is an elderly woman who, prior to her motor vehicle accident, was diagnosed with early stage Alzheimer's. She was in a serious car accident resulting in brain injuries, after which her dementia accelerated. Her no-fault insurance carrier has denied recent expenses for brain injury rehabilitation and attendant care on the basis that Helen's current cognitive problems and her need for brain injury rehabilitation are no longer related to her motor vehicle accident, but rather, are the result of her pre-existing Alzheimer's condition. If this defense is successful, Helen will be precluded from recovering any further expenses for brain injury related rehabilitation treatment and in-home attendant care.

In every one of the above-referenced scenarios, the patient received services from multiple providers. If any of those providers had obtained an assignment from the patients, filed a lawsuit against the insurer pursuant to that assignment, and then lost the case, it is quite likely that every provider rendering services to that particular patient would lose its claim for payment! This is so because the patient had assigned the patient's rights to the provider, who then exercised those rights and proceeded to lose the case, thereby establishing a legally binding judicial precedent (via *res judicata* or collateral estoppel), that the insurer had no legal responsibility to pay PIP benefits on behalf of that patient. As a result, neither the patient nor any of the patient's other providers would be able to compel the insurer to pay PIP benefits. ***This is exactly why assignments can be devastating to both the patient and to other providers whose rights hang in the balance!***

4. Other Concerns

Patient assignments to providers that end up going bad, like the examples above, also create potential legal risks for the attorneys involved in those cases and, perhaps, the assignees. For example, if the assignee and the assignee's attorney bungles the case, resulting in a victory for the insurer, does this create any possible legal liability to the patient and/or other providers who have now had their rights foreclosed because of the bungled case? Also, if the patient had a lawyer who recommended that the patient give the assignment, could that lawyer be sued for legal malpractice if the assignment ends up disqualifying the patient from future benefits? Finally, there is the question of conflict of interest. If a provider requests and obtains an assignment from a patient, files a lawsuit against the patient's insurer, loses the case, and then sues the patient for the provider's unpaid charges, has the

provider and/or the provider's attorney created a conflict of interest scenario that has ethical implications?

III. DRAFTING ASSIGNMENTS IN ACCORDANCE WITH BEST PRACTICES

In light of the fact that the *Covenant* decision will create a heightened interest in obtaining an assignment of rights from patients, it is important for providers who wish to obtain assignments from patients to employ certain *"best practices"* in the drafting and the obtaining of these assignments. A few of these *"best practices"* are discussed below.

1. Best Practice #1: Never Assign Future Benefits

As indicated above, §3143 of the No-Fault Act specifically states that, *"an agreement for assignment of a right to benefits payable in the future is void."* Therefore, assignments must only encompass and assign rights to enforce payment for past expenses incurred before the assignment was executed. Any language in the assignment document implying that the assignment relates to future benefits could very likely render the entire assignment unenforceable. Therefore, careful and precise language should be drafted so that the assignment does not directly or indirectly violate the prohibition against assigning the right to receive future benefits. As a practical matter, in any case where the provider is relying upon a patient assignment of benefits as the legal basis to pursue collection of the provider's charges, the provider should institute a routine procedure to make sure that the patient is properly and timely executing subsequent assignments of benefits every 60 or 90 days after treatment has been rendered, thereby giving the provider the continued legal authority to pursue collection.

2. Best Practice #2: Protect the Incurred Requirement

It is important to remember that under §3107(1)(a) of the no-fault statute, no-fault benefits are never payable for any expense that has not been *"incurred."* This means that in order for the patient to pursue a legal claim against a no-fault insurance company for non-payment of medical expenses, the patient must have *"incurred"* the expense. The courts have defined the word *"incurred"* as meaning that the patient has either paid the expense or has become legally liable for its payment. When the provider utilizes a patient assignment to pursue an insurance company for payment, the assignment must be drafted in such a way as to not create problems with the *"incurred requirement"* set forth in §3107(1)(a) of the No-Fault Act. That means that

the assignment must not be written in such a way as to absolve the patient of his/her liability to pay the provider should the provider be unsuccessful in obtaining payment from the no-fault insurer. Rather, the assignment document should explicitly state that, notwithstanding the assignment, the patient remains financially liable to the provider for all unpaid charges.

3. Best Practice #3: Mutuality of Consideration

Michigan case law has referenced the fact that in order for an assignment to be valid, it must be based upon adequate and proper "*consideration.*" The concept of "*consideration,*" means that both parties to the assignment transaction are receiving a mutual benefit by the execution of the assignment. This raises complex strategies in drafting assignments. While it may not be necessary to specifically describe in the actual assignment document, the consideration that flows between the parties to the assignment, there should be some clear understanding and documentation of the nature of that consideration. In the case of assignments under the No-Fault Act, the mutual consideration appears to be rather obvious. The provider receives the consideration of being able to legally pursue collection against the patient's insurance company, while the patient is relieved of the obligation to pursue such a claim. Whether this will be deemed to be sufficient consideration is one of the many issues that may be raised in the post-*Covenant* world.

4. Best Practice #4: Avoiding the "*Anti-Assignment*" Issue

Shortly after the *Covenant* decision was decided, some insurers announced that, because their insurance policies contained language prohibiting an assignment of benefits, assignments by patients to providers are not enforceable. Typically, such policy language states something to the effect that, "*benefits cannot be assigned under this contract without our consent and that any such assignments made without our consent are void.*" If this anti-assignment language in an insurance policy is deemed to be valid, it would prevent a patient from assigning the right to collect payment to the patient's provider

There are several reasons why such anti-assignment clauses in insurance policies should not be legally enforceable in Michigan. First, in the *Covenant* decision, the Supreme Court confirmed that assignments of benefits from patients to providers are permissible. Second, in the Michigan Supreme Court's decision in *Cruz v State Farm*, 466 Mich 588 (2002), the Court held that any no-fault insurance policy language that is more restrictive than the No-Fault Act itself is simply not enforceable. As previously indicated, §3143 is the only section in the No-Fault Act that addresses assignments and, because it only prohibits the assignment of future benefits, the

Legislature has expressed the intent to allow patients to assign their right to collect past due benefits. Therefore, because the No-Fault Act impliedly gives patients this right of assignment, any language in a no-fault insurance policy prohibiting assignments would be in conflict with the No-Fault Act and, thus, would be void under the analysis employed in *Cruz v State Farm*. Third, there is old case law authority for the proposition that anti-assignment language in an insurance policy cannot prevent assignments given after a loss, only assignments given before a loss. That principle has been cited approvingly by some courts recently, which is further support for the proposition that assignments of past due benefits cannot be prohibited by insurance policy language [see *Roger Williams Ins Co v* Carrington, 43 Mich 252 (1880); *Benson v Assurity Life Ins Co*, 2004 US Dist LEXIS 18953 (WD Mich June 16, 2004; and *Century Indemnity Co v Aero-Motive* Co, 2004 US Dist LEXIS 31180 (WD Mich March 12, 2004]. Nevertheless, there are no specific appellate decisions regarding the issue of anti-assignment clauses under the Michigan Auto No-Fault Act, so some uncertainty may remain regarding this issue going forward.

However, the issue itself confirms the need to exercise great caution when drafting assignments that might be challenged by certain insurance companies who have policies that contain anti-assignment clauses. *Accordingly, providers should always make an attempt to obtain a copy of their patient's no-fault insurance policy if they are contemplating obtaining an assignment from the patient.* If the policy contains anti-assignment language, then the assignment may need to be drafted in such a way as to include specific language that renders the assignment "*null and void*" from the date of its execution if it is subsequently determined by a court that the assignment was not enforceable. This would allow the injured person to reacquire the assigned rights from the provider in the event the provider is not able to enforce the assignment because of an anti-assignment clause.

5. Best Practice #5: Properly Obtain the Patient's Assignment

In the wake of *Covenant,* providers must openly talk to their patients about the issue of enforcing payment of the provider's charges. Patients must understand that they remain legally liable to the provider for any expenses not paid by the patient's no-fault insurance company. Providers who are willing to pursue collection of their charges via the patient assignment method, should explain to their patients how an assignment of benefits works and how it will be used to collect payment on their account balance. If the provider obtains an assignment from the patient, the provider should make sure to obtain updated assignments as treatment is rendered in the future. The methods used by providers to obtain assignments from patients should also be carefully considered. In the early days following release of the *Covenant* decision, some insurance companies began arguing that providers cannot engage in

"solicitation" of a patient's assignment of benefits, and that where providers engage in the solicitation of patient assignments, insurers may challenge the validity of those assignments. This issue becomes problematic in those situations where, prior to *Covenant,* a provider filed a lawsuit only in the name of the provider and then, in the wake of *Covenant,* directly requests an assignment from the patient. In these scenarios, providers must exercise considerable caution in how they approach their patients for these *"retroactive assignments."*

If a provider chooses not to seek an assignment from a patient, then the provider should also make it very clear to the patient that the patient may need to sue the no-fault insurance company for non-payment of benefits in order to enforce payment of the provider's charges. Patients should understand that such lawsuits must be filed within one year of the date the expense in question was incurred. This is true because the so-called *"one-year-back rule"* contained in §3145 of the Act only allows recovery of expenses incurred during the one-year period immediately prior to filing suit.

In situations involving new patients, providers should always prepare a *"patient welcome package"* which includes reference to the patient's ongoing legal responsibility for payment of the provider's charges and any proposed assignments the provider wishes to have the patient execute.

6. Best Practice #6: Evaluating Existing Assignments

Prior to the release of the *Covenant* decision, many medical providers obtained assignment of benefits from their patients. However, in light of the many issues discussed in this memo, it is highly advisable for providers to review their existing assignments to determine if they are adequate in terms of enabling the provider to file and pursue litigation in the wake of the *Covenant* decision.

IV. THE NEED FOR CAUTION

The point of this article is that there are very real legal issues that need to be carefully analyzed before patients are asked, and agree, on a routine basis, to execute an assignment of rights. This is particularly of concern in situations where patients are receiving treatment from a multitude of medical providers, all of whom request assignments from the patient, thereby increasing the possibility that negative judicial determinations in such multiple assignment-based lawsuits could end up harming everyone involved in the patient's care. Because of these dangerous issues, attorneys who represent patients should be very careful about allowing their clients to execute

assignments on a routine basis. Rather, the more prudent course is for the provider and the patient's counsel to work together to avoid such potential pitfalls.

Until there is more clarity regarding these issues, here are some "*tips*" for providers going forward:

1. Find out if the patient has an attorney. If so, discuss the issue of assignment with the patient's counsel.

2. Find out if the patient's insurance policy prohibits assignments. Get a certified copy of the policy and examine it. A copy can be obtained via a properly drafted and executed "*Release of Information*" form signed by the patient.

3. Find out if the patient has executed other assignments to other providers and if those cases are in suit. If so, you may want to join in those lawsuits as a "*co-assignee*" to protect your rights.

4. Contact the insurer and ask if it will honor the assignment or if it has a preferred assignment form it prefers to use.

5. Send the patient a post-assignment letter confirming that the patient has assigned the right to payment of the provider's charges to the provider and should not take action inconsistent with that assignment. Also consider reminding the patient of his/her continued financial responsibility should the insurer deny payment.

6. Make sure the patient has the legal capacity to execute the Assignment document.

Main Point: It is not in the best interests of either providers or patients to embark upon the creation of a "*culture of assignment*" at this specific point in the early days of the post-*Covenant* world. Provider excesses created *Covenant*. Provider excesses can make it worse.