

**MICHIGAN’S NO-FAULT REFORM: A NIGHTMARE FOR  
VICTIMS AND THEIR PROVIDERS**

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## I. INTRODUCTION

In the State of Michigan, it is no subject for debate that auto insurance premiums continue to escalate.<sup>1</sup> In fact, across the United States, Michigan citizens are confronted with the highest auto insurance premiums in the country.<sup>2</sup> With such high rates burdening drivers across the State of Michigan, the Michigan Legislature realized the imminent need to bring down the cost of auto insurance for Michiganders.<sup>3</sup> To do so, the legislature imposed the concept of caps on insurance coverage as part of a supposed effort to minimize the amount of money Michigan citizens dedicate to their auto insurance.<sup>4</sup>

However, despite setting out with a goal of reducing rates for policyholders, in reality, Public Act 21 “focuses on only taking benefits and protections away from car crash victims, and does nothing to force the insurance companies to reduce premiums.”<sup>5</sup> Even with the new changes in place, insurance companies still have the ability to “micro-target” rates and utilize factors such as credit history and geography to determine premiums.<sup>6</sup> Insurance companies themselves admit that “no-fault reform [is not] guaranteed to cut costs.”<sup>7</sup>

The main problem with the new no-fault law is that, instead of targeting insurance companies to save money for policyholders, Public Act 21’s *main* target is the medical provider industry.<sup>8</sup> This Note argues that the Act’s main effect will be to destroy the current medical provider system, leaving policyholders worse off than they were under the old Michigan no-fault system in place prior to the passage of Public Act 21.<sup>9</sup>

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1. Wayne J. Miller, *No-Fault Reform 2019: Shame*, J. INS. & INDEMNITY L., July 2019, at 4.

2. Nancy Kaffer, *There’s One Big Problem with Michigan’s No-Fault Auto Insurance Reform*, DET. FREE PRESS (July 19, 2019, 11:10 AM), <https://www.freep.com/story/opinion/columnists/nancy-kaffer/2019/07/19/michigan-no-fault-auto-insurance-reform/1759554001/> [<http://web.archive.org/web/20210126203113/https://www.freep.com/story/opinion/columnists/nancy-kaffer/2019/07/19/michigan-no-fault-auto-insurance-reform/1759554001/>].

3. *See id.*

4. *See id.*

5. Steven M. Gursten, *New Michigan No-Fault Auto Insurance Bill: What Does It Mean?*, MICH. AUTO L. (May 7, 2019), <https://www.michiganautolaw.com/blog/2019/05/07/new-michigan-no-fault-auto-insurance-bill/> [<http://web.archive.org/web/20210126203657/https://www.michiganautolaw.com/blog/2019/05/07/new-michigan-no-fault-auto-insurance-bill/>].

6. Kaffer, *supra* note 2.

7. *Id.*

8. *See infra* Section III.D.

9. *See infra* Section III.D.

This Note will analyze the two main provisions of Public Act 21, tiered levels of benefit coverage and fee schedules for providers,<sup>10</sup> and will examine the provisions with an eye toward their anticipated impact on policyholders and medical providers. Through its analysis, this Note will argue: (1) that the new law will *not* result in long-run cost savings for drivers<sup>11</sup> and (2) that the legislation “singles out” the medical provider industry while providing a beneficial “out” for insurance providers,<sup>12</sup> which will end up placing an inordinate strain on medical providers and punishing both providers and the policyholders they treat.<sup>13</sup>

## II. BACKGROUND

### *A. The No-Fault System and the History of Michigan’s No-Fault Law*

Currently, twelve states across the nation regulate automobile accidents within their borders based on no-fault auto insurance laws.<sup>14</sup> In its most basic form, the “no-fault” designation describes state laws that allow auto accident victims to receive first party benefits, also known as “personal injury protection” (PIP) benefits.<sup>15</sup> The laws also provide accident victims with a limited right to sue if a certain “tort liability threshold” is met.<sup>16</sup> Regardless of fault, an auto accident victim is eligible to receive PIP benefits.<sup>17</sup> The payment of PIP benefits comes from the individual’s own insurance company.<sup>18</sup> PIP benefits can include, depending on the individual’s situation and the severity of the injuries resulting from the accident, the payment of money for medical expenses,

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10. *See infra* Section II.B.

11. *See infra* Section III.D.

12. *See infra* Section III.B.

13. *See infra* Section III.D.

14. *Background on: No-fault Auto Insurance*, INS. INFO. INST. (Nov. 6, 2018), <https://www.iii.org/article/background-on-no-fault-auto-insurance> [<http://web.archive.org/web/20210126204714/https://www.iii.org/article/background-on-no-fault-auto-insurance>].

15. David Goguen, J.D., *Michigan No-Fault Car Insurance*, NOLO, <https://www.nolo.com/legal-encyclopedia/michigan-no-fault-car-insurance.html> [<http://web.archive.org/web/20210126205149/https://www.nolo.com/legal-encyclopedia/michigan-no-fault-car-insurance.html>] (last visited Mar. 1, 2020).

16. *Background on: No-fault Auto Insurance*, *supra* note 14.

17. Goguen, *supra* note 15.

18. *Id.*

replacement services,<sup>19</sup> attendant care,<sup>20</sup> and wage loss.<sup>21</sup> In the case of replacement services and attendant care payments, the accident victim elects an individual, such as a family member or nurse, to be his or her service provider, and the benefit payments are made to the service provider for the help he or she provides to the accident victim.<sup>22</sup>

Further, the individual who is not the party at fault can receive benefits via a “third-party” claim against the at-fault driver.<sup>23</sup> A third-party claim allows the claimant to recover benefits for pain and suffering and other non-economic damages.<sup>24</sup> In Michigan, in order to win a third-party claim, the individual bringing the claim must prove that: (1) the other party was at fault in the accident, and (2) the claimant must meet the “threshold requirement.”<sup>25</sup> In order to meet the threshold requirement, the claimant must have suffered “death, permanent serious disfigurement, or serious impairment of a body function.”<sup>26</sup> Under Michigan law, serious impairment of a body function is “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.”<sup>27</sup>

Transitioning to Michigan exclusively, the State of Michigan instituted its no-fault auto insurance laws on October 1, 1973.<sup>28</sup> The goal of Michigan’s initial implementation of the system was “to provide

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19. Replacement services include help with work around the house, such as taking out the trash, making beds, doing the dishes, etc. Steven M. Gursten, *Michigan No-Fault Law 101: Replacement Services & Household Services*, MICH. AUTO L. (Jan. 17, 2012), <https://www.michiganautolaw.com/blog/2012/01/17/michigan-no-fault-law-replacement-services/> [http://web.archive.org/web/20210126205700/https://www.michiganautolaw.com/blog/2012/01/17/michigan-no-fault-law-replacement-services/].

20. Attendant care includes help with daily living activities such as eating, bathing, getting dressed, etc. *Michigan Attendant Care-FAQs*, MICH. AUTO L., <https://www.michiganautolaw.com/no-fault/no-fault-benefits/attendant-care-faqs/#2> [http://web.archive.org/web/20210126205922/https://www.michiganautolaw.com/no-fault/no-fault-benefits/attendant-care-faqs/] (last visited Nov. 16, 2019).

21. *Background on: No-fault Auto Insurance*, *supra* note 14.

22. *Michigan Attendant Care-FAQs*, *supra* note 20.

23. *Michigan No-Fault First Party and Third-Party Claims Lawyers*, MICH. INJURY LS., <https://www.michiganinjurylawyers.com/first-third-party-claims> [http://web.archive.org/web/20210126210306/https://www.michiganinjurylawyers.com/first-third-party-claims] (last visited Nov. 16, 2019).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Michigan Third-Party Claim for Car Accidents*, CLARK L. OFFICE, <https://theclarklawoffice.com/auto-accident-attorneys/third-party-claim/> [http://web.archive.org/web/20200921053620/https://theclarklawoffice.com/auto-accident-attorneys/third-party-claim/] (last visited Nov. 16, 2019).

28. WAYNE J. MILLER, MICHIGAN NO-FAULT INSURANCE GUIDE 2019, at cover page (2019).

assured, adequate, and prompt payment for motor vehicle accidents.”<sup>29</sup> Irrespective of which party caused the accident, drivers, passengers, and pedestrians are all eligible to receive benefits under Michigan no-fault law.<sup>30</sup> Specifically, under section 500.3105 of the Michigan Compiled Laws (MCL), regardless of fault, a no-fault insurer “is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle.”<sup>31</sup>

For a number of years, Michigan’s no-fault system operated very efficiently and, thus, was considered to be a model for the nation.<sup>32</sup> However, Michigan consumers have been experiencing increases in their premiums in recent years.<sup>33</sup> The causes of these increases have been difficult to determine.<sup>34</sup> For example, insurance companies point to the medical providers and claim that their high medical costs are the reason for the premium increases.<sup>35</sup> Alternatively, policyholders point to the insurance companies themselves and argue that insurers are engaging in “predatory” rating procedures.<sup>36</sup> However, rather than try to determine the root cause of the premium increases, the Michigan Legislature simply took action to make serious changes to the no-fault system in Michigan via a piece of legislation now known as Public Act 21.<sup>37</sup>

#### *B. Main Provisions of Public Act 21*

On May 30, 2019, Michigan Governor Gretchen Whitmer approved Senate Bill 1, a piece of legislation that drastically changed the operation of no-fault law in Michigan, becoming what is now referred to as Public Act 21 when passed into law.<sup>38</sup> Specifically, the reform to Michigan’s No-Fault Act aims to reduce rates<sup>39</sup> for policyholders via two *main* provisions:

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29. *Id.*

30. *Id.*

31. MICH. COMP. LAWS § 500.3105(1) (2019).

32. Miller, *supra* note 1, at 4.

33. *Id.*

34. *Id.*

35. JC Reindl, *Study Blames Medical Claims for High Auto Insurance Rates in Michigan*, DET. FREE PRESS (Apr. 24, 2019, 7:17 AM), <https://www.freep.com/story/money/business/2019/04/24/michigan-auto-insurance-medical-claims/3538720002/> [<http://web.archive.org/web/20210126211829/https://www.freep.com/story/money/business/2019/04/24/michigan-auto-insurance-medical-claims/3538720002/>].

36. *Id.*

37. Miller, *supra* note 1, at 4.

38. Public Act 21 of 2019, S. 0001, 100th Leg. (Mich. 2019) (codified as amended in scattered sections of MICH. COMP. LAWS §§ 501.3101–501.3179).

39. Although, as will be described later, these rate reductions will not likely be achieved. *See infra* Section III.D.1.

(1) tiered levels of PIP coverage, no longer requiring policyholders to purchase unlimited coverage and (2) fee schedules for providers.<sup>40</sup>

The first main provision of Public Act 21 is laid out in MCL 500.3107c, which details the different levels of PIP coverage now available under the Act.<sup>41</sup> The options under this provision include: the continued option of unlimited PIP coverage, a \$500,000 cap on PIP coverage, a \$250,000 cap on PIP coverage, a \$50,000 cap on PIP coverage if the insured is eligible for Medicaid, and an option to completely opt out of PIP coverage if the insured maintains alternative health insurance coverage.<sup>42</sup> These tiered levels of coverage, allegedly aimed at reducing premiums, take effect in July of 2020,<sup>43</sup> and they are only set to stay in effect for policies that are active prior to July 1, 2028.<sup>44</sup>

Corresponding to the PIP coverage options, MCL 500.2111f sets out mandatory premium reductions,<sup>45</sup> the lower the amount of coverage selected, the greater the reduction, and vice versa.<sup>46</sup> Under the statute: choosing to opt out of coverage entirely (only available for individuals with health insurance or Medicare) results in a 100% premium reduction (no premium charge); choosing \$50,000 in coverage results in an average 45% premium reduction or greater; choosing the \$250,000 coverage option results in an average 35% premium reduction or greater; choosing the \$500,000 coverage option results in an average 20% premium reduction or greater; and the highest coverage option, unlimited coverage, receives an average 10% premium reduction or greater.<sup>47</sup>

The second main provision of Public Act 21, MCL 500.3157, declares a fee schedule for providers via two main sections of the statute, both of which go into effect July 2021.<sup>48</sup> Under MCL 500.3157(2), a “physician, hospital, clinic, or other person that renders treatment or rehabilitative occupational training” to an auto accident victim may charge 200% of the amount that would be paid by Medicare for treatment provided subsequent to July 1, 2021 and prior to July 2, 2022.<sup>49</sup> Further, between July 1, 2022

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40. Miller, *supra* note 1, at 4.

41. MICH. COMP. LAWS § 500.3107c (2019).

42. Miller, *supra* note 1, at 4.

43. *Id.*

44. Ronald M. Sangster, *No-Fault Reform—The End of an Era - Part I*, J. INS. & INDEMNITY L., July 2019, at 8, 9.

45. § 500.2111f.

46. *Michigan Auto Insurance Reform*, FRANKENMUTH INS., <https://www.fmins.com/personal/auto-coverage/michigan-no-fault/> [<http://web.archive.org/web/20210126214020/https://www.fmins.com/personal/auto-coverage/michigan-no-fault/>] (last visited Apr. 4, 2020).

47. §§ 500.2111f(2)(a)–(d), (3).

48. Miller, *supra* note 1, at 4.

49. § 500.3157(2)(a).

and July 2, 2023, providers may charge a reduced rate of 195% of the amount payable by Medicare,<sup>50</sup> and any treatment provided after July 1, 2023 is only reimbursable to providers at a rate of 190% of the amount that would be paid by Medicare.<sup>51</sup> Additionally, under MCL 500.3157(7), if a service delivered by a provider is not payable by Medicare, the rendering provider may charge only 55% of the cost it would originally have charged for the service as of January 1, 2019.<sup>52</sup>

In addition to the Act's two main provisions, starting July 1, 2021, MCL 500.3157(10) will not mandate insurance companies to pay for at-home attendant care provided by family members that exceeds fifty-six hours per week.<sup>53</sup> However, via MCL 500.3157(11), the Act does give insurance carriers the option to provide, via contract, for the payment of an excess of fifty-six hours.<sup>54</sup> Further, MCL 500.3157(12) mandates that "neurological rehabilitation clinics"—which by definition include brain injury rehab institutions, doctors, nurses, therapists, and individuals providing attendant care—receive accreditation by the Commission on Accreditation of Rehabilitation Facilities (CARF).<sup>55</sup> Typically, achieving a CARF accreditation is a long, costly, and difficult endeavor.<sup>56</sup>

### *C. Effects of Public Act 21*

#### *1. Differential Treatment of Insurance Companies and Medical Providers*

Although Public Act 21 appears to treat insurance companies and medical providers equally in terms of the aims of its rate reduction provisions (with the tiered levels of PIP coverage having a direct impact on insurance companies and the fee schedules having a direct impact on medical providers), such "equal" treatment is not actually the reality.<sup>57</sup> Under MCL 500.2111f(9), Public Act 21 provides an escape clause for insurance companies, but provides no similar relief provision for medical providers.<sup>58</sup> Overall, the Act, through the tiered levels of PIP coverage,

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50. § 500.3157(2)(b).

51. § 500.3157(2)(c).

52. Miller, *supra* note 1, at 4.

53. Steven M. Gursten, *New Michigan No-Fault Law Passes: What You Need to Know*, MICH. AUTO L. (May 24, 2019), <https://www.michiganautolaw.com/blog/2019/05/24/new-michigan-no-fault-law/> [http://web.archive.org/web/20210126214937/https://www.michiganautolaw.com/blog/2019/05/24/new-michigan-no-fault-law/].

54. § 500.3157(11).

55. Miller, *supra* note 1, at 6.

56. *Id.*

57. *See id.*

58. *Id.*

requires significant reductions in premiums for policyholders who choose the lower levels of PIP coverage.<sup>59</sup> However, despite this, insurance companies can escape these premium reductions via MCL 500.2119f(9), which allows insurers to raise individual premiums “if the increase results from applying rating factors as approved under this chapter.”<sup>60</sup> The result of such a provision is that insurance companies are free to rate policies in the same way they would have prior to the passage of the new law.<sup>61</sup> Thus, MCL 500.2119f(9) allows insurers to completely escape the effects of the premium reductions.<sup>62</sup>

## 2. *The Medicaid System*

Overall, Medicaid functions as a health care program that “provides comprehensive health care services to low income adults and children.”<sup>63</sup> In Michigan, individuals receive Medicaid services via either a fee-for-service system or through Medicaid Health Plans.<sup>64</sup> Under the fee-for-service option, Medicaid funds the services provided to the individual; in order to receive the coverage by Medicaid, individuals must present their “mihealth card.”<sup>65</sup> Under the Medicaid Health Plans option, individuals must join a health plan, and the health plan then funds the majority of the services received.<sup>66</sup> In order to receive services under the second option, the individual seeking services must present the mihealth card and the health plan card.<sup>67</sup> In terms of costs, enrolled members in the Medicaid program do not have to pay the full amount charged for the services they receive, but the enrollee may have to pay a minimal co-pay amount.<sup>68</sup>

One of the effects of the lower levels of PIP coverage that Public Act 21 offers policyholders will be a cost shift to the Medicaid system.<sup>69</sup> For example, if an individual opts to purchase the \$50,000 PIP cap policy,<sup>70</sup>

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59. *Id.*

60. *Id.* at 5–6.

61. *Id.* at 6.

62. *Id.*

63. *Medicaid*, MICH. DEP’T. HEALTH & HUM. SERVS., [https://www.michigan.gov/mdhhs/0,5885,7-339-71547\\_4860\\_78446\\_78447\\_78454-407318--,00.html](https://www.michigan.gov/mdhhs/0,5885,7-339-71547_4860_78446_78447_78454-407318--,00.html) [http://web.archive.org/web/20210126221021/https://www.michigan.gov/mdhhs/0,5885,7-339-71547\_4860\_78446\_78447\_78454-407318--,00.html] (last visited Nov. 16, 2019).

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. Miller, *supra* note 1, at 5.

70. The \$50,000 cap policy can only be purchased by Medicaid-eligible individuals. *Id.* at 4.

the low cap will likely be met quickly, and once exhausted, the individual will then turn to Medicaid to cover the remainder of his or her medical bills.<sup>71</sup> Further, under the provisions of the new law, accident victims who do not maintain insurance coverage will be capped at \$250,000 worth of coverage via the Michigan Assigned Claims Plan,<sup>72</sup> and once that cap is met, Medicaid will take over as the primary coverage provider.<sup>73</sup> A fiscal analysis conducted by the Senate Fiscal Agency projected that under the new provisions of Public Act 21, “Michigan Medicaid costs will increase by \$70 million over [ten] years.”<sup>74</sup> As a result of the increased pressure on the Medicaid system, taxes will likely have to increase in order to fund Medicaid’s heightened demands.<sup>75</sup>

### 3. Michigan Assigned Claims Plan

The Michigan Assigned Claims Plan (MACP) is a program that allows motor vehicle accident victims to receive insurance coverage when they otherwise would not have access to coverage.<sup>76</sup> Under the MACP, an individual without automobile insurance coverage must fill out an MACP application for PIP benefits.<sup>77</sup> After submission of the application to MACP, if the individual qualifies for benefits, the Michigan Automobile Insurance Placement Facility (MAIPF), which manages the MACP,<sup>78</sup> will designate an insurance company to handle the individual’s claim.<sup>79</sup>

Under the original provisions of Public Act 21, and specifically under sections 500.3114(4) and 500.3115 of the Act, individuals who do not have insurance but are still eligible for PIP benefits are capped at \$250,000

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71. *Id.* at 5.

72. *Id.*

73. *Id.*

74. Paul Egan, *Insurance Official: No Guaranteed Savings Under New Michigan Auto Law*, DET. FREE PRESS (June 11, 2019, 11:12 AM), <https://www.freep.com/story/news/local/michigan/2019/06/11/no-guaranteed-savings-under-new-michigan-auto-law/1369364001/> [<http://web.archive.org/web/20210126222055/https://www.freep.com/story/news/local/michigan/2019/06/11/no-guaranteed-savings-under-new-michigan-auto-law/1369364001/>].

75. Miller, *supra* note 1, at 5.

76. *About MACP Michigan Assigned Claims Plan*, MICHACP, <https://www.michacp.org/> [<http://web.archive.org/web/20210126222457/https://www.michacp.org/>] (last visited Nov. 16, 2019).

77. *Id.*

78. *Id.*

79. *No-Fault Explained: Michigan Assigned Claims Plan*, CHRISTENSEN L., <https://www.davidchristensenlaw.com/no-fault-explained-michigan-assigned-claims-plan/> [<http://web.archive.org/web/20210126222810/https://www.davidchristensenlaw.com/no-fault-explained-michigan-assigned-claims-plan/>] (last visited Nov. 16, 2019).

in benefits from the MACP.<sup>80</sup> Therefore, once the accident victim's bills deplete the \$250,000, either the individual's health insurance or Medicaid must take over to cover the remaining medical expenses.<sup>81</sup> Per the MACP, this \$250,000 cap provision became effective on June 11, 2019, when the new Michigan no-fault law became operative.<sup>82</sup>

However, subsequent to the effective date of the new law, on September 24, 2019, the Director of the Department of Insurance and Financial Services (DIFS) implemented an order stating that the cap on benefits from MACP will not go into effect until July 1, 2020.<sup>83</sup> This order, pushing back the effective date of the cap, did not receive favor from the MACP, and on Monday, October 14, 2019, the MAIPF filed suit against the State of Michigan.<sup>84</sup> The lawsuit claimed that the state DIFS "d[id] not have the authority to amend or alter Michigan law, and any attempt to do so [was] a violation of separation of power principles under Michigan's Constitution."<sup>85</sup>

Due to the filing of the lawsuit by MAIPF, the current state of the law on this issue of capped MACP coverage is presently unknown until the court issues an opinion.<sup>86</sup>

#### 4. *Independent Medical Examinations (IMEs)*

An independent medical examination (IME) is an examination that auto insurance adjusters schedule accident victims to attend.<sup>87</sup> The exam functions as a "second opinion," and either the insurance adjuster or

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80. Miller, *supra* note 1, at 5.

81. *Id.*

82. *Insurance Commissioner Changes Rule on PIP Benefits for Michigan Assigned Claims Cases*, STEINBERG L. FIRM (Sept. 26, 2019), <https://www.1800leefree.com/blog/insurance-commissioner-changes-rule-on-pip-benefits-for-michigan-assigned-claims-cases/> [<http://web.archive.org/web/20210126223138/https://www.1800leefree.com/blog/insurance-commissioner-changes-rule-on-pip-benefits-for-michigan-assigned-claims-cases/>].

83. *Id.*

84. David Eggert, *Suit Challenges Michigan Regulator over \$250,000 Benefit Cap*, AP NEWS (Oct. 15, 2019), <https://apnews.com/07469f44e87b4f15914d4ad7b138b554> [<http://web.archive.org/web/20210126223403/https://apnews.com/article/07469f44e87b4f15914d4ad7b138b554>].

85. *Id.*

86. *Id.*

87. *What Is an Independent Medical Examination (IME) and the Truth Behind It*, MICH. AUTO L., <https://www.michiganautolaw.com/car-accident-lawyer/car-accident-medical-care/what-is-an-independent-medical-examination-ime/> [<http://web.archive.org/web/20210126223737/https://www.michiganautolaw.com/car-accident-lawyer/car-accident-medical-care/what-is-an-independent-medical-examination-ime/>] (last visited Feb. 3, 2021).

insurance company's defense attorney chooses the IME doctor.<sup>88</sup> Overall, the IME system works via a brokerage system: IME doctors sign up to work for a company, and that company then schedules its doctors for IMEs.<sup>89</sup> For example, ExamWorks, a company operating both domestically and internationally, is one of the main providers of IMEs in Michigan.<sup>90</sup> ExamWorks maintains a panel of physicians, and insurance companies contact ExamWorks when they desire that a claimant undergo an IME.<sup>91</sup>

For IME doctors, the situation is often a “win-win”; IME doctors receive significant pay,<sup>92</sup> while at the same time, their designation as an IME doctor does not hold them to a higher standard, as accident victims cannot sue IME doctors for malpractice or professional negligence.<sup>93</sup> IME doctors simply function as an expert witness for the insurance carrier.<sup>94</sup> For the insurance companies, IME doctors serve as a cost savings measure.<sup>95</sup> The “independent” doctors conduct short, ten- to fifteen-minute, one-time examinations of accident victims, and they are paid hefty sums to issue reports stating that they found “nothing wrong” with the examinee; however, in reality, the examinee may often maintain significant injuries from the accident.<sup>96</sup> Following IMEs, accident victims are often cut off from benefits by the insurance company due to the IME doctors' findings, despite the fact that such findings are often dishonest and unfair to the victims.<sup>97</sup>

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88. *Id.*

89. *About ExamWorks*, EXAMWORKS.COM, <https://www.examworks.com/about/about-examworks> [/web/20210417050516/<https://www.examworks.com/about/about-examworks>] (last visited Apr. 4, 2020).

90. *Id.*

91. *Id.*

92. Steven M. Gursten, *Independent Medical Examination (IME): Why They Are No Laughing Matter*, MICH. AUTO L. (Apr. 15, 2020), <https://www.michiganautolaw.com/blog/2020/04/15/independent-medical-examination-ime-exam/> [<http://web.archive.org/web/20210126224609/https://www.michiganautolaw.com/blog/2020/04/15/independent-medical-examination-ime-exam/>].

93. IME doctors cannot be sued for malpractice or professional negligence in Michigan. Steven Gursten, *Michigan Insurance Company Medical Exam Doctors — What You Need to Know*, LAWYERS.COM (Mar. 29, 2011), <https://blogs.lawyers.com/attorney/automobile-accidents/michigan-insurance-company-medical-exam-doctors-what-you-need-to-know-12317/> [<http://web.archive.org/web/20210128164852/https://blogs.lawyers.com/attorney/automobile-accidents/michigan-insurance-company-medical-exam-doctors-what-you-need-to-know-12317/>].

94. *Id.*

95. Gursten, *supra* note 92.

96. *What Is an Independent Medical Examination (IME) and the Truth Behind It*, *supra* note 87.

97. *Id.*

Under a new provision of Public Act 21, MCL 500.3151, individuals rendering IMEs must be licensed, board-certified, or board-qualified medical providers practicing in the medical area necessary to treat the injuries or conditions of the auto accident victim.<sup>98</sup> Further, for the year prior to the IME, the physician rendering the IME must have “devoted a majority of his or her professional time to either or both the active clinical practice of medicine or the instruction of students in an accredited medical school, residency or clinical research program.”<sup>99</sup> This statutory section will not affect legitimate medical practitioners offering IME services; however, IME doctors that are unqualified, or who are not still engaged in the practice of medicine, will feel the harsh impact of this new law, as they will no longer be able to conduct IMEs on victims.<sup>100</sup>

### 5. Utilization Review

Although Public Act 21 just recently introduced the utilization review concept to the auto law scene, the utilization review process already maintained existence within the workers’ compensation sector.<sup>101</sup> In broad terms, utilization review functions as a system of reviewing medical services provided to patients to police the quality and relevance of the provided services.<sup>102</sup> Specific to the workers’ compensation context is the part of the utilization review process known as “precertification.”<sup>103</sup> Overall, precertification determines if the services provided are medically necessary, and, based on the results of the precertification process, the workers’ compensation carrier will either pre-approve or reject the

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98. Joel Ashton, *A Breakdown of the New Michigan No-Fault Legislation*, CMDA L. (June 7, 2019), <https://cmda-law.com/a-breakdown-of-the-new-michigan-no-fault-legislation/> [<http://web.archive.org/web/20210126225816/https://cmda-law.com/a-breakdown-of-the-new-michigan-no-fault-legislation/>].

99. *Id.*

100. *Know the Law – Auto No-Fault Changes: Insurance Medical Exams*, FOX 17 NEWS (July 20, 2019, 9:00 AM), <https://www.fox17online.com/2019/07/20/know-the-law-auto-no-fault-changes-insurance-medical-exams> [<http://web.archive.org/web/20210126230100/https://www.fox17online.com/2019/07/20/know-the-law-auto-no-fault-changes-insurance-medical-exams>].

101. *Medical Services: An Overview for Michigan Workers’ Compensation*, MICHIGAN.GOV, [https://www.michigan.gov/documents/cis\\_bwuc\\_hcbook\\_30069\\_7.pdf](https://www.michigan.gov/documents/cis_bwuc_hcbook_30069_7.pdf) [[http://web.archive.org/web/20210126230327/https://www.michigan.gov/documents/cis\\_bwuc\\_hcbook\\_30069\\_7.pdf](http://web.archive.org/web/20210126230327/https://www.michigan.gov/documents/cis_bwuc_hcbook_30069_7.pdf)] (last visited Apr. 4, 2020).

102. Jackie Payne, *Back to the Basics: Cost Control and the Role of Precertification and Utilization Review in Workers’ Compensation*, MPOWER.MITCHELL.COM (June 11, 2018), <https://www.mpower.mitchell.com/precertification-utilization-review-workers-compensation/> [<http://web.archive.org/web/20210126230528/https://www.mpower.mitchell.com/precertification-utilization-review-workers-compensation/>].

103. *Id.*

medical services prior to the actual performance of the services and prior to payment for the services.<sup>104</sup>

In light of Public Act 21's new provisions under MCL 500.3157a, proposed rules regarding the utilization review process are now currently being considered for implementation within the auto law context.<sup>105</sup> Under MCL 500.3157a, the Michigan Department of Insurance must create a Utilization Review Department.<sup>106</sup> Medical providers must provide records and other information in connection with utilization reviews, and if the Department of Insurance decides that a provider is providing more treatment than necessary, the insurance company can ask the provider to offer explanation for such treatment.<sup>107</sup> Insurance companies, based on the utilization review by the Department of Insurance, then have the power to deny a claim, and a provider's only method for challenging such a denial is via an appeal to the Department of Insurance under the Department of Insurance's own procedures.<sup>108</sup> Overall, the utilization review process functions as an administrative tool<sup>109</sup> that the new law seems to supply to the insurance industry as another "arrow in its quiver" of alternatives it can use to police medical providers and the treatment and services they render to patients.

#### *D. The Present State of the Law*

As detailed above, Public Act 21 instituted a multitude of changes to Michigan's previously established no-fault law, and many of the changes go into effect at different times, with some of the changes not taking effect until 2021.<sup>110</sup> Further, some of the new provisions still remain up in the air, like the cap on MACP-provided benefits, which is currently the subject of ongoing litigation.<sup>111</sup> With all of this in mind, it is understandable that insurers and attorneys alike are having trouble grasping all of the new laws and their present and projected effects on the industry.<sup>112</sup>

In consideration of all of the above-discussed provisions of Public Act 21, it is evident that medical providers have received the short end of the

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104. *Id.*

105. Sangster, *supra* note 44, at 15.

106. *Id.*

107. *Id.* at 15–16.

108. *Id.* at 16.

109. *Id.* at 15–16.

110. *See supra* Section I.B.

111. *See supra* Section I.C.3.

112. *Michigan's New No Fault Law*, MIKEMORSELAWFIRM, <https://www.855mikewins.com/michigans-new-no-fault-law/> [<http://web.archive.org/web/20210127000329/https://www.855mikewins.com/michigans-new-no-fault-law/>] (last visited Mar. 1, 2020).

stick.<sup>113</sup> The remainder of this Note will discuss the impact of the new law on policyholders and medical providers. This Note argues that in addition to not providing long-run savings for insured drivers, the main target of Public Act 21 is the medical provider industry, as the Act places several unnecessary burdens on providers, and will end up forcing many providers out of the industry altogether.

### III. ANALYSIS

#### *A. The Current Structure of Pricing in the Medical Industry Cannot Withstand Public Act 21*

The current structure of pricing in the medical industry is at complete odds with the provisions of Public Act 21 and, specifically, with the fee-schedule provisions for medical providers. The initial foundation required for this analysis lies with the pricing structure of hospitals, where individuals injured in an auto accident, and especially critically injured individuals, go immediately following their auto-related trauma.

Overall, pricing of hospital services is based on what is known as a “chargemaster.”<sup>114</sup> A chargemaster is a long detailing of all of the prices a particular hospital charges for each and every one of the procedures its staff performs as well as the prices of the supply items used to execute those procedures.<sup>115</sup> The process that hospitals use to change and revise the prices on the chargemaster is not set in stone.<sup>116</sup> Certain hospitals may increase the price of each item on the list annually by a uniform percentage, while other hospitals may make individualized changes to certain line items at no set time.<sup>117</sup> However, there are a number of factors that play into the prices that particular hospitals charge for their services, including: the location of the hospital, who is paying for the services, and the hospital’s costs.<sup>118</sup> In terms of the geographic factor, areas categorized as “high spending” see a significantly higher percentage of spending on health care than “lower-spending” areas.<sup>119</sup> Further, hospitals also tailor

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113. See *infra* Section III.C.

114. Uwe E. Reinhardt, *The Pricing of U.S. Hospital Services: Chaos Behind a Veil of Secrecy*, 25 HEALTH AFFS. 57, 58 (2006).

115. *Id.*

116. *Id.* at 59.

117. *Id.*

118. Emily Gee, *The High Price of Hospital Care*, CTR. FOR AM. PROGRESS (June 26, 2019, 5:00 AM), <https://www.americanprogress.org/issues/healthcare/reports/2019/06/26/471464/high-price-hospital-care/> [http://web.archive.org/web/20210127002212/https://www.americanprogress.org/issues/healthcare/reports/2019/06/26/471464/high-price-hospital-care/].

119. *Id.*

their prices based on who is paying for the services—studies indicate that payment rates from private insurers are significantly greater than payment rates from Medicare.<sup>120</sup> In addition to the location of the hospital and the payor, the bottom line costs a hospital takes on, such as the costs for paying its workers or utilities, also dictate the way a hospital prices its services.<sup>121</sup>

A useful depiction of how hospitals set their prices is exemplified in a breakdown of the costs hospitals take on in order to provide a patient with an MRI.<sup>122</sup> Overall, a hospital must cover three sections of costs in order to conduct an MRI: (1) costs for staff wages, supplies, and machinery depreciation, (2) administrator salaries, and (3) costs related to the upkeep of the radiology department in general, including maintenance and janitorial costs.<sup>123</sup> The crux of the medical sector pricing issue is this: if the costs for a particular MRI (or certain number of MRIs within a certain time frame) come out to be *more* than the official price determined by the Centers for Medicare and Medicaid Services (CMS), payment from all patients receiving Medicare will not exceed the price set by CMS.<sup>124</sup> This issue illustrates the reason hospitals charge private insurance companies and cash-paying patients up to 1,000% of the Medicare prices—“they’re making up for expenses left uncovered by government programs.”<sup>125</sup>

Herein lies the problem: the new fee schedule for providers under the new Michigan no-fault law only allows providers to charge 200% of the amount that would be paid by Medicare starting July 1, 2021, and by July 1, 2023, that percentage drops down even further to 190%.<sup>126</sup> Those percentages are astoundingly lower than the up to 1,000% markup<sup>127</sup> of Medicare prices that some hospitals set in order to cover expenses not otherwise covered by payments from Medicare. Even more astoundingly, if a service delivered by a provider is not payable by Medicare, under the new law, a provider may only charge 55% of the cost it normally would have billed for the service as of January 1, 2019.<sup>128</sup>

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120. *Id.*

121. *Id.*

122. The MRI pricing scheme is simply presented here as an example of how prices are set by the hospital industry.

123. *How Hospitals Determine the Price of an MRI—and Why Clinics Can Charge Less*, PRECISE IMAGING (July 12, 2017), <https://www.precisemri.com/2017/07/12/hospitals-determine-price-mri-clinics-can-charge-less/#> [http://web.archive.org/web/20210127002511/https://www.precisemri.com/2017/07/12/hospitals-determine-price-mri-clinics-can-charge-less/].

124. *Id.*

125. *Id.*

126. MICH. COMP. LAWS §§ 500.3157(2)(a)–(c) (2019).

127. *How Hospitals Determine the Price of an MRI—and Why Clinics Can Charge Less*, *supra* note 123.

128. Miller, *supra* note 1, at 4.

As depicted above, in order to provide patients, and specifically, accident victims, with services, hospitals and medical providers must cover a number of costs.<sup>129</sup> Further, another large factor is government services such as Medicare; prices for services paid by the government cannot be charged in excess of the price set by the respective federal agency administering the government program (such as CMS).<sup>130</sup> Due to these set prices, many medical providers have no choice but to mark up the prices charged to private-paying patients in order to cover their expenses and remain in business.<sup>131</sup> Although a 1,000% markup could arguably be considered “overcharging” and in excess of what the hospital or provider requires to remain viable, a downgrade to a maximum 200% allowable upcharge definitely stands out as an 800% deduction in some cases—something many providers will not be able to withstand.

Further, even worse than the effect on hospitals will be the effect of the new provider fee schedule on the brain injury rehabilitation sector.<sup>132</sup> If an accident victim suffers an extreme brain injury, he or she, after receiving treatment in the hospital following the accident, will be referred to an institution that provides long-term rehab and custodial care.<sup>133</sup> Some providers may maintain Medicare coverage and, thus, be permitted to charge up to the 200% fee schedule under the new law, but long-term custodial care institutions, which do not receive Medicare coverage, will be forced into the 55% bracket of the fee schedule.<sup>134</sup> Therefore, one of the main results of the new law will be that catastrophically injured motor vehicle victims will have many fewer options for long-term custodial care, as long-term custodial care institutions will be forced out of business for the simple reason that “such facilities (like most businesses on this planet) do not operate on a 45% margin.”<sup>135</sup>

*B. Why Did the Legislature Provide an Escape Clause for Insurance Companies, but Did Not Provide a Similar Escape Clause for Medical Providers?*

As previously detailed above, in addition to the fee schedules for providers, the second main provision of Public Act 21 is the availability

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129. See generally *supra* notes 118 and 123 and accompanying text.

130. *How Hospitals Determine the Price of an MRI—and Why Clinics Can Charge Less*, *supra* note 123.

131. Gee, *supra* note 118.

132. Miller, *supra* note 1, at 6.

133. *Id.*

134. *Id.*

135. *Id.*

of the tiered levels of PIP coverage.<sup>136</sup> The levels include: unlimited PIP coverage, a \$500,000 cap on PIP coverage, a \$250,000 cap on PIP coverage, a \$50,000 cap on PIP coverage if Medicaid eligible, and an option to completely opt out of PIP coverage if health insurance is maintained.<sup>137</sup> In addition, section 500.2111f of the new statute details a schedule of required premium reductions that must be implemented by insurance companies.<sup>138</sup>

On the face of MCL 500.2111f, the mandatory premium reductions seem to target the insurance industry in the same manner and to the same degree as the fee schedules of MCL 500.3157 target the provider industry. However, upon a closer examination of the new law, the insurance industry is provided with an “out” to such premium reductions via an escape clause in MCL 500.2111f.<sup>139</sup> The language of MCL 500.2111f(9) states that “[t]his section *does not prohibit an increase*<sup>140</sup> for any individual insurance policy premium if the increase results from applying rating factors as approved under this chapter . . . .”<sup>141</sup> Thus, due to the inclusion of this provision, insurers can escape the premium reduction mandates by simply rating insurance policies as they normally would.<sup>142</sup>

### *1. Rating Practices by Insurance Companies*

Overall, in light of the fact that insurance companies can evade the premium reductions and simply rate policies as they previously would,<sup>143</sup> an analysis of how insurance companies currently price their policies is key in illustrating just how prejudicial the new no-fault law is towards the medical industry. The main reason individuals in Michigan pay high rates for car insurance is simple: insurance companies basically have the liberty

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136. *Id.* at 4.

137. *Id.*

138. *Id.* at 5. The premium reductions correspond to the various PIP coverage options that are available starting in July of 2020. MICH. COMP. LAWS § 500.2111f (2019). If the \$50,000 PIP cap is chosen, a 45% or higher premium reduction must take place. § 500.2111f(2)(a). If the \$250,000 cap is chosen, a 35% or higher premium reduction must take place. § 500.2111f(2)(b). If the \$500,000 cap is chosen, a 20% or higher premium reduction must take place. § 500.2111f(2)(c). Further, if the unlimited PIP option is chosen, a 10% or higher premium reduction must take place. § 500.2111f(2)(d). For individuals who choose to opt out of PIP coverage altogether, a premium must not be charged to the insured. § 500.2111f(3).

139. Miller, *supra* note 1, at 6.

140. § 500.2111f(9) (emphasis added).

141. *Id.*

142. Miller, *supra* note 1, at 6.

143. *Id.*

to charge whatever rates they desire.<sup>144</sup> This initially derived, in significant respect, from the implementation of a “file and use” system in Michigan. Under this system, insurance companies merely file their rates with DIFS and then proceed to bill their consumers those rates.<sup>145</sup> Further, although the law in Michigan does allow the insurance commissioner to identify a rate as “excessive” and object to such a rate, since the implementation of Michigan’s no-fault law, the commissioner has never come forward with such an objection.<sup>146</sup> This is likely the result of the ambiguous definition of the term “excessive” in the insurance code, which makes it difficult to deem any rate charged by an insurance company “excessive” and worthy of an objection.<sup>147</sup>

Under the new no-fault system, however, it is important to note that Michigan shifted to a modified “file and review system,” under which DIFS must actually review and approve rates submitted by insurance companies before such rates can be assessed on policyholders.<sup>148</sup> However, it is important to note that even though this new system gives DIFS the liberty to push back against rating procedures by insurance companies,<sup>149</sup> it is currently still unknown what standards of review DIFS will abide by and how much time and effort DIFS will even put into such review.

Further, insurers often engage in a form of “targeting” when it comes to their rating practices.<sup>150</sup> For example, women, individuals with subpar credit, and widows and widowers frequently pay higher premiums than other drivers.<sup>151</sup> Further, under a common practice known as “auto insurance redlining,” insurance companies charge up to thirty percent higher premiums in areas dominated by minorities (as opposed to areas which are predominantly white with comparable accident statistics or

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144. *Michigan Auto Insurance Rates: How Are They Determined?* SINAS DRAMIS L. FIRM, <https://sinasdramis.com/michigan-auto-insurance-rates> [<http://web.archive.org/web/20210127005551/https://sinasdramis.com/michigan-auto-insurance-rates/>] (last visited Feb. 3, 2020).

145. *Id.*

146. *Id.*

147. *Id.*

148. Zeinab Najm, *Town Hall Held to Answer Questions on New No-Fault Auto Insurance Law*, DOWNRIVER SUNDAY TIMES (July 26, 2019), <https://www.downriversundaytimes.com/2019/07/26/town-hall-held-to-answer-questions-on-new-no-fault-auto-insurance-law/> [<http://web.archive.org/web/20210127005932/https://www.downriversundaytimes.com/2019/07/26/town-hall-held-to-answer-questions-on-new-no-fault-auto-insurance-law/>].

149. *Id.*

150. *Michigan Auto Insurance Rates: How Are They Determined?*, *supra* note 144.

151. *Id.*

costs).<sup>152</sup> These practices, combined with the “file and use” system (which is now the new “file and review” system, but which may end up having similar effects to those of the “file and use” system), leave drivers across the State of Michigan with no choice but to pay insurance rates that are much higher than the rates charged to drivers in other states.<sup>153</sup>

DIFS provided further insight into why insurers are permitted to charge Michigan drivers such high rates.<sup>154</sup> In describing how rates are established, DIFS explained that auto insurance in Michigan operates under state law “on a competitive basis.”<sup>155</sup> What this means in practice is that so far as competition exists between insurance companies, the rates such companies charge cannot be deemed excessive.<sup>156</sup> Further, it is important to recognize that insurance companies pay insurance claims using the premium payments they receive from their consumers.<sup>157</sup> In setting their premiums, insurance companies estimate how much they will have to pay out to injured auto accident victims for the injuries such victims sustain as well as how much they will have to pay out to fix or replace vehicles damaged in auto accidents.<sup>158</sup> The expensive nature of medical services, combined with the uncertainty surrounding how much will have to be paid out in future medical costs, leads insurance companies to charge continually increasing premiums.<sup>159</sup>

Even with all of the changes Public Act 21 makes to the no-fault law in Michigan, the escape clause prescribed in MCL 500.2111f(9) permits insurance companies to continue charging the rates they charged consumers prior to the passage of the Act.<sup>160</sup> The premium reductions outlined in MCL 500.2111f virtually have no effect on insurance companies due to the escape clause.<sup>161</sup> Thus, what is leftover is: (1) a medical provider industry forced to comply with a fee schedule that, for many providers, will mean the demise of their businesses, and (2) an auto insurance industry that is permitted to carry on charging the same rates as charged before, prior to the passage of Public Act 21. This leads to a question that proponents and members of the insurance industry want to

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152. *Id.*

153. *Id.*

154. *How Are Rates Developed?*, DIFS, [https://www.michigan.gov/difs/0,5269,7-303-13648\\_60666\\_77183-388734--,00.html](https://www.michigan.gov/difs/0,5269,7-303-13648_60666_77183-388734--,00.html) [[http://web.archive.org/web/20210202170326/https://www.michigan.gov/difs/0,5269,7-303-13648\\_60666\\_77606-391032--,00.html](http://web.archive.org/web/20210202170326/https://www.michigan.gov/difs/0,5269,7-303-13648_60666_77606-391032--,00.html)] (last visited Feb. 3, 2021).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. Miller, *supra* note 1, at 6.

161. *See id.*

avoid at all costs: why not implement a fee schedule for insurance carriers?<sup>162</sup>

## 2. *Fee Schedule for Insurance Carriers: A Viable Option*

With the new tiered levels of PIP coverage available under the new no-fault law, subjecting insurance companies to a fee schedule is a much more viable idea now than prior to the implementation of the new law. As stated previously, one of the biggest contributing factors that plays into how insurance companies price their premiums is the projection of future medical expenses that will have to be paid out to policyholders in the event of an auto accident.<sup>163</sup> Prior to the passage of Public Act 21, such a projection was virtually impossible, as accident victims received unlimited medical benefits.<sup>164</sup> However, under the new law, with the option to purchase varying levels of PIP coverage, many individuals will elect to purchase lower levels of coverage than the unlimited PIP option, thinking that doing so will save them money.<sup>165</sup> With consumers purchasing capped policies, it will be more tangible for insurance companies to project what they will have to pay out in the future if their consumers fall victim to auto accidents. This makes the idea of imposing a fee schedule on insurance companies—or, in other words, putting caps on the premium amounts insurance companies can charge their policyholders—a more tangible concept than it would have been prior to the passage of Public Act 21.

Overall, MCL 500.2111f already exhibits the making of a fee schedule on insurance companies. As described above, MCL 500.2111f(2)(a)–(d) and (3) already implement reductions on the premium amounts that insurance companies can charge their policyholders, which correspond to the PIP coverage level that the policyholder elects.<sup>166</sup> However, these provisions of the statute are virtually “cancelled out” by MCL 500.2111f; the escape clause allows insurance companies to continue rating their policies as they did prior to the passage of the new law.<sup>167</sup> The first step in implementing a fee schedule, then, would be to eliminate the escape

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162. *Id.* at 7.

163. *See How Are Rates Developed?*, *supra* note 154.

164. *Consumer Counselor Insurance Information for Michigan Consumers: Brief Explanation of Michigan No-Fault Insurance*, DIFS, [https://www.michigan.gov/documents/cis\\_ofis\\_ip202\\_25083\\_7.pdf](https://www.michigan.gov/documents/cis_ofis_ip202_25083_7.pdf) [[http://web.archive.org/web/20210127222731/https://www.michigan.gov/documents/cis\\_ofis\\_ip202\\_25083\\_7.pdf](http://web.archive.org/web/20210127222731/https://www.michigan.gov/documents/cis_ofis_ip202_25083_7.pdf)] (last visited Feb. 3, 2020).

165. *See* George T. Sinas et al., *Navigating The Chaos: The New No-Fault Legislation*, SINAS DRAMIS L. FIRM (June 14, 2019), <https://sinasdramis.com/wp-content/uploads/michigan-no-fault-reform-summary.pdf> [<http://web.archive.org/web/20210127222913/https://sinasdramis.com/wp-content/uploads/michigan-no-fault-reform-summary.pdf>].

166. MICH. COMP. LAWS § 500.2111f (2019).

167. § 500.2111f(9).

clause. From there, a more rational approach would be to implement set limits on the premium amounts that insurance companies can charge for their policies rather than simply mandating reductions from the premium amounts charged as of May 1, 2019.<sup>168</sup> Implementing caps on how much insurers can charge policyholders would allow policyholders to save more money than under a system where insurers must only reduce the premium amount charged as of May 1, 2019. The caps for premiums could be set as low as appropriate to save policyholders the most money.

*C. Public Act 21 Targets the Medical Industry Much More Than the Insurance Industry*

Even though Public Act 21 attempts to target the insurance industry and reduce costs to consumers via the tiered levels of PIP coverage in MCL 500.3107, such efforts are virtually “wiped out” by the escape clause in MCL 500.2111f(9).<sup>169</sup> It is, thus, apparent that the effect of Public Act 21 is to target the medical industry much more than the insurance industry, not only via the fee-schedule provisions for medical providers in MCL 500.3157 but also via a number of other means as well.

First, MCL 500.3157(12) of the new law mandates that “neurological rehabilitation clinics,” which include brain rehab institutions, doctors, nurses, therapists, and individuals providing attendant care, be accredited by the Commission on Accreditation of Rehabilitation Facilities (CARF).<sup>170</sup> This accreditation requirement places a strain on the medical industry that is not similarly imposed by the new law on the insurance industry, as achieving CARF accreditation is a long, expensive, and difficult task.<sup>171</sup> In a sense, this provision of the new law questions the quality of care providers are rendering without adequate justification.

Second, beginning on July 1, 2021, insurance companies will not have to pay for at-home attendant care provided by family members that exceeds fifty-six hours per week.<sup>172</sup> This can be viewed as a *medically* related strain that the new law imposes, both on medical providers and on family members providing in-home care to their loved ones following a catastrophic auto accident. The in-home care such family members provide to their loved ones includes medically necessary actions such as helping the victim go to the bathroom, helping the victim eat, helping the

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168. § 500.2111f(2).

169. *See supra* Section III.B.

170. Miller, *supra* note 1, at 6.

171. *Id.*

172. Gursten, *supra* note 53.

victim take medication, and helping the victim use medical equipment.<sup>173</sup> Prior to the implementation of the new law, family members of victims of spinal cord and brain injuries could quit their jobs in order to furnish attendant care to their loved ones.<sup>174</sup> However, under the new system's implementation of the fifty-six hour cap, this will no longer be an option.<sup>175</sup>

Overall, this limit on family-provided attendant care may indirectly place a strain on professional providers of medical care; once the fifty-six hours of family-provided care is met, insurance companies can contract with private providers for any hours exceeding the fifty-six hour limit.<sup>176</sup> Although this may lead to increased revenue for private providers, this may also place an added strain on the medical industry, as private facilities will have to hire more individuals to provide care that was previously provided by the family members of victims.<sup>177</sup> For example, crash victims who suffer injuries to their brain or spinal cord often need twenty-four seven care; it is inevitable that private facilities will have to take on additional expenses to hire more workers and acquire the necessary equipment to provide such constant care.<sup>178</sup>

Additionally, aside from the family members of victims and facilities providing care, the auto accident victims themselves also do not look upon this new provision with favor.<sup>179</sup> For many victims, having such care provided by a family member is comforting after a life-changing accident; with the possibility of family-provided care now limited, victims, and especially those that require constant care, fear that they will be institutionalized in a Medicaid facility or other like institution.<sup>180</sup>

Third, under MCL 500.3151, individuals providing IMEs must be licensed, board-certified, or board-qualified medical providers practicing in the medical area required to treat the accident victim's injuries.<sup>181</sup> In addition, for the year leading up to the IME, the physician conducting the IME must have allotted the majority of his or her time towards the clinical

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173. *Michigan Attendant Care-FAQs*, *supra* note 20.

174. Kim Kozlowski & Jonathan Oosting, 'Very afraid' Auto Crash Survivors Fear No-Fault Overhaul Will Reduce or Wipe Out Aid, DET. NEWS (June 12, 2019, 11:18 PM), <https://www.detroitnews.com/story/news/politics/2019/06/13/crash-survivors-fear-no-fault-auto-insurance-overhaul-cuts-aid/1346198001/> [[http://web.archive.org/web/20210127224521if\\_/https://www.detroitnews.com/story/news/politics/2019/06/13/crash-survivors-fear-no-fault-auto-insurance-overhaul-cuts-aid/1346198001/](http://web.archive.org/web/20210127224521if_/https://www.detroitnews.com/story/news/politics/2019/06/13/crash-survivors-fear-no-fault-auto-insurance-overhaul-cuts-aid/1346198001/)].

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. Ashton, *supra* note 98.

practice of medicine or to the teaching of students in an accredited school, residency, or program.<sup>182</sup> Even though this specific provision is not the crux of this Note's analysis, it is one provision of the new law that impacts care providers. Although the new IME provisions do not function as a strain on the medical provider industry as a whole, the provisions will impact IME doctors who are unable to meet the new requirements.<sup>183</sup> Said in another way, this portion of the new law does not negatively affect legitimate medical practitioners who are already complying with the requirements; it affects IME doctors who cannot meet the standards set by the new law and, thus, will not be able to conduct IMEs anymore.<sup>184</sup> In the situation of IMEs, the insurance company is the one hiring the IME doctor.<sup>185</sup> Thus, if some of the lower-quality IME doctors are eliminated from the available pool of IME providers, insurance companies may have to pay more for the medical practitioners that meet the requirements of MCL 500.3151, and such costs will likely be passed on to policyholders.

Finally, under MCL 500.3157(a), DIFS is mandated to create a Utilization Review Department.<sup>186</sup> Per this provision of the statute, medical providers are required to provide records and other information in connection with the utilization review.<sup>187</sup> The insurer can mandate that the provider detail the reasons for treatment in writing.<sup>188</sup> If it is determined by DIFS that the provider is providing more treatment than necessary, insurance companies have the power to deny a claim, and the only way the provider can challenge the denial is through an appeal to DIFS via DIFS' own procedures.<sup>189</sup>

There is no question that the utilization review process will place an additional strain on the medical provider industry. Overall, the utilization review process obligates providers to comply with several mandates, including: producing billing and treatment records for patients; and

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182. *Id.*

183. *Id.*

184. *Id.*

185. *What Is an Independent Medical Examination?*, MICH. AUTO L., <https://www.michiganautolaw.com/no-fault/no-fault-act/what-is-an-ime/> [http://web.archive.org/web/20210127225607/https://www.michiganautolaw.com/no-fault/no-fault-act/what-is-an-ime/] (last visited Jan. 27, 2021).

186. Sangster, *supra* note 44, at 15.

187. *Id.*

188. Matthew S. LaBeau, *Looking Down the Road at Changes to the Michigan No-Fault Act*, COLLINS EINHORN FARRELL (May 30, 2019), <https://ceflawyers.com/2019/05/30/looking-down-the-road-at-changes-to-the-michigan-no-fault-act-prepared-by-matthew-s-labeau/> [http://web.archive.org/web/20210127230356/https://ceflawyers.com/2019/05/30/looking-down-the-road-at-changes-to-the-michigan-no-fault-act-prepared-by-matthew-s-labeau/].

189. Sangster, *supra* note 44, at 15–16.

coming forward with reasons for providing products, services, or accommodations that are different, longer, or more frequent than what is usually provided to a patient who has suffered the same condition.<sup>190</sup> Compliance with such requirements will cost medical providers time and money, and even if the provider complies with all obligations, the insurance company may still deny the provider's claim.

*D. The New No-Fault System Will Not Achieve Its Main Goal of Reducing Premiums for Policyholders and Will Leave Policyholders Worse Off Than They Were Before*

*1. Policyholders Will Not Truly Receive Rate Reductions*

In effect, the options for reduced levels of PIP coverage under Public Act 21 could actually lead to increased costs for policyholders. Health officials anticipate that the majority of drivers will select the least expensive PIP coverage permitted under the new law.<sup>191</sup> However, what most policyholders do not realize is that the lowest available levels of PIP coverage, such as the \$50,000 and \$250,000 capped plans, will be eaten up after just a few days in the hospital following a catastrophic injury, and the average stay in the hospital following an auto accident is around six weeks or more.<sup>192</sup> For policyholders who meet the cap quickly, and for policyholders who completely opt out of PIP coverage, health insurance or Medicaid will take over to cover the victim's medical expenses.<sup>193</sup> The damaging truth about health insurance for policyholders is that health insurance does not cover as many services, maintains a stricter limit on medical charges, and also often implements more expensive deductibles.<sup>194</sup> Therefore, the tiered options for PIP coverage will likely end up proving detrimental for policyholders. Once the PIP limit is met, policyholders will have to turn to their health insurance, which will require the payment of costly deductibles and provide less coverage for medical services.<sup>195</sup> In addition to higher co-pays, policyholders may be forced to

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190. Sinas et al., *supra* note 165, at 13.

191. Kozlowski & Oosting, *supra* note 174.

192. *Id.*

193. Miller, *supra* note 1, at 5.

194. JC Reindl, *After Michigan's No-Fault Overhaul, Health Costs May Depend on Your Employer*, DET. FREE PRESS (Oct. 19, 2019, 6:00 AM), <https://www.freep.com/story/money/business/2019/10/19/michigan-no-fault-law-health-insurance/3984808002> [<http://web.archive.org/web/20210127231437/https://www.freep.com/story/money/business/2019/10/19/michigan-no-fault-law-health-insurance/3984808002/>].

195. *Id.*

pay out of pocket for some medically necessary services that their health insurance plans do not cover.<sup>196</sup>

Overall, the different options for PIP coverage will inevitably lead to a cost *shift*, not a cost *savings*. For example, it is estimated that Medicaid costs will increase by \$70 million in a span of ten years as a consequence of consumers opting to purchase lower levels of PIP coverage.<sup>197</sup> Aside from accident victims, who will be negatively affected if Medicaid does not cover certain services, and the Medicaid industry in general, it is also important to note that hospitals and medical providers will be negatively affected by this cost shift.<sup>198</sup> As stated previously, if the cost of a certain service rendered by a provider ends up exceeding the official price determined by CMS, payment to the provider will not exceed the set CMS price.<sup>199</sup> Therefore, for all Medicaid-eligible accident victims who elect a lower level of PIP coverage, providers will suffer—costs normally paid by the auto insurer will shift to Medicaid, and providers will receive significantly less payment for services payable under Medicaid.<sup>200</sup>

In addition to the cost shift to health insurance and Medicaid, there will likely also be a cost shift to the liability insurance section of auto insurance policies.<sup>201</sup> Thus, although an individual may elect a lower level of PIP coverage, auto insurance companies will likely increase the bodily injury portion of policies in order to compensate for this reduction in the PIP portion of the policy.<sup>202</sup> For example, if an individual elects one of the lower levels of PIP coverage and the PIP limit is met quickly by medical expenses, the individual's remaining medical expenses become an aspect of damages in the injured individual's third party lawsuit against the at-fault driver.<sup>203</sup> Thus, policyholders who are found to be at-fault in auto accidents will face increased tort liability.<sup>204</sup> "In other words, the [Michigan] Legislature has shifted the 'pot of money' from the PIP pot to

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196. Kozlowski & Oosting, *supra* note 174.

197. Egan, *supra* note 74.

198. *How Hospitals Determine the Price of an MRI—and Why Clinics Can Charge Less*, *supra* note 123.

199. *Id.*

200. *Id.*

201. Paul Egan, *No-Fault Claims Fee to Drop 55% Under New Michigan Law; Many Motorists Will Pay Nothing*, DET. FREE PRESS (Nov. 13, 2019, 4:35 PM), <https://www.freep.com/story/news/local/michigan/2019/11/13/michigan-no-fault-insurance-law-reform-catastrophic-claim/4179266002/> [http://web.archive.org/web/20210128003328/https://www.freep.com/story/news/local/michigan/2019/11/13/michigan-no-fault-insurance-law-reform-catastrophic-claim/4179266002/].

202. *Id.*

203. Sangster, *supra* note 44, at 13.

204. *Id.*

the tort pot!”<sup>205</sup> As a result of the shift, insurance companies will likely charge policyholders more for the bodily injury portions of their policies in order to cover the increased tort exposure.<sup>206</sup>

Finally, another vital point that may be overlooked in the midst of the legislature’s claim that the different options for PIP coverage will save policyholders money is that PIP coverage rarely functions as the largest contributing factor to an individual’s auto insurance bill.<sup>207</sup> Overall, the most expensive line item of an insured’s premium is frequently collision/comprehensive coverage, and the legislature, via Public Act 21, did nothing to address and/or limit how much insurance companies are charging for such coverage.<sup>208</sup>

## 2. Policyholders Will Have Less Access to Medical Providers

The cost shift to health insurance and Medicaid that will occur as individuals start purchasing lower levels of PIP coverage will inevitably force providers out of the market. For example, the “Medicare-style price controls,” as discussed above, will lead hospitals and rehabilitation facilities to generate millions of dollars less in yearly revenue, as no-fault insurance consistently compensates medical providers more than any other kind of insurance.<sup>209</sup> According to *Crain’s Detroit Business*, with the fee schedule for providers set to take effect on July 1, 2021, hospitals remain apprehensive about the possibility that private health insurance plans may not compensate them for treatment provided to auto accident victims who chose to entirely opt out of PIP coverage with their auto insurer.<sup>210</sup> Carolyn Wilson, the COO of Beaumont Health, informed *Crain’s* that Beaumont estimated that the fee schedule and PIP coverage options will lead to

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205. *Id.*

206. Egan, *supra* note 74.

207. Miller, *supra* note 1, at 6. In reality, the largest contributing factor to an insured’s bottom line premium amount is the collision/comprehensive coverage section of the auto insurance policy. *Id.* Although the new law targets the PIP portion of the policy, it institutes no mechanisms for reducing the most expensive portion of the policy—collision/comprehensive coverage. *Id.* With collision/comprehensive accounting for one-half to two-thirds of one’s premium amount, it is evident that the PIP options will only result in minimal savings in relation to the overall cost of an insured’s auto insurance policy. *Id.*

208. *Id.*

209. Reindl, *supra* note 194.

210. Chad Livengood, *Uncertainty Looms for Hospitals Under New Auto Insurance Law*, *CRAIN’S DET. BUS.* (June 2, 12:06 AM), <https://www.craisdetroit.com/health-care/uncertainty-looms-hospitals-under-new-auto-insurance-law> [<https://web.archive.org/web/20200629145321/https://www.craisdetroit.com/health-care/uncertainty-looms-hospitals-under-new-auto-insurance-law>].

“multiple tens of millions of dollars of loss in revenue for Beaumont Health.”<sup>211</sup> In addition, Wilson predicted that Beaumont, which maintains 8 hospitals, 145 outpatient facilities, and 38,000 employees, will have to resort to shutting down or downsizing a number of Detroit area trauma facilities in response to the new changes in the law.<sup>212</sup>

Further, even more detrimental to the provider industry will be the fifty-five percent fee schedule, which applies to provider rendered services not covered under Medicare.<sup>213</sup> The minimal fee schedule could lead to the demise of long-term institutions that provide specialized care to accident victims who have suffered trauma to their brain and spinal cord.<sup>214</sup> In reference to the fifty-five percent fee schedule, Phil Weaver, the CEO of the nonprofit, Hope Network, which maintains four neuro-rehabilitation locations in Michigan, stated: “We can[not] hire therapists for that. We can[not] have doctors and occupational therapists, speech therapists and regular physical therapists for that fee. There[ is] just no way to do it.”<sup>215</sup> Further, according to Erica Coulston, who started a recovery center in Southfield, Michigan and who is a survivor of an injury to her spinal cord, the fifty-five percent fee schedule functions as a “pay cut.”<sup>216</sup> Facilities such as Ms. Coulston’s, which provide injured individuals with specialized neurological care, must hire and employ a significant number of staff members, provide staff members with extensive training, and buy and maintain costly equipment.<sup>217</sup> According to Coulston, “As this fee schedule takes into [sic] effect and as providers adjust, there are many providers that will go out of business because they simply can[not] survive.”<sup>218</sup>

### *3. Policyholders Will Receive Less Care*

Even though individuals who choose to purchase a lower level of PIP coverage under the new law can turn to their health insurance, Medicare, or Medicaid once the PIP cap is met, such coverage will not be enough in many situations.<sup>219</sup> Although health insurance may cover certain things, such as an accident victim’s hospital bills and provider-sponsored rehabilitation, health insurance, Medicare, and Medicaid do not cover as

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211. *Id.*

212. *Id.*

213. Miller, *supra* note 1, at 4.

214. Kozlowski & Oosting, *supra* note 174.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. Reindl, *supra* note 194.

many provider services as no-fault insurance.<sup>220</sup> For example, services such as transportation to medical appointments, expansive hours of in-home attendant care, long-term speech and cognitive therapy, wage loss, and custodial care provided in residential rehabilitation facilities will not all be covered by an individual's health insurance, Medicare, or Medicaid.<sup>221</sup> Further, unlike no-fault insurance, which does not place such limits on an individual's care, the majority of health insurance policies cap the number of physical therapy appointments an injured individual can make at between thirty and ninety visits per year.<sup>222</sup> Thus, once the inevitable cost shift occurs after an individual's PIP cap is exhausted, an accident victim may be left without coverage for medical services and treatment necessary for that individual's survival.

#### IV. CONCLUSION

Public Act 21, although intended by the legislature to target policyholders and the insurance industry in general to ensure positive cost savings, actually more directly targets the medical industry in a negative manner; many of its provisions focus on medical providers rather than insurance companies. Instead of achieving cost savings, the Act will place an inordinate strain on the medical industry. The Act will cause medical providers to drop out of the market and leave auto accident victims worse off than they were under the old law, with fewer and lower quality options for the treatment of their injuries. A more practical alternative would have been for the legislature to adopt a fee schedule for *insurance companies* rather than to impose a fee schedule on medical providers since accident victims rely on medical providers for care and, in extreme cases, rely on medical providers to *sustain their lives*.

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220. *Id.*

221. *Id.*

222. *Id.*