



# **INSURERS SUING** **PROVIDERS: A NEW** **TREND?**

**Gerard V. Mantese  
Adele E. Ice  
Mantese and Rossman, P.C.  
1361 E. Big Beaver Road  
Troy, Michigan 48038  
248-457-9200**

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**Typical posture of no-fault litigation:**

**Injured Party vs. No-fault Insurance Company**

**Or:**

**Provider vs. No-Fault Insurance Company**

**The typical issues in these cases include:**

**Reasonable charge? Customary charge? MCL 500.3157**

**Is the subject care, recovery or rehabilitation reasonably necessary and related to the auto injury? MCL 500.3107**

## **New phenomenon:**

**Insurance companies are putting providers on trial.**

**Launching overall investigations of their practices.**

**Doing surveillance.**

**Auditing their charges and their coding.**

**Subjecting their entire operations to scrutiny.**

## **The New Horizon (of the Last Few Years):**

In Acme Insurance Company vs Provider X, Y, Z

Goal: Recovery of all No-Fault payments made over the past six years or more, as to all insureds

Affirmative litigation projects. Michigan, New York, New Jersey, and Minnesota.

Essentially, the insurance companies seek to recover years of payments made to providers, for care rendered to several different persons.

Goal: To recover sometimes hundreds of thousands, if not millions of dollars, and to damage or put out of business a targeted provider.

What are the insurance company's theories of recovery? Are they valid? What are the Provider's defenses? Counterclaims?

**If you find substantial discovery being directed to a provider, recommend that –**

- **Provider obtain legal counsel. This will be in patient's interest as well. Challenges to the care of a provider impede a patient's right to choose providers.**
- **Vigorously move for a protective order to avoid fishing expeditions – especially those unrelated to the care of the particular injured party at issue.**

## **CAUSES OF ACTION:**

- **violation of the No-Fault Act,**
- **fraud,**
- **mistake,**
- **unjust enrichment,**
- **breach of contract,**
  
- **Racketeer Influenced and Corrupt Organizations Act (RICO).**

# Count I – Violation of No-Fault Act

Essentially, at least four factors must be met for an item to be considered an “allowable expense” under the statute:

- (1) the charge must be reasonable and customary;
- (2) the treatment must be reasonably necessary;
- (3) the charge must be incurred; and
- (4) the treatment must be lawfully rendered.

*Nasser v. Auto Club Insurance Association*, 435 Mich 33, 50 (1990);  
MCL 500.3157

## ***Does An Insurer Have A Cause Of Action Against A Provider Under The No-Fault Act?***

Not clear.

The express language of the No-Fault Act does not provide for an insurance company to recover payments it made to a provider.

See *Adams v. Auto Club Insurance Association*, 154 Mich App 186, 194-195 (1986)(discussing the relationship between common law causes of action, such as payment by mistake of fact, and the No-Fault Act, and stating:

[A]s plaintiff correctly points out, the no-fault act is a derogation of the common law and ***there is no specific provision which permits reimbursement for overpayment.*** (emphasis added).

See also *Allstate v. Lewerenz supra* (affirming summary disposition in favor of provider under the No-Fault Act where Allstate challenged “allowable expenses” and sought recovery of payments it had already made; court did not engage in analysis of whether the claims were permitted under the Act).

## ***If There Is A Cause Of Action, Which Provisions Give Rise To It?***

**The requirement that charges be customary and reasonable.**

**The requirement that the services be reasonably necessary.**

**The requirement that the care be “lawfully rendered.”**

## ***The “Lawfully Rendered” Requirement***

**Because of the “lawfully rendered” requirement, insurers will often search for aspects of a provider’s practice which are arguably violative of various regulations or laws, e.g., Stark Laws.**

**MCL 500.3157 provides:**

**A physician, hospital, clinic or other person or institution lawfully rendering treatment to an injured person . . . may charge a reasonable amount for the products, services and accommodations rendered. The charge shall not exceed the amount the person or institution customarily charges for like products, services and accommodations in cases not involving insurance.**

# **Challenges might be based on:**

**Licensure of the persons providing the care**

**Lack of supervision of personnel**

**Discriminatory charges (charging an insurance company more)**

**Stark Law violations under federal or state law (referring to financially related practices)**

**Anti-kickback statutes**

**Fee splitting statutes.**

**Coding challenges (claims of fraud)**

**Corporate Form**

**Miller vs Allstate and PT Works, Inc., No. 259992 (May 31, 2007 Mich App), Publication. On Remand from the Supreme Court, 477 Mich 1062 (2007):**

**Holding: (1) Physical Therapists were not properly incorporated because, as licensed professionals, they were required to be incorporated only under the Professional Service Corporation Act; (2) However, the physical therapists themselves were “lawfully rendering treatment” because they were all licensed.**

**Court states: “We additionally note that MCL 500.3157 does not contain language providing that hospitals, clinics, and other institutions ‘lawfully organized, established, or incorporated’ may recover for their services, yet Allstate argues for just such an interpretation of the statutory language.”**

**Distinguished Cherry v State Farm Mutual Automobile Ins Co, 195 Mich App 316 (1992) because there, acupuncture services were provided by a nurse who was not licensed to perform acupuncture.**

**The Supreme Court may well grant an Application for Leave to Appeal in Miller.**

## ***Challenges to Charges That Are Allegedly Not Reasonable or Customary***

### ***A Customary Charge***

*A customary charge is one that is constant among insurance companies and private pay patients. No discrimination is permitted. See Advocacy Org. for Patients & Providers v. Auto. Club Ins. Ass'n., 257 Mich App 365, 377 (2003), affirmed by Michigan Supreme Court, 472 Mich 97 (2005).*

## ***What Is Reasonable? Not Defined.***

### ***Expert Testimony- CPA's? Similarly situated providers?***

In determining reasonable and customary charges, courts routinely consider expert testimony. *Kaplan v. State Auto. Mut. Ins.*, 2000 WL 33399801 (Mich App); *Nelson v. Detroit Auto. Inter-Insurance Exch.*, 137 Mich App 226 (1984); and *Green v. Fed. Kemper Ins. Co.*, 88 Mich App 364 (1979).

### ***Prior Consistent Charges Are Paid***

Further, in determining reasonable and customary charges, courts have also emphasized the importance of evidence of the provider's prior consistent charges to other payers, and the fact that other no-fault insurers pay 100% of the same medical charges. *Munson Medical Center v. ACIA*, 218 Mich App 375 (1996). In *Munson*, the trial court granted summary disposition in favor of a provider, a decision upheld by the Court of Appeals, as it held that the uncontested affidavit of the provider's representative was sufficient to meet the provider's burden.

## ***Prohibited Considerations***

### ***Worker's Compensation Fee Schedules***

In *Munson Medical Center v. ACIA*, 218 Mich App 375 (1996), the court held that an insurer could not legally utilize the worker's compensation fee schedule to determine its liability to pay allowable medical expenses:

### ***Medicaid Rates***

Independent medical auditing companies and No-Fault insurers cannot rely on what would have been paid by Medicaid, which is only available to the "medically indigent." *Johnson v. MI Mutual Ins. Co*, 180 Mich App 314 (1989).

### ***Blue Cross/Blue Shield Rates***

Insurers cannot rely upon what would have been paid under a Blue Cross Blue Shield contractual agreement because the No-Fault obligation is controlled by statute, not contract. *Hofmann v. Auto Club*, 211 Mich App 55, 113 (1995).

## ***The Above Are Not Even Relevant***

In *Mercy Mt. Clemens Corp. v. ACIA*, 219 Mich App 46 (1996), the Court made it clear that a No-Fault insurer is not only prohibited from arguing that its liability is limited to the amounts payable under workers compensation, Blue Cross, HMO, and other third party payments, but held that the amount of payments from these third party sources is not even relevant to what is a reasonable charge under Sections 3107 and 3157.

## ***Burden Of Proof***

***When The Provider Is The Plaintiff***, the burden of proof on whether a particular expense is reasonable and necessary lies with the *plaintiff*. *Nasser*, 435 Mich, at 49-50.

### ***When The Insurer Is The Plaintiff***

No case has decided this.

In *Allstate v. Lewerenz supra*, a case in which the insurer sued the provider to recover payments, the court declined to consider who had the burden of establishing right to recovery.

Instead, the court determined the outcome by analyzing the burden of proof in the context of motions for summary disposition.

### ***Doesn't The Plaintiff Always Have The Burden?***

It is logical that the burden would rest on the plaintiff regardless of who the plaintiff is.

# ***Statute of Limitations***

## ***1 -Year Under The No-Fault Act***

The courts are clear that regardless of how a plaintiff-insured couches her cause of action, recovery of No-Fault benefits is limited to one year from the time the suit was filed – MCL 500.3145.

***Grant v. AAA Michigan Wisconsin***, 272 Mich App 142, 149 (2006)(holding that the plaintiffs could not evade the one-year-back rule by attempting to recast claim for PIP benefits as a different cause of action).

***New Start Inc. v. Bristol West Insurance Co.***, 2007 WL 1207099, (Mich App) (plaintiff's claims for fraud and misrepresentation were precluded by the one-year-back rule because such claims, in substance, sought benefits under the No-Fault Act.

# ***An Insurer Is Permitted To Seek Recovery For Up To Six Years***

Case law suggests that the insurance companies are permitted to seek up to six years of reimbursement.

## ***Hofmann v. Auto Club Insurance Association***

In *Hofmann v. Auto Club Insurance Association*, 211 Mich App 55 (1995), chiropractors brought an action to recover No-Fault benefits for treatment of insureds and the insurer counterclaimed for reimbursement alleging that the payments were not due under the Act.

The court held that the one-year period of limitation embodied in Sec 3145(1) was not applicable to the counterclaims because that statute, by its terms, only applied to actions for recovery of benefits “payable under [the] chapter.” *Id.* at 116.

The court then concluded that because there were no other statute of limitations directly applicable, the general six-year limitation period in MCL 600.5813 applied to the counterclaims.

## **Fraud**

Insurance companies have also sought recovery for fraud against both the business entity and the individuals who own and operate the business entity.

## **A. *Elements Of Fraudulent Misrepresentation***

- (1) defendant made a material representation;
- (2) it was false;
- (3) when he made it, he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion;
- (4) he made it with the intention that it should be acted upon by plaintiff;
- (5) plaintiff acted in reasonable reliance upon it; and
- (6) he thereby suffered injury.

*Temborius v. Slatkin*, 157 Mich App 587, 596-597 (1986).

## ***Individuals Are Liable For Their Own Torts***

A corporate officer is liable for torts committed by him personally, regardless of piercing. See *In re Interstate Agency*, 760 F2d 121, 125 (6th Cir 1985); *Allen v. Morris Building Co.*, 360 Mich 214, 218 (1960).

## ***Allegations Must Be Pled With Particularity***

MCR 2.112 (B) requires that, “[i]n allegations of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity.”

## ***Defense: The Insurer Had The Means To Ascertain The “Truth”***

Where a defrauded party has the means to ascertain the true state of affairs, but instead ignores such means, no fraud can be found as a matter of law. *Shuler v. American Motors Sales*, 39 Mich App 276, 279-280 (1972).

## Mistaken Payment

Another theory of recovery alleged by insurance companies is payment by mistake of fact or mistaken payment.

Payments of money made under a mutual mistake of material fact, may be recovered. *Madden v. Employers Insurance of Wausau*, 168 Mich App 33 (1988); *Montgomery Ward & Co v. Williams*, 330 Mich 275, 285; 47 NW2d 607 (1951); *Hofmann v. Auto Club Ins Ass'n*, 162 Mich App 424, 428 (1987); *Auto-Owners Insurance Comp. v. Fabian*, 2000 WL 33529723 (Mich App 2000).

## ***Mistake of Fact Defined***

“Mistake of fact” is a misunderstanding, misapprehension, error, fault, or ignorance on the part of both parties, of a material fact; a belief that a certain fact exists when in truth, and in fact, it does not exist.

## ***Mistake Of Law Will Not Suffice***

The Michigan Supreme Court has held that payments made under a mistake of law are not recoverable. In *Montgomery Ward & Co. v. Williams*, 330 Mich 275, 285 (1951) the Court held:

The rule is well settled that, where money has been voluntarily paid with full knowledge of the facts, it cannot be recovered on the ground that the payment was made under a misapprehension of the legal rights and obligations of the person paying.

## ***Application To The No-Fault Act***

*See also Adams v. Auto Club Ins. Ass'n.*, 154 Mich App 186, 195 (1986) (affirming the trial court's order that the insured reimburse Auto Club where Auto Club had been overpaying the insured based on a miscalculation of work-loss benefits). The recovery of money paid by mistake is a common law cause of action that was not abrogated by the no-fault act. *Id.*

## Defense: show full knowledge of circumstances

A voluntary payment made with full knowledge of all the circumstances upon which it is demanded, cannot be recovered back absent artifice, fraud, or deception on the part of the payee, or duress of the payor. *Montgomery Ward v. Williams*, 330 Mich 275, 284-85 (1951).

## **Unjust Enrichment**

The insurance company may also seek recovery based on the theory of unjust enrichment. Unjust enrichment is similar to a cause of action for mistaken payment.

### **A. *Elements***

The elements of unjust enrichment are:

- (1) receipt of a benefit by a defendant from the plaintiff; and
- (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant.

*Barber v. SMH, Inc.*, 202 Mich App 366, 375 (1993).

## ***No Unjust Enrichment When An Express Contract Exists***

A contract cannot be implied in law where an express contract covering the same subject matter is in force between the parties. *HJ Tucker and Assoc., Inc. v. Allied Chucker and Engineering Co.*, 234 Mich App 550, 573 (1999).

## ***Determining Whether The Provider Was Unjustly Enriched***

Courts are to consider “all relevant circumstances,” including any detrimental reliance by the defendant. *Michigan Educ Employees Mut. Ins. Co. v. Morris*, 460 Mich 180, 199 (1999).

## ***Application In Insurer v. Provider Context***

Where the insurer was extensively involved in reviewing and approving the provider's services and accommodations before they were rendered, the insurance company may fail to state any reason why a court of equity should grant its claim for relief .

Judge Rudy Nichols dismissed a claim by Allstate for unjust enrichment against a health care provider:

[T]his Court is at a total loss as to why a court of equity should aid a party who sat on its rights and willingly allowed the collection to go on for so long and here, over a decade. . .

(Allstate v. Ruben, No. 02-0415888NF, OCCC).

## ***Breach of Contract***

**Plaintiff must establish all of the elements of a breach of contract claim:**

- (1) competency of parties;**
- (2) proper subject matter;**
- (3) legal consideration;**
- (4) mutuality of agreement; and**
- (5) mutuality of obligation.**

***Thomas v. Leja*, 187 Mich App 418, 422 (1991).**

## ***Establishing A Contract***

**Insurance companies may get creative in establishing the existence of a contract. The insurance company may rely on the following:**

- (1) the No-Fault Act;**
- (2) course of performance; and/or**
- (3) correspondence, proposals, e-mails and/or oral statements.**

**Insurer must prove breach, and resulting damages.**

### ***Damages***

**The party asserting a breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate result of the breach. *In re F Yeager Bridge Culvert Co*, 150 Mich App 386, 401 (1986).**

## **Damages As to All Counts**

### ***Damages Must Be Established With Reasonable Certainty***

A party bringing a claim has the burden of proving its damages with reasonable certainty. *Hofmann v. Auto Club Ins Ass'n*, 211 Mich App 55 (1995).

### ***Damages Based On Speculation Are Not Permitted***

It is well-settled that a jury may not “guess, speculate, or conjecture on the amount of damages.” *The Vogue v. Shopping Centers, Inc.*, 402 Mich 546, 551 (1978).

Damages based on speculation or conjecture are not recoverable. *Health Call v. Atrium Health Care*, 268 Mich App 83, 96 (2005)

***A Directed Verdict Or A Judgment  
Notwithstanding The Verdict May Be Appropriate***

In *Richards v. FC Matthews & Co*, 256 Mich 159, 164 (1931), the Court affirmed a JNOV, holding:

It was incumbent upon the plaintiff to give sufficient data, facts and circumstances from which the jury might find the actual loss, if there was one. The burden of proof to establish the loss was upon plaintiff. This he did not sustain.

## ***Application In No-Fault Cases***

### ***Liability For Some Does Not Mean Liability For All***

In *Nasser v. Auto Club Association*, 435 Mich 33, 51 (1990) the Court held that the “fact that the defendant may be liable for some of the expense . . . does not necessarily establish its liability for all expenses.  
..”

### ***A JNOV Is Appropriate If Jury Is Required To Speculate***

In *Kallabat v. State Farm Mutual Auto Ins. Co*, 256 Mich App 146, 150 (2003) the jury was required to determine the allowable No-Fault expenses which the insurer could recover and the court held

In determining damages for allowable expenses, the jury may not be allowed to speculate concerning the cost of a particular procedure or service, and a trial court should grant a motion for judgment notwithstanding the verdict if the jury was permitted to engage in speculation.

## **Consider Whether A Counterclaim Is Appropriate**

### **A. *Violation Of The No-Fault Act***

As discussed in detail above, an insurer is liable for the reasonable and necessary expenses incurred in the care and treatment of the insured. Therefore, if the insurer fails to pay those expenses, a provider may challenge the insurer's failure as a violation of the No-Fault Act. *Advocacy Organization for Patients v. Auto Club Insurance Association*, 257 Mich App 365, 380 (2003).

See discussion above regarding burden of proof, statute of limitations and establishing that charges are reasonable and necessary.

### **B. *Declaratory Judgment Counterclaim***

It may be possible to file a declaratory judgment counterclaim regarding the charges associated with an insured. The judgment would declare the charges to be reasonable and necessary, and would thus require the insurer to continue to pay the charges on a prospective basis.

### **C. *Tortious Interference With A Business Relationship***

In order to properly plead tortious interference with a business relationship, the Complaint must plead the following elements:

- a. the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract,
- b. knowledge of the relationship or expectancy on the part of the defendant interferer;
- c. an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy; and
- d. resulting damage to the party whose relationship or expectancy was disrupted.

*Health Call of Detroit v. Atrium Home & Health Care Services, Inc.*, 268 Mich App 83, 90 (2005).

The plaintiff must also prove wrongful conduct or malice. See *Advocacy Organization for Patients & Providers v. Auto Club Ins. Ass'n*, 257 Mich App 365, 383 (2003).

## ***D. Defamation***

It may be possible to file claim for defamation if company made statements to a third party (such as the insured) that harmed the provider's reputation, or deterred other insurers or patients from dealing with that provider.

A communication is defamatory if, under all the circumstances, it tends to so harm the reputation of an individual that it lowers the individual's reputation in the community or deters others from associating or dealing with the individual. *Mino v. Clio School Dist.*, 255 Mich App 60, 72 (2003).

In order to establish a claim of defamation, a plaintiff must show:

- a. a false and defamatory statement concerning the plaintiff;

Not all defamatory statements are actionable. If a statement cannot be interpreted as stating actual facts about the plaintiff, it is protected by the First Amendment. *Ireland v. Edwards*, 230 Mich App 607, 614 (1998). A statement must be provable as false to be actionable. *Id.*

- b. an unprivileged publication to a third party;

The element of publication requires only that the statement be published to a third party; a release to the media is not required. *Colista v. Thomas*, 241 Mich App 529, 538 (2000).

- c. fault amounting to at least negligence on part of the publisher;

- d. either actionability of the statement irrespective of special harm (defamation per se); or the existence of special harm caused by the publication (defamation per quod).

Defamation per se is found where the words spoken are false and malicious and are injurious to a person in his or her profession, business or employment. *Minnis v. McDonnell Douglas Technical Services Co.*, 162 Fsupp2d 718 (ED Mich 2001)(applying Michigan law).

*Mino*, 255 Mich App at 72.

## ***Defenses***

### ***a. Truth***

Recovery cannot be predicated upon defamatory charges which are proven to be true. *Harrison v. Arrow Metal Products Corp.*, 20 Mich App 590 (1969).

### ***b. Privilege***

Statements made during the course of a judicial proceeding are privileged and are not actionable. *Couch v. Schultz*, 193 Mich App 292, 294 (1992).

Therefore, it is necessary to allege that there were statements made apart from the allegations in the Complaint.

### **3. *Establishing Damages***

#### **a. *Actual Damages***

Except as provided in MCL 600.2911(b) (discussed below), the plaintiff is entitled to recover only the actual damages which he or she suffered in respect to his or her property, business, trade, profession, occupation or feelings. MCL 600.2911(2)(a).

When the plaintiff states a claim for defamation per se, damages are presumed regardless of any showing of economic damages or actual malice. *See Burden v. Elias Brothers Big Boy Restaurants*, 240 Mich App 723 (2000)(holding that the allegations by uniformed transit police officers that employees had falsely accused them, in front of other customers, of leaving the restaurant without paying for their meals, involved the imputation of a criminal offense, and thus stated a claim for defamation per se, damages for which were presumed).

## ***Exemplary And Punitive***

Exemplary and punitive damages shall not be recovered for libel unless the plaintiff, before instituting his or her action, gives notice to the defendant to publish a retraction and allows a reasonable time to do so. MCL 600.2911(2)(b).

## ***Statute Of Limitations***

The period of limitations is one year for a person charging libel or slander. MCL 600.5805(9).

## **Bottom Line:**

- **Be on guard for claims against providers. This is a new horizon for health care litigation.**
- **Before any no-fault suit is filed, provider should realize that its entire operations as it applies to that individual are opened up for scrutiny and attack.**
- **Any provider submitting substantial no fault claims should consider a health care audit.**
- **Object to discovery that is overbroad and represents a fishing expedition into provider's operations. Advise provider to obtain counsel.**
- **Consider counterclaims if an affirmative litigation project is filed.**