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Covenant v State Farm: Michigan Supreme Court Hears Oral Arguments

By: Mark C. Vanneste **December 9, 2016**

On December 7, 2016, the Michigan Supreme Court heard oral arguments on *Covenant v State Farm*, a case in which no-fault carriers and their defense counsel have become all too familiar. Counsel for State Farm began by arguing that there was (1) no direct cause of action for a provider against a no-fault carrier; (2) that a provider's claim is derivative of the injured party's claim and therefore barred if the benefits have been released by the injured party; (3) the "some other person" language of Section 3112 does not apply to providers; and (4) that the procedure outlined in 3112 is not mandatory. Counsel for State Farm also mentioned that the No-Fault Act was intended to limit lawsuits arising from an accident and, instead, it has resulted in the opposite effect - there are now multiple lawsuits arising from an accident.

Chief Justice Young, typically a conservative jurist, asked multiple questions to both counsel for State Farm and counsel for Covenant and was the most verbose justice. He began by asking how it is that a bill from a provider can somehow be converted into an insurance benefit itself as opposed to being something paid from an insurance benefit. He also seemed to point out that the provider has an agreement with the injured person and the injured person has an agreement with the insurance company; implying that the provider does not have an agreement directly with the insurance company.

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When the Court of Appeals issued its opinion on *Covenant v State Farm* on October 22, 2015, it changed PIP litigation in a significant way. Since then, carriers have been forced to file what has been referred to as a *Covenant* motion, 3112 motion, or a Motion for Apportionment of Settlement Proceeds to avoid potentially being sued by a provider for a bill released by the claimant.

Over a year after the *Covenant* opinion, on December 7, 2016, the Michigan Supreme Court heard oral arguments on this important case. While we may not see a decision for a number of months, the Justice's inquires and comments give us some insight into the concerns of the state's highest court.

In regard to the language of Section 3112, Chief Justice Young characterized it as applying to two classes of persons: injured persons and, in the case of the death of the injured person, the injured person's dependents. On more than one occasion he described the statute as providing a right of statutory interpleader for dependents in the case of the injured person's death.

Chief Justice Young also attempted to draw a distinction between the way an accident-related injury is handled by a provider and the way that a non-accident-related injury is handled by a provider. In other words, he sought explanation for why it was being argued that providers have a direct cause of action against insurers when the injury arises from an accident when they do not have that same right against another third-party payer for a non-accident-related injury.

Justice Bernstein, elected in 2015 as a democrat, was also an active participant in the hearing, although he only asked questions to counsel for State Farm and was silent during Covenant's oral argument. He seemed to focus on the "for the benefit of" language in Section 3112 in asking why the provider should not be considered "some other person" since that interpretation would be "for the benefit of" the injured person. He inquired whether abolishing the provider's direct cause of action would simply turn hospitals against patients and referred to the abolishment of provider suits as an "end run" for insurance companies who would no longer have to deal with providers and would only be obligated to deal with the injured person.

Justice Larson inquired whether counsel for State Farm foresaw any issue with taking away a provider's cause of action considering that emergency departments, by law, have no choice whether to provide treatment. She differentiated an analogy in which a roofer who repairs a person's roof after damage from a fallen tree does not have a direct cause of action against the homeowner's insurance company with the fact that the roofer has a choice whether to fix the roof.

There was also discussion and questioning from multiple justices regarding the assignment of insurance benefits from the injured person to the provider. There was clearly some agreement among the justices that an assignment would allow for a direct cause of action by the provider against the no-fault carrier but also some concern that such a remedy would not alleviate the practical concerns made by the involved parties.

However, there were concerns regarding whether an assignment of benefits could be challenged as having been made under duress. Counsel for Covenant correctly noted that Section 3143 prohibits the assignment of future benefits; an assignment made on presentation to the emergency department would probably be unenforceable. Therefore, the assignment would have to be obtained from the injured person after treatment; sometimes an impossible or very difficult feat.

Judge Viviano asked about the last portion of Section 3112 regarding payments after the death of the injured person. In asking whether the legislature "made a mistake" by including this provision, Justice Viviano may have been implying that it would not have been included if Chief Justice Young's interpretation of the statute dealing with injured persons and dependents only were not the case.

Lastly, Judge McCormick wondered how the language "or for the benefit of" creates a direct cause of action for providers. Instead, she seemed to be of the opinion that the language created an "option" for insurance companies to pay a provider directly if it chose to do so, but did not create a right for providers.

While the Justices' questions can, at times, give some indication as to how the Court is leaning, this particular case is complicated and involves numerous moving parts and interested parties. Any attempt to predict the outcome would be pure speculation. It will be interesting to see how the Supreme Court deals with these issues. We may not know for a number of months but a decision is likely to come before the term ends in July, 2017.

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