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# First-Party Litigation

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Exhibit 6.2, the 2014 Economics of Law Practice in Michigan Attorney Income and Billing Rate Summary Report, is reprinted by permission of the State Bar of Michigan.

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- 6.34 M Civ JI 35.04—No-Fault First-Party Benefits Action: Statutory Interest

- 6.35 M Civ JI 67.01—Form of Verdict: No-Fault First-Party Benefits Action

#### Exhibits

- 6.1 State Bar Ethics Opinion C-223
- 6.2 State Bar of Michigan's Economics of Law Practice Attorney Income and Billing Rate Summary Report
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### I. Overview

§6.1 After interviewing the client, identifying the insurer, and determining the types of first-party benefits that may be recoverable, an initial step in first-party litigation is providing notice to the insurer of a claim. The No-Fault Act has several different provisions relating to notice of claims: MCL 500.3141 specifies what is required for notice of loss but does not provide for sanctions against an insured who fails to give notice. Almost every no-fault carrier has its own application for benefits; submitting the form constitutes proper notice. MCL 500.3174 designates the required notice of claim through the assigned claims plan (which arises when no insurance is available to cover the claim or when no insurer can be identified). See §6.13 for further discussion of the notice requirements.

The most important notice provision is the statute of limitations section, MCL 500.3145. There is a one-year limitation of action unless the claimant gives the insurer written notice of the accident within one year of the accident or the insurer makes payment within one year. If the claimant gives the insurer written notice or the insurer makes a payment within one year, a suit can be started within one year of the most recent expense incurred. The plaintiff is barred from recovering no-fault benefits for any portion of the loss incurred more than one year before the date the suit was commenced; this is called the one-year-back rule. The statute of limitations may be tolled by certain circumstances, but the courts have refused to apply the tolling provisions to the one-year-back rule. See §§6.15–6.19.

Actual attorney fees may be recovered under MCL 500.3148(1) when a no-fault insurer fails to pay no-fault benefits or delays paying the benefits. As a prerequisite for an award of actual attorney fees, the claimant must demonstrate that the insurer has unreasonably refused to pay a claim or unreasonably delayed paying the claim when the benefits are overdue. Under MCL 500.3142(2), a benefit is overdue if it has not been paid within 30 days after reasonable proof has been supplied to the insurer. Thus, the claimant must establish that reasonable proof has been supplied, that 30 days have elapsed since the submission of the proof, and that the insurer refused to pay or has unreasonably delayed paying the claim. See §§6.30–6.33.

MCL 500.3142(3) provides that an overdue payment for first-party benefits bears simple interest at the rate of 12 percent per year. An overdue payment is one

that is not paid within 30 days after an insurer receives reasonable proof of the claim. MCL 500.3142(2). See §6.36.

Unless the judgment is rendered on a written instrument evidencing indebtedness with a specified interest rate, interest on a judgment is calculated at the fluctuating six-month statutory interest rate. MCL 600.6013(7)–(8). Insurance and other contracts that do not evidence indebtedness and do not specify a rate of interest are not treated as written instruments. Some courts have combined the 12 percent interest rate in the No-Fault Act and the applicable interest rate in MCL 600.6013. See §6.36.

Plaintiff's counsel should consider a number of factors when deciding whether to file a first-party lawsuit. The need for legal action may arise out of a factual dispute between the adjuster and the claimant regarding the amount of benefits owed, the need for those benefits, or whether the benefits are provided for by law. Litigation may be necessary when a medical examination scheduled by the no-fault insurer finds no continued disability or no necessity or relationship of medical care resulting in the termination of benefits. Other common reasons for litigation are factual disputes over the nature of the wage loss benefits that are due; what items may be deducted; how long the wage loss or other income item should be paid; and what medical care is accident-related, reasonable, or necessary. The suit may also be necessitated by the one-year-back rule in MCL 500.3145 and the need to file a suit to protect the claim while negotiations continue. Sometimes genuine issues of law, unresolved by the courts, require filing a suit to recover certain benefits.

As the defense counsel, you will often receive the no-fault first-party complaint the day before the answer is due. Generally the plaintiff's counsel will agree to allow you to have a 30-day extension to file the answer. The extension should be confirmed by an agreement or a letter. The initial 30-day period is an extremely important time in which to identify the issues, pay undisputed claims, preserve any affirmative defenses, and initiate discovery. Independent medical examinations (IMEs), notices to produce, interrogatories, and, where appropriate, partial summary disposition on issues not reasonably in dispute will help the insurer tie down the benefits in dispute and identify the issues in the lawsuit.

## II. Initial Client Meeting

### A. In General

§6.2 As a no-fault attorney, you will likely rely on advertising and referrals to obtain clients. Be aware, however, that legislation was passed in Michigan to address concerns of attorneys soliciting business from recent motor vehicle accident victims. It is a misdemeanor to contact an accident victim, or a member of his or her family, with “a direct solicitation to provide a service” for 30 days after the accident. MCL 750.410b. In this context, an accident victim is someone the contacting person “knows has sustained a personal injury as a direct result of a motor vehicle accident.” MCL 750.410b(1). The prohibition is inapplicable if (a) the victim or his or her immediate family member requested the contact or (b) the contacting person is an employee or agent of an insurance company and contacted

the individual or his or her family member on behalf of the insurance company to adjust a claim. MCL 750.410b(1)(a)–(b). Note that the second exemption is limited to adjusting the claim; it does not apply if the adjuster refers the individual or family member to an attorney. MCL 750.410b(1)(b). It is also a misdemeanor to access a motor vehicle accident report for solicitation purposes for 30 days after the report was filed. MCL 257.503. To obtain an accident report during the 30-day period, you must file a statement acknowledging that you are prohibited from using the report for solicitation. MCL 257.503(1).

At your initial client meeting, you should conduct a detailed interview using an intake form and checklists to ensure that you have all of the needed information. See forms 6.1, 6.2, and 6.3. It is essential that you gather the appropriate information to assist your client in obtaining all benefits and understanding all causes of action available to him or her arising out of a motor vehicle accident. Locating all no-fault and health insurance policies that may apply to a no-fault claim and compiling the factual information about the accident, the injuries, and the resultant economic losses are crucial for the plaintiff's attorney to thoughtfully evaluate the client's situation. Frequently the initial interview gives you an opportunity to fill out the no-fault application and send it promptly to the no-fault carrier with a letter of retention. See §6.13 for further discussion of the application for benefits.

Once you have decided to take a case, it is helpful to use a tickler sheet for the new file. The tickler sheet provides a quick way of listing the clients and the various litigation deadlines. The sheet also provides the basic information for more sophisticated tickler systems that might be placed on a computer, such as client lists, statutes of limitations, witness and discovery cutoff dates, and case evaluation and trial dates. See form 6.4. You should note that the intake form (form 6.1) and the tickler sheet (form 6.4) ask for social security numbers. Federal and state laws may impact the handling of these records. See 16 CFR 682.3 (regarding disposal of consumer report information and records, including taking reasonable measures to protect against unauthorized access or use of information) and MCL 445.81 et seq. (requiring a privacy policy regarding social security numbers).

At the initial interview, you should give your client a handout describing the various no-fault benefits available, the limitation of actions, and the notice of claim requirements (see form 6.5). The handout can help your client understand the No-Fault Act. It also serves as a shorthand method of documenting that you have explained the statute of limitations and the one-year-back rule, MCL 500.3145(1), and given your client a general description of no-fault benefits. Providing a client handout helps prevent later malpractice claims or criticism that such topics were not discussed. A systematic explanation of no-fault benefits and their limitations, as well as third-party limitations, helps you and your client understand and appreciate this difficult and confusing area of law. The Department of Insurance and Financial Services also has a guide that provides a basic explanation of Michigan's no-fault insurance.

At the initial meeting you should also secure from your client a complete description of how the accident occurred. In addition, you should gather informa-

tion on all medical treatment the client has received, along with the names and addresses of all treating physicians and medical facilities visited as a result of the accident. Proper evaluation of a first-party benefit claim involves additional extensive inquiry into a variety of issues, including the following:

1. whether no-fault law applies to the claim
2. the applicability of all automobile insurance policies in the household (including declaration sheets, policies, and riders)
3. whether any no-fault exclusions are involved
4. whether other health and accident policies are available for coverage and set-off
5. wage loss information for claims, including overtime, promotions, and change in employer
6. replacement services
7. the scope of no-fault medical coverage, including coverage for expenses for mileage, attendants, vans, appliances and orthopedic devices, home modifications, and outstanding hospital and physician charges
8. the availability of other insurance coverage, such as uninsured and underinsured motorist coverage

You should discuss the no-fault first-party benefits with your client realistically, outlining the nature and duration of the benefits and any difficulties that may arise in securing those benefits. The nature of no-fault benefits—including occupational and vocational rehabilitation, aide attendance, mileage expenses, replacement services, and loss of income from other sources of employment—may come as a pleasant surprise to the no-fault claimant. Such assistance and guidance benefit the claimant and generate a meaningful, comfortable relationship between you and your client during the pursuit of first-party no-fault benefits.

When an attorney is retained to handle a first-party matter, usually wage loss or medical benefits (or both) are unpaid. For most people with limited savings, the immediate short-term economic consequences are catastrophic. A plaintiff's lawyer should keep that in mind and promptly take the necessary steps to either process the benefits and get them paid or to file suit against the insurer. One of the most frequent complaints the author (a plaintiff's attorney) hears is that clients retain attorneys for no-fault first-party claims, and it appears to the client that nothing is done on the claim for many months. The client needs to see action. A lawsuit may get attention that resolves the matter. Sometimes a lawsuit moves the file to a more responsive adjuster or lawyer. Furthermore, the plaintiff's attorney should not hide his or her diligent and sterling efforts from the client. The client should be copied on all inquiries or steps taken to process the claim. Attorneys should also send to the client responses or information (including medical records or reports) as they are received. The attorney's prompt undertaking of what the client has been promised and taking the necessary steps to get the benefits paid will properly direct the client's wrath to the no-fault insurer rather than his or her attorney if the matter is not resolved.

Soon after the initial interview, you should obtain the police report, take witness statements, inspect the scene of the accident, and take other investigative steps. The details of the accident, the injuries, and the disability are important in evaluating a possible tort lawsuit. See chapter 7 for a complete discussion of third-party actions.

### **B. Identifying the Proper Insurer**

**§6.3** The law of no-fault priorities (see chapter 3) may allow the claimant to file a claim under a no-fault policy in the household other than the policy covering the vehicle involved in the collision or the insured's current policy. Selecting the best of several no-fault policies may result in substantially improved benefits to a claimant. You should secure all information on other private health and accident insurance coverages, including copies of the policies and declaration sheets. Look carefully for any riders, policy definitions, or designations that would classify the claimant as a named insured for purposes of no-fault benefits on policies in which benefits otherwise were not expected.

Often the no-fault claimant erroneously seeks no-fault benefits from a no-fault policy that is less comprehensive than other policies. A thorough search of all applicable insurance policies may disclose an uncoordinated no-fault policy and an uncoordinated health insurance policy that cover the no-fault claimant. This discovery could provide tremendous duplicate benefits. See §§4.70–4.82 for discussion of the coordination of insurance policies.

### **C. Determining the Types of Benefits Recoverable**

#### **1. In General**

**§6.4** The benefits presented in the following sections are merely a sampling of the areas of income claims that a thoughtful and creative attorney must pursue when developing a no-fault claim. A hasty initial client conference may well fail to disclose economic losses that the claimant has a legal right to recover. Therefore, it is imperative that when interviewing a no-fault claimant you pursue not only the scope of no-fault and health and accident policies but also the scope of applicable benefits recoverable for the injured person or his or her survivors. See chapter 4 for a thorough discussion of first-party benefits. You should also note that effective March 31, 2003, there may be a \$500,000 cap on personal protection insurance (PIP) benefits recoverable from the no-fault insurer of an out-of-state resident who, when injured, was (1) an occupant in an out-of-state vehicle not registered in Michigan, (2) a pedestrian, or (3) a motorcycle occupant. MCL 500.3163(4). See §9.10.

#### **2. Work Loss Benefits; Mitigation of Damages**

**§6.5** You should question the claimant thoroughly about his or her current employment as well as the effect the injuries will have on future employment prospects and promotion potential. Benefits are paid for the income that the individual would have earned and are not necessarily tied to what he or she earned in the past. Accordingly, information about missed promotions, lost bonuses, overtime, raises, and job changes may reveal items of income loss that are easily