STATE OF MICHIGAN
IN THE 30TH JUDICIAL CIRCUIT FOR INGHAM COUNTY

ELLEN M. ANDARY, a legally-incapacitated adult, by and through her Guardian and Conservator, MICHAEL T. ANDARY, M.D., and PHILIP KRUEGER, a legally-incapacitated adult, by and through his Guardian, RONALD KRUEGER, and MORIAH, INC. d/b/a EISENHOWER CENTER, a Michigan corporation,

Plaintiffs,

v

USAA CASUALTY INSURANCE COMPANY, a foreign corporation, and CITIZENS INSURANCE CORPORATION OF AMERICA, a Michigan corporation,

Defendants.

ORDER REGARDING DEFENDANTS' MOTION TO DISMISS

CASE NO. 19-738-CZ

HON. WANDA M. STOKES

At a session of said Court
held in the city of Mason, county of Ingham,
this 13 day of November, 2020.

PRESENT: HON. WANDA M. STOKES

This case comes before the Court for a hearing on Defendants USAA Casualty Insurance Company and Citizens Insurance Company of America's Motion to Dismiss Plaintiffs Complaint for Declaratory Relief pursuant to MCR 2.116(C)(8) for failure to state a claim for which relief can be granted. The Plaintiffs complaint, with Counts I through XVIII, seeks a declaration under MCR 2.605 that MCL 500.3157(2), (7), and (10), as amended by Public Acts 21 and 22 of 2019, implicate constitutionally protected fundamental rights in violation of the Michigan Constitution.

Plaintiffs ask that Defendants be prohibited from enforcing these new provisions as to any Michigan medical provider.

The Court received nine briefs of Amicus Curiae submitted by various interested Michigan entities and their unique arguments are addressed herein.

FACTS/BACKGROUND

This action is being brought by Plaintiffs Ellen M. Andary ("Andary") and Philip Krueger ("Kruger") represented by their Guardians Michael Andary, MD and Ronald Krueger, respectively. Andary and Krueger are legally incapacitated adults who suffered traumatic brain injuries arising from separate motor vehicle accidents in 2014 and 1990 respectively. They were both passengers in a motor vehicle and sustained serious injuries which implicates the Michigan No-Fault Statute. Andary receives in-home attendant care administered by her physician-husband, family, and friends. Krueger resides at the Eisenhower Center, where he receives long-term care and rehabilitation services. Moriah, Inc., d/b/a Eisenhower Center is also a Plaintiff in this case.

The Eisenhower Center is a care facility that provides inpatient living accommodations to individuals suffering from traumatic brain injuries. Approximately 130 of the facility's 156 patients are motor vehicle accident victims whose care is funded by no-fault personal protection insurance ("PIP") benefits under 3107(1)(a) of the Michigan No-Fault Act. The specifics of the care provided by Eisenhower are detailed in Plaintiff's brief.

The Defendants in this action are USAA Casualty Insurance Company ("USAA") and Citizens Insurance Company of America ("Citizens"). USAA and Citizens are the insurers providing automobile coverage and required benefits to the various plaintiff's under the Michigan No-Fault Act.

The Michigan No-Fault Act ("No-Fault Act" or "the Act") MCL 500.3101 *et seq.*, was originally adopted on October 1, 1973. On May 30, 2019, the Michigan Legislature enacted amendments to the Act as Public Act 21 ("PA 21") and 22 ("PA 22"), which became effective on June 11, 2019. Some of the changes went into effect on June 11, 2019 and additional changes, which are the subject of this dec action, will go into effect on July 1, 2021. The new changes include limitations in family provided attendant care services rendered by family-members and limitations on no-fault insurer's obligation to reimburse rehabilitation centers' and other care providers' expenses rendered for the care, recovery, or rehabilitation of motor vehicle accident victims by adopting fee schedules. The fee schedules are based on Medicare compensation rates, or, where Medicare does not cover a service, a minimum 45% reduction from the rate the provider charged for the service as of January 1, 2019. These limitations are expected to apply to individuals injured in motor vehicle accidents prior to June 11, 2019.

PROCEDURAL POSTURE

Plaintiff's eighteen-count Complaint for Declaratory Judgment alleges that the statutory changes to the No-Fault Act violate the Michigan constitution by interfering with rights vested under contracts that became executory before the amendments were enacted, by depriving insured parties of their privacy and bodily integrity rights without due process of law, and by treating patients and providers differently based on whether Medicare covers the service at issue, in violation of the Michigan constitution's equal protection guarantees.

In lieu of an answer, Defendants filed the instant motion to dismiss under MCR 2.116(C)(8) asserting that Plaintiffs have failed to state a claim for which relief can be granted. Defendants four primary arguments are: (1) that the No-Fault reform is constitutional because it bears a

reasonable relationship to a permissible legislative objective; (2) that Plaintiffs' claims related to the Right to Privacy, Right to Bodily Integrity, Liberty Interest in Providers' Fees, and Property Interests fail as fundamental rights; (3) that the purported constitutional violations related to the Contract Clause are invalid because PIP benefits are governed by the No-Fault Act, rather than by contract; and (4) that Plaintiffs lack standing to assert the constitutional rights of others.

In addition to the parties' motions, the Court reviewed the nine briefs of Amicus Curiae submitted by various interested Michigan entities. The five briefs in support of Defendants' motion were submitted by the American Property and Casualty Insurance Association, National Association of Mutual Insurance Companies, Director of the Department of Insurance and Financial Services (DIFS), City of Detroit, and Michigan Catastrophic Claims Association. DIFS also requested oral argument, which was granted by the Court. The four briefs filed in opposition to Defendants' motion were submitted by the Michigan State Medical Society with the Michigan Osteopathic Association and Michigan Association of Chiropractors, the Brain Injury Association of Michigan; the Michigan Brain Injury Provider Counsel, and the Coalition Protecting Auto No-Fault.

STANDARD

A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the claim on the pleadings alone," taking as true "all well-plead facts and reasonable inferences drawn therefrom," so as "to determine whether the plaintiff has stated a claim on which relief may be granted." *Spiek v DOT*, 456 Mich 331, 337; 572 NW2d 201, 204 (1998); *Markis v Grosse Pointe Park*, 180 Mich App 545, 551; 448 NW2d 352, 355 (1989). Such motions denounce a claim's legal sufficiency and require the court to consider evidence only from the pleadings. MCR 2.116(G)(5); *Maiden v*

Rozwood, 461 Mich 109, 120 (1999). Further, the factual allegations are construed in a light most favorable to the nonmoving party. *Haywood v Fowler*, 190 Mich App 253, 256; 475 NW2d 458, 460 (1991). "The motion must be granted if no factual development could justify the plaintiffs' claim for relief." *Spiek v DOT*, 456 Mich 331, 337; 572 NW2d 201, 204 (1998) Stated in the alternative, the motion should be denied unless the claims are "so clearly unenforceable that no factual development could possibly justify recovery." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152; 934 NW2d 665 (2019); *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004) (Emphasis added).

ANALYSIS

Th Plaintiffs have filed an eighteen-count complaint which comprises three constitutional arguments that the Court will be addresses separately. Counts II, V, VIII, XI, XIII, and XV assert substantive due process violations. Counts III, VI, IX, XII, XIV, XVI, and XVIII assert equal protection violations, and Counts I, IV, VII, X, and XVII allege contract clause claims in violations of the Michigan constitution. Additionally, the Court will address the issues of standing as it relates and ripeness as they relate to Counts XIII through XVIII.

I. CONSTITUTIONAL CLAIMS

When legislation is challenged in courts on the basis that they are unconstitutional, courts have a duty to presume constitutionality. *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 6; 658 NW2d 127(2003). Further,

> [e]very reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity.

Phillips v Mirac, Inc, 470 Mich 415, 423; 685 NW2d 174, 179 (2004)(citing *Cady v Detroit*, 289 Mich 499, 505, 286 NW 805 (1939)). While constitutionality is presumed, the Court must determine whether the claims as alleged in the Complaint meet the appropriate standard of review.

A. CONTRACT CLAUSE

Counts I, IV, VII, X, and XVII of the complaint claim that the contract rights of Plaintiffs are impaired by the changes made to the No-Fault Act.

As an initial matter,

> PIP benefits are mandated by the no-fault act, and a claimant's entitlement to PIP benefits is therefore based in statute, not in contract. Because [PIP] benefits are mandated by the no-fault statute, the statute is the 'rule-book' for deciding the issues in questions regarding awarding those benefits. Therefore, our task is to interpret the statute and not the policy. Where insurance policy coverage is directed by the no-fault act and the language in the policy is intended to be consistent with that act, the language should be interpreted in a consistent fashion, which can only be accomplished by interpreting the statute, rather than individual policies.

Bronson Health Care Group, Inc v State Auto Prop & Cas Ins Co, No. 345332, 2019 WL 5849013, at *2 (Mich Ct App, November 7, 2019). This case is controlling and holds that a challenge to the constitutionality of the no-fault act based on the language of the contract rather than the Act itself must fail. The No-Fault Act is the "rule-book" by which conflicts between the Act and insurance policy contract must be resolved. If there are changes to the rule-book itself, in the context of the contract clause, the appropriate interpretive analysis is required.

Echoing the same section of the Federal Constitution, the Michigan Constitution provides that "[n]o bill of attainder, ex post facto law or law impairing the obligation of contract shall be

enacted." Const 1963, art 1, § 10. The Michigan Supreme Court has adopted a three-pronged test to assist in analysis of claims alleging a violation of the contract clause has occurred:

> The first prong is to determine "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship."
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> To the extent, if any, that contractual interests are impaired, the second prong of the Contract Clause test requires that there be a legitimate public purpose for the regulation. This requirement guarantees that rather than merely providing a benefit to special interests, the state is validly exercising its police power.
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> * * *
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> The final prong of the Contract Clause test examines the means by which the contracting parties' rights and responsibilities are adjusted.

Romein v Gen Motors Corp, 436 Mich 515, 534–36; 462 NW2d 555, 565–66 (1990)(citing *Allied Structural Steel Co v Spannaus*, 438 US 234, 244; 98 SCt 2716, 2722; 57 LEd2d 727 (1978). In all of the contract-clause-based claims, Plaintiffs allege that the Michigan Legislature's amendments to the No-Fault Act unreasonably altered Plaintiffs' vested contractual rights, "jeopardizing and diminishing" the quality of care they would receive, or the amount of compensation the medical service provider would receive. Each of those arguments will be addressed.

i. SUBSTANTIAL IMPAIRMENT OF CONTRACTUAL RELATIONSHIP

The Michigan Supreme Court has made clear that:

> One factor in determining the extent of the impairment is the degree of regulation in the industry the complaining party has entered. The party to a contract who has entered into a highly regulated industry may not remove their contract from state restrictions merely by making a contract purportedly immune from legal limitation.

Romein, at 534–35; 565 (citing *Energy Reserves Group, Inc v Kansas Power & Light Co*, 459 US 400, 411; 103 S Ct 697, 704; 74 L Ed 2d 569 (1983)).

As part of the substantial impairment analysis, the Court must consider the degree of regulation in the industry at issue. The *Romein* case involved changes to the workers' compensation system in the late 1980's which substituted recovery through the workers' compensation system for previously available tort remedies. Like in this case, the statutory changes were retroactive and applied to claims that accrued even before the statutory amendments. Workers' compensation and no-fault are obviously separate and distinct areas of law; yet they have undergone similar changes and have similar statutory and contractual schemes. For purposes of the contract clause analysis each presents a statutory regime enacted by the Michigan legislature to largely do away with tort remedies, and instead regulate the industry comprehensively.

The Court in *Romein* essentially held that parties to a contract involving a highly-regulated industry cannot contractually immunize their agreement from changes in the underlying law. Thus, even supposing *ad arguendo* that Plaintiffs' contractual relationship is impaired, their agreement must yield to the State's statutory restrictions.

ii. LEGITIMATE PUBLIC PURPOSE FOR REGULATION

The No-Fault Act's legitimate public purpose has been outlined by the Michigan Supreme Court on another occasion on which the Act faced constitutional scrutiny:

> The [no-fault] act's personal injury protection insurance scheme, with its comprehensive and expeditious benefit system, reasonably relates to the evidence . . . that under the tort liability system the doctrine of contributory negligence denied benefits to a high percentage of motor vehicle accident victims, minor injuries were overcompensated, serious injuries were under-compensated, long payment delays were commonplace, the court system was

> overburdened, and those with low income and little education suffered discrimination.

Shavers v Kelley, 402 Mich 554, 579–80; 267 NW2d 72, 77 (1978). This analysis still prevails and the Court has long concluded that a rational basis review the standard. This Court sees no need to mount any further interpretive effort where the Michigan Supreme Court has already spoken.

iii. MEANS BY WHICH PARTIES' RIGHTS AND RESPONSIBILITIES ARE ADJUSTED

"The final prong of the Contract Clause test examines the means by which the contracting parties' rights and responsibilities are adjusted. The means chosen [in *Romein*] are reasonable in the light of deference given to legislative action. 'As is customary in reviewing economic and social regulation . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.' " *Romein*, at 536; 566 (1990)(quoting *United States Trust Co v New Jersey*, 431 US 1, 22–23; 97 SCt 1505, 1518; 52 LEd2d 92 (1977).

The means chosen to address high auto insurance rates and fraud and abuse are a matter of public policy well within the purview of the Legislature. Here, the means chosen by the legislature were adoption of fee schedules to define what costs are "reasonable," and limitation on the number of hours that may be claimed for in-home family-provided attendant care. As in *Romein*, here the legislature adopted changes to a statutory scheme that retroactively altered what benefits were available to those affected. Also similar to *Romein*, this Court defers to the Legislature's judgment as to the necessity and reasonableness of the measure. The Court made clear in *Romein* that the Plaintiffs "cannot rely on the level of benefits existing at the time of an injury as a legitimate contractual expectation protected by the Contract Clause." While the Legislature's changes to the

Act may be, and have been subjected to criticism on policy grounds, the question before the Court here is whether the changes violate the contract clause of the Michigan Constitution. The Court finds that no such violation is apparent.

The Court will note Plaintiffs argument that the amendments are not reasonable and necessary based on *AFT Mich v State of Mich,* 501 Mich 939; 904 NW2d 417 (2017). (Pl's Brief, p. 21.) In *AFT,* the state employees had contracts that specified the exact amount they would be paid, which the Legislature changed. Plaintiffs here cannot point to any similar provision. The Legislature always left the No-Fault Act general, referring to a reasonable fee, which parties have argued the meaning of for the last 40 years. It is not unconstitutional for the Legislature to bring meaning to these terms by specifying what a reasonable fee means. The Court agrees with Defendants that *AFT* does not apply here.

B. DUE PROCESS

Counts II, V, VIII, XI, XIII, and XV of Plaintiffs' Complaint allege substantive due process violations for infringing fundamental rights at issue in amendments to the Act found at MCL 500.3157(2), (7) and (10). Contrary to Plaintiff's contention, there is no fundamental right to have medical providers paid at a certain rate, or to pay family members at a certain rate for attendant care for more than 56 hours per week. In the absence of a fundamental right, the statute is reviewable under the rational basis test, and it is presumed to be constitutional. The Michigan Supreme Court holding in *Shavers*, *supra*, makes clear that this is socioeconomic legislation and it's subject to review under the rational basis standard. *Shavers* defined the relevant test for determining the legitimacy of such claims:

> The test to determine whether legislation enacted pursuant to the police power comports with due process is whether the legislation bears a reasonable relation to a permissible legislative objective.

> The test to determine whether a statute enacted pursuant to the police power comports with equal protection is essentially the same.
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> * * *
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> In the application of these tests, it is axiomatic that the challenged legislative judgment is accorded a presumption of constitutionality. What this "presumption of constitutionality" means, in terms of challenged police power legislation, is that in the face of a due process or equal protection challenge, "where the legislative judgment is drawn in question", a court's inquiry "must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it". A corollary to this rule is that where the legislative judgment is supported by "any state of facts either known or which could reasonably be assumed", although such facts may be "debatable", the legislative judgment must be accepted.
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> In accord with this axiomatic rule and its corollary a court may uphold the constitutionality of police power legislative judgments in the face of due process or equal protection challenge by taking judicial notice of indisputable, generally known or easily ascertainable facts. And, because the "presumption of constitutionality" is a rebuttable presumption, a party challenging the legislative judgment may attack its constitutionality in terms of purely legal arguments (if the legislative judgment is so arbitrary and irrational as to render the legislation unconstitutional on its face) or may show, by bringing to the court's attention facts which the court can judicially notice, that the legislative judgment is without rational basis.

Shavers, supra at 612–15 (citations omitted).

i. WHETHER A FUNDAMENTAL RIGHT IS IMPLICATED

As a threshold matter, this Court must determine whether there is a fundamental right at issue. This is important because the standard of review varies depending on whether such a right is present.[1] Plaintiffs argue that both privacy and bodily integrity rights are at issue.

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[1] 'Substantive due process' analysis must begin with a careful description of the asserted right," for there has "always been reluctan[ce] to expand the concept of substantive due process" given that "[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." Where the right asserted is not fundamental, the government's interference with that right need only be reasonably

> The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, has not been reduced to any formula. Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present.

Obergefell v Hodges, 135 S Ct 2584, 2598; 192 L Ed 2d 609 (2015).

If a fundamental right is implicated, the party asserting the substantive due process violation must show that deprivation of the right is so arbitrary that it shocks the conscience. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 201; 761 NW2d 293, 306 (2008); see also *Mays v Snyder,* 323 Mich App 1, 104; 916 NW2d 227 (2018) (explaining that in order to survive dismissal, the alleged "violation of the right to bodily integrity must be so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.") (citations and quotation marks omitted). "Conduct that is merely negligent does not shock the conscience, but conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Mays,* 323 Mich App at-104. Proof of at least "deliberate indifference is required." *Id.* While this seemly creates a fact question that would require discovery, the legislature acted within the scope of its legal authority, police power, so there is no basis for further inquiry. The Court will not second-guess the wisdom, need, or appropriateness of the legislation. *O'Donnell v State Farm Mut Auto Ins Co*, 404 Mich 524; 273 NW2d 829, 832 (1979)

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related to a legitimate governmental interest. *Bonner v City of Brighton*, 495 Mich 209, 226–27; 848 NW2d 380, 391 (2014)(citations omitted).

a. PRIVACY INTEREST

"The 'guarantee of personal privacy' has been 'exten[ded] to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education.'" *People v Jensen*, 231 Mich App 439, 456; 586 NW2d 748, 756 (1998)(emphasis added).

Plaintiffs argue that the amendments to the No-Fault Act would interfere with the right of Plaintiff Andary "to make personal decisions relating to family relationships in the context of the in-home attendant care provided . . . by family members as opposed to strangers." Plaintiffs cite several cases which established certain familial relationships as fundamental privacy rights. *Troxel v Granville*, 530 US 57 (2000)(parents' fundamental right to manage the care of their children); *Moore v City of East Cleveland*, 431 US 494 (1977)(ordinance prohibiting grandmother from living with her two grandchildren who were cousins violated her privacy right); *Brinkley v Brinkley*, 277 Mich App 23; 742 NW2d 629 (2007)(statute permitting fit parents to completely deny grand parenting time was constitutional).

However, no authority is cited for the proposition that the same services that family members currently provides to an individual would become a violation of the individual's fundamental constitutional rights if required to be performed by someone else. In support of this portion of the complaint, Plaintiffs ask the Court to permit discovery because this would necessarily require a factual determination. The Court does not agree.

The United States Supreme Court has held that residents of a nursing home which had its license revoked had no right to continued residency there. *O'Bannon v Town Court Nursing Ctr*, 447 US 773, 785; 100 S Ct 2467, 2475; 65 L Ed 2d 506 (1980). Rather, residents had a right to choose among a range of qualified providers without government interference. *Id.* The case applies

persuasively here, where Plaintiffs do not have a right to continue to receive compensation for family members' care services in the home after the 56-hour limit per week is reached.

In the Court's reasoned judgment, there is no fundamental privacy right implicated here.

b. BODILY INTEGRITY

Plaintiffs next assert that forcing individuals to receive care from strangers rather than family members amounts to a violation of the privacy right to bodily integrity, because the services provided might involve bathing and using the bathroom. Further, Plaintiffs assert that providers of such services receive insufficient compensation to be sustainable.

"Violation of the right to bodily integrity involves 'an egregious, nonconsensual entry into the body which was an exercise of power without any legitimate governmental objective.'" *Mays, supra* at 60, app gtd sub nom *Mays v Governor of Michigan*, 503 Mich 1030; 926 NW2d 803 (2019)(quoting *Rogers v Little Rock, Arkansas*, 152 F3d 790, 797 (CA 8, 1998)). In *Mays* the Court of Appeals held that the plaintiffs alleged sufficient facts to support their bodily integrity claim based on allegations of ingesting poisons through contaminated water. Under this definition, it may be a violation of Plaintiff Andary's bodily integrity if the State statute compelled her to be touched by a service provider by force or a provider who was not qualified to provide the appropriate service. The very fact of the amendment does not mean that such egregious conduct will occur. The Court notes that any services rendered to Ms. Andary in her home are necessarily rendered with her consent, or that of her guardian. By definition, there can be no violation of a fundamental bodily integrity right where the individual, or the guardian of a legally incapacitated individual, consents to the touching.

Further, Plaintiff argues that provision of bathing and bathroom services by attendants not previously known to the individual constitutes an "egregious . . . entry into the body." The Court

finds no legal support for this contention. As noted above, cases citing such egregious entries contemplated incidents in which police forcibly pumped a man's stomach to obtain evidence, or where prison guards beat a man to death. *Rochin v California*, 342 US 165; 72 SCt 205; 96 LEd 183 (1952); *Screws v United States*, 325 US 91; 65 SCt 1031; 89 LEd 1495 (1945). Plaintiffs' inability to continue to receive needed services from the provider of their choice is not on the same level of egregious conduct as these examples.

Finally, Plaintiffs argue that Plaintiff Eisenhower Center would be forced to discontinue Plaintiff Krueger's care. The Court finds this argument unpersuasive and speculative. Plaintiffs Krueger and Andary do not have a bodily integrity right to continue to receive services from their preferred provider. Likewise, the service provider does not have a constitutionally-protected right to continue to be compensated at its preferred rate for those services. Nor does the Michigan Constitution require insurers to continue to pay the provider of the insured's preference at a rate higher than that provided by statute, or for which the parties have contracted[2]. Indeed, under the amended statute, the insurer may choose to pay family members to provide care instead of a medical service provider, and the insured may choose to purchase additional attendant-care benefits in excess of the statutory minimum. MCL 500.3157(11).

In the Court's reasoned judgment, there is no fundamental bodily integrity right implicated here.

[2] The contract-related claims are discussed in Section I. A. The amendments to statute provide a definition of reasonableness, upon which contracts including terms such as "reasonable cost" or similar may rely. Any specific rates contracted for could still be honored, as long as the contract term does not controvert the amended statute.

ii. APPLICATION OF CONSTITUTIONAL STANDARD

Under the circumstances of this case, the applicable constitutional question is whether "the government's interference with that right . . . [is] reasonably related to a legitimate government interest." *Bonner v City of Brighton*, 495 Mich 209, 227; 848 NW2d 380 (2014).

As is broadly known, and confirmed by the legislative history of Public Acts 21 and 22 of 2019, among the goals of the amendments to the No-Fault Act was to reduce insurance premiums (among the highest in the nation at the time). The legislature chose to define "reasonable amount" in the statute by adopting a fee schedule related to either the Medicare rates or the providers' own rates as of January 1, 2019. To the extent this regime interferes with any rights of Plaintiffs, the interference is reasonably related to the legitimate government interest of reducing the cost of insurance, and to some extent also the cost of healthcare.

Plaintiffs argue that the fee schedules interfere with the practice of medicine by providers. There is no such fundamental right and this argument fails for the same reasons set forth above. The argument also ignores the fact that the Michigan constitution obligates the legislature to pass laws to provide for the public health and general welfare – the legislature's "police power."[3] The Michigan Supreme Court has previously held that compulsory purchase of no-fault insurance is a valid exercise of this police power, and this Court sees no reason why the amendments to the Act should require a departure from that analysis. *Shavers*, *supra* at 596. This Court also holds that the Michigan Legislature has authority under its police power to compel the purchase of no-fault insurance").

[3] "The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health." Const 1963, art 4, § 51.

No substantive due process violation is apparent from these pleadings. Thus, Counts II, V, VIII, XI, XIII and XV of the Plaintiffs Complaint are dismissed.

C. EQUAL PROTECTION

Counts III, VI, IX, XII, XIV, XVI and XVIII of Plaintiffs' Complaint allege the respective No-Fault amendments implicate equal protection violations.

> [u]nder traditional equal protection analysis, a legislative classification must be sustained, if the classification itself is rationally related to a legitimate governmental interest.
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> If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality'. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations.
> If it be said, the law is unnecessarily severe, and may sometimes do injustice, without fault in the sufferer under it, our reply is: these are considerations that may very properly be addressed to the legislature, but not to the judiciary they go to the expediency of the law, and not to its constitutionality.

O'Donnell v State Farm Mut Auto Ins Co, 404 Mich 524, 542; 273 NW2d 829, 834 (1979)(citations omitted).

Further,

> The test to determine whether legislation enacted pursuant to the police power comports with due process is whether the legislation bears a reasonable relation to a permissible legislative objective.
> The test to determine whether a statute enacted pursuant to the police power comports with equal protection is essentially the same.

Shavers at 612–15 (citations omitted).

Plaintiffs' equal protection claims are founded on the assertion that the two fee schedules created in the amendments to the No-Fault Act create two classes – a class of motor vehicle accident victims who receive products and services that are compensable by Medicare, and another class of such victims which receives products and services not compensable under Medicare. Plaintiffs argue the latter group would receive lower compensation through the Act, and would therefore be "second-class patients." This status would likely result in patients being treated differently and possibly harshly by providers who would receive less compensation for treating them.

Plaintiffs identify no suspect or quasi-suspect class into which they would fit, therefore the rational basis standard is applicable. In addressing the equal protection challenge to the No-Fault Act in *O'Donnell* the Michigan Supreme Court opined that:

> [t]he Legislature's judgment that the recipients of private benefits should be treated differently from the recipients of government benefits is supported by a rational basis and should therefore be sustained. This distinction rationally promotes the legitimate legislative objectives of enabling persons with economic needs and/or wages exceeding the maximum benefits permitted under the No-Fault Act to obtain the supplemental coverage they need and of placing the burden of such extra coverage directly on the shoulders of those persons, instead of spreading it throughout the ranks of no-fault insureds.

O'Donnell, 404 Mich at 537–38. While the statutory scheme at issue here is different, the Court's essential holding that the legislature may treat recipients of private benefits differently from recipients of government benefits applies. The same private/government-provided difference distinguishes the two fee schedules at issue.

Likewise in *Shavers, supra,* the Michigan Supreme Court ruled that the constitutional test for both due process and equal protection claims where no fundamental right is implicated, use

essentially the same test. Since no fundamental right is implicated, the rational basis/reasonable relation test is again the appropriate standard.

The amendments to the No-Fault act are reasonably related to the government's legitimate public interest in reducing auto insurance costs, addressing fraud, and in providing for the general welfare of its citizens. Therefore, the Due Process challenges asserted in Plaintiffs complaint fail and must be dismissed.

II. STANDING

Counts XIII through XVI of the complaint seek relief "on behalf of all motor vehicle accident victims, past, present, or future." Counts XVII and XVIII similarly seek relief for "all Michigan medical providers who treat motor vehicle accident victims in this State." Defendants argue that Plaintiffs lack standing to vindicate the rights of third parties. This Court agrees.

The law in Michigan is clear that "constitutional rights are personal, and a person generally cannot assert the constitutional rights of others." *Reed v Reed*, 265 Mich App 131, 159; 693 NW2d 825, 842 (2005)(citing *In re Chmura*, 461 Mich 517, 530, 608 NW2d 31 (2000)); *Fieger v Comm'r of Ins*, 174 Mich App 467, 471; 437 NW2d 271 (1988). "A plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.*

Plaintiff's rely on *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010) to support their claims in this case on behalf of other victims and medical providers. This case concerns whether the litigant before the court had a cause of action, special injury, right, or substantial interest that would be affected differently from the general public, or had been impliedly granted standing by the legislature. It does not stand for the proposition that Plaintiffs may represent the claims of an emerging class of others who are <u>not</u> presently before the Court.

While *Lansing Sch Ed Ass'n* permits courts in their discretion to make prudential determinations regarding standing, this Court finds that it must not ignore the *Reed* and *Fieger* cases cited *supra*.

In *Fieger*, attorney Geoffrey Fieger and his law clerk sought declaratory judgment and brought an action challenging portions of a medical malpractice law as unconstitutional. *Fieger*, 174 Mich App at 468-469. The Michigan Court of Appeals held that Fieger lacked standing to secure or adjudicate his clients' constitutional rights and further noted that, "[a] plaintiff must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.* Fieger also claimed economic injuries as a result of the time he was required to spend counseling his new medical-malpractice plaintiffs due to the unconstitutional provisions. To this argument, the Court held that such expenses incurred in litigation are not unique or uncommon, and such an "alleged economic injury does not create a justiciable actual controversy." *Id.* at 472. Lastly, and perhaps most notably, the Court held that, in order to avoid deciding "abstract questions on hypothetical issues . . . regardless of the liberal declaratory judgment rule, a plaintiff must still allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Id.*

Reed and *Fieger* both stand for the same proposition – that litigants generally may only assert their own interest or causes of action. *Lansing Sch Ed Ass'n* criticizes the *Reed* era for applying a mistaken standing doctrine. Yet, *Fieger*, which long preceded *Reed*, remains good law and stands for the identical proposition. Again, the Court notes that the reforms to the No-Fault Act are not in effect until July 1, 2021, and therefore, no actual controversy exists as to the hypothetical injuries of future Michigan medical providers and motor vehicle victims, past, present, and future. See *Fieger*, 174 Mich App at 472 (rejecting claims based on hypothetical issues).

While it may be argued that dismissal of these claims would leave unnamed accident victims and medical providers without a legal remedy, the relief sought by Plaintiffs in this case would be available to any specific individual when an alleged violation occurs. Since Counts XIII through XVIII seek relief on behalf of others not before the Court, Plaintiffs lack standing to raise them, and these Counts are dismissed.

III. RIPENESS

While not raised by the parties, amicus curiae raise the issue of ripeness. The Department of Insurance and Financial Services (DIFS) argues that the issues presented in Plaintiff's complaint cannot be properly adjudicated at this time because there is no case or controversy. DIFS argues that not only are these potential claims asserted on behalf of unnamed other parties, they are mere hypotheticals and speculation of what might occur in the future. MCR 2.605(A) provides the following:

> (1) In a case of *actual controversy* within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.
> (2) For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief *other than a declaratory judgment*.

MCR 2.605(A). (Emphasis added.)

Generally courts cannot review the constitutionality of a government action unless and until there is an "actual injury." However, "facial challenges to regulation are generally ripe the moment the challenged regulation or ordinance is passed." *Suitum v Tahoe Regl Planning Agency*, 520 US 725, 736; 117 S Ct 1659, 1666; 137 L Ed 2d 980 (1997)(quoting *Keystone Bituminous Coal Ass'n v DeBenedictis*, 480 US 470, 495; 107 S Ct 1232, 1247; 94 L Ed 2d 472 (1987)(state statute facially challenged as a taking); see also *Paragon Properties Co v City of Novi*, 452 Mich

568, 576; 550 NW2d 772, 775 (1996). Since the statutory sections at issue have not yet taken effect as stated above, the challenge here is a 'facial challenge', and became ripe as soon as the statute was passed.

IV. FACTUAL DEVELOPMENT

Plaintiff argues that a factual development of the record is necessary for the very reason that the impact of the amendments raised in their complaint need to be explored and vetted to determine the legislative intent and whether the process engaged by the Legislature was appropriate. Defendants and the Amici supporting dismissal of the Complaint raised several arguments and cited binding precedent that a facial challenge to constitutionality "can be decided without reviewing the facts considered by the Legislature, as the wisdom of the Legislature is not open to debate." (Citations omitted.) The Court will not regurgitate all those arguments here. However, the Court agrees that Plaintiffs complaint seeks declaratory relief regarding alleged future actions of insurers, patients, and providers after July 1, 2021. Defendants said it best in their Reply Brief in Opposition to the Motion to Dismiss at page 1, that "... there are no "facts" that are relevant to the determination of the constitutionality of the statute. Under Michigan law, challenges to future actions are facial challenges decided as a question of law, and not an "as applied" challenge as to which factual development might be considered."

Finally, Defendant's Motion to Dismiss is premised on MCR 2.116(C)(8), which permits consideration only of the pleadings. As this complaint presents a facial challenge of the statute itself – any facts which could reasonably be assumed are to be considered[4] (at least as to the due

[4] *United States v Carolene Products Co*, 304 US 144, 154; 58 S Ct 778, 784; 82 L Ed 1234 (1938)(explaining that due process and equal protection challenges "must be restricted to the issue whether any state of facts . . . affords support for [the challenge]").

process and equal protection arguments), vitiating the need for any further factual development of the record.

V. CONCLUSION

The No Fault statute was enacted in service to the needs of the public, as a valid exercise of the State's police power and serves multiple purposes for the public good. The 2019 amendments are a method of limiting costs and fraud in the no-fault system to make insurance more affordable, and such cost containment measures have been upheld principally in *Shavers*, *Romein* and *Health Care Ass'n Workers Compensation Fund*. (Citations omitted.) The arguments advance by Plaintiffs are asking this Court to invalidate the long standing presumption of constitutionality that has been afforded this legislation which it finds no basis for doing. Having found that the contract clause does not protect the parties' agreements from changes to the underlying statute, and that neither due process nor equal protection principles can meet the high standard required to rebut that presumption;

IT IS ORDERED that Defendants USAA Casualty Insurance Company and Citizens Insurance Company of America's Motion to Dismiss is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiffs' complaint is **DISMISSED**.

In accordance with MCR 2.602(A)(3), the Court finds that this order resolves the last pending claim and closes the case.

11/13/2020

Date

Wanda M. Stokes

Hon. Wanda M. Stokes
Circuit Court Judge

PROOF OF SERVICE

I hereby certify that I provided a copy of the above ORDER to each attorney of record, or to the parties, by hand delivery, email, or by placing a true copy in a sealed envelope, addressed to each, with full postage prepaid and placing said envelope in the United States mail, on November 13, 2020.

Courtney Ware
Law Clerk