

The Affordable Care Act's Uncertain Impact on Michigan's No-Fault Act

By Nelson P. Miller

The Affordable Care Act's individual mandate requiring the purchase of health insurance likely turns the No-Fault Act's coordination of medical and no-fault benefits into a setoff of health insurance coverage. Michigan no-fault insurers may be about to receive a substantial windfall, while those injured in Michigan motor-vehicle accidents and their medical-care providers may receive a substantial setback.

The Affordable Care Act's individual mandate

Unless you've been on a trip to Mars, you know the individual mandate as the cornerstone of what the public calls Obamacare; lawyers know it as the Patient Protection and Affordable Care Act. Beginning this year, Congress requires that most adult Americans buy health insurance for themselves and their dependents.¹

Individuals who do not buy and maintain the federally mandated coverage must pay the government a "shared responsibility payment" that the act also calls a



“penalty.” In *National Federation of Independent Business v Sebelius*, the United States Supreme Court held the mandate’s penalty unconstitutional as an exercise of Commerce Clause powers but constitutional as a “tax.”² This much, most lawyers know.

No-fault setoff and coordination

Michigan’s legislature promoted the No-Fault Act’s goal of reducing no-fault-insurance costs by authorizing no-fault insurers to either set off certain other sources against no-fault coverage or coordinate coverage with other sources. Think of a setoff as the no-fault insurer having no responsibility to pay for an expense covered by the other source. By contrast, think of coordination as the insurer examining the nature and terms of the other source and then, in many cases, paying some or all of the expense the other source would pay were it not for no-fault coverage.

Specifically, Michigan’s No-Fault Act authorizes no-fault insurers to set off against the act’s personal-injury-protection benefits any other benefits “provided or required to be provided under the laws of any state or the federal government”³ Social Security disability benefits are a good example. Because federal law provides for those benefits, no-fault insurers may set them off so as not to pay that amount in no-fault work-loss benefits.⁴

Workers’ compensation benefits are another good example. Because state law requires those benefits, no-fault insurers may set them off so as not to pay that amount in no-fault work loss or as an allowable expense.⁵ Setoff is also available for Social Security survivor’s loss benefits,⁶ wage loss paid under the Federal Railroad Unemployment Insurance Act,⁷ and even medical benefits under a no-fault-insurance policy required under another state’s law.⁸

Significantly, no-fault insurers get to set off law-required benefits even when the claimant takes no reasonable steps to secure the benefits.⁹

By contrast, the No-Fault Act authorizes no-fault insurers only to coordinate (rather than to set off) “other health and accident coverage.”¹⁰ The big example is health-insurance coverage. When a no-fault insurer coordinates its policy with health-insurance coverage, the health insurer ordinarily pays the benefits.¹¹ Even when the health insurer attempts to coordinate right back, the no-fault insurer still wins under the oft-cited *Federal Kemper* decision.¹² Coordination also applies to healthcare benefits provided through an HMO.¹³

The No-Fault Act’s coordination provision is not a sound firewall for no-fault insurers. When a no-fault insurer does not coordinate its no-fault policy with health-insurance coverage, and the health policy does coordinate, the no-fault insurer must pay the healthcare benefit.¹⁴ Moreover, when the health plan is an employer ERISA plan, the ERISA plan’s coordination clause will prevail over the no-fault insurer’s coordination clause, making the no-fault insurer pay.¹⁵ Federal ERISA law, permitting ERISA plans to make them secondary to no-fault insurance, supersedes contrary state no-fault law. The differences between setoff and coordination are thus significant.

The Affordable Care Act’s probable effect

You may have anticipated the probable effect of the Affordable Care Act’s individual mandate on no-fault medical-care benefits. The act—federal law—requires health insurance. What do we call it but the individual *mandate*? The clear inference is that health insurance under the Affordable Care Act becomes a no-fault-insurer setoff under the No-Fault Act. Say goodbye to coordination and hello to setoff. No-fault insurers will now set off health insurance rather than merely coordinate it.

Individuals who do not buy and maintain the federally mandated coverage must pay the government a “shared responsibility payment” that the act also calls a “penalty.”

Fast Facts

No-fault lawyers and insurers should prepare for the coming collision of the Affordable Care Act’s individual mandate with Michigan’s No-Fault Act.

The Affordable Care Act likely makes health insurance a setoff against no-fault medical coverage rather than coordinated coverage.

No-fault insurers may get a substantial windfall while hospitals take a substantial hit.

The 2014 shift to setoff may hit healthcare providers because of the generally higher medical payments no-fault insurers pay over health insurers. Hospitals and other medical-care providers depend on the higher reimbursement rates that no-fault insurers pay.

One might argue that we should treat differently insurance required by law from other benefits required by law. The No-Fault Act does not make that distinction. As noted above, Michigan's appellate courts have already held that no-fault insurers may set off benefits paid or payable under insurances required by law, like workers' compensation insurance¹⁶ or out-of-state no-fault insurance.¹⁷ Presumably, then, the same should be true for Affordable Care Act-mandated health insurance—that no-fault insurers can set off those federally mandated insurance benefits.

The impact

If this plain interpretation is correct, how big will the impact be on Michigan no-fault payments? Michigan no-fault insurers pay hundreds of millions of dollars in allowable expense, much of it medical expense. And much of that medical expense employer ERISA health-insurance plans shift to no-fault insurers or no-fault insurers pay under uncoordinated no-fault coverage. Beginning this year, no-fault insurers should be able to set off those payments, shifting the costs back to health insurers.

The 2014 shift to setoff may hit healthcare providers because of the generally higher medical payments no-fault insurers pay over health insurers. Hospitals and other medical-care providers depend on the higher reimbursement rates that no-fault insurers pay. While the No-Fault Act requires medical charges to be reasonable,¹⁸ the act permits no-fault insurers to charge up to the amount customarily charged “in cases not involving insurance.”¹⁹ This provision means hospitals and other medical-care providers need not accept the discounted amounts that Medicaid, Medicare, and health insurers often pay. No-fault insurers help keep emergency rooms open—but may no longer do so beginning in 2014.

A photograph of a doctor in a white lab coat with a stethoscope around their neck. The doctor is holding a white rectangular sign with both hands. The sign has the text "Who will be covering you today?" written on it in a bold, dark blue font. The background is a plain, light-colored wall.

**Who will be
covering you today?**

Possible responses

The possibility remains that Congress will amend the Affordable Care Act to shift these healthcare costs back to no-fault insurers or that regulators or courts will interpret the act to do so as written. One federal program already makes that cost shift back to the no-fault insurer. Medicare does not pay benefits that a no-fault policy would pay.²⁰ Congress did not enact the measure to increase healthcare costs, but to decrease them. Some probability of a saving reform may exist.

Lawyers know the plain interpretation is not necessarily the right one. Michigan's appellate courts may yet interpret the Affordable Care Act's broad individual mandate not to be "required by law" in the No-Fault Act sense. Look at what the United States Supreme Court did in *National Federation of Independent Business v Sebelius* to save the mandate, reinterpreting what Congress expressly called a "penalty" instead to be a "tax." Michigan's appellate courts could follow the Supreme Court's rationale. Doing so might possibly preserve the status quo under which no-fault insurers pay before ERISA health plans and when offering uncoordinated benefits.

A better alternative for preserving the status quo would be for the legislature to except the individual mandate from the No-Fault Act's setoff provision. Hospitals and other medical-care providers, who depend financially on the No-Fault Act's largesse, would presumably favor preserving the status quo. So would members of the public who value or rely on the no-fault medical safety net.

On the other hand, those looking solely at premium costs and no-fault-insurer profits may favor the opposite approach to let the individual mandate supplant no-fault medical benefits. In theory, no-fault rates should fall as costs shift from no-fault insurers to healthcare insurers and the taxpayer. If no-fault rates do not fall, watch for legislative review of the shape and value of a still helpful but less necessary no-fault safety net.

If the individual mandate guts no-fault medical coverage with no legislative response, Michigan's no-fault lawyers should turn their attention to other Affordable Care Act provisions. While individuals who accept the federal mandate and buy their insurance would lose to the no-fault setoff, others may not. Those who refuse the mandate and instead pay Congress's penalty (the Supreme Court's tax) might still argue that they face no setoff.

Other Michigan no-fault healthcare-coverage claimants will qualify for mandated coverage only through the swelling Medicaid rolls. As noted previously relative to endnote 20, Medicare shifts cost recovery back to the no-fault insurers. Other claimants will not yet have reached the Affordable Care Act's mandate age. The act requires that their parents' healthcare insurers provide coverage, but not all youthful, no-fault healthcare-coverage claimants will have responsible, employed parents.

Conclusion

Law is complex because life is complex. No-fault lawyers should prepare for the coming collision of the Affordable Care Act's individual mandate with the No-Fault Act. In a couple of years, the appropriate practices of no-fault claimants and insurers and their counsel should once again become clear. Until that clarity arises, watch Michigan's appellate courts and legislature on this issue. Study this new setoff issue in every first-party, no-fault claim. Expect no-fault insurers to claim Affordable Care Act-mandated health insurance as a major new setoff. ■



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Research credit to Cooley student Kristal Gruevski.

ENDNOTES

- 26 USC 5000A(a).
- Nat'l Federation of Independent Business v Sebelius*, ___ US ___; 132 S Ct 2566; 183 L Ed 2d [2012].
- MCL 500.3109(1).
- Popma v Auto Club Ins Ass'n*, 446 Mich 460, 476; 521 NW2d 831 (1994).
- Kuty v DAILE*, 140 Mich App 310; 364 NW2d 315 (1985).
- Wood v Auto-Owners Ins Co*, 469 Mich 401; 668 NW2d 353 (2003).
- Moore v Auto Club Ins Ass'n*, 173 Mich App 308; 433 NW2d 355 (1988).
- DeMeglio v Auto Club Ins Ass'n*, 449 Mich 33; 534 NW2d 665 (1995).
- Perez v State Farm Mut Auto Ins Co*, 418 Mich 634; 344 NW2d 773 (1984); see also *Fields v State Farm Mut Auto Ins Co*, unpublished opinion of the US District Court for the Eastern District of Michigan, issued April 3, 2012 [Docket No. 11-15296].
- MCL 500.3109a.
- See *Tousignant v Allstate Ins Co*, 444 Mich 301; 506 NW2d 844 (1993).
- Federal Kemper Ins Co v Health Ins Admin*, 424 Mich 537; 383 NW2d 590 (1986).
- United States Fid & Guar Co v Group Health Plan of Southeast Michigan*, 131 Mich App 268; 345 NW2d 683 (1983).
- See *Smith v Physicians Health Plan, Inc*, 444 Mich 743; 514 NW2d 150 (1994).
- Auto Club Ins Ass'n v Frederick & Herrud, Inc*, 443 Mich 358; 505 NW2d 820 (1993).
- Kuty*, n 5 *supra*.
- DeMeglio*, n 8 *supra*.
- MCL 500.3107(a).
- MCL 500.3157.
- 42 USC 1395y(b)(2)(A)(ii).