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Protecting insureds or complicating Michigan claims adjusting?

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Ten Democratic state senators introduced on May 9 Michigan Senate Bill 329, which if adopted, would dramatically reshape the adjusting process in first- and third- party auto claims.

This legislation, which proposes to add Chapter 30B to the state's insurance code, is being marketed by its proponents as a "Good Faith bill." It outlines additional responsibilities and duties that these senators seek to impose on insurers who are still reeling from the Michigan Court of Appeals decision in *Andary*. While the bill is in its infancy, it provides the backdrop for a discussion about an insurer's current duties and how a law like this would affect the claims adjusting process.

As written, the proposed legislation would apply to first- and third-party claims. The bill would bar insurers from delaying, denying or failing to pay a claim unless there is a reasonable basis found in the policy. Therefore, it would require the insurer to specifically articulate the reason for delay or denial, and once litigation commences, the bill would prevent an insurer from changing the legal or factual basis of that denial unless new information was obtained during litigation.

This requirement of the bill codifies a process that insurers should currently use. It is always important to clearly document the reason or reasons for nonpayment in the claim notes and in notifying the claimant. If a claimant has not performed a condition precedent to payment or if additional information is necessary, the insurer should communicate that request to the claimant or their attorney. It is these communications that provide a factual basis to defend a claim or demand for attorney fees during litigation, and they can be used to explain those delays or denials to a jury.

The legislation further codifies prior Michigan case law regarding the defense of insureds in third party claims. After actual notice of the claim, the insurer must assign an adjuster, request information from the insured to evaluate the claim, and provide notice to the claimant of the need to cooperate to limit their liability. Most insurers will recognize these steps as those they currently take to limit a potential bad faith claim, but the proposed litigation goes further, and it would require the insurer to provide specific information to the insured of the pending claim, including:

- The identity of other potential causes of damages;
- The insurer's evaluation of the claim;
- Likelihood of an excess judgment;
- Any steps the insured can take to avoid an excess judgment; and
- Notice of any settlement offer and the reasons for the insurer's rejection of the settlement offer.

In further shifting the burden of claims management to the insurer, the bill also requires an insurer to provide notice and a cure period (of not less than 30 days) for the claimant's alleged failure to comply with a policy condition prior to denying the claim. It also would require an insurer to provide specific factual and legal basis of a denial within seven days of the effective date of the denial. It appears this portion of the legislation is an attempt to prohibit retroactive denials.

Several sections of the proposed legislation require the insurer to produce certain information (i.e., recorded statements, status update on claim, and any vehicle inspection if the claimant was not present for it) within seven days of the request. It also would require an insurer to provide a status report to the insured or claimant every 30 days whether or not it is requested by the claimant. This will certainly limit the number of claims that claims adjusters will be able to manage as this requirement would add a large amount of work for each claim.

Perhaps the most daunting requirement of the bill is that an insurer will have to create and maintain written standards for claims adjusting. A change in insurance law like this requirement can create large liability issues. It is also likely to provide additional reasons why claimant's counsel will demand to take more adjuster depositions. Whereas most of the proposed litigation is a codification of case law or processes that are already in place for most large insurers, this particular requirement will alter the potential liability of insurers.

Insurers generally train their adjusters through onboarding and state specific training because each claim can have slightly different issues. If adjusters are not trained properly to abide by the claims manual, or information is not documented properly, an insurer may be exposed to liability under this legislative scheme.

A person alleging that an insurer violates this legislation can make a claim for unpaid benefits, damage to their credit reputation, emotional distress and anxiety (even that which might be suffered in the future), 12% penalty interest on all first party claims not paid within 60 days of receipt of proof, exemplary and/or punitive damages, and reasonable attorney fees. These damages overlap those allowed under MCL 500.2006, 3142 and 3148, and the legislation does limit the insured to only one award of interest and attorney fees.

As this is proposed legislation, there are more questions than answers. However, it is clear that the Michigan legislature made insurance rights a priority in this session. While this legislation is not likely to pass as written, it serves as an important reminder of the basics of insurance claim adjusting that create a strong foundation for defense in the litigation.

Insurers must clearly communicate the information needed to make a claims decision, must maintain ongoing communication with the insured or medical providers and must provide written communication of the reasons for the claim's denial.

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