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WRITTEN TESTIMONY

Re: HB 4936 (Lund House Bill)

My name is Barry F. LaKritz. I have been a practicing Michigan No-Fault lawyer since the year that No-Fault was passed, 1974. For nearly 30 years, my practice included the representation of Michigan No-Fault insurers. For the past seven years, I have been representing No-Fault claimants. I also currently serve as a No-Fault Mediator, mediating disputes in litigated cases between No-Fault claimants and No-Fault insurers. I am listed in the 2011 edition of "Best Lawyers in America", a national peer review organization. I have achieved an AV preeminent rating from Martindale-Hubbell, emblematic of the highest possible rating for ethical standard and legal skills. I am a member of the Federal Bar Association, and I am also admitted to practice in the United States Supreme Court.

Topic of Presentation: Unconstitutionality of Lund Bill as written.

As an attorney with 37 years of No-Fault experience, I have found what I believe to be a major flaw in the proposed legislation, Lund Bill HB 4936. I do not believe this flaw was intended by the drafters of this legislation.

Early in my career, I represented No-Fault insurers. More recently, I have represented injured No-Fault claimants. Thus, I am able to look at the issue from both sides and to predict what No-Fault insurers are likely to do with the legislation in its current format.

On page two at sub-paragraph 2(b), in reference to in-home attendant care, there is no statement or clause indicating when the changes referenced are intended to take effect.

These changes in in-home attendant care benefits appear to be retroactive and thus, applicable to all current and future accident victims.

More specifically, it appears that the language in the current bill makes retroactive changes with respect to in-home attendant care. However, this cannot be what the drafters intended, because retroactivity of such a measure would not only bring about chaos, but would also be plainly unconstitutional as a violation of due process under the 14th Amendment of the State and Federal Constitution.

My concern is simply this. Aside from being against any changes in the current No-Fault Law (a system that is fully functional and beneficial to Michigan policyholders), if the Lund Bill passes in its current form, the entire No-Fault system will be thrown into chaos insofar as in-home attendant care is concerned. I have litigated thousands of cases over the years, both as an insurance lawyer and more recently as a lawyer for No-Fault claimants. Often times, an insurer will begin paying benefits and then cut off or terminate benefits, in effect, going back on its word. That, we cannot prevent under any incarnation of the No-Fault Law. However, here, with this new legislation, I fear that No-Fault insurers will read this and then seek to curtail and/or terminate benefits that have been paid to innocent No-Fault claimants going back several years. They will read this legislation and believe that it gives them a license to terminate or curtail benefits. Surely, that cannot be what the drafters of this Bill intended.

Hence, although I am against the passage of <u>any</u> portion of the Lund Bill, I would suggest that if there is an inclination on the part of the House of the Representatives to pass the bill, the bill <u>must</u> contain language which indicates that any changes in regard to the current No-Fault Statute which are brought about by virtue of the Lund Bill are merely prospective, and not in any way retrospective or retroactive. For example, the language in the Lund Bill could include a clause stating that the changes effectuated by that legislation only apply to "accidental bodily injuries" occurring in accidents that take place following the date of passage of the said bill.

Without such language, I am sure that we will have thousands of innocent No-Fault claimants (many of whom are children) who will immediately go uncared for in situations where family members or friends of family members have been contracted with by the families of No-Fault claimants in reference to providing attendant care which has been duly prescribed by treating physicians. Just as an example, I have a client who suffered such a massive brain injury that he occupies the family dining room as a bedroom in his home, with his mother and sister providing him 24 hour attendant care, which they have provided to him for several years. There has never been any question that he has required and received such care. I recently negotiated a very fair and equitable hourly rate (fair and equitable to the family and to the No-Fault carrier), and that rate is

being paid every month as documentation of the attendant care is submitted to the insurance carrier. With the Lund Bill in its current form, the insurance carrier in that case (or in any other case) could simply decide to unilaterally lower the negotiated pay rate to $11.00 per hour when all concerned are content with the pay rate that has been negotiated, a pay rate which is in excess of $11.00 per hour. In that particular case, the patient requires two caregivers at one time; hence, a modification in the hourly pay rate could immediately bankrupt the family for no meritorious reason whatsoever. Moreover, if the family were to cease administering care, the patient would die. This is the kind of thing that I fear will happen unless the Lund Bill is modified so as to contain language that it is prospective only, as alluded to above. Moreover, in the above real life situation, since neither caregiver is certified, neither would be eligible for payment on the basis of 24 hours per day let alone 8 hours per day. Thus, the patient would be deprived of the conscientious care of his family, as they would go unpaid, for no meritorious reason whatsoever. Surely, that is not the coverage they contracted for when they bought their No-Fault policy. The accident in that case occurred at a time when the policy was in force, providing lifetime benefits with no escape clause for the insurer such as is apparently afforded to the insurer under the Lund Bill which in effect disqualifies family caregivers who are uncertified but who provide around the clock care to an injured family member, pursuant to a prescription from the treating physician.

The question is simply this: In its haste to reform a system that does not need reforming, does the Michigan Legislature and its Governor want to throw into chaos a system that involves thousands of catastrophically injured individuals who are totally without fault for their current debilitated plight? Worse yet, in such a chaotic situation, there would be a sheer torrent of lawsuits flooding the Courts, wherein Judges would be asked whether such retroactive application of the Lund Bill is even constitutional. In my opinion, retroactive application of the Lund Bill would clearly be unconstitutional as a violation of due process. However, why give the Courts more of a burden, asking them to decide the issue of constitutionality of the Bill when a simple modification of the language in the Lund Bill can make certain that it is to be applied prospectively only.

Thank you.

Barry F. LaKritz