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## NO-FAULT INDEPENDENT MEDICAL EXAMINATIONS: PURPOSE, TIMING AND IMPACT

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### I. INTRODUCTION

The Minnesota No-Fault Automobile Insurance Act (“Act”) was passed by the Minnesota legislature in 1974.<sup>1</sup> The Act was specifically designed, in part, “to encourage appropriate medical and rehabilitation treatment of the automobile accident victim by assuring prompt payment for such treatment.”<sup>2</sup> Additionally, the Act was envisioned “to speed the administration of justice [and] to ease the burden of litigation on the courts of this state” by legislatively creating “a system of small claims arbitration to decrease the expense of and to simplify litigation.”<sup>3</sup> The no-fault concept at

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1. See generally MICHAEL K. STEENSON, MINNESOTA NO-FAULT AUTOMOBILE INSURANCE 1-22 (2d ed. 1997) (discussing the history of no-fault legislation in Minnesota)

2. MINN. STAT. § 65B.42(3) (1996).

3. *Id.* § 65B.42(4).

tempted to create a compulsory system where all automobile owners would be required to maintain insurance that would pay for basic economic losses, including medical expenses and wage loss, without regard to fault, incurred as a result of an automobile accident.<sup>4</sup>

Significant tension arises between the goal of speedy compensation of medical bills and the perceived need to eliminate the cost of unnecessary or unrelated medical costs. The Act attempts to regulate this tension through the use of "independent medical examinations."<sup>5</sup> In the preamble to the Act, the legislature specifically noted that one of its purposes was to "require medical examination and disclosure."<sup>6</sup> The physical examination provision serves a singular purpose: to prevent abuse in the system by allowing the insurer to independently assess the claimant's medical condition and, based upon that review, terminate benefits if there is no present evidence of injury or causal relationship to the accident in question. The system must have "checks" to control unnecessary or unrelated costs. The question remains, however, as to who controls the "checks."

There can be no dispute that the physical examination plays an integral part in the no-fault system for the claimant and the insurer. For the claimant, the physical examination is, in the vast majority of cases, the precursor to a termination of benefits which, in turn, results in the cessation of treatment, the shifting of the treatment costs to a private health carrier, or in litigation. For the insurer, the physical examination is used as a cost containment mechanism to terminate benefits for a claimant who, based on the opinion of the examiners, needs no further treatment or has reached maximum medical improvement. Consideration of this tension must be examined by reviewing the fundamental underpinnings of the Act. If the Act was created as an adversary system between the insurer and claimant, the physical examination provision fits that paradigm well. If, however, the Act was created as a

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4. See generally STEENSON, *supra* note 1, at 4.

5. The nomenclature of the physical examination underlies the problem. Insurers and defense counsel refer to the physical examination as an independent medical examination or IME and to the healthcare provider conducting the examination as the independent medical examiner. Insureds and their counsel, on the other hand, dispute that the examinations are "independent" and refer to them as adverse medical examinations and to the healthcare provider as the insurance company's doctor.

6. MINN. STAT. § 65B.42(5) (1996).

neutral system of determining injuries and reasonable treatment for those injuries, the physical examination, if controlled exclusively by the insurer, can become adverse to the Act and should be re-examined. This article will address no-fault physical examinations in the context of the Act, their use by insurers and their impact on the no-fault system from a practitioner's standpoint.

## II. THE ACT AND PHYSICAL EXAMINATIONS

The Act specifically authorizes physical examinations.<sup>7</sup> The Act provides that any person seeking no-fault benefits "shall, upon the request of [the insurer] from whom recovery is sought, submit to a physical examination by a physician or physicians selected by the [insurer] as may reasonably be required."<sup>8</sup> It has been noted that the "reasonably request" language creates a "reasonableness" standard which applies to all aspects of the Act.<sup>9</sup>

The Act provides that the physical examination shall be conducted within the city or town where the claimant resides.<sup>10</sup> If there is no "qualified" physician in the city or town where the claimant resides, the insurer can arrange for the examination to be conducted in the nearest city or town where there is a qualified physician.<sup>11</sup>

A claimant is also required to "do all things reasonably necessary to enable the [insurer] to obtain medical reports and other needed information to assist in determining the nature and extent" of the claimant's injuries.<sup>12</sup> If the claimant refuses to cooperate in responding to a request for an examination, the lack of cooperation "shall be admissible in any suit or arbitration" filed for no-fault

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7. *See id.* § 65B.56. The no-fault arbitration rules also address physical examinations. *See id.* § 65B.525, Rule 12. Under Rule 12, the insurer can apply to the arbitrator for an order to require the claimant to attend a physical examination. Unlike the language in section 65B.56 of the Minnesota Statutes, under Rule 12 the insurer must show good cause for the physical examination and it must be completed within ninety days from the commencement of the arbitration. Rule 12 only applies once an arbitration over benefits has been initiated. Usually, the insurer has obtained a physical examination prior to the commencement of the arbitration proceedings.

8. *Id.* § 65B.56, subd. 1.

9. *See Milwaukee Mut. Ins. Co. v. Murphy*, 474 N.W.2d 438, 440 (Minn. Ct. App. 1991).

10. *See* MINN. STAT. § 65B.56, subd. 1 (1996).

11. *See id.*

12. *Id.*

benefits.<sup>13</sup>

Although the Act's treatment of physical examinations is fairly comprehensive, the legislature specifically provided that Minnesota Statutes section 65B.56 did not preempt an insurer from placing additional "reasonable provisions in policies for mental or physical examination."<sup>14</sup>

### III. INSURED'S ATTENDANCE AT A NO-FAULT IME

The Act provides that a person claiming benefits under a no-fault insurance policy "shall, [upon the request of the insurer] submit to a physical examination."<sup>15</sup> The language of the Act gives the insurer an unqualified right to demand a physical examination and mandates that the claimant attend the examination. For the most part, the mandatory language of the Act applies in practice.

Minnesota courts have addressed the mandatory nature of the physical examination provisions of the Act. If a claimant unreasonably refuses to attend the examination, the insurer can "suspend" benefits until the claimant submits to the physical examination or until the arbitrator concludes that the failure to attend was reasonable.<sup>16</sup> The claimant may also be required to reimburse the insurer for any charges it has incurred as a result of the failure to attend the examination.<sup>17</sup>

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13. *Id.*

14. *Id.* It is interesting to note that Minnesota Statute section 65B.56 subdivision 1, initially provides only that a claimant must submit to a "physical examination" and does not seem to contemplate mental examinations. The statute goes on to provide that the insurer can include reasonable provisions for "mental and physical examinations." *Id.* One could argue that unless the no-fault insurance policy specifically provides for a mental examination, the Act does not authorize such an exam.

15. *Id.* § 65B.56.

16. *See Neal v. State Farm Mut. Ins. Co.*, 529 N.W.2d 330, 333 (Minn. 1995). Prior to *Neal*, the controlling authority on this issue was *Maryland Cas. Co. v. Harvey*, 474 N.W.2d 189, 189 (Minn. Ct. App. 1991). In *Harvey*, the Minnesota Court of Appeals held that Minnesota Statutes section 65B.56 did not specifically authorize the termination of benefits for the claimant's failure to attend the physical examination, and, accordingly, automatic termination of benefits was inappropriate. *See id.* at 193. Under the *Harvey* court's analysis, the arbitrator was to determine whether the claimant's failure to attend was reasonable. *See id.* Although the *Neal* decision specifically overruled *Harvey*, it is unclear if there is any practical difference between "termination" of benefits under *Harvey* and "suspension" of benefits under *Neal*. *See Neal*, 529 N.W.2d at 334 (stating explicitly that *Harvey* was no longer controlling).

17. *See Milwaukee Mut. Ins. Co. v. Murphy*, 474 N.W.2d 438, 440 (Minn. Ct. App. 1991).

There is, however, one clear exception to the insurer's almost absolute right to require a claimant to attend a physical examination. If the insurer breaches its contract with the claimant, it cannot compel the claimant's attendance at a physical examination.<sup>18</sup> This exception most typically arises where the insurer has failed or refused to pay benefits due and owing as of the date of the physical examination. An example of this principle is found in *Milwaukee Mutual Ins. Co. v. Murphy*.<sup>19</sup> In *Murphy*, the claimant had been injured in an automobile accident.<sup>20</sup> Approximately ten months after the loss, the insurer scheduled a physical examination.<sup>21</sup> The claimant, however, refused to attend the examination on the basis that the insurer had failed to pay \$800 in outstanding medical expenses.<sup>22</sup> The insurer argued that, based on the examination, it would retrospectively determine whether the treatment already rendered was reasonable and necessary.<sup>23</sup> In the subsequent declaratory judgment action, the trial court agreed with the insurer that it was not liable for any further benefit payments based on the claimant's failure to attend the physical examination.<sup>24</sup> The court of appeals, however, reversed, finding that, "[i]f Milwaukee Mutual breached the insurance contract by failing to pay medical expenses as they came due, Milwaukee Mutual cannot raise Murphy's failure to attend an IME as a basis for terminating payment of benefits."<sup>25</sup>

It should be noted, however, that an expense is unpaid does not necessarily mean that it is "owing" at the time of the examination. For example, an insurer has thirty days after receipt of reasonable proof of loss to pay certain basic economic losses.<sup>26</sup> Accordingly, if payment requests for those economic losses were not submitted more than thirty days prior to examination, it is inappropriate to advise a client to refuse to attend the examination until payment of those losses.

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18. See *id.*; See also *Harvey*, 474 N.W.2d at 189.

19. 474 N.W.2d at 438.

20. See *id.* at 439.

21. See *id.*

22. See *id.*

23. See *id.*

24. See *id.*

25. *Id.* at 440.

26. See MINN. STAT. § 65B.54, subd. 1 (1996).

#### IV. SELECTION OF PHYSICIAN TO CONDUCT THE PHYSICAL EXAMINATION

The Minnesota Act, like the statutory framework in a majority of no-fault jurisdictions,<sup>27</sup> provides that the insurer may select the physician to perform the examination.<sup>28</sup> By granting the insurer the power to select the healthcare provider to perform the physical examination, the Act gives the insurer significant control over the no-fault system.

The issue of who would select the healthcare provider to perform the physical examination was apparently a subject of some debate at the legislature. The early versions of the Act introduced by Senator Jack Davies provided that an insurer wanting a physical examination could petition a court of "competent jurisdiction" for an order directing the claimant to appear for a physical examination.<sup>29</sup> It appears that under the earlier versions of the Act, the court, rather than the insurer, would have the authority to select the examiner. Even the original version of the bill which became the Act provided that the insurer could obtain a physical examination of a claimant by petitioning the district court for an order compelling such an examination and that the court's order "shall specify the time, place manner, conditions, scope of the examination, and the physician by whom it is to be made."<sup>30</sup> The bill in this version was actually passed by the Senate. A competing bill introduced in the Minnesota House, drafted by State Farm Insurance, specifically provided that the insurer had the authority to select the healthcare provider to conduct the examination.<sup>31</sup> In conference committee, physical examination provisions in the Senate Bill were deleted and replaced by the language in House bill. It is this lan-

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27. The following jurisdictions give the insurer the a right to select the examiner: District of Columbia, D.C. CODE ANN. § 35-2111(b) (1997); New Jersey, N.J. REV. STAT. § 39:6A-13(d) (1997); North Dakota, N.D. CENT. CODE § 26.1-41-11 (1995).

28. See MINN. STAT. § 65B.56, subd. 1 (1996).

29. See S.F. 568, 67th Minn. Leg., 1971 Sess. (introduced by Senators Davies, Glewwe and Holmquist).

30. See S.F. 96, 68th Minn. Leg., 1973 Sess. (Sec. 32) (introduced by Senators Davies, Novak and Knutson).

31. See H.F. 2149, 68th Minn. Leg., 1973 Sess. (introduced by Representatives Quirin, Biersdorf, Sieben, Vento and Wenzel).

guage which now exists as Minnesota Statutes section 65B.56.

Although the Act's grant of authority to the insurer to select the healthcare provider to perform the examination places Minnesota in the majority of jurisdictions in this regard, this framework is by no means universal. The Uniform Motor Vehicle Accident Reparations Act provides, as did the earlier versions of the Act, that the insurer must petition the district court for an order for a physical examination of the claimant.<sup>32</sup> The insurer must establish "good cause" for the examination.<sup>33</sup> If the insurer makes an adequate showing and the examination is ordered, the court is given the authority to select the examiner. Other states give the claimant the right to reject the examiner selected by the insurer.<sup>34</sup> If the claimant exercises that right, the claimant and insurer must attempt to select a mutually agreeable examiner. If none can be agreed upon, the insurer can petition the state insurance commissioner to select the examiner.<sup>35</sup> In yet other states, courts are authorized to select a review board of healthcare providers to examine the claimant and make a determination regarding the claimant's past and future care and treatment.<sup>36</sup>

Although the Act is in line with the majority of jurisdictions, it can be criticized as giving the insurer too much control over the system and creating an overly adversarial system. There can be little dispute that the selection of the examiner gives the insurer tremendous control over the no-fault system. Where "soft tissue" injuries are at issue, the vast majority of claimants who are examined by a physician selected by the insurer, that examination will invariably result in a finding that further care and treatment is not warranted or that he or she has reached maximum medical improvement.<sup>37</sup>

## V. TIMING OF PHYSICAL EXAMINATIONS

Nowhere in the Act is the issue of the timing of a physical examination by an insurer addressed. In practice, insurers are in-

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32. UNIF. MOTOR VEHICLE ACCIDENT REPARATIONS ACT § 32, 14 U.L.A. 103 (1990).

33. *See id.*; *see also* KY. REV. STAT. ANN. § 304.39-270(1) (Michie 1996).

34. *See* CONN. GEN. STAT. ANN. § 38A-372(c) (West 1992).

35. *See id.*

36. *See, e.g.*, UTAH CODE ANN. § 31A-22-307(2)(e) (1997); COLO. REV. STAT. § 10-4-701 (1997).

37. For those who practice in the personal injury area, it is reported anecdotally that a relatively small group of physicians perform a vast majority of the no-fault examinations.

creasingly demanding early physical examinations of no-fault claimants. Some insurers are requiring physical examination as early as three months after the automobile accident giving rise to the claim. Timing of the examination plays an important role in the no-fault system for both insurers and claimants. From the insurer's point of view, early physical examinations are used to prevent claimants who are not injured from abusing the system and obtaining unnecessary and/or unwarranted treatment. From a claimant's view, early physical examinations are used to terminate benefits before a condition has stabilized or before a treatment alternative is determined to be effective.<sup>38</sup>

These early physical examinations, and resultant termination of benefits, forces the claimant to forego treatment or shift the cost of that treatment to his/her health insurance carrier at a very early stage of treatment. Early physical examinations, while appropriate in some circumstances, are becoming the rule rather than the exception.

## VI. IMPACT OF NO-FAULT PHYSICAL EXAMINATIONS

Physical examinations in the no-fault system serve a critical function both in theory and in practice. In practice, the examination, more often than not, results in a finding adverse to the claimant and, accordingly, a termination of benefits. For some claimants, particularly those who are unrepresented, this termination of benefits results in a cessation of treatment, continuation of treatment at personal expense, or the shifting of those treatment costs to the claimant's health carrier. For other claimants, the termination of benefits will require arbitration or litigation. If the Minnesota no-fault system was created as an adversarial one, the present physical examination provisions fit well within that context. If, however, the Act was conceived and designed to be an efficient and neutral mechanism for the compensation of injured persons, the system is inadequate. The adversity created by the Act has resulted in a system that, in practice, results in increased arbitration and litigation or the shifting of treatment costs to a health carrier. If

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38. It is interesting to note that while the examiners are asked to, and do, provide opinions on permanent injury, or lack of it, of the claimant's condition within three months of the accident. Treating physicians, however, usually do not render opinions of permanent injury until approximately one year after the accident. Treating physicians contend that a condition cannot be adequately assessed until a significant amount of time has elapsed.

the physical examination provision under the Act provided that a neutral entity, such as the court, or an arbitrator, selected the examiner, there would be an increased reliability in the system. Examiners would have no incentive to be anything other than completely objective and would less likely act as an advocate for either party. The results of the examination would also have increased respect from claimants. Presently, the claimant gives little or no deference to the report of the examiner given its actual or perceived partiality. If the examination would, rather, be conducted by a truly neutral physician, claimants would be more likely to accept those findings and less likely to immediately pursue arbitration of the claim.

The insurer should have little difficulty accepting such a proposed change given that it merely creates a more neutral system of adjudication. If the matter was to be arbitrated, the insurer still has the right under Rule 12 of the Rules of No-Fault arbitration to a physical examination which, given the nature of the proceedings at that point, is adversarial.

