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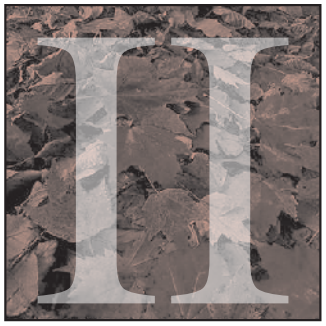

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Articles: All articles published in the *Michigan Defense Quarterly* reflect the views of the individual authors. The *Quarterly* always welcomes articles and opinions on any topic that will be of interest to MDTC members in their practices. Although MDTC is an association of lawyers who primarily practice on the defense side, the *Quarterly* always emphasizes analysis over advocacy and favors the expression of a broad range of views, so articles from a plaintiff's perspective are always welcome. Author's Guidelines are available from Michael Cook (Michael.Cook@ceflawyers.com) or Jenny Zavadil (jenny.zavadil@bowmanandbrooke.com).

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Michigan Defense Quarterly is a publication of the MDTC. All inquiries should be directed to Madelyne Lawry, (517) 627-3745.

President's Corner

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Back to the Future

Since its inception in 1979, MDTC has had 35 presidents, beginning with **Bob Rutt (Plunkett Cooney)**. Bob was the first of four Plunkett Cooney attorneys to be president of MDTC. I have had the privilege of being involved with MDTC during the last seven presidents – **Robert Schaffer (Robert H S. Schaffer, P.C.)** was the first – and have seen firsthand how each has contributed to the growth of MDTC in his and her own unique way.

It's no surprise that past presidents play an important role in any organization. They have invaluable historical perspective, insight, and experience. They provide guidance navigating the inevitable minefields that pop up when managing an organization. And they offer immeasurable support in times of struggle and growth. MDTC is lucky to have a deep bench of past presidents that allow it to maintain its tradition and expand its reach.

MDTC acknowledges the importance of its past presidents through its Past Presidents Committee and its annual Past Presidents Dinner, which this year took place on November 12. That dinner formally brings past presidents together to reconnect with each other, reminisce about years past, and reflect on past accomplishments and challenges.

For the last 10 years, the Past Presidents Committee has been led by **John Jacobs (Jacobs & Diemer, P.C.)**, MDTC President 1996-97, who is responsible for two of MDTC's strongest traditions, its Annual Golf Outing and the Respective Advocates Award, both of which will celebrate their 20-year anniversary in 2016.

John's focus as chair of the Past Presidents Committee has been on young lawyers – getting them involved in, engaged in, and committed to MDTC, like **Tim Diemer**, who eventually became MDTC President a few years ago. John has understood that young lawyers in an organization are the future of that organization. His emphasis on this principle reflects a long tradition in MDTC of recruiting and mentoring young lawyers.

Walt Griffin (**Cline, Cline & Griffin)**, MDTC's fifth president and the first of two Cline, Cline & Griffin attorneys to be president, was known for mentoring young lawyers in MDTC. Most recently, **Paul Vance**, an active member of MDTC for years, has been the face of Cline, Cline & Griffin.

John Scott and **Bob Krause (Dickinson Wright)** likewise brought in young lawyers and shepherded them through MDTC, including **Barb Erard**, who was the first woman president of MDTC.

Bill Jack (Smith, Haughey, Rice, & Roegge), MDTC's eighth president, was well known for his young lawyers boot camp that repeatedly received rave reviews. Three Smith Haughey lawyers after Bill would become president of MDTC, with **Mark Gilchrist** currently being MDTC's Past President.

While it's great to reflect on past accomplishments and achievements, we always have to turn our eyes back to the future. Unfortunately, the time has come for John

MDTC is lucky to have a deep bench of past presidents that allow it to maintain its tradition and expand its reach.

Jacobs to pass the baton of Chair of the Past Presidents Committee to another. **Ed Kronk** (**Brooks Wilkins Sharkey & Turco, PLLC)**, MDTC President 2001-02, graciously has agreed to step into that critical role. We welcome Ed into this new position and look forward to his leadership of this important committee.

As we make this transition, we'll be catching up with our past presidents and tipping our collective hats to them by publishing their mini-profiles. So, past presidents, keep an eye out for our questionnaire; and members, keep an eye out for these profiles. In the meantime, a nod to those who came before us:

Past Presidents	Year	Firm Name at Time of Presidency
*Robert E. Rutt	1979-81	Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen
*Richard B. Baxter	1981-82	Hilman, Baxter
James R. Kohl	1982-83	Plunkett, Cooney, Rutt, Watters, Stanczyk & Pedersen
J. Michael Fordney	1983-84	Fordney, Cady, Rusch & Prine
Walter P. Griffin	1984-85	Cline, Cline & Griffin PC
*John E. S. Scott	1985-86	Dickinson Wright, McKean & Cudlip
*David M. Tyler	1986-87	Canham & Tyler
William W. Jack, Jr.	1987-88	Smith, Haughey, Rice & Roegge
Jack Neal	1988-89	Neal & Lengauer, PC
Arthur W. Brill	1989-90	James, Dark & Brill
Lawrence R. Donaldson	1990-91	Plunkett & Cooney PC
C. Kenneth Perry, Jr.	1991-92	Kerr, Russell & Weber
Harry Ingleson, II	1992-93	Peacock, Ingleson, Stenton, Elzinga & Maynard PC
Robert S. Krause	1993-94	Dickinson Wright, Moon, VanDusen & Freeman
Jose T. Brown	1994-95	Cline, Cline & Griffin PC
James E. Lozier	1995-96	Howard & Howard Attorney's PC
John P. Jacobs	1996-97	O'Leary, O'Leary, Jacobs Mattson & Perry PC
Barbara Erard	1997-98	Dickinson Wright, Moon, VanDusen & Freeman
Steven Barney	1998-99	Plunkett & Cooney PC
Albert Engel, III	1999-00	Smith, Haughey, Rice & Roegge
Patrick Geary	2000-01	Smith, Haughey, Rice & Roegge
Edward M. Kronk	2001-02	Butzel Long
J. Michael Malloy III	2002-03	J. Michael Malloy III, PC
James W. Bodary	2003-04	Siemion, Huckabay, Bodary, Padilla, Morganti, & Bowerman PC
James G. Gross	2004-05	Gross Nemeth & Silverman
Gregory P. Jahn	2005-06	Mastromarco & Jahn
Terrence J. Miglio	2006-07	Keller Thoma, PC
Peter L. Dunlap	2007-08	Fraser Trebilcock Davis & Dunlap, PC
Robert H S. Schaffer	2008-09	Robert H S. Schaffer, PC
J. Steven Johnston	2009-10	Berry Johnston Sztykiel & Hunt, PC
Lori A. Ittner	2010-11	Garan Lucow Miller, PC
Phillip Korovesis	2011-12	Butzel Long PLC
Timothy A. Diemer	2012-13	Jacobs and Diemer, PC
Raymond W. Morganti	2013-14	Siemion Huckabay, PC
Mark A. Gilchrist	2014-15	Smith, Haughey, Rice, & Roegge PC

The Aircraft Exclusion: How the "Model or Hobby Aircraft" Exception Affects Insurance Coverage for Unmanned Aircraft[1]

By Matthew G. Berard, *Plunkett Cooney P.C.*

"Landing" on good definitions can make all the difference in the world.

A new claim is on your desk. You become familiar with the facts and discover that the insured under a homeowners policy is being sued because the insured's drone caused bodily injury when it fell from the sky. Naturally, your first thought is whether the homeowners policy covers this claim. You read the insurance policy line by line to determine if there is coverage. Then, you reach the aircraft exclusion and conclude that it should apply to bar coverage for losses arising out of the operation, maintenance or use of drones because drones are "aircraft." However, depending on the language of the policy, a coverage determination may need far more analysis.

The prevalence of Unmanned Aircraft Systems (UAS) today, commonly referred to as drones, increases the likelihood that the aircraft exclusion in a homeowners insurance policy will become more relevant than ever before. Undoubtedly, there are many beneficial uses for UAS. However, apart from commercial uses, many individuals operate UAS simply for recreation. It is commonplace for such individuals to attach a camera to their freshly unboxed UAS and take to the skies. The problem, however, is that often these UAS operators are inexperienced, unfamiliar with Federal Aviation Administration (FAA) regulations and airspace, and do not take proper care to ensure that the aircraft functions properly. Instances of such failures are evident from a simple YouTube search, such as "drone fail" or "drone crash," which will yield numerous results of videos of UAS mishaps. Those who operate UAS that malfunction, run out of battery life, or encounter icing or strong winds at high altitude may cause property damage or serious bodily injury to unsuspecting individuals on the ground below.

You and your clients should anticipate that individuals who sustain bodily injury or property damage caused by a UAS will turn to an operator's homeowners insurance for coverage. It is also possible that a claimant may seek coverage under a commercial general liability (CGL) policy if a UAS was operated by or on behalf of a business. Thus, it is necessary to determine which coverage obligations an insurer owes when a claim is tendered after a UAS causes bodily injury or property damage. This article will take this insurance coverage analysis step by step, point out issues that will be encountered and potentially raised by plaintiffs' lawyers, highlight the critical information to obtain during the claims-handling process before making a coverage determination, and present recommendations to attorneys counseling insureds and insurers regarding this emerging area of insurance and aviation law.

Matthew G. Berard is an attorney with Plunkett Cooney in Detroit and is licensed in Michigan, Illinois, Indiana, and Massachusetts. Mr. Berard's practice includes medical malpractice and insurance coverage representing insurers in a wide variety of insurance coverage disputes. An FAA-certified private pilot, Mr. Berard is the membership chair of the DRI Aviation Law Committee. He is also a member of the DRI Insurance Law Committee, the Lawyer-Pilots Bar Association, the Aviation Insurance Association, the Michigan Business Aviation Association, and the Aviation Law Section of the State Bar of Michigan.

The Aircraft Exclusion

Those familiar with homeowners insurance policies are aware of the terms commonly found in insuring agreements, exclusions, exceptions, and conditions. Generally, the aircraft exclusion precludes coverage for "bodily injury or property damage arising out of the operation, maintenance, use, loading or unloading of . . . an aircraft." Homeowners Policy, Form FP-7955. Aircraft exclusions may also preclude coverage for "bodily injury or property damage arising out of the ownership, maintenance, occupancy, operation, use, or loading or unloading of an aircraft owned or operated by or rented or loaned to you," Homeowners Policy, Form MPL 8180-000; and "bodily injury or property damage arising out of (1) the operation, maintenance, use, loading or unloading of an aircraft; the entrustment by an 'insured' of an aircraft to any person; or (3) vicarious liability, whether or not statutorily imposed, for the actions of a child or minor using an aircraft," Homeowners Policy, Form FMHO 943 (ed 11-96) (ISO 1990). Similarly, CGL policies preclude coverage for "'bodily injury' or 'property damage' arising out of the ownership, maintenance, use or entrustment to others of any aircraft . . . owned or operated by or rented or loaned to any insured." CGL Policy, ISO Form CG 00 01 10 01- 2000.

At first glance, these aircraft exclusions appear to be relatively straightforward and would appear to preclude coverage for UAS-related accidents. After all, UAS is the acronym for Unmanned *Aircraft* Systems. However, bear in mind that an insurer bears the burden to establish the applicability of an exclusion. See generally *Hollywood Flying Serv, Inc v Compass Ins Co*, 597 F2d 507 (CA 5, 1979).

Notably, some homeowners policies define "aircraft," whereas other policies might not, as "any contrivance used or designed for flight, except model aircraft or hobby aircraft not used or designed to carry people or cargo." Homeowners Policy, Form FMHO 943 (ed 11-96) (ISO 1990). See also *Hanover Ins Co v Showalter*, 204 Ill App 3d 263; 561 NE2d 1230 (1990) (defining "aircraft" in the policy as "any contrivance used or designed for flight except model aircraft of the hobby variety not used or designed to carry people or cargo").

The first part of the definition of "aircraft" as stated above is "any contrivance designed or used for flight." This language mirrors the definitions found in many states' aeronautics codes and is broader than the dictionary definition. See *Merriam-Webster's Dictionary* (9th ed) (defining "aircraft" as "a machine (such as an airplane or a helicopter) that flies through the air"). If an analysis stopped here, a drone would qualify as an "aircraft" because it is a "contrivance used or designed for flight." However, this aircraft exclusion provides an exception for "model aircraft or hobby aircraft not used or designed to carry people or cargo." Homeowners Policy, Form FMHO 943 (ed 11-96) (ISO 1990). See also *St Paul Guardian Ins Co v Old Republic Ins Co*, unpublished opinion of the United States District Court for the District of Oregon, issued April 5, 1993 (Docket No. CIV. 92-1045-FR); 1993 WL 112468, aff'd 47 F3d 1176 (CA 9, 1995) (excluding coverage for "liability resulting from aircraft accidents, commercial or noncommercial. But we do cover model aircraft incapable of carrying passengers or property.").

Because the homeowners policy does not define the terms "model aircraft" and "hobby aircraft," the next question in a coverage analysis is what makes an aircraft a "model" or a "hobby" aircraft? To answer that question, the exception must be dissected into two inquiries. First, are drones "model" or "hobby" aircraft? Second, are drones used or designed to carry people or cargo?

The Model or Hobby Aircraft Exception

Determining whether a drone is a "model" or a "hobby" aircraft is critical to a coverage analysis. While an insurer has the burden to establish whether an aircraft exclusion precludes coverage, the burden of proof shifts to an insured to demonstrate that the "model or hobby aircraft" exception applies to **restore** coverage. See generally *Quaker State Minit-Lube, Inc v Fireman's Fund Ins Co*, 868 F Supp 1278 (D Utah, 1994), aff'd 52 F3d 1522 (CA 10, 1995).

Neither "model" nor "hobby" is defined in today's homeowners policies. When an insurance policy does not define a term, courts look to the plain and ordinary meaning, generally by referring to the dictionary definition. See, e.g., *State Farm Fire & Cas Co v Ham & Rye, LLC*, 142 Wash App 6; 174 P3d 1175 (2007) ("If an insurance policy leaves a term undefined, courts give to the term its plain, ordinary, and popular meaning; [and] may use a standard English dictionary definition as an aid."); *Design Professionals Ins Co v Chicago Ins Co*, 454 F3d 906, 913 (CA 8, 2006) ("If an insurance policy does not define a word, ... courts may look to a standard English-language dictionary to determine its common meaning."); *Lyons v Allstate Ins Co*, unpublished opinion of the United States District Court for the Northern District of Georgia, issued Feb. 7, 2014 (Docket No. 1:13-cv-373-TCB); 2014 WL 494873 (same).

Before consulting a dictionary, ask yourself, what do you see when you think of a "model" or a "hobby" aircraft? One might argue that "model" or "hobby" aircraft are commonly perceived to be small-scale, replica airplanes that a pilot might purchase at a hobby shop, assemble, and fly over open fields. But does the word "model" refer to the physical characteristics of an aircraft or to something else? Further, does the term "hobby" mean that it is a "hobby" to build

the aircraft or a "hobby" to fly it?

Because there is no case law that governs the definition of "model aircraft" or "hobby aircraft," a plain and ordinary meaning of those terms may be used. *Merriam-Webster's Dictionary* defines the noun "model" as "(1) a usually small copy of something; (2) a particular type or version of a product [such as a car or computer]; (3) a set of ideas and numbers that describe the past, present, or future state of something [such as an economy or a business]." The verb "model" means "(1) to design [something] so that it is similar to something else; (2) to make a small copy of [something]; (3) to create a model of [something]; (4) to make something by forming or shaping clay or some other material." *Id.*

"Hobby" is defined in *Merriam-Webster's Dictionary* as "a pursuit outside one's regular occupation engaged in especially for relaxation." *Id.* The Texas Court of Appeals similarly defined "hobby" as "a specialized pursuit ... that is outside one's regular occupation and that one finds particularly interesting and enjoys doing usu[ally] in a nonprofessional way as a source of leisure-time relaxation; ... any favorite pursuit or interest." *Moore v Tarrant Appraisal Dist*, 823 SW2d 418, 419 (Tex App, 1992), rev'd on other grounds 845 SW2d 820 (Tex, 1993). Yet these definitions fail to answer whether it is a "hobby" to build or a "hobby" to fly the aircraft referred to in a homeowners policy. Consequently, we still do not know whether a "hobby aircraft" is a particular class of aircraft or simply any aircraft, regardless of size, flown for hobby.

A plaintiff's lawyer may assert that there is more than one reasonable interpretation of the word "hobby" and an ambiguity exists that should be construed in favor of an insured. A plaintiff's lawyer will attempt to argue that drones are flown for hobby and are, thus, "hobby aircraft," which means that the "model or hobby aircraft" exception applies to restore coverage. However, this interpretation is probably too broad because it could lead to an absurd result not reasonably expected by an insured or contemplated by a policy. For instance, this interpretation would make a private jet a "hobby aircraft" simply because a pilot flies it as a hobby. Additionally, the use of the word "model" with "hobby" in the exception to the aircraft exclusion strongly suggests that these words were intended to refer to small-scale, replica aircraft.

At first glance, these aircraft exclusions appear to be relatively straightforward and would appear to preclude coverage for UAS-related accidents. After all, UAS is the acronym for Unmanned Aircraft Systems.

Although courts have not yet ruled on this issue, the dictionary definitions appear to be consistent with what are commonly perceived as "model" or "hobby" aircraft. Thus, an insurer would generally advance its position by relying solely on these definitions to argue that the plain and ordinary meaning of "model or hobby aircraft" does not encompass a drone (quad-copter) because it is not a "small copy of something" or "similar to something else."

One potential counterargument that a plaintiff's lawyer could make is that the insurance policy does not limit the terms "model aircraft" and "hobby aircraft" strictly to fixed-wing airplanes. A plaintiff's lawyer may insist that "model **aircraft**" includes model helicopters as well as model airplanes, and the plaintiff's lawyer would be correct. Tellingly, the use of the word "aircraft," rather than "airplane," in the aircraft exclusion was a deliberate drafting choice to include, among others, full-size airplanes *and* helicopters.

Notably, the aircraft exclusion has been applied to aircraft other than airplanes. See *Metro Prop & Cas Ins Co v Gilson*, 458 Fed Appx 609 (CA 9, 2011) (applying New Hampshire law to hold that an ultralight vehicle was an "aircraft" under the aircraft exclusion in the insurance policy and that "[a] reasonable insured would interpret the term according to its everyday usage, and a motorized vehicle that flies through the air for hundreds of miles under the control of one or more pilots easily falls within the everyday definition of an 'aircraft'"); *Farmers Ins Co v Daniel*, unpublished opinion of the United States District Court for the Western District of Oklahoma, issued Sept. 19, 2008 (Docket No. CIV-07-1421-C); 2008 WL 4372879 (holding that the aircraft exclusion in a homeowners policy clearly and unambiguously applied to preclude coverage for deaths and injuries sustained in a helicopter crash where the homeowner hired a pilot to provide sight-seeing tours to party guests at an Elks Lodge in Oklahoma.); *Hanover Ins Co v Showalter*, 204 Ill App 3d 263; 561 NE2d 1230 (1990) (noting that *Webster's Third New International Dictionary* 1635 (1981) defines "aircraft" as "a weight-carrying machine or structure for flight in or navigation of the air that is designed to be supported by the air either by the buoyancy of the structure or by the dynamic action of the air against its surfaces—used of airplanes, balloons, helicopters, kites, kite balloons, orthopters, and gliders but chiefly of airplanes or aerostats"); *Totten*

v New York Life Ins Co, 298 Or 765; 696 P2d 1082 (1985) (determining that the clause in the insurance policy did not merely exclude "aircraft" from coverage, but excluded "any aircraft," and therefore the court used the ordinary dictionary definition of "aircraft" to exclude coverage for a hang-gliding accident.); *Tucker v Allstate Texas Lloyds Ins Co*, 180 SW3d 880 (Tex App, 2005) (reasoning that determining if a homeowners' insurance policy exclusion applied to liability coverage for injury arising out of use of aircraft depended on whether (1) the accident arose out of the inherent nature of the aircraft; (2) the accident occurred within the natural territorial limits of the aircraft; (3) the aircraft merely contributed to the condition that produced the injury or the aircraft itself produced the injury; and (4) insured had intended to use the plane as a plane). But see *Hanover Ins Co v Showalter*, 204 Ill App 3d 263, 270; 561 NE2d 1230 (1990) ("In construing the language of the exclusionary provision, we judge that a parachute is not an 'aircraft,' that is, a 'contrivance used or designed for flight ...."); *N Mut Ins Co v Hammar*, unpublished opinion per curiam of the Michigan Court of Appeals, issued Nov. 12, 1996 (Docket No. 191642); 1996 WL 33348777 (holding that the aircraft exclusion did not apply to a skydiving accident because bodily injury did not "arise out of" operation maintenance, operation or use of an aircraft," but rather, injuries were sustained when one skydiver landed on another during a parachute jump exhibition).

A plaintiff's lawyer may argue that a "model **aircraft**" or a "hobby **aircraft**" would encompass a "model" or a "hobby" helicopter. With the exception of fixed-wing military or law enforcement drones, we commonly perceive UAS as quad-copters, that is, rotor-wing aircraft that are able to take off and land vertically. A plaintiff's lawyer would then likely argue that there is no significant difference between, for instance, a small-scale replica of a Blackhawk helicopter and a rotor-wing UAS that would justify excluding coverage for one but insuring the other, especially because both have similar flight capabilities. However, the dictionary definition of "model" ("usually small copy of something") might ultimately save an insurer because a drone is not a small copy or a replica of a larger aircraft.

In the event that an insurer issued a homeowners policy without the exception for "model" or "hobby" aircraft, the insurer would likely prevail. If an insurer is confronted with a claim under a homeowners policy that includes an exception for "model" or "hobby" aircraft, a plaintiff might concede that a drone is an "aircraft" and thus the aircraft exclusion applies. But a plaintiff's lawyer would likely focus on the argument that a drone constitutes a "model" or a "hobby" aircraft to attempt to trigger the exception to the aircraft exclusion.

A plaintiff's lawyer may cite the definitions contained in the FAA Modernization and Reform Act of 2012, PL 112-95, Feb. 14, 2012, Title III, Subtitle B, Sec 331, *et seq.* (FMRA). The FMRA provides that "[t]he term 'unmanned aircraft' means an *aircraft* that is operated without the possibility of direct human intervention from within or on the aircraft." *Id.* Additionally, "[t]he term 'unmanned aircraft system' means an unmanned aircraft and associated elements (including communication links and the components that control the unmanned aircraft) that are required for the pilot in command to operate safely and efficiently in the national airspace system." *Id.* The FMRA defines "model aircraft" as "an **unmanned aircraft** that is (1) capable of sustained flight in the atmosphere; (2) flown within visual line of sight of the person operating the aircraft; and (3) flown for hobby or recreational purposes." *Id.* at Sec 336 (emphasis added).

Notably, the FMRA does not mention what we might typically envision when we think of a "model" or a "hobby" aircraft—a small-scale replica of an actual airplane that someone might purchase at a hobby shop and assemble. A plaintiff's lawyer probably could not make a credible argument that a UAS is an "aircraft" in the general sense. Thus, most plaintiffs' lawyers will have an incentive to rely on the definition in the FMRA, and they might successfully argue that an unmanned aircraft flown for recreation falls within the exception to the aircraft exclusion. At the very least, a plaintiff's lawyer may encourage a court to find an ambiguity in the policy language that should be construed against an insurer.

The FMRA does not characterize a "model aircraft" in terms of its physical characteristics or size. As indicated by the quotes from the FMRA above, analyzing whether to characterize something as a "model aircraft" requires a determination of whether an unmanned aircraft is "flown for hobby or recreational purposes." Based on this definition, there might appear to be plenty of confusion regarding the term "model aircraft," and a court may find that there is ambiguity in the definitions provided in the language of the policy itself, the state aeronautics codes, the dictionary, **and** the FMRA when lawyers cite them. A plaintiff's lawyer will likely argue that the definition of "model aircraft" is ambiguous because it has more than one meaning, especially in light of the definition in the FMRA. A plaintiff's lawyer might also point out that the FAA website refers to UAS as "model aircraft" in the FAA regulations

and recommendations for safe operation. However, should a court rely on the FAA's referral to UAS as "model aircraft" when the drafter of an insurance policy may not have contemplated such a broad definition in the coverage context? Insurers' lawyers could argue that a governmental agency's technical definition of, or the references found in other regulations to, the same words should have no effect on the plain and ordinary meaning of those terms or interpreting the intent of a policy drafter.

For instance, the U.S. Court of Appeals for the Ninth Circuit affirmed the district court's rejection of an attempt to create ambiguity in an insurance policy by referencing regulations and publications, rather than the natural and ordinary understanding of the term "aircraft." *Metro Prop & Cas Ins Co v Gilson*, 458 Fed Appx 609 (CA 9, 2011). The insured's estate argued that the Federal Aviation Regulations (FARs) distinguished an ultralight vehicle from an "aircraft" because the FARs "limit[] the operation of 'ultralight vehicles' near 'aircraft.'" See Defendant Pauline Gilson's Opposition to Metropolitan's Motion for Summary Judgment at 12-13, *Metro Prop & Cas Ins Co v Gilson*, United States District Court for the District of Arizona, filed July 7, 2010 (Docket No. 2:09-cv-01874-PHX-GMS); 2010 WL 2068218, citing 14 CFR 103.13. Further, the insured argued that "**ultralight** *vehicles* need not even meet the elementary airworthiness standards specified for '**aircraft**.'" *Id.*, citing 14 CFR 103.7 ("[U]ltralight vehicles and their component parts and equipment are not required to meet the airworthiness certification standards specified for aircraft or to have certificates of airworthiness."). The district court held that the ultralight vehicle was an "aircraft" and found that "[w]hether or not the insurance term ['aircraft'] is ambiguous, no New Hampshire decision relies on technical publications to guide its definition of a term in an insurance policy. Rather, the courts look to the 'natural and ordinary meaning,' not to technical classifications." *Id.*, citing *Nicolaou v Vermont Mut Ins Co*, 155 NH 724, 728; 931 A2d 1265, 1268 (2007).

If a plaintiff's lawyer relies on the FMRA, there is authority for the proposition that referencing anything other than the plain and ordinary meaning of a term to create an ambiguity is improper. See generally *Gilson*, 458 Fed Appx 609; See also *Boeing Co v Aetna Cas & Sur Co*, 113 Wash 2d 869; 784 P2d 507 (1990) ("The language of insurance policies is to be interpreted in accordance with the way it would be understood by the average man, rather than in a technical sense."); *Farmland Indus, Inc v Republic Ins Co*, 941 SW2d 505 (Mo, 1997) ("When interpreting the language of an insurance policy, this Court gives a term its ordinary meaning [that is, one that the average layperson would reasonably understand], unless it plainly appears that a technical meaning was intended."); *Allstate Ins Co v Runyon Chatterton*, 135 NC App 92; 518 SE2d 814 (1999) ("Non-technical words are to be given their meaning in ordinary speech unless it is clear that the parties intended the words to have a specific technical meaning ... [u]se of the ordinary meaning of a term is the preferred construction, and in construing the ordinary meaning of a disputed term, it is appropriate to consult a standard dictionary."). But see *Valley Forge Ins Co v Field*, 670 F3d 93 (CA 1, 2012) ("Words in an agreement are given their ordinary and usual sense 'unless it appears that [the words] are to be given a peculiar or technical meaning' . . . [a]nd insurance policy language is interpreted based on both the common and the technical understanding of the words.").

A court might be reluctant to use a definition of a term that would depend on deciphering the intended use of the item to which the term refers. Nonetheless, if a court relies on the FMRA, there may be one other saving grace for insurers. In addition to being flown for hobby or recreation, an unmanned aircraft must be in the visual line of sight of the person operating the aircraft for it to constitute a "model aircraft." See FMRA sec 336(c)(2). In the event that a court uses the definition of "model aircraft" in the FMRA, an insurer has one last opportunity to deny coverage properly: an insurer can deny coverage if it has information that an unmanned aircraft was not in the visual line of sight of its operator. Thus, if an operator did not keep the unmanned aircraft in sight, an insurer's lawyer may succeed in arguing that the unmanned aircraft does not qualify as a "model aircraft" according to the definition in the FMRA.

A court may ultimately determine that the FMRA provides a technical definition and that the plain and ordinary meaning of "model" or "hobby" aircraft does not hinge on the intent of the flight. Rather, a court may rule in an insurer's favor and find that a small-scale replica plane or helicopter is a "model aircraft" in the traditional sense according to the dictionary. However, because the FMRA premised classifying what constitutes a "model aircraft" on the intent of the flight, we can expect a plaintiff's lawyer to argue that the definitions in the FMRA create an ambiguity in the policy language.

"Designed to Carry People or Cargo"

The exception to the aircraft exclusion

applies to model or hobby aircraft **not used or designed to carry persons or cargo**. Thus, if a model or a hobby aircraft is "designed," and perhaps to a lesser extent "used," to carry persons or cargo, the exception does not apply to restore coverage. An argument might be made that UAS are **designed** to carry "cargo." For instance, cameras are commonly attached to UAS, and Amazon.com has announced that it is experimenting with delivering merchandise to its customers using UAS. Thus, if it can be successfully argued that a camera or a single package is "cargo," and the specific UAS involved in a claim was used or designed to carry it, then coverage may be denied. To resolve this part of a coverage analysis, it is necessary to determine what constitutes "cargo."

In *Baker v Catlin Specialty Ins Co*, 769 F Supp 2d 1157 (ND Iowa, 2011), the court addressed whether a 1979 Chevrolet pickup truck with an auxiliary fuel tank was "mobile equipment" under a commercial general liability policy. The Chevrolet was used to transport fuel for other construction equipment at a salvage site. The CGL policy at issue defined "mobile equipment" in part as "[v]ehicles not described . . . above maintained primarily for purposes other than the transportation of persons or cargo." *Id.* at 1164. Pertinent to the drone analysis, the court noted that "cargo" is defined by *Merriam–Webster's Dictionary* as "the goods or merchandise conveyed in a ship, airplane, or vehicle." *Id.* at 1171. The court held that the fuel in the auxiliary tank was "cargo," and thus the Chevrolet failed to meet the definition of "mobile equipment." *Id.*

In *Am States Ins Co v Travelers Prop Cas Co of Am*, 223 Cal App 4th 495; 167 Cal Rptr 3d 288 (2014), the court addressed whether a food truck satisfied the definition of "mobile equipment," which included vehicles "maintained primarily for purposes other than the transportation of persons or cargo." *Id.* at 296. The court held that "the primary purpose of the . . . food truck was to serve as a mobile kitchen and not to **transport** persons or cargo." *Id.* (citing *Employers Mutual Casualty Company v Bonilla*, 613 F3d 512, 518 (CA 5, 2010) ("The 'inherent purpose' of a mobile catering truck certainly could be seen as including the use and maintenance of its kitchen facilities ....").

Following the logic in *Am States Ins Co*, and as implied in the dictionary definition, a camera would not likely qualify as "cargo" when a drone with an attached camera takes pictures or video, then returns to its originating location. Conversely, if a person delivers a package to a neighbor for noncommercial purposes, the package might be considered "cargo." See *State v Hager*, unpublished opinion of the Washington Court of Appeals, issued March 2, 2015 (Docket No. 70947-0-I); 2015 WL 890989 (citing *Webster's Third New International Dictionary* 339 (1993) for its definition of "cargo" as "the lading or freight of a ship, airplane, or vehicle: the goods, merchandise, or whatever is **conveyed**"); *Nationwide Agribusiness Ins Co v Byler*, unpublished opinion of the United States District Court for the Eastern District of Pennsylvania, issued March 31, 2009 (Docket No. CIV.A. 06-1604); 2009 WL 890114 (defining cargo as "the goods or merchandise **conveyed** in a ship, airplane, or vehicle; freight"); *Black's Law Dictionary* 226 (8th ed 2004) (defining "cargo" to mean "goods **transported** by a vessel, airplane, or vehicle" (emphasis added)). Note, however, that courts have recognized the commercial nature of the term "cargo." *State Farm Fire and Cas Co v Pinson*, 984 F2d 610, 613 (CA 4, 1993) (stating that "[c]learly, the term cargo has a strong commercial connotation" and concluding that a boat being towed by a car is not "cargo"). See also *Compact Oxford English Dictionary*, (3rd ed 2005) ("goods **carried commercially** on a ship, aircraft, or truck").

When an item is designed to carry "cargo," it implies that the item, in this case, a drone, must be capable of delivering or commercially conveying those goods or cargo. If a camera is attached to a drone, the drone pilot generally did not intend to deliver it as much as to use the camera for taking pictures or video. While courts have yet to address specifically whether an item that a UAS is **capable** of lifting would be considered "cargo" that the UAS was **designed** to carry, a court would probably find that the plain and ordinary meaning of "cargo" does not include a camera attached to a drone. Thus, it seems unlikely that the exception for "model or hobby aircraft not designed to carry persons or cargo" can be avoided solely on this basis.

However, if all else fails and a court accepts a plaintiff's lawyer's argument that the FMRA should supply the definition of "model or hobby aircraft," an insurer's lawyer should be prepared to advocate that the court should then also use the definition of "cargo" found in the Federal Aviation Act. 49 USC 40101, *et seq*. Under the Federal Aviation Act, which the FMRA partially amended, "'cargo' means property, mail, or both." 49 USC 40102(12). An insurer's lawyer could argue that a drone carrying a camera was used to carry "property," even using technical definitions. This argument should be a last resort because insurers will need to be consistent in seeking the plain and ordinary interpretations of "model" and "hobby" for "model or hobby aircraft," rather than relying on technical definitions, for use in a coverage analysis. Again, in the

worst case scenario, when a court agrees with a plaintiff's lawyer that the FMRA definitions govern a coverage analysis, this avenue is available to argue that the model or hobby aircraft exception does not apply.

Questions to Ask an Insured When an Insured Makes a Claim Involving a UAS

If you are an insurer and you receive a claim involving an unmanned aircraft, or if you counsel insurers, there is specific information that you will need to determine whether coverage exists under a homeowners policy containing a "model or hobby aircraft" exception. If an aircraft exclusion does not contain the exception for "model" or "hobby" aircraft, it may be appropriate for an insurer to deny coverage. However, if a policy contains the exception, an insurer should ask certain general and certain specific questions.

General Questions

- If a policy contains the exception, an insurer should ask these general questions.
- Does the insured own the aircraft?
- When did the insured purchase the aircraft?
- Where did the insured purchase the aircraft?
- Who piloted the aircraft when the event leading to the claim took place?
- How much experience does the pilot have flying this aircraft?
- Is the pilot FAA certified to fly UAS? Does the pilot have an FAA license or licenses of any kind?
- What is the make and model of the UAS? What does it look like? If the UAS at issue is what someone traditionally would perceive to be a drone (i.e., a quad-copter), then it likely does not fit the plain and ordinary meaning of "model" or "hobby" aircraft.
- What were the weather conditions, and did the pilot fly the aircraft into the clouds? If yes, the drone might not satisfy the definition of "model aircraft" in the FMRA if it was not in the pilot's visual line of sight.

[B]ecause the FMRA premised classifying what constitutes a "model aircraft" on the intent of the flight, we can expect a plaintiff's lawyer to argue that the definitions in the FMRA create an ambiguity in the policy language.

Specific Questions

- If a policy contains the exception, an insurer should ask these specific questions.
- Why was the pilot operating the aircraft, or more precisely, what was the intent or purpose of the flight? If the intent was for anything other than hobby or recreation, the UAS does not satisfy the definition of "model aircraft" in the FMRA, and the claimant would lose the ability to rely on this definition to argue there is coverage under the homeowners policy.
- Was the operation of the aircraft for compensation or for a commercial purpose? If so, the UAS not only fails to satisfy the definition of "model aircraft" under the FMRA, but the insurer can also rely on the business-pursuits exclusion as a fallback to preclude coverage.
- Was the aircraft carrying anything such as a camera or a package? Courts have not resolved whether either one constitute "cargo"; however, if a court determines that whatever was transported with the drone is "cargo," then the business-pursuits exclusion should apply because "cargo" is a commercial term.
- Where was the pilot physically located while operating the aircraft?
- Where did the aircraft crash in relation to that position?
- Where did the pilot last observe the UAS?
- Was the pilot flying the unmanned aircraft strictly with reference to a video feed from a camera attached to the aircraft? If so, this would further bolsters the insurer's position because the UAS might not satisfy the definition of "model aircraft" under the FMRA if it was not in the pilot's visual line of sight.
- Were there buildings or any other obstructions between the aircraft and the pilot? If so, this also would bolster the insurer's position further, again because the UAS might not satisfy the definition of "model aircraft" under the FMRA if it was not in the pilot's visual line of sight.
- Did the UAS crash while it was not in the pilot's visual line of sight?
- Did the UAS crash because it was not in the pilot's visual line of sight?

While courts have yet to address specifically whether an item that a UAS is capable of lifting would be considered "cargo" that the UAS was designed to carry, a court would probably find that the plain and ordinary meaning of "cargo" does not include a camera attached to a drone.

Recommendations

It is important that an insurer review its policy language and consider the effect of the "model or hobby aircraft" exception. Now that UAS are becoming inexpensive and increasingly popular, the potential for an occurrence involving an aircraft has increased exponentially, and the aircraft exclusion may be relevant in far more claims than initially envisioned when the language was drafted.

Accordingly, the language in a policy should take into account a plaintiff's potential arguments about whether the aircraft exclusion applies to a UAS. An insurer could simply issue a homeowners policy without a definition of "aircraft" or without the "model or hobby aircraft" exception. Alternatively, an insurer could eliminate the definition of "aircraft," including the "model or hobby aircraft" exception, entirely by endorsement. However, if an insurer still wishes to provide coverage for traditional model or hobby aircraft pilots, it could redefine the term "aircraft" in its policy, by endorsement, to provide an exception for small-scale, replica model or hobby aircraft only. When "landing" on a new definition, it is important not to use the FMRA as guidance on what constitutes a "model" or a "hobby" aircraft. Any similarities between the policy language and the FMRA definitions may compromise an insurer's argument seeking a plain and ordinary meaning of those terms in future litigation.

While some policies have contemplated the use of model and hobby aircraft, UAS previously were less commonly used compared to current UAS operations. Insurers today encounter inexpensive, mass-produced flying machines operated by inexperienced pilots who have little knowledge of applicable federal law and regulations than in the past, and it is a certainty that claims for bodily injury and property damage arising out of the use of UAS will increase in the years to come. The uncertainty, however, is how a court will address such claims.

Endnotes

1 Previously published in DRI *For the Defense*, Vol. 57, No. 8, August 2015.

MEMBER NEWS

Work, Life, and All that Matters

Edward P. Purdue (Dickinson Wright PLLC) has been selected as the inaugural recipient of the DRI Veterans Network Meritorious Service Award. This award honors a member of the DRI, who is also a military veteran, for their selfless and exemplary performance during military or civilian life. The award was presented at the Awards Luncheon during the DRI Annual Meeting in Washington, D.C.

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When A Vague Claim of "Hostile Work Environment" is A Discrimination Complaint

By: Patricia Nemeth and Kellen Myers, *Nemeth Law, P.C.*.

The Sixth Circuit Court of Appeals recently found that an employee's vague complaint of a hostile-work environment constituted protected activity under Title VII. The case, *Yazdian v ConMed Endoscopic Technologies, Inc*.,[1] highlights critical issues that employers must consider when dealing with similar vague statements by employees and the importance of treating such statements as tangible complaints about discrimination and/or harassment.

Yazdian v. ConMed

The plaintiff, Reza Yazdian, a first-generation Iranian-American and non-practicing Muslim, worked as a territory manager for ConMed. As a territory manager, Yazdian received numerous awards, bonuses, and promotions for his performance. However, Yazdian had a troubled relationship with his direct supervisor and district manager, Tim Sweatt. Yazdian felt that Sweatt often singled him out because of his ethnic background. Specific incidents included when:

- Sweatt sent him a National Geographic article about ancient Persia stating, "I took out the subscription to National Geographic for my kids, but this cover story on ancient Iran caught my eye [and] was a very interesting read. Thught [sic] you would want to see it as well."
- Sweatt sent out gift certificates to the Honey Baked Ham Stores to all territory managers (a customary act for ConMed managers). Sweatt sent an email to Yazdian stating, "Although I believe you have said you do eat pork, I would like to mention that if you have never shopped at this place, they have many other items-the turkey is quite good!"
- Sweatt rejected an article written by Yazdian for publication in ConMed's newsletter espousing Yazdian's recent sales success as being "far too self-serving."

In June 2010, Yazdian complained to Sweatt about his behavior, saying that Sweatt was "creating a hostile work environment," that Sweatt was the "worst manager [he] had ever had," that numerous co-workers complained about Sweatt's management style, and that Sweatt did not show Yazdian any "longevity or respect." Lastly, he told Sweatt, "I'm in the driver seat, don't think you are[.] You are out of line."

Yazdian also made similar complaints to Sweatt's supervisor and asked to be transferred. Following this, Sweatt emailed human resources to discuss Yazdian's "behavioral issues," including Yazdian's comments. ConMed issued a written warning to Yazdian citing his inappropriate outbursts, combativeness, rudeness or indifference

Patricia Nemeth has been an attorney since 1984. Ms. Nemeth specializes in the labor and employment arena as an arbitrator, mediator, investigator, litigator, consultant, and negotiator. Her areas of expertise include, but are not limited to investigations, religious, ethnic, and gender discrimination, workplace sex, race, and ethnic harassment, wrongful discharge, union organizing activities and multi-party lawsuits. Industries served include healthcare, nursing homes, retail, manufacturing, gaming, insurance, and government entities. Ms. Nemeth serves as a certified mediator for all types of civil litigation matters, including employment. She also serves as an employment arbitrator and commercial arbitrator.

Kellen T. Myers focuses his practice on management labor and employment law. Areas of particular interest include wage and hour and traditional labor law.

to management, and use of a threatening tone, among other things. The warning also referenced Yazdian's comment that Sweatt was creating a "hostile work environment" and his accusation that Sweatt did not like his race.

Insubordination or Protected Activity?

When Sweatt informed Yazdian of the written warning, Yazdian again responded with, "You are a bad individual," "You make poor decisions," "You are not in a position to challenge me," and "I don't think you are a gentleman." In addition he said, "I'm going to respond with counsel," "You are creating a hostile work environment," "I will be responding with charges," and "I am going to bring a lawsuit against you." Two weeks later ConMed terminated Yazdian's employment.

Yazdian filed a lawsuit alleging, among other things, national origin discrimination and retaliation. The district court dismissed all of his claims. Yazdian appealed to the Sixth Circuit Court of Appeals which held that the district court erred in dismissing the retaliation claim. The appellate court reasoned that a jury could conclude that Yazdian was terminated for engaging in protected activity based on his statements to Sweatt.

Protected Activity

ConMed argued that Yazdian's complaints were too vague to qualify as a protected activity – a necessary requirement to prove retaliation. The court disagreed. Importantly, the court indicated that **each** of the following statements made to Sweatt **constituted protected activity** under Title VII:

- "Hostile work environment."
- "I'm going to respond with counsel."
- "I'm going to bring you up on charges …."
- "Bring a lawsuit against [Sweatt]"
- "I will have an attorney respond."
- "I will be responding with charges."

These statements, the court said, put ConMed on notice of a national-origin complaint. The court focused on the hostile-work-environment statement and said that the phrase is a term of art specifically referring to "an unlawful employment practice under Title VII" when "the context objectively reveals that the employee is using the expression to complain about repeated abusive discriminatory comments or treatment."[2]

Even though the court said that many of Yazdian's defiant statements would have supported termination, those inappropriate statements were "intertwined with Yazdian's concerns about a hostile work environment."[3] Thus, Yazdian was still engaged in a protected activity.

Ultimately, the court held that a jury could conclude that Yazdian had intended the phrase "hostile work environment" to refer to discriminatory treatment because he was aware of the "legal significance" of the term and meant it to be a complaint about national origin or religious discrimination.[4]

Insight for Employers

The Sixth Circuit's determination that nearly all of Yazdian's arguably vague statements constituted protected activity means that employers will now need to treat such statements as actual complaints about discrimination and/or harassment. As a result, employers will need to conduct an investigation and, when warranted, take prompt and remedial action. A distinguishing factor for employers may be in those cases where they cannot determine from the context of the vague hostile-work-environment statement(s) that the employee is complaining about discrimination/harassment. Employers need to be certain of this, however, before taking a position. Without such certainty, the position may not be defensible in court should the employer forego conducting an investigation and taking prompt remedial action.

Endnotes

1 *Yazdian v ConMed Endoscopic Technologies, Inc*, 793 F3d 634 (CA 6, 2015).

2 *Id.* at 646.

3 *Id.* at 652.

4 *Id.* at 646

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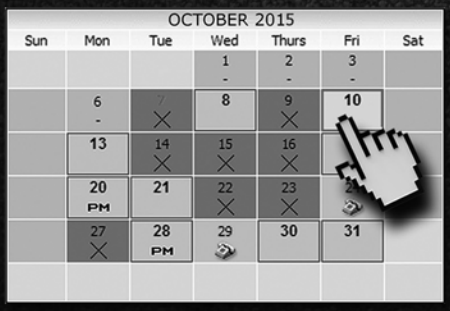

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MDTC Schedule of Events

2015

November 12	MDTC Board Meeting – Sheraton, Novi
November 12	Past Presidents Dinner – Sheraton, Novi
November 13	Winter Meeting – Sheraton, Novi

2016

January 10	EID/Golden Gavel Award Deadline
January 29	Future Planning – Soaring Eagle, Mt. Pleasant
January 30	Board Meeting – Soaring Eagle, Mt. Pleasant
May 12-14	Annual Meeting – The Atheneum, Greek Town
September 21-23	SBM Annual Meeting – Grand Rapids
September 21	Respected Advocate Award Presentation – Grand Rapids
October 6	MDTC Meet the Judges – Sheraton, Novi
October 19-23	DRI Annual Meeting – Boston
November 10	MDTC Board Meeting – Sheraton, Novi
November 10	Past Presidents Dinner – Sheraton, Novi
November 11	Winter Meeting – Sheraton, Novi

2017

June 22-24	Annual Meeting – Shanty Creek, Bellaire
Sept 27-29	SBM – Annual Meeting – Cobo Hall, Detroit

2018

May 10-11	Annual Meeting & Conference – Soaring Eagle, Mt. Pleasant

2019

June 20-22	Annual Meeting – Shanty Creek, Bellaire

By: Graham K. Crabtree, *Fraser, Trebilcock, Davis & Dunlap, PC*
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MDTC Legislative Report

As I write this report in mid-October, the sun is reflecting brightly off the gleaming finish of the newly-renovated Capitol dome, and we have entered into what should be a promising time of legislative opportunity. The summer recess is over, the recent traumatic cleaning of the House has been concluded for the present at least, and the traditional break for the firearm deer season is still more than a month away. Most importantly, none of our legislators are actively campaigning for election or re-election in this odd-numbered year, and few voters will have any recollection, a year from now, of anything accomplished this fall. In short, it is the perfect time for our Legislature to get a few things done. We will be watching with interest to see if our expectations are fulfilled.

2015 Public Acts

As of this writing on October 13, 2015, there are 139 Public Acts of 2015 – only nine more than when I last reported in August. Only two of these most recent Public Acts are of any significant interest to civil litigators. They are:

2015 PA 131 – Senate Bill 62 (Hertel – D), which will amend 1937 PA 103, MCL 565.203, regarding requirements for execution of documents filed with a register of deeds. As amended, **this provision will exempt certified copies of death certificates described in MCL 333.2886 from the provisions of the Act, and will also exempt instruments bearing electronically-affixed signatures from certain formal requirements** imposed under MCL 565.201. This amendatory act will take effect on December 29, 2015.

2015 PA 135 – House Bill 4193 (Nesbitt – R), which will amend the Vehicle Code, MCL 257.328, to **allow drivers to display proof of insurance by use of electronic communication devices when asked to provide proof of insurance by a law enforcement officer.** When proof of insurance is provided in this manner, the driver may be required to forward a copy of the electronically furnished certificate to a location specified by the officer. This amendatory act will also take effect on December 29, 2015.

Old Business and New Initiatives

The legislation now under consideration is, as usual, a mixture of old and new ideas. The bills of interest include:

Senate Bill 531 (Jones – R), Senate Bill 532 (Proos – R) and **Senate Bill 533 (Schuitmaker – R)**, proposing amendment of the Revised Judicature Act to add a new section, MCL 600.176, and a new Chapter, 19A, which would **create a new Judicial Electronic Filing Fund in the Department of Treasury;** provide for the administration of the fund by the State Court Administrative Office to support the implementation, operation and maintenance of a statewide electronic filing system and supporting technology; and provide for the funding of the project by the collection of additional fees, in addition to the previously established filing fees, to be paid once upon initiation of a civil action or review in the state trial or appellate courts.

Graham K. Crabtree is a Shareholder and appellate specialist in the Lansing office of Fraser Trebilcock Davis & Dunlap, P.C. Before joining the Fraser firm, he served as Majority Counsel and Policy Advisor to the Judiciary Committee of the Michigan Senate from 1991 to 1996, and as an Assistant Prosecuting Attorney in the Appellate Division of the Oakland County Prosecutor's Office from 1980 to 1991. He can be reached at gcrabtree@fraserlawfirm.com or (517) 377-0895.

Most importantly, none of our legislators are actively campaigning for election or re-election in this odd-numbered year, and few voters will have any recollection, a year from now, of anything accomplished this fall. In short, it is the perfect time for our Legislature to get a few things done.

For civil actions filed in the Supreme Court, Court of Appeals, circuit court, probate court or Court of Claims, the additional "Electronic Filing System Fee" would be $25.00. For actions filed in district court, the additional filing fee would be $20.00 if money damages are sought and $10.00 for all other cases except those in the small-claims division, for which a $5.00 fee would be collected. An additional "Automated Payment Service Fee" of not more than 3% of the automated payment could be charged if a bank or other electronic-commerce business charges the court or court funding unit a merchant transaction fee for an automated payment. Courts that are already collecting fees for electronic filing would be allowed to continue collecting specified fees for filing and service, in addition to the new Electronic Filing System Fee, until December 31, 2016.

Governmental entities would not be required to pay an Electronic Filing System Fee, and, although the new fees would be paid by anyone initiating a civil action, the fee would be waived if the regular filing fee is waived for indigence of the filing party. The legislation states that the new provisions could not be construed to require a person to file documents electronically "except as directed by the Supreme Court." Thus, the legislation would pave the way for mandatory e-filing in the future if required by the Supreme Court.

This legislation has been proposed by the Supreme Court to facilitate the creation of the statewide e-filing system which has been widely discussed for some time, and to provide the necessary statutory authorization for the collection of the new filing fees that will be used to fund the creation and implementation of that system. These bills were introduced on September 30, 2015, and were promptly reported by the Senate Judiciary Committee on October 6th with Bill Substitutes that added a five-year sunset on the collection of the new filing fees. They appear to be on a fast track, and it is expected that they will probably receive final approval before the end of this year to provide statutory authorization for the e-filing fees that are already being collected in relation to pilot projects in Wayne, Oakland, and Macomb counties.

House Bill 4658 (McCready – R), based upon last session's House Bill 5511**,** proposes amendment of the Revised Judicature Act to create a new section, MCL 600.6096, which would **establish new provisions requiring collection of amounts owed for tax liabilities and other known liabilities to the state, support payments, garnishments directed to the state, IRS levies, and repayment of benefits received under the Michigan Employment Security Act from payments made in satisfaction of judgments against the state or its departments.** This Bill was passed by the House on September 16, 2015, and has now been referred to the Senate Committee on Families, Seniors and Human Services.

Senate Bill 427 (Hansen – R) would amend the "Good Samaritan Act," MCL 691.1501 and 691.1502, to **include licensed EMS providers within the class of health care providers who are granted limited immunity from civil liability for providing emergency care without compensation at the scene of an emergency, or to individuals injured as a result of participation in competitive sports.** This bill was passed by the Senate on October 7, 2015, and has now been referred to the House Committee on Criminal Justice.

Senate Bill 444 (Stamas – R) would amend the Public Health Code to add a new Part 209A, addressing "Critical Incident Stress Management Services." **The new provisions would apply to services provided to emergency-service providers by members of a "Critical Incident Stress Management (CISM) Team" to help them cope with stress resulting from a "Critical Incident," defined by the proposed legislation as "an actual or perceived event or situation that involves crisis, disaster, stress or trauma."** The new provisions would provide for confidentiality of statements made by emergency-service providers to CISM team members, and records kept by team members in relation to the services provided, subject to specified limitations. They would also provide CISM team members with limited immunity from civil liability for damages or loss related to their performance of CISM services. This bill was introduced on September 9, 2015, and referred to the Senate Committee on Health Policy.

House Bill 4847 (Glenn – R) would amend the Revised Judicature Act to add a new section, MCL 600.1476, and amend MCL 600.6419 and MCL 600.6421, pertaining to jurisdiction of the Court of Claims. **The new section 1476 would provide that a person has a right to trial by jury in any action against the state that is not brought in the Court of Claims if a demand for a jury trial is made in accordance with the court rules.** It is noteworthy that the

This legislation has been proposed by the Supreme Court to facilitate the creation of the statewide e-filing system which has been widely discussed for some time, and to provide the necessary statutory authorization for the collection of the new filing fees that will be used to fund the creation and implementation of that system.

right to a jury trial provided under this new provision would be far broader than the right to a jury trial existing today, as it would apply to any claim against the state "whether constitutional or statutory, liquidated or unliquidated, or arising from a contract or a tort," and to any such claims demanding monetary, equitable or declaratory relief. And this newly broadened scope of the right to a jury trial would apply "regardless of whether the claim or demand was one as to which the claimant historically had a right to jury trial."

MCL 600.6419, which defines the exclusive jurisdiction of the Court of Claims would be amended to add a new subsection (7), which would provide that "[t]he Court of Claims does not have jurisdiction over an action brought in another court and described in section 1476 if the person bringing the action has demanded a jury trial as provided in section 1476." Thus, the new provisions would effectively eliminate the exclusive jurisdiction of the Court of Claims because litigants preferring to litigate in the circuit court would be permitted to avoid the Court of Claims by simply filing in circuit court and demanding trial by jury. This bill was introduced on September 9, 2015, and referred to the House Judiciary Committee. As of this writing, it has not been scheduled for hearing.

What Do You Think?

Our members are again reminded that the MDTC Board regularly discusses pending legislation and positions to be taken on bills and resolutions of interest. Your comments and suggestions are appreciated, and may be submitted to the board through any officer, board member, regional chairperson or committee chair.

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Appellate Practice Report

It Never Hurts to Ask (or, An Introduction to MCR 7.205(E)(2)).

Most parties filing an application for leave at the Michigan Court of Appeals simply ask the court to grant leave — to exercise jurisdiction over the case, allow further briefing and argument, and issue a panel opinion. Sometimes, that's the only relief one can hope for.

But it can be a mistake to treat the "relief requested" portion of an application for leave as a one-size-fits-all proposition. The court can do more with an application for leave than just grant leave to appeal. Other relief might be appropriate and, if so, it might be worthwhile to ask for it.

The critical rule on this point is Michigan Court Rule 7.205(E)(2). This rule states: "The court may grant or deny the application; enter a final decision; *grant other relief*; request additional material from the record; or require a certified concise statement of proceedings and facts from the court, tribunal, or agency whose order is being appealed."

Notice the italicized portion: "grant other relief." This is a broad, almost open-ended, grant of authority. And the court sometimes exercises it.

In one recent case, for example, the defendants opposed certain conditions that the trial court imposed on discovery and filed an application for leave to appeal. Instead of granting the application, the Court of Appeals simply vacated the trial court's order, explained the governing rule for the trial court, and sent the matter back for further proceedings. It did so even though one member of the panel would have denied the application for leave altogether.

Rule 7.205(E)(2) therefore gives ample reason for attorneys to think about what exactly they'd like the court to do, and to *ask* the court for the relief that seems appropriate. After all, you'll never know unless you ask. That may sound like a cat poster, as Vitruvius (Morgan Freeman's character) says in *The Lego Movie*, but it's true.

Michigan Court of Appeals Mediation Pilot Project

Effective October 1, 2015, the Michigan Court of Appeals has implemented a mediation pilot project. See Administrative Order No. 2015-8. The Supreme Court's order explains that the program, which will remain in effect for 12 months, "is established to study the feasibility and effectiveness of appellate mediation." The Court of Appeals will track the results of the program and report its findings to the Michigan Supreme Court.

In many respects, the mediation pilot program appears similar to the Court of Appeals' prior settlement program, which was suspended in September 2009 due to budget reductions. Under the new mediation program, the court will "review civil appeals to determine if mediation would be of assistance to the court or the parties" and identify certain cases for participation in the program. While participation is mandatory in those cases that are selected (subject to sanctions for failure to participate), a party may file a written request to remove a case from mediation. "Such a request may be made without formal motion and shall be confidential." The

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[I]t can be a mistake to treat the "relief requested" portion of an application for leave as a one-size-fits-all proposition.

Court's order provides that "the chief judge or another designated judge may remove the case on finding that mediation would be inappropriate."

Any party to a pending civil appeal may also "file a written request that the appeal be submitted to mediation." Once again, "[s]uch a request may be made without formal motion and shall be confidential."

Whereas settlement conferences used to be handled by the former director of the Court of Appeals Settlement Office, outside mediators will be used for the court's new mediation pilot program. The parties may either stipulate to a mediator, or the court will appoint one if the parties cannot agree. Any mediator designated by the court must meet the qualifications provided in MCR 2.411(F) and be on the "roster of approved mediators maintained by the circuit court in which the case originated."

The order referring the case to mediation (which does not toll the briefing schedule) will specify a date by which mediation must be completed. "Within the time stated in the order, the mediator shall file a notice with the clerk stating only the date of completion of mediation, who participated in the mediation, whether settlement was reached, and whether any further mediation is warranted." If mediation is successful, the parties must file a stipulation to dismiss the appeal within 21 days of the mediator's notice.

As with the court's prior Settlement Program, any statements that the parties make to the mediator are confidential, and "may not be disclosed in the notice filed by the mediator . . . or by the participants in briefs or in argument."

AO 2015-8 also addresses the mediator's fee. The mediator may charge a "reasonable fee, which shall be divided and borne equally by the parties unless agreed otherwise and paid by the parties directly to the mediator." If a party does not agree with the mediator's requested fee, the party can file a motion asking the Court to set a "reasonable fee," which will be determined by "the chief judge or another designated judge."

How successful the mediation pilot program will be in resolving appeals obviously remains to be seen. Hopefully parties will approach it as yet another opportunity to assess the relative strengths and weaknesses of their positions and eliminate the risk that both sides face in any appeal, regardless of who prevailed in the trial court.

Amendments to Subchapter 7.300 of the Michigan Court Rules

Effective September 1, 2015, the Michigan Supreme Court has amended Subchapter 7.300 of the Michigan Court Rules, which governs appeals to the Supreme Court. As explained on the Court's website, the rules have been "renumbered to be consistent with the numbering scheme of the Subchapter 7.200 rules, which apply to the Court of Appeals (COA)." In addition, there are several substantive amendments designed to "reflect the MSC's current needs and practices, establish clearer procedures, or provide the MSC with greater control over its docket." The Court's website provides the following summary of these changes:

- Reduce the number of hard copies of applications or original actions, answers, replies, and motions (except rehearing) from eight to four. MCR 7.305(A)(1) & (D); MCR 7.306(B), (C) & (D); MCR 7.311(A)(1) & (D).
- Reduce the number of hard copies of briefs in calendar cases and motions for rehearing from 24 to 14. MCR 7.312(F); MCR 7.311(F)(1)(a).
- Eliminate the requirement that the filing party submit a notice of hearing date for an application for leave to appeal, original action, or motion. Hearing dates are now governed by the time requirements of the amended court rules. MCR 7.305(A); MCR 7.306(B); MCR 7.311(B). A leave application or an original action may be submitted after the reply brief has been filed or the time for filing such has expired, whichever occurs first. Motions are submitted on the first Tuesday at least 14 days after filing, although administrative-type motions may be submitted earlier to advance the efficient administration of the Court.
- Add COA original action to the list of pre-COA decision matters for which an application must be filed within 42 days. MCR 7.305(C)(1)(c).
- Refer to the appellee's responsive pleading as an "answer," consistent with COA practice, rather than an "opposing brief." MCR 7.305(D).
- Provide that the submission of a non-conforming pleading (application or original action) does not satisfy the time limitation for filing the pleading if it is not corrected within the time specified by the Clerk's Office. MCR

Under the new mediation program, the court will "review civil appeals to determine if mediation would be of assistance to the court or the parties" and identify certain cases for participation in the program.

7.305(F); MCR 7.306(F).
- Create a separate rule for cross appeals, MCR 7.307, and clarify that a cross application is not required to advance alternative arguments in support of the judgment/order being appealed but is required if new or different relief is sought. MCR 7.307(B).
- Allow the parties to stipulate in writing regarding any matter constituting the basis for an application for leave to appeal or regarding any matter relevant to a part of the record on appeal, consistent with the COA practice. MCR 7.310(C).
- Prohibit the Clerk's Office from accepting a late motion for rehearing or a motion for reconsideration of an order denying rehearing. MCR 7.311(F)(5).
- Consolidate provisions from existing MCR 7.306 (Briefs in Calendar Cases), 7.307 (Appellant's Appendix), 7.308 (Appellee's Appendix), and 7.309 (Preparation, Filing, and Serving Briefs and Appendixes). MCR 7.312.
- Allow the filing of supplemental authority, consistent with the COA practice. MCR 7.312(I).
- Specify that the MSC, on its own initiative, may *extend*, not just shorten, the time for briefing. MCR 7.312(J)(1).
- Require a motion to obtain oral argument when it was not reserved or was forfeited. MCR 7.313(B)(2).
- Specify that each side arguing a case on the application is limited to 15 minutes of argument unless the MSC orders otherwise. MCR 7.314(B)(2).
- Allow a case to be placed on the no-progress docket when the time has passed under the court rules or by court order for filing the appellant's brief, rather than 182 days after the time for filing the appellant's brief. MCR .317(A).
- Provide that an involuntarily dismissed case may be reinstated if a conforming brief and a motion showing mistake, inadvertence, or excusable neglect are filed within 21 days of the dismissal order. Also prohibit the Clerk's Office from accepting a late-filed motion to reinstate. MCR 7.317(C).
- Authorize the MSC to impose costs in an order granting a stipulated dismissal of a case that was scheduled for oral argument if the stipulation was received less than 21 days before the first day of the monthly session. MCR 7.318.
- Authorize the MSC to impose costs on a party or attorney for violation of the court rules, consistent with COA court rule MCR 7.219(I). MCR 7.319(D).

Effect of Approving the "Form and Content" of Orders

It is well-established that consent judgments and orders are not appealable, so parties should always be cautious when stipulating to the entry of orders. But a recent opinion from the Michigan Court of Appeals confirms that approval of an order's "form and content" does not necessarily indicate that the aggrieved party has consented to it.

In *Trahey v City of Inkster*, ___ Mich App ___; ___ NW2d ___ (2015) (Docket Nos. 320161 & 324564; 2015 WL 4920784), the trial court found that the City of Inkster had overcharged residents for water and sewer services and ordered the city to issue a refund not only to the plaintiff, but also to other city residents. Slip op at 3. While the city's appeal was pending, the plaintiff filed a motion to show cause why the city was not complying with certain aspects of the trial court's judgment. The trial court determined that although the city had credited the plaintiff's own water/sewer account, it did not "issue the appropriate credits to the city's residents for the reduced water and sewer rates." *Id*. As a result, the trial court ordered the city "to credit each of the 8,425 resident water/sewer accounts $303.78, based on a total credit amount of $2,559,321.63," and entered a postjudgment order that the City approved for "form and content." *Id*. at 4. The city sought leave to appeal, and in the meantime issued the credits required by the trial court's order.

Though the Court of Appeals granted the city's application for leave to appeal the trial court's postjudgment order, the plaintiff argued that the city's appeal was moot because the city had approved the order's "form and content," and had also complied with it. *Id*. The Court of Appeals disagreed. The Court acknowledged the city's "form and content" approval of the order, but concluded that it "[did] not signal the city's agreement with the trial court's finding of unreasonableness or its decision that residents were entitled to refunds." *Id*. Presumably this was because the entire case and appeal centered on those issues, such that it would not have been reasonable to conclude that the city had consented to the trial court's order. As for the city's issuance of the refunds

[T]he rules have been "renumbered to be consistent with the numbering scheme of the Subchapter 7.200 rules, which apply to the Court of Appeal...."

while its appeal was pending, the Court of Appeals held that this did not preclude the city's appeal either because the city issued the refunds "only after [the] plaintiff sought to invoke the trial court's contempt power." *Id*. at 4-5. The city's satisfaction of the order was thus "compelled," and not voluntary. *Id*. at 5.

Trahey is consistent with the Michigan Supreme Court's decision in *Ahrenberg Mech Contracting, Inc v Howlett*, 451 Mich 74; 545 NW2d 4 (1996), in which the Court held that determining the effect of a party's approval of the "substance" of an order depends on the circumstances. *Id*. at 77-78. The Court explained that where a proposed order comports with the trial court's ruling, and the aggrieved party has "vigorously litigated its position in circuit court, and then acted promptly to perfect an appeal," it cannot be said that approval of the "form and content" of a trial court's order "signaled [the party's] agreement with the trial judge's ruling." *Id*. at 78. See also *Aubuchon v Farmers Ins Exchange*, 448 Mich 860; 528 NW2d 733 (1995) ("The Court of Appeals erroneously determined under the facts of this case that plaintiff is precluded from appealing the trial court judgment where he approved the satisfaction of judgment. Plaintiff challenged from the outset defendant's decision to pay a portion of the judgment to an out-of-state medical care provider.").

While these cases confirm that approving an order's "substance" is not necessarily fatal to its appealability, the easiest way for a party to avoid uncertainty may be to simply indicate approval of an order's "form" only, or to note in the stipulation that the party is not consenting to the relief being ordered.

Interlocutory Appeals from Orders Denying Governmental Immunity in the Sixth Circuit

Defendants who believe they are entitled to governmental immunity typically raise that argument at the outset, in a motion to dismiss (in federal court) or a motion for summary disposition (in Michigan courts). And when a trial court denies that motion, defendants typically seek immediate appellate review. Whether that order is immediately appealable, however, depends on whether the plaintiff's claim invokes Michigan or federal law.

Michigan's rule is straightforward. Under Michigan Court Rule 7.203(A), the Court of Appeals has jurisdiction over an appeal of right from "a final judgment or final order of the circuit court," among other things. An order denying governmental immunity is a final order under Michigan Court Rule 7.202(6)(a)(v):

> "final judgment" or "final order" means:
>
> * * *
>
> (v) an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7) or an order denying a motion for summary disposition under MCR 2.116(C) (10) based on a claim of governmental immunity ....

Therefore, a defendant may pursue an appeal of right in the Michigan Court of Appeals from an order denying summary disposition based on governmental immunity. Federal law is quite different, as demonstrated by the Sixth Circuit Court of Appeals' recent opinion in *Kindl v City of Berkley*, 798 F3d 391 (CA 6, 2015).

The plaintiff in *Kindl* was the daughter of Lisa Kindl, who died of delirium tremens while in custody. Two of the defendants in her civil action were police officers who allegedly failed to ensure that Lisa Kindl received adequate medical attention.

The plaintiff asserted that the officers were liable for deliberate indifference under federal law and for gross negligence and intentional infliction of emotional distress under Michigan law. The district court rejected the officers' qualified-immunity argument and the officers appealed.

The Sixth Circuit concluded that it lacked jurisdiction over the federal qualified-immunity ruling. Under federal law, a denial of qualified immunity in a case under 42 USC 1983 "is a final, immediately appealable decision under the collateral order doctrine only to the extent the appeal presents a 'neat abstract issue[] of law.'" *Id.* at 398. Thus, if an interlocutory appeal on qualified immunity "only test[s] 'the substance and clarity of pre-existing law[,]'" then the Sixth Circuit may exercise jurisdiction. *Id.*, quoting *Martin v City of Broadview Heights,* 712 F3d 951, 957 (CA 6, 2013). But if a lower court declines to dismiss federal claims because it determines that there is a genuine issue of fact regarding qualified immunity, then the Sixth Circuit may not review an interlocutory appeal.

In *Kindl,* the qualified-immunity decision largely hinged on whether the officers knew or should have known

While these cases confirm that approving an order's "substance" is not necessarily fatal to its appealability, the easiest way for a party to avoid uncertainty may be to simply indicate approval of an order's "form" only, or to note in the stipulation that the party is not consenting to the relief being ordered.

about Lisa Kindl's serious medical need. *Kindl,* 798 F3d at 398. That was a factual issue that prevented the Sixth Circuit from entertaining the defendants' appeal regarding the plaintiff's federal-law claim.

The court held, however, that it could entertain the officers' appeal regarding the plaintiff's state-law claims. The *Kindl* court followed earlier decisions holding that, given Michigan Court Rule 7.202's inclusion of governmental-immunity orders in its definition of "final judgment," orders denying qualified immunity on **state-law** claims are immediately appealable. Nevertheless, the Sixth Circuit affirmed the district court's decision and remanded the matter for further proceedings.

Kindl demonstrates that not all immunity claims are created equal: if the underlying claim arises under Michigan law, the defendant likely has the right to an interlocutory appeal from an order denying summary disposition. Under federal law, the defendant's right to an interlocutory appeal depends on the nature of the dispute and, in particular, whether it hinges on a factual or legal issue.

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INDEMNITY AND INSURANCE ISSUES

Author of numerous articles on indemnity and coverage issues and chapter in ICLE book *Insurance Law in Michigan*, veteran of many declaratory judgement actions, is available to consult on cases involving complex issues of insurance and indemnity or to serve as mediator or facilitator.

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Legal Malpractice Update

When a court's *sua sponte* ruling proximately causes the harm alleged, a claim for legal malpractice may be ripe for summary disposition.

Yaldo v Attorney Defendants, unpublished opinion per curiam of the Court of Appeals, issued June 11, 2015 (Docket No. 319720); 2015 WL 3649088.

Facts: Attorney Defendants filed a Chapter 7 bankruptcy petition on behalf of the plaintiff and her husband (collectively, "the Yaldos") in the U.S. Bankruptcy Court for the Eastern District of Michigan. Thereafter, one of the creditors initiated an adversary proceeding, asserting that certain debts should not be discharged because the Yaldos had made fraudulent misrepresentations with respect to several loans at issue. Attorney Defendants then moved for summary judgment on behalf of the plaintiff, arguing that the Yaldos never made any such statements and, in support, they attached an affidavit signed by the plaintiff's husband, who affirmed that the facts set forth in the motion were true. The creditor responded with documents that established that the Yaldos in fact signed documents with false representations. Despite the lender having not filed a cross-motion for summary judgment—and without any notice to Attorney Defendants—the bankruptcy court entered summary judgment in favor of the lender at the hearing on the Yaldos' motion. Attorney Defendants later withdrew as counsel, though co-counsel continued representing the Yaldos. Notably, co-counsel did not seek any relief from the bankruptcy court's *sua sponte*, adverse ruling.

Plaintiff subsequently brought an action for legal malpractice in circuit court against Attorney Defendants, alleging that they failed to properly support her motion for summary judgment, which led to the bankruptcy court's judgment in favor of the creditor and the plaintiff's inability to obtain any debt relief. Attorney Defendants moved for summary disposition under MCR 2.116(C)(10). Relying solely upon the transcript from the bankruptcy court hearing on the dispositive motion, the trial court dismissed the plaintiff's claim, finding there was no factual dispute that Attorney Defendants' handling of the motion did not proximately cause the negative outcome of the hearing. The plaintiff then appealed from that judgment.

Ruling: The Court of Appeals affirmed the trial court's decision on the basis that the plaintiff could not establish that Attorney Defendants' handling of the motion for summary judgment proximately caused the adverse ruling. The court further held that any such negligence could nevertheless have been corrected thereafter by co-counsel but was not—thus relieving Attorney Defendants of any liability.

The court first held that the trial court, in granting Attorney Defendants' motion, did not err by limiting its consideration of the evidence to the bankruptcy court transcript—reasoning that "[t]he limitation was reasonably calculated to allow discovery of the evidence most likely to demonstrate the basis for the bankruptcy court's order, which was at the center of the parties' dispute."

Examining the transcript, the court found that the bankruptcy court acted on its

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[T]he court held that Attorney Defendants' allegedly negligent pursuit of summary judgment did not proximately cause the ultimate outcome.

own initiative to grant summary judgment to the nonmoving party (i.e. the lender)—without providing notice to Attorney Defendants as required by Federal Rule of Civil Procedure 56(f). Citing the well-established legal principle that causation "is an essential element of every malpractice claim," the court held that Attorney Defendants' allegedly negligent pursuit of summary judgment did not proximately cause the ultimate outcome.

The court went on to note that even if Attorney Defendants handled the motion for summary judgment in a substandard manner, "the adverse ruling was in error and could have been timely corrected" by co-counsel after Attorney Defendants withdrew from their representation of the Yaldos. And consequently, the trial court did not err in dismissing the plaintiff's legal-malpractice claim.

When analyzing a malpractice action involving an alleged failure to properly pursue an appeal, demonstrating the futility of that appeal will often lead to summary dismissal of the claim.

Practice Note: When a legal malpractice claim is premised upon a court's *sua sponte*, adverse ruling, lack of causation may provide a basis for summary disposition. Alternatively, where a ruling is made in error but could be timely corrected, a claimant's failure to seek such relief may also preclude liability.

When a legal-malpractice claim is premised on the alleged failure to properly pursue an appeal, the claimant must demonstrate that he would have prevailed in that appeal to avoid summary disposition.

Bowden v Attorney Defendant, unpublished opinion per curiam of the Court of Appeals, issued March 24, 2015 (Docket No. 319047); 2015 WL 1314498.

Facts: In May 2008, the plaintiff filed an application for non-duty disability with Michigan's Office of Retirement Services (ORS), claiming that her constant cervical pain, resulting from several prior spinal surgeries, limited the use of her right arm and hand. And because her job—which the state previously created to accommodate her physical restrictions— primarily required her to sign cars in and out of the state's motor pool, she claimed an inability to work. The physician designated by the state to examine the plaintiff and review all of her pertinent medical history concluded that she was not totally and permanently disabled, and, as such, that she could return to work. Thus, in a letter dated August 1, 2008, the ORS denied the plaintiff's application and advised her that she had sixty days to appeal its decision.

The plaintiff hired Attorney Defendant to pursue an appeal on her behalf, though that appeal was not timely filed. In November 2008, Attorney Defendant requested an appeal hearing, citing to a "misfiling of the ORS's decision" as the reason for his untimeliness. That request was denied. Attorney Defendant then sought a reversal of that denial from the circuit court, which was similarly unsuccessful. Upon learning of these events, the plaintiff filed a professional-negligence suit against Attorney Defendant.

Attorney Defendant moved for summary disposition on the grounds that his failure to timely file an appeal from the ORS's decision did not proximately cause the plaintiff's alleged damages. Attorney Defendant pointed to the fact that no medical advisor had certified in writing that the plaintiff was disabled—a necessary requirement for obtaining non-duty disability. The plaintiff countered that the case law that Attorney Defendant relied on did not apply retroactively and that prior to that decision, "the hearing officer would have looked beyond an independent medical examiner's disability statement and considered all the evidence"—the implication being she might have prevailed under that standard. The trial court disagreed, concluding that the case at issue did not establish new law, but merely discerned the intent of the Legislature with respect to a statute that had been in effect since 2002. And accordingly, because the plaintiff did not meet the requirements of the disability statute, she would not have prevailed on appeal, thereby necessitating the dismissal of her malpractice claim. The plaintiff then appealed.

Ruling: The Court of Appeals agreed that the disability statute required a medical advisor to certify that the plaintiff was disabled, and, because no such certification had been made, the plaintiff would not have prevailed on appeal. The court therefore affirmed the trial court's summary dismissal of the plaintiff's legal-malpractice claim on the

When a legal malpractice claim is premised upon a court's sua sponte, adverse ruling, lack of causation may provide a basis for summary disposition. Alternatively, where a ruling is made in error but could be timely corrected, a claimant's failure to seek such relief may also preclude liability.

basis that she could not prove causation.

The court began its analysis by setting forth the elements of a legal-malpractice action, including the third element that requires the purported negligence to have been a proximate cause of the injury alleged. "To prove proximate cause, a plaintiff 'must show that but for the attorney's alleged malpractice, he would have been successful in the underlying suit.'" Applied to situations where it is alleged an attorney failed to properly pursue an appeal, this "suit within a suit" concept requires the plaintiff to demonstrate that "the attorney's negligence caused the loss or unfavorable result of the appeal" and that "the loss or unfavorable result of the appeal in turn caused a loss or unfavorable result in the underlying litigation."

First noting that whether a claimant would have prevailed in the underlying appeal is a question of law, the court rejected the plaintiff's interpretation of the case law at issue. It held that the disability statute, MCL 38.24, "had always meant that in order to be eligible to receive a non-duty disability retirement, a medical advisor had to certify the applicant as totally and likely permanently disabled." And because it was undisputed that the plaintiff never secured any such certification, the plaintiff could not establish that she would have prevailed on appeal had Attorney Defendant timely sought relief from ORS's denial. Consequently, the plaintiff could not demonstrate that Attorney Defendant's alleged negligence was a proximate cause of her claimed damages, and summary disposition was therefore proper.

Practice Note: When analyzing a malpractice action involving an alleged failure to properly pursue an appeal, demonstrating the futility of that appeal will often lead to summary dismissal of the claim.

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No-Fault Report

More Recent Developments Regarding "Innocent Third Party" Coverage for Michigan PIP Claims

In our last article, we discussed whether or not a no-fault insurer was still obligated to afford Michigan no-fault insurance benefits to an "innocent third party," even though the policy itself had been rescinded as to the named insured. The rescission, of course, could be based on a variety of reasons, but usually involves fraud in the insurance application, such as a misrepresentation regarding the principle garaging address for the vehicle, or a misrepresentation as to who actually owned the vehicle to be insured under the policy. Readers will recall that, at the time, we had two unpublished Court of Appeals decisions reaching the opposite conclusions on the effect of a rescission on the claims of an "innocent third party."

In one case, *Frost v Progressive Michigan Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued September 23, 2014 (Docket No. 316157); 2014 WL 4723810, the Court of Appeals concluded that the no-fault insurer could rescind coverage based upon the fraudulent misrepresentations of its insured, even though an "innocent third party" could no longer recover benefits through Progressive.

However, in *State Farm Mut Auto Ins Co v Michigan Muni Risk Mgmt Auth*, unpublished opinion per curiam of the Court of Appeals, issued February 19, 2015 (Docket Nos. 319709 & 319710); 2015 WL 728652, the Court of Appeals reached the opposite conclusion – the no-fault insurer could not rescind coverage for the "innocent third party" involved in that claim. The innocent third party was a motorcyclist who was struck by a motor vehicle being operated by a QBE insured, who had supplied false information in the insurance application regarding ownership and registration of the vehicle to be insured under the QBE policy.

We also had an order from the Michigan Supreme Court, dated March 31, 2015, vacating the Court of Appeals' decision in *Frost* and remanding the matter back with an instruction that "the Court of Appeals shall hold this case in abeyance pending its decision in *Bazzi v Sentinel Ins Co* (Court of Appeals Docket No. 320518)." *Frost v Progressive Michigan Ins Co*, 497 Mich 980; 860 NW2d 636 (2015). For those of you keeping score, it was one to nothing in favor of precluding the insurer from rescinding coverage as to an "innocent third party."

On September 9, 2015, the Michigan Supreme Court took away the "run" in favor of affording coverage to the "innocent third party" when it vacated the Court of Appeals' opinion of February 19, 2015 in *State Farm, supra*. In its order, the Supreme Court stated:

> On Order of the Court, the application for leave to appeal the February 19, 2015 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals, and we REMAND this case to the Court of Appeals for reconsideration of the issue of whether the insurance policy issued by QBE Insurance Corporation can be voided *ab initio*. On remand, the Court of Appeals shall hold this case in abeyance pending its decision in *Bazzi v Sentinel Ins Co* (Court of Appeals Docket No. 320518). After *Bazzi* is decided, the Court of

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The short answer is that there is no appellate court decision that provides any guidance on this issue whatsoever. In other words, the *Bazzi* opinion does not yet exist!

> Appeals shall reconsider this issue in light of *Bazzi*. In all other respects, the Application for Leave to Appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court. [*State Farm Mut Auto Ins Co v Michigan Muni Risk Mgmt Auth*, 498 Mich 870; 868 NW2d 898 (2015).]

Now, the score is nothing to nothing! Since the Supreme Court issued its Order on March 31, 2015, vacating *Frost* and particularly since the Supreme Court's Order of September 9, 2015, vacating *State Farm*, a question has frequently arisen – "where can we find this *Bazzi* case?"

The short answer is that there is no appellate court decision that provides any guidance on this issue whatsoever. In other words, the *Bazzi* opinion does not yet exist! However, Mary Massaron, counsel for Sentinel Insurance Company, was kind enough to provide us with a copy of her Brief on Appeal and, because the appellate court decision (or decisions) in that case will ultimately have a significant impact on "innocent third party" coverage under policies that have been rescinded, it is useful to examine the underlying facts in *Bazzi*, and why this case is so important in this rapidly developing area of the law.

Plaintiff Ali Bazzi was injured in an automobile accident while driving a vehicle insured by Sentinel Insurance Company. The policy had been procured by his mother, Hala Bazzi, and his sister, Mariam Bazzi, and the named insured on the policy was Mimo Investments, LLC. Mimo Investments, LLC had no insurable interest in the vehicle and, in fact, appeared to be a shell corporation, without assets, employees or other indicia of a viable commercial entity. Apparently, insuring the vehicle under a commercial policy resulted in a lower premium than insuring the vehicle under a personal policy. It does not appear that plaintiff Ali Bazzi was involved, in any way, with the procurement of insurance on the vehicle. Ali Bazzi subsequently filed suit against Sentinel Insurance Company and, in turn, Sentinel Insurance Company filed a third-party complaint against Hala Bazzi and Mariam Bazzi, seeking rescission of the insurance policy due to the purported material misrepresentations during the application process. Because the third-party defendants failed to respond, a default judgment was entered in favor of Sentinel, permitting it to rescind the policy issued to Mimo Investments, LLC.

Having established that Sentinel Insurance Company was entitled to rescind the policy, the question then became how the "innocent third party," Ali Bazzi, would be affected by the rescission. Sentinel Insurance Company argued that it was entitled to rescind coverage completely, even as to the "innocent third party," based upon the Michigan Supreme Court's decision in *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012). Sentinel Insurance Company also argued that Ali Bazzi had a source of recovery for payment of his no-fault benefits – the Michigan Assigned Claims Plan, which had actually assigned Citizens Insurance Company to investigate and adjust Ali Bazzi's claim for no-fault benefits, arising out of the subject accident. On February 6, 2014, the Wayne County Circuit Court entertained oral argument on the motion for summary disposition. After extensive oral argument and briefing, the circuit court denied Sentinel Insurance Company's motion for summary disposition, relying on the "innocent third party" exception to the general rule regarding rescissions.

Following the adverse ruling by the Wayne County Circuit Court, Sentinel filed an interlocutory appeal to the Michigan Court of Appeals. The Court of Appeals denied the application for leave to appeal pursuant to an order entered on May 21, 2014. Sentinel then filed an application for leave to appeal with the Michigan Supreme Court which, in lieu of granting the application for leave to appeal, remanded the matter back to the Michigan Court of Appeals for hearing as on leave granted.

At this point, briefing appears to be complete, with *Amicus Curiae* Insurance Institute of Michigan filing its *amicus* brief in late August 2015, and the Michigan Association for Justice filing its *amicus* brief on September 29, 2015. This writer anticipates that the Court of Appeals will hear oral argument sometime in early 2016, with an opinion (hopefully published) to be issued some time during the spring of 2016. Given the significance of the issues involved, the author would not be surprised to see a further application for leave to appeal being taken up to the Michigan Supreme Court, following the release of the Court of Appeals' decision.

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Supreme Court Update

The Supreme Court Reverses Course and Allows Law Firms Representing Themselves to Be Awarded Attorney Fees in Case Evaluation Sanctions

On June 3, 2015, the Michigan Supreme Court held that a law firm whose members represent it in litigation cannot recover a "reasonable attorney fee" as a case evaluation sanction. *Fraser Trebilcock Davis & Dunlap PC v Boyce Trust 2350*, 497 Mich 265; ___ NW2d ___ (2015). On September 23, 2015, the Court amended MCR 2.403 to include in the definition of "actual costs" for case evaluation purposes, "legal services provided by attorneys representing themselves or the entity for whom they work, including time and labor of any legal assistant as defined by MCR 2.626." This amendment effectively abrogates the Court's June 3, 2015 ruling. The new rule becomes effective January 1, 2016.

A Contract with an Unlicensed Residential Builder Is Merely Voidable

On September 28, 2015, the Michigan Supreme Court held that MCL 339.2412(1) (providing that a residential builder shall not bring an action to collect compensation for the performance of a contract if s/he was not licensed during the performance of the contract):

(1) does not prevent an unlicensed residential builder from defending itself in litigation,
(2) does not create a private cause of action for homeowners against unlicensed residential builders, and
(3) makes contracts with unlicensed residential builders voidable rather than void.

Epps v 4 Quarters Restoration LLC, 496 Mich 853; 846 NW2d 928 (2015).

Facts: Defendant contracted with the plaintiff homeowners to perform restoration work on the plaintiffs' flood-damaged home. Unbeknownst to the plaintiffs, however, the defendant's residential builder's license had been revoked. In the contract, the plaintiffs assigned the proceeds of their insurance claim to defendant as full payment for the repairs, and gave the defendant Power of Attorney to sign their names to documents pertaining to settling the insurance claim and restoring the damage to their property. The defendant received checks from the insurance company, sometimes in both the plaintiffs' and the defendant's names, and sometimes only in the plaintiffs' names. He endorsed and cashed the checks by signing the plaintiffs' names. When the defendant finished work on the plaintiffs' home, the plaintiffs disputed whether the job was complete. Eventually, the plaintiffs filed a lawsuit, claiming that the defendant was not entitled to compensation for the work that he performed since he was unlicensed. The plaintiffs sought to have the contract declared "illegal, void and unenforceable" and thereby rescinded. The plaintiffs also claimed that the defendant converted the insurance check proceeds.

The trial court granted summary disposition in favor of the plaintiffs, relying upon MCL 339.2412(1). The Michigan Court of Appeals disagreed with the trial court and found that MCL 339.2412(1) did not impose liability on the defendant because

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There is no express private cause of action in the statute, and no basis for inferring a private cause of action because homeowners are protected under traditional common law causes of action from harm that may result from work performed by unlicensed builders.

it only applied to prevent the defendant from bringing an action; it did not prevent the defendant from defending against an action. The Court of Appeals also held that MCL 339.2412(1) did not give homeowners a private cause of action for its violation.

[T]he Court clarified that, despite such contracts being "voidable," an unlicensed builder still has no right to bring an action to collect upon such a contract, even if the contract is ratified by the homeowner.

The Court of Appeals affirmed the trial court on other grounds, however. It found that the defendant's misrepresentations rendered the contracts, including the Power of Attorney, void *ab initio*, and thus the defendant converted the proceeds of the checks. In reaching this conclusion, the Court of Appeals cited case law stating that where a license is required for a profession, a contract is void if a contractor enters into the agreement without possessing the license.

Ruling: The Michigan Supreme Court affirmed in part and reversed in part. The Court agreed with the Court of Appeals that the statute does not prevent an unlicensed builder from defending against a claim on its merits. The language of the statute was clear in showing that it applied to an "action" for the "collection of compensation," which the Court explained was different than, and did not apply to a "defense" to "retain compensation." Likewise, the Court agreed with the Court of Appeals that the statute does not create a private cause of action that a homeowner may bring against an unlicensed builder for the return of monies paid for work performed. There is no express private cause of action in the statute, and no basis for inferring a private cause of action because homeowners are protected under traditional common law causes of action from harm that may result from work performed by unlicensed builders. Further, the statute provides an enforcement method through the attorney general or a prosecuting attorney. Overall, the Court explained that the statute is a shield for the public, not a sword.

The Court disagreed with the Court of Appeals that the contract was void and held that contracts between homeowners and unlicensed residential builders are voidable rather than void. The Court's conclusion was based on inferences derived from the statute, which suggested that such contracts are better characterized as voidable, including (1) the fact that the statute was structured to vest the power to enforce any contract solely in the hands of the homeowner, creating an asymmetry of power akin to a voidable contract, and (2) the fact that such contracts being considered void *ab initio* could harm homeowners when seeking enforcement of such a contract is desirable, which is contradictory to the purpose of the statute, which is to protect homeowners.

The Court also relied on indications in case law, including the fact that, while not directly addressed, Michigan courts have not treated such contracts as being void, but have sometimes treated them as being enforceable by the homeowner. Indeed, the Court relied on the fact that Michigan courts' application of the "substantial compliance" doctrine in similar cases (holding that an unlicensed builder who obtained his/her license after entering into a contract, but before s/he actually provided services, has entered into a valid and enforceable contract) shows that courts have not treated such contracts as being truly void.

Notably, however, the Court clarified that, despite such contracts being "voidable," an unlicensed builder still has no right to bring an action to collect upon such a contract, even if the contract is ratified by the homeowner. The Court remanded the case to the trial court for a determination of whether the contract, which was not void *ab initio*, granted defendant the authority to endorse and cash the insurance checks.

Practice Note: There has been much confusion regarding the legal status of contracts between homeowners and unlicensed residential builders. Michigan courts have treated such contracts inconsistently, and have at times employed varying definitions and treatment of "void" contracts. This holding presents a significant clarification to the state of the law.

Court Rules Update

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Michigan Court Rules

For additional information on these and other amendments, visit the Court's official site at

http://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Pages/default.aspx

Adopted Amendments

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http://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Pages/default.aspx

2013-35 – Appeal from verdict in bench trial

Rule affected: MCR 7.211
Issued: May 27, 2015
Effective: September 1, 2015

A party to a non-jury trial is not required to file a motion for new trial based on the "great weight of the evidence" standard before filing for appeal.

2013-36 – Practice in the Michigan Supreme Court

Rule affected: MCR 7.300
Issued: May 27, 2015
Effective: September 1, 2015

The entirety of subchapter 7.300 has been reorganized, with no substantive changes.

2015-09 – Attorney fee awards

Rule affected: MCR 2.403
Issued: September 23, 2015
Effective: January 1, 2016

Permits an award of "attorney's fees" for a pro se attorney as litigant, and for attorneys employed by a party, under the case evaluation rule.

2014-40 – Electronic service

Rule affected: MCR 2.506
Issued: September 23, 2015
Effective: January 1, 2016

Allows electronic service of a subpoena or order to attend a trial to the following, if the agency has issued a Memorandum of Understanding as to such service:

- Michigan Department of Corrections
- Michigan Department of Health and Human Services
- Michigan State Police Forensic Laboratory
- other accredited forensic laboratory
- law enforcement agencies
- other governmental agencies

Sean Fosmire is a 1976 graduate of Michigan State University's James Madison College and received his J.D. from American University, Washington College of Law in 1980. He is a partner with Garan Lucow Miller, P.C., manning its Upper Peninsula office.

A Note on revisions to Federal Rules

New versions of several rules under the Federal Rules of Civil Procedure are set to go into effect on December 1, 2015 unless Congress takes action to reject or delay them.

Key amendments:

- Rule 34 - Objections to document production requests must be stated "with specificity."
- Rule 37(e) - Rewritten to address "Failure to preserve electronically stored information."

A summary of the changes has been posted by the law firm of K&L Gates at http://www.ediscoverylaw.com/wp-content/uploads/2015/10/Rules-Amendment-Alert-100115.pdf

MDTC Golf Outing 2015 – Mystic Creek Golf Course

Thanks to the many who attended MDTC's September 11, 2015 golf outing at Mystic Creek in Milford. This year's event boasted the highest attendance in years and is a credit to the committee of **Jim Gross (James G. Gross PLC)**, **Jenny Zavadil (Bowman and Brooke LLP)** and **Terry Durkin (Kitch Drutchas)**, as well as MDTC's new leadership, who showed their enthusiasm in spades. Next year marks MDTC's 20th Golf Outing – look for details next summer!

A special thanks to our event sponsors:

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Technology Corner:
Eventbrite - Registration Made Simple

Attending an event can be a great experience, but registration can get complicated at times. Finding the form online or in an email, printing it, filling it out, writing a check, finding an envelope, putting a stamp on it ... and the list continues. In this day and age, registration does not have to be this time consuming. Eventbrite is a company that strives to make event registration easier for everyone. Eventbrite is able to provide better credit-card processing, group transactions, and ease of event registration.

How many people today use a credit or debit card? The majority of the people reading this likely have at least one. Those credit/debit cardholders have also more than likely made some type of transaction online. With online shopping, electronic billing, and millions of mobile apps available, there seems to be some helpful use for everyone on the internet. Eventbrite makes it easy and very secure to register for an event online with a credit or debit card. No need to worry about sending your credit-card information through the mail and checking often to make sure it processed. The Eventbrite form will take your information securely and process the card right away. For those skeptical of using a credit/debit card online, the form can be filled out online and a check can be sent by mail.

Does your firm or company like to attend conferences and events together? If the business is paying for all of the employees' attendance fees, Eventbrite will make this extremely easy. Simply select the amount of people going and it will combine all the registration forms into one form that will only need one credit-card transaction. This means less time on your part signing up and less work for your business's accounting department.

Eventbrite was built to make event registration as easy as possible for everyone. Americans live a fast paced life, and when tasks like signing up for a conference can be taken care of at convenient times, it makes life just a little easier. Eventbrite has removed the traditional pen-and-envelope style of registration. You can sign up for an event in the back of a taxi or when you're laying down in bed and know immediately that you are all setup to attend that event. Eventbrite is an awesome software that the MDTC is looking forward to using regularly. Hopefully your excitement will be just as high because the goal is to make every MDTC member's experience as great as possible. Look for events that are going to start using Eventbrite!

Kyle Platt is a business major at Central Michigan University. He currently works at Shared Resources as an information technology intern under Madelyne Lawry, the executive director of MDTC.

Meet the MDTC Leaders

A key component of MDTC's mission is facilitating the exchange of views, knowledge, and insight that our members have obtained through their experiences. That doesn't happen without interaction. And interaction doesn't typically happen until you've been introduced. So, in this section, we invite you to meet the new (and, possibly, some not-so-new) MDTC leaders who have volunteered their time to advance MDTC's mission.

MEET: Brandon C. Hubbard

Brandon is a Member of Dickinson Wright PLLC's Lansing office. He focuses his practice in the areas of commercial and business litigation, education, energy and sustainability, insurance, and healthcare. He represents clients in a number of litigation matters in both judicial and arbitration forums in a number of states, with many of the cases involving fraud, breach of contract, breach of fiduciary duties, negligence, tortious interference with business relationships, and other tort and contractual causes of action. He also represents energy clients in a number of matters before the Michigan Public Service Commission, including all phases of litigation. Mr. Hubbard is a member of the Ingham County Bar Association and the State Bar of Michigan, has served as a local campaign liaison for the Capital Area United Way, and serves on the firm's Pro-Bono Committee. Mr. Hubbard received his B.A. from Michigan State University and his J.D. from DePaul University College of Law.

More about Brandon

Q: *What's the most unusual thing in your desk drawer?*
A: A chronicle of hunting adventures.
Q: *How old were you when you had your worst haircut and what style was it?*
A: 22. I just landed my first job in Chicago. When I showed up on my first day, they didn't recognize me. Nearly a buzz cut. Super short.
Q: *If you weren't doing what you do today, what other job would you have?*
A: Realistically? An outdoorsman guide. Otherwise, a doctor.
Q: *What "lesson from mom" do you still live by today?*
A: Work hard. Be respectful. The rest will figure itself out.
Q: *If you could be any animal what would it be and why?*
A: My dog. Eats, sleeps, and goes on long walks. Every day.

How to contact Brandon

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MEET: Michael Jolet

Michael graduated from Wayne State University with a B.A. in 2001. He attended law school at The University of Detroit Mercy School of Law and graduated Cum Laude with a Juris Doctorate in 2004. Michael was admitted to the State Bar of Michigan in 2004.

Over the past eight years, Michael has specialized in insurance-fraud defense and has handled over a thousand cases involving complex issues in first-party, uninsured-motorist and third-party civil cases.

Michael joined Hewson & Van Hellemont, P.C. in May 2011. Prior to joining the firm, he was a partner at an insurance-defense law firm in Michigan.

Michael's passion and involvement in all of his files has given him the reputation and allowed him to take an aggressive and no-nonsense approach in effectively litigating cases for Hewson & Van Hellemont's clients.

Michael currently sits as a co-chair of the Michigan Defense Trial Council's Insurance Section and has had the opportunity to participate in various speaking engagements.

More about Michael

Q: *What's the most unusual thing in your desk drawer?*
A: A presidential history book.
Q: *How old were you when you had your worst haircut and what style was it?*
A: 36. A trim.
Q: *If you weren't doing what you do today, what other job would you have?*
A: Chef.
Q: *What "lesson from mom" do you still live by today?*
A: Treat everyone with respect.
Q: *If you could be any animal what would it be and why?*
A: An eagle. I would love to enjoy the view!

How to contact Michael

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MDTC/MAJ Respected Advocate Award

Every year MDTC and MAJ each present a "Respected Advocate Award." The MDTC annually gives the award to a member of the plaintiff's bar for the purpose of recognizing and honoring the individual's history of successful representation of clients and adherence to the highest standards of ethics. The MAJ does the same annually for a defense practitioner. In so doing, we promote mutual respect and civility.

The 2015 MDTC/MAJ Respected Advocate Awards were presented during the SBM Annual Awards Banquet.
October 7, 2015 , Suburban Collection Showplace, Novi, MI
MDTC President, Lee Khachaturian
Award recipients, George T. Sinas, and Robert F. Riley
Presenting the awards to the recipients, Lori A. Buiteweg, SBM President

	MAJ Recipients	MDTC Recipients
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19.	2015 Robert F. Riley	George T. Sinas

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