MICHIGAN DEFENSE
QUARTERLY

Volume 35, No. 2 - 2018




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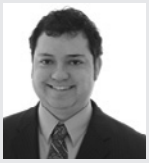

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MICHIGAN DEFENSE
QUARTERLY

Volume 35, No. 2 - 2018

Cite this publication as 35-2 Mich Defense Quarterly

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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Joshua K. Richardson is a shareholder in the Lansing office of Foster, Swift, Collins & Smith, P.C., where he concentrates his practice primarily on commercial litigation, employment litigation, and insurance regulatory law.

Mr. Richardson is admitted to practice law in Michigan, the U.S. District Court for the Eastern and Western Districts of Michigan and the Eastern District of Wisconsin, the U.S. Sixth Circuit Court of Appeals, and the U.S. Supreme Court. Mr. Richardson earned his B.A. from Michigan State University in 2004 and his J.D. from Indiana University School of Law - Bloomington in 2007.

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On The Shoulders of Giants Advancing the Mission Together

My first President's Report mentioned some of the great things that the MDTC accomplished in the previous year, such as hosting educational seminars and events, providing amicus support in important appellate cases, and honoring those lawyers and judges whose integrity, skill, and civility warranted special recognition. I also mentioned some of the outstanding individuals involved in these accomplishments and the organization as a whole.

These achievements are surely notable and worth mention, but we can all agree that good due diligence requires more than a one-year look back. So, for those of us who enjoy a bit of history, here are some things to consider.

The MDTC was established in 1979 by a handful of dedicated civil litigation attorneys for the purpose of exchanging ideas and advancing the interests of the civil defense bar. The organization's original articles of incorporation identified several lofty goals, from promoting "improved relations between the legal profession and the public" to enhancing "the knowledge and improv[ing] the skills of defense lawyers."

Although the MDTC Quarterly was many years from existence and the idea of conducting formal educational events was still in its infancy (the term "webinar" would have no accepted meaning until nearly twenty years later), the organization hit the ground running. Almost immediately, the MDTC began submitting amicus briefs in support of issues of interest in civil litigation. Seeing the benefit of the organization's input, the Michigan Supreme Court began inviting the MDTC to weigh in on and file amicus briefs for many of complicated legal issues.

Over the years, the MDTC membership and leadership has continued to grow. Today, our leadership, including board and committee members and regional and section chairs, is comprised of 73 individuals, representing 39 separate law firms. But our reach is so much broader.

We now provide articles, educational events, and additional resources to thousands of members and non-members, including judges, clients, industry leaders, paralegals and attorney staff members. Our membership comes from various and diverse practice areas, including insurance defense, commercial litigation, appellate, labor and employment, municipal and governmental liability, among many others. The MDTC continues to file amicus briefs in complicated and impactful cases, and has also weighed in on various legislative matters having the potential for serious effects on the profession and the administration of legal justice.

Each of these things is a testament to and is done in support of the MDTC's overall mission: ***to promote excellence in civil litigation***.

This mission can be broken down into both a desire to benefit the practice of law, generally, and a desire to serve and assist the practitioner, specifically. It seems simple enough, but we could not achieve our goals without your help, support, and input. There are many ways to make an impact, and we invite you to get involved by attending events, submitting articles for the Quarterly and E-news, participating in committees and practice sections, and volunteering to draft amicus briefs, among many others opportunities.

We hope that you will join us as we continue to carry out the mission of a great organization that was started many years ago, and we look forward to working together in the many years ahead.

MDTC E-Newsletter
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Michigan Defense Quarterly
Publication Schedule

Publication Date, Copy Deadline
January, December 1
April, March 1
July, June 1
October, September 1

For information on article requirements, please contact:

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Secret Shopper Recordings: Good Business Plan or Invasion of Privacy?

By: Nicholas Huguelet and Elaine Dalrymple, *Nemeth Law, P.C*

Executive Summary

"Secret shoppers" have been used for decades by retailers as a tool for assuring the quality of customer service and transactions in stores. With today's technology, however, "secret shoppers" have access to ultra-high-definition smartphone cameras and built-in voice recorders to capture their experiences. The use of this technology, however, may have several privacy law implications. In Michigan, whether such recordings are legal depends primarily on who is doing the recording, the expectations of the conversing employee, and where the conversation takes place.

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In today's ultra-competitive retail environment, where brick-and-mortar stores must compete with online sellers, one advantage a "real" store can offer its customers is face-to-face customer service. To maximize this advantage, retailers have various tools to measure – and hopefully improve – that experience. One such tool is the "secret shopper." A secret or mystery shopper is a person retained by a retailer to evaluate the in-store experience, under the guise of being a prospective customer. The shopper then completes a questionnaire, ranking the employees' customer service skills, how well the business's standard procedures were followed, and the overall impression of the establishment and staff, including store cleanliness, merchandising, maintenance, and organization.

For retailers, secret shoppers are a useful tool for assuring the quality of customer service and transactions. It also provides the employer with feedback regarding particular areas in which the employee excelled, and which areas could use some work. Historically, though, traditional secret shopping methods were limited by the need for the shopper to rely on her memory – taking notes during the encounter could expose the "secret" aspect of secret shopping.

Today, technological improvements such as ultra-high-definition smartphone cameras and built-in voice recorders, along with the pervasiveness of microphone-enabled earphones have eliminated the need for secret shoppers to remember every detail of their experience. Recordings also allow the business to surreptitiously observe an actual customer interaction and prevent the employee from challenging the shopper's recollection of events.

As with most technological advances, though, there is a hitch – is this recording legal? In Michigan, the answer depends primarily on who is doing the recording, the expectations of the conversing employee, and where the conversation takes place.

Michigan's One-Party Consent Rule

On its face, Michigan's eavesdropping statute suggests – incorrectly – that consent to record a conversation must be provided by both parties to that conversation. According to the statute, any person, present or not, during a private conversation, who willfully uses a device to eavesdrop **without the consent of all parties**, is guilty of a felony.[1] The "consent from all parties" language suggests that Michigan is a two-party consent state. In 1982, however, the Michigan Court of Appeals held that the statutory definition of "eavesdrop," defined as "overhear, record, amplify, or transmit any part of the private discourse of others without the permission of all persons engaged in the discourse," means that only a party **not** involved in the conversation is capable of

eavesdropping.[2] According to the Court, then, a participant to a conversation cannot, by law, "eavesdrop."

The Court also reasoned that, "absent a request that discussions be held 'off the record', it is only reasonable to expect that a conversation may be repeated."[3] A "recording made by a participant is nothing more than a more accurate record of what was said."[4] Accordingly, a participant is not required to obtain consent from the other participants in order to record the conversation.[5] As long as one person involved in the conversation consents to being recorded, taping that conversation is legal. Consent of all is only required when a third-party is recording the conversation.[6]

To ensure full compliance with the law, an employer using secret shoppers to record interactions with employees should design such programs with an eye to who is recording the conversation, who the participants are, where the conversation is taking place, where the recording is made, and whether anyone is listening contemporaneously to the recording.

Ferrara v Detroit Free Press illustrates just how far this expectation that a conversation may be repeated can be pushed.[7] There, the plaintiff's ex-husband recorded his phone conversation with the plaintiff, without her knowledge.[8] During the call, the plaintiff made a number of religious and racial slurs.[9] The ex-husband then provided the recording to a local newspaper, which reported on the plaintiff's statements.[10] The plaintiff sued her ex-husband and the newspaper for violations of federal wiretapping laws as well as Michigan's eavesdropping statutes.[11] Because the plaintiff's ex-husband was a participant to the conversation and was the one who actually recorded the conversation, the Sixth Circuit Court of Appeals affirmed judgment in favor of the defendants on the eavesdropping count, reaffirming the idea that it is reasonable to expect that your conversations may be repeated by a participant.[12]

Wearing a Wire

While it may be reasonable to expect that your conversations may be repeated (or even published in the newspaper), does that expectation change based on how quickly the conversation is repeated to a third party? In *Dickerson v Raphael*, the plaintiff's daughter took the plaintiff to a public park in Ann Arbor and confronted plaintiff on her income, the stability of her marriage, and her involvement in the Church of Scientology.[13] The plaintiff's daughter initiated the conversation in a public place with the planned intent of airing it on the Sally Jessy Raphael television show.[14] To accomplish this, the plaintiff's daughter agreed to wear a wire.[15] As the plaintiff and her daughter were talking, the conversation was picked up by microphone and transmitted to a nearby van.[16] Inside the van, a private surveillance company listened to and recorded the conversation.[17] Excerpts from the conversation were then aired on national television.[18] The plaintiff sued her daughter, Sally Jessy Raphael, the production company and the surveillance company.[19] In sustaining the plaintiff's claims, the Court held that transmitting a conversation by wearing a wire violated the eavesdropping statute.[20] The surveillance team – which made the recording – was not a participant in the conversation, but a third-party using a device to eavesdrop on a conversation without the consent of all of the participants in the conversation.[21] Accordingly, the defendants had violated the eavesdropping statute.[22]

While the plaintiff's daughter could have legally recorded the conversation herself and then played the recording for everyone inside the van, it was not legal for her to simultaneously transmit that conversation into the van for recording. As a non-participant, a third party becomes an eavesdropper, absent consent of all parties. Accordingly, a participant – and only a participant – can record a conversation without the consent of all participants.

Private Conversation Concerns

In addition to ensuring that the recording is done by the secret shopper and not by a remote third-party, companies employing secret shoppers should also ensure that the recorded individual does not have a reasonable expectation of privacy in the conversation. In determining whether a conversation is private, surprisingly, the substance of the conversation is generally irrelevant. Courts instead focus on the expectation of the speaker. A private conversation is one in which "a person reasonably expects to be free from casual or hostile intrusion or surveillance."[23] Or, put more simply, a conversation is private if the speaker "intended and reasonably expected that the conversation was private."[24]

Thus, if a recorded conversation occurs in an area where people are "free to come and go from the room, and listen to the conversation as they please[]," there is no reasonable expectation of privacy.[25] A recording of a conversation held in the public area of a retail store likely would not violate the statute. The outcome might be different, however, if the employee leads the secret shopper to a private office to have a conversation.

Recording in Private Areas

In addition to the eavesdropping statute, Michigan law prohibits a person from "[i]nstall[ing], plac[ing], or us[ing] in any private place, without the consent of the person or persons entitled to privacy in that place, any device for observing, recording, transmitting, photographing, or eavesdropping upon the sounds or events in that place."[26] A private place is defined as "a place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance but does not include a place to which the public or substantial group of the public has access."[27] This language has been interpreted to apply

to common sense locations, such as the stall of a public restroom[28] and a private bedroom.[29] When determining whether an individual has a reasonable expectation of privacy in a place, courts consider the specific features and nature of the location in which a video recording is made, including the design of the walls, type of door, and purpose of the space in question.[30] Therefore, a recording made in an area generally open to the public, such as a retail store into which anyone could enter during business hours, would likely not violate this statute. A recorded conversation between employee and secret shopper, however, that takes place inside a changing room could be interpreted by the court as a "private place" and violate the invasion of privacy statute.

Avoiding Illegal Recordings

For the most part, Michigan statutory law and case law provides direction as to what can and cannot be done with respect to recording others without their consent. To ensure full compliance with the law, an employer using secret shoppers to record interactions with employees should design such programs with an eye to who is recording the conversation, who the participants are, where the conversation is taking place, where the recording is made, and whether anyone is listening contemporaneously to the recording. As a felony punishable by imprisonment up to two years and a $2,000 fine, violation of the eavesdropping statute carries a hefty penalty.[31]

Employers wishing to use secret shopping, need to ensure the above guidelines are followed, to save time, headache, and legal fees.

Endnotes

1 MCL 750.539c (emphasis added).
2 *Sullivan v Gray* 117 Mich App 476, 482-483; 324 NW2d 58 (1982).
3 *Id.* at 482.
4 *Id.*
5 *Id.* at 481.
6 Different standards would, of course, apply to recordings made for law enforcement purposes, including but not limited to the necessity of obtaining warrants. See *People v Collins,* 438 Mich 8; 475 NW2d 684 (1991) for a discussion of law enforcement officers monitoring police informants.
7 *Ferrara v Detroit Free Press,* Inc, 52 Fed Appx 229, 231-232 (CA 6, 2002).
8 *Id.* at 230.
9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 *Dickerson v Raphael,* 222 Mich App 185, 190; 564 NW2d 85 (1997), *rev'd* on other grounds 461 Mich 851 (1999).
14 *Id.* at 189.
15 *Id.* at 190.
16 *Id.*
17 *Id.*
18 *Id.*
19 *Id.*
20 *Id.* at 193.
21 *Id.* at 195.
22 *Id.* at 198-99.
23 *People v Stone,* 463 Mich 558, 563; 621 NW2d 702 (2001).
24 *Dickerson v Raphael,* 461 Mich 851, 851; 601 NW2d 108 (1999).
25 *Bowens v Ary, Inc,* 489 Mich 851, 843-844; 794 NW2d 842 (2011).
26 MCL 750.539d(1)(a).
27 MCL 750.539a(1).
28 *People v Abate,* 105 Mich App 274; 306 NW2d 476 (1981).
29 *Lewis v LeGrow,* 258 Mich App 175; 670 NW2d 675 (2003).
30 See, e.g., *Abate, supra* note 28 at 276-279 (considering the height of the walls around the stalls, the latching door, and the fact that the stall was designed to ensure privacy).
31 MCL 750.539e.

Consider Removing Your Next PIP Case To Federal Court[1]

By: Matthew S. LaBeau, *Collins Einhorn Farrell PC*

Executive Summary

Removal of a no-fault claim to federal court can be a favorable maneuver that ultimately proves beneficial to the defense of the claim. In an instance where the state court jury pool is considered to be adverse, a federal jury pool will pull from a wider geographical region and may provide a better opportunity to select a more favorable jury. Additionally, a complex matter may be more appropriate in federal court, where more time and resources can be utilized to bring the matter to a favorable conclusion. To remove a no-fault case to federal court, however, several procedural requirements must be met in order for the federal court to retain jurisdiction over the case. Where these requirements are met, the removal of a no-fault case to federal court can completely alter the course of the litigation, and even the playing field for the insurance carrier.

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Introduction

Throughout the course of litigation, there are certain facts and circumstances that favor one side or the other. The venue and presiding judge in a given matter can significantly impact the outcome of litigation. All too often, insurance carriers find themselves before a judge, or in a county, that is favorable to the plaintiff. Unlike the facts that develop through the case, the venue and presiding judge will remain static throughout the litigation. One way, though, to even the playing field in a first-party no-fault case may be to remove the matter to federal court. In the right circumstances, removal can be beneficial in obtaining a favorable outcome for the carrier.

Why Consider Removal?

Removal of a claim to federal court may be an opportunity for an insurance carrier to even the playing field. When a matter is filed in state court, it is important to assess the venue where the case is pending. If the jurisdiction or judge is favorable, then removal of the matter may not be the best course of action. However, in an instance where the state court jury pool is considered to be adverse, a federal jury pool will pull from a wider geographical region and may provide a better opportunity to select a more favorable jury. In addition, the judge presiding over the state court action may, either by experience or reputation, be more likely to give the benefit of the doubt to the opposing side. Removal of the matter to federal court may provide an opportunity to draw a jurist who will be more favorable to your position.

The complexity of the issues involved in the case should also be considered. There are state-court venues that have more knowledge of no-fault cases. If the case involves a matter of complex statutory interpretation, or a complicated coverage issue that is germane to cases under the no-fault act, a state-court judge with experience in such matters may be beneficial to the defense. On the other hand, there are also state-court venues where, regardless how experienced, the judges have congested dockets with limited time and resources to devote to each case. In that instance, a complex matter may be more appropriate in federal court, where more time and resources can be utilized to bring the matter to a favorable conclusion.

Another consideration is your opposing counsel. There are aggressive attorneys that masterfully utilize the broad discovery rules in the state of Michigan to their advantage. The Federal Rules of Civil Procedure are narrower and can be utilized to shield the insurance carrier from extensive and far-reaching discovery. In addition, motion hearings in federal court are frequently only permitted by leave of the court, and are not on a weekly scheduled docket. Once again, this can potentially limit the outlay of

defense costs as well as limiting discovery disputes since there could be a delay in the court's addressing of the issue.[2] Lastly, there are certain attorneys who are better known to judges and juries in a certain jurisdiction by way of routinely practicing in the venue and being otherwise well known in the community. Removal of a claim can neutralize the advantage opposing counsel may have by selecting a jurisdiction with a larger jury pool and appointed judge.

The Basics of Federal Jurisdiction

A case can be removed from state court to federal court if the case could originally have been filed in federal court.[3] As most of us recall from our civil-procedure course in law school, there are two primary bases for federal-court jurisdiction over a civil action: federal question and diversity. The Michigan no-fault act[4] controls claims for personal-injury-protection benefits. Therefore, claims for such benefits do not involve a federal question. Accordingly, the primary basis to seek federal jurisdiction over a claim for no-fault benefits is by way of diversity.

In the instance of diversity jurisdiction, federal courts have original jurisdiction over all civil actions between citizens of different states if the amount in controversy exceeds $75,000.[5] The general rule is that a corporation is deemed a citizen of the state in which it is incorporated and the state where it has its principal place of business.[6]

Diversity jurisdiction is broader for "any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which the action the insured is not joined as a party-defendant." In that instance, an insurer is also a citizen of "every State and foreign state of which the insured is a citizen."[7] In *Ljuljdjuraj v State Farm Mut Auto Ins Co,* 774 F3d 908 (CA 6, 2014), the Sixth Circuit Court of Appeals held that this exception does not apply to a claim for first-party no-fault benefits.[8]

It should also be noted that, even in instances where diversity requirements are otherwise met, a case is not removable on the basis of diversity when any defendant is a resident of the state in which the suit is brought.[9] For example, if a plaintiff who resides in Florida files an action in state court in Michigan, and the defendant is a citizen of Michigan, the claim cannot be removed to federal court.

Therefore, for a no-fault carrier to remove a state-court action filed in Michigan, the carrier must be incorporated and have a principal place of business outside of the state of Michigan. From time to time, a Michigan based carrier is sued for no-fault benefits in another state. Such an action would be removable as long as all other requirements are met.

> The removal of a no-fault case to federal court can completely alter the course of the litigation, and even the playing field for the insurance carrier.

The Timing for Removal

If a defendant wishes to remove the case to federal district court, it must file a notice of removal within 30 days after being served with the complaint.[10] It is important to note, however, that this is not the only opportunity to remove a case to federal court. If it is not evident based upon the initial pleadings that a case is removable, a case may also be removed to federal court **within 30 days after receipt** "by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one which is or has become removable."[11]

The Sixth Circuit has never fully expounded the meaning of "other paper" for purposes of removal. The court has indicated that, as a general matter, documents such as deposition transcripts, answers to interrogatories and request for admissions, amendments to ad damnum clauses of complaints, and correspondence between the parties and their attorneys or between attorneys may constitute "other papers" for the purposes of removal.[12] If the initial pleading lacks solid and unambiguous information that the case is removable, the defendant must file a notice of removal within 30 days of receipt of an amended pleading, motion, order, or other paper that contains solid and unambiguous information that the case is removable.[13] Several courts have interpreted that as "other paper" for the purposes of removal to apply to papers and documents involved in the case being removed.[14]

At the initial pleadings stage, it is not unusual for a carrier to be unaware of the total amount of benefits claimed by a plaintiff in a lawsuit for no-fault benefits. It may not be until the plaintiff responds to written discovery requests that it is first learned that the plaintiff is seeking an amount that exceeds $75,000. Therefore, an attorney representing a diverse insurance carrier should be vigilant in reviewing the plaintiff's discovery responses, and should timely file a notice of removal if appropriate.

A question may arise as to whether documentation submitted within the claim file, prior to the filing of a lawsuit, constitutes information sufficient to give notice that a claim is removable. Case law in the Sixth Circuit would suggest that information compiled before the filing of the lawsuit would not necessarily be considered an "other paper" for the purposes of removal.[15] Therefore, just because documentation was submitted to a carrier prior to the filing of a lawsuit does not necessarily mean that a case is removable.

Ideally, counsel obtains a copy of the claim prior to the filing of responsive pleadings, but that is not always the case. If the claim file materials suggest that the amount in controversy would exceed $75,000 at the time of filing responsive pleadings, then counsel should strongly consider filing a notice of removal at that time. If the amount in controversy is not clear from the claim file materials, however, a failure to remove the matter at the time responsive pleadings were due may not be fatal to a successful removal of the matter to federal court at a later date,

upon receipt of additional documents. An argument can be made that, regardless of what was contained in the claim file, it does not constitute "other paper" for purposes of the removal statute, and that the claims and/or damages the plaintiff is claiming entitlement to in a lawsuit is not discernible until assertions are made through required disclosures in the discovery process.

The Amount in Controversy Requirement

As referenced above, the minimum jurisdictional amount for a civil action based on diversity jurisdiction in federal court is $75,000. As a general rule, the court considers whether it had jurisdiction at the time of removal, not whether it has jurisdiction based on post-removal events.[16] Therefore, because no-fault benefits are not payable until they are incurred under MCL 500.3107, any expenses incurred after removal for which the plaintiff may seek reimbursement are not considered in determining whether the $75,000 diversity jurisdictional requirement is met.[17]

There are circumstances where federal courts have departed from this general rule. In *Herring v State Farm Mut Auto Ins Co*,[18] the plaintiff sought $30,096 in attendant care benefits already incurred, ongoing benefits without any end date, and a declaratory action seeking future damages. In that circumstance, the court found that the amount in controversy was met. In other cases with similar facts, however, this argument was rejected.[19]

The Michigan no-fault act provides for statutory interest and attorney fees pursuant to MCL 500.3142 and MCL 500.3148. A plaintiff's claim for interest and attorney fees can be considered as part of the amount in controversy for purposes of the amount in controversy requirement.[20] A defendant must prove that the amount of interest and attorney fees more likely than not makes up any difference between the claimed benefits and the jurisdictional requirement of $75,000.[21]

An interesting wrinkle involves the assignment of claims to providers in the wake of the Michigan Supreme Court's opinion in *Covenant v State Farm Mut Auto Ins Co.*[22] In that case, the court found that there is only one cause of action for no-fault benefits and it belongs to the injured claimant. While carriers continue to challenge whether a claim for no-fault benefits can be lawfully assigned to a medical provider, the *Covenant* decision suggested and subsequent Court of Appeals decisions have operated as though such a right exists. The question then becomes whether an expense that is assigned prior to or subsequent to removal can be considered as part of the amount in controversy requirement. At this point, there is no clear direction on this issue and room to argue for or against jurisdiction.

Another consideration relevant to the $75,000 threshold is whether an action by a claimant and a provider, or multiple providers can be aggregated together to meet the amount in controversy requirement. Current case law would suggest that the claims can be aggregated to meet the requirement. Two or more claims asserted by a single plaintiff against a single defendant may be aggregated for the purposes of determining whether the amount in controversy requirement is met.[23] Considering that the *Covenant* decision found that there is one claim for benefits, there is an argument that medical providers are merely assigned a portion of a claimant's overall claim as a whole.

Therefore, for a no-fault carrier to remove a state-court action filed in Michigan, the carrier must be incorporated and have a principal place of business outside of the state of Michigan.

Notice of Removal

A defendant seeking to remove a claim to federal court must file a notice of removal in the federal district court "containing a short and plain statement of the grounds for removal."[24] In Michigan, a plaintiff need only state that a claim seeks damages in excess of $25,000 to be within the jurisdiction of the circuit court. Therefore, in such circumstances, the amount stated in the initial pleadings is not deemed to be the amount in controversy.[25] In that case, the notice of removal may assert the amount in controversy and removal is appropriate on that basis if the district court finds, by a preponderance of the evidence, that the amount in controversy exceeds $75,000.[26]

Federal judges recommend that the notice of removal be as detailed as possible to avoid an order from the court requesting that the defendant show cause as to why the matter should not be remanded.[27] In the instance of diversity jurisdiction, that includes identifying the citizenship of the parties, and every basis on which removal is sought. This also includes referencing all information that supports the defendant's assertion that the amount in controversy exceeds $75,000. A defendant's notice of removal, though, need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold. Evidence establishing the amount is required by 1446(c)(2)(B) only when the plaintiff contests, or the court questions, the defendant's allegation.[28]

Challenging Removal

There are circumstances where a plaintiff may approve of removing the matter to federal court. If that is not the case, though, a plaintiff can challenge the removal by way of a motion to remand. A motion to remand based on a defect other than lack of subject-matter jurisdiction must be made within 30 days after filing of the notice of removal.[29]

A common basis for challenging the removal of an action is that the notice was not timely filed. As referenced above, a defendant must remove a case within 30 days after service of the complaint, or within 30 days of receipt of certain information which allows the party to ascertain that the case is or has become removable. The argument in this instance is that the defendant had sufficient information at the time of

initial responsive pleadings and should have removed the case at that time based on allegations in the complaint. In the instance of where a case subsequently becomes removable, the argument is that the defendant did not act timely when sufficient information was received.

Another common basis for challenging the removal is that the amount in controversy does not exceed the minimum jurisdictional limit, i.e. $75,000. A plaintiff can argue that, at the time of removal, the outstanding claim does not exceed $75,000, and argue that the court cannot consider ongoing incurred benefits. A plaintiff can also argue that, while there may be a large amount of benefits anticipated, such as future home modifications, van modifications, or attendant care, the claim is not incurred and should not be considered as part of the amount in controversy. It should be noted, however, that the court can always remand a case if it discovers at any time before the final judgment that it lacks subject-matter jurisdiction.[30] Therefore, a plaintiff can argue that if certain benefits are no longer being claimed, or cannot be claimed, the case can be remanded[31].

Generally, with exceptions that do not apply to no-fault cases, a remand order cannot be appealed.[32] Therefore, the district court has sole authority as it relates to whether to remand a claim for no-fault benefits to state court.

Conclusion

In certain circumstances, removal of a no-fault claim to federal court can be a favorable maneuver that ultimately proves beneficial to the defense of the claim. There are certain strategic considerations to take into account. There are also strict procedural requirements that require diligence and forethought. A plaintiff, though, is not without recourse if state court is the desired venue. The removal of a no-fault case to federal court can completely alter the course of the litigation, and even the playing field for the insurance carrier. Therefore, defense attorneys, consider removing your next no-fault case to federal court.

Endnotes

1 Originally published in The Journal of Insurance & Indemnity Law, Vol. 11, No. 3, July 2018, and reprinted with permission

2 This, obviously, goes both ways. If the defense is seeking discovery, or otherwise has an objection, there will be a delay in resolution.

3 28 USC 1441(a)

4 MCL 500.3101, et seq.

5 28 USC 1332(a)(1).

6 28 USC 1332(c)(1).

7 *Id.*

8 The Court specifically found that the direct action provision "on its face does not apply where a suit is brought under an insurance policy provision that does not provide for liability insurance." 774 F3d at 911. The provision for no-fault benefits in this case "provides benefits on the basis of plaintiff's having been a passenger in the primary insured's automobile, and not on the basis of the primary insured's liability to the plaintiff." *Id.*

9 28 USC 1441(b)(2).

10 28 USC 1446(b).

11 28 USC 1446(b)(3).

12 *Brerea v Mesa Medical Group, PLLC,* 779 F3d 352, 365 (CA 6, 2015).

13 *Id* at 364.

14 *Dahl v RJ Reynolds Tobacco Co,* 478 F3d 965, 969 (CA 8, 2007), citing *Chaganti & Assocs, PC v Nowotny,* 470 F3d 1215, 1220–1221 (CA 8, 2006) (motion response which states federal cause of action is "other paper") and *Addo v Globe Life & Accident Ins Co,* 230 F3d 759, 761–762 (CA 5, 2000) (post complaint demand letter seeking an amount greater than $75,000 is "other paper").

15 See *Holston v Carolina Freight Carriers Corp,* unpublished per curiam opinion of the United States Court of Appeals for the Sixth Circuit, issued June 26, 1991 (Docket No. 90-1358); 1991 WL 112809 (Even if a "defendant may have the papers in its possession as of the filing of the suit," a defendant "does not receive notice of the facts contained therein until it reviews those papers in connection with the suit."), as cited by *Berera, supra* note 11.

16 *Rogers v Wal-Mart Stores, Inc,* 230 F3d 868, 872-873 (CA 6, 2000), cert den, 532 US 953 (2001).

17 *JD ex rel Braverman v ABM Amtech, Inc,* unpublished order of the United States District Court for the Eastern District of Michigan, issued Jan. 31, 2006 (Docket No. 05-40393); 2006 WL 273623; 2006 US Dist LEXIS 7056.

18 *Herring v State Farm Mut Auto Ins Co,* unpublished order of the United States District Court for the Eastern District of Michigan, issued Nov. 16, 2005 (Docket No. 05-CV-73556); 2005 WL 3071902; 2005 US Dist LEXIS 29648.

19 *Spawr v Encompass Ins Co,* unpublished opinion of the United States District Court for the Western District of Michigan, issued Oct. 2, 2008 (Docket No. 1:08-CV-614); 2008 WL 4534411; 2008 US Dist LEXIS 77087.

20 *Haggard v Allstate Prop and Case Ins Co,* unpublished opinion and order of the United States District Court for the Eastern District of Michigan, issued Sept. 12, 2013 (Docket No. 13-12779); 2013 WL 12181716, citing *Williamson v Aetna Life Ins Co,* 481 F3d 369, 376 (CA 6, 2007).

21 *Michigan Head and Spine Institute, Inc v Safeco Ins Co of Illinois,* unpublished opinion and order of the United States District Court for the Eastern District of Michigan, issued June 1, 2018 (Docket No. 18-10902); 2018 WL 2452987, citing *Everett v Verizon Wireless, Inc,* 460 F3d 818, 822 (CA 6, 2006).

22 *Covenant v State Farm Mut Auto Ins Co,* 500 Mich 191; 895 NW2d 490 (2017).

23 *Everett v Verizon Wireless, Inc,* 460 F3d 818, 822 (CA 6, 2006).

24 28 USC 1446(a).

25 Under 28 USC 1446(c)(2), "the sum demanded in good faith in the initial pleading shall be deemed to be the amount in controversy, except that-- (A) the notice of removal may assert the amount in controversy if the initial pleading seeks-- (i) nonmonetary relief; or (ii) a money judgment, but the State practice either does not permit demand for a specific sum or permits recovery of damages in excess of the amount demanded; . . ."

26 28 USC 1446(c)(2)(B).

27 Per Judge David Lawson's presentation at the Insurance and Indemnity Law Section's Spring Meeting & Program on May 21, 2018.

28 *Dart Cherokee Basin Operating Co, LLC v Owens,* 135 S Ct 547, 554; 190 L Ed 2d 495 (2014); 28 USC 1446(c)(2)(B).

29 28 USC 1447(c).

30 *Anusbigian v Trugreen/Chemlawn, Inc,* 72 F3d 1253, 1254 (CA 6, 1996); 28 USC 1447(c).

31 *See Kibler v Luiso,* unpublished opinion and order of the United States District Court for the Eastern District of Michigan, issued Jan. 11, 2007 (Docket No. 06-13215); 2007 WL 127911; 2007 US Dist LEXIS 2018 (Because (1) Plaintiff never sought to bring this action in federal court, (2) Plaintiff never specifically sought damages exceeding $75,000, and (3) Plaintiff has agreed to seek damages not greater than $74,000, the case should be remanded to state court once plaintiff files an amended complaint).

32 28 USC 1447(d).

Appellate Practice Report

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New Rules Governing Exhibits in the Michigan Court of Appeals

Until recently, parties could submit exhibits to the Michigan Court of Appeals any way they chose. Some advocates took the lack of governing rules as an opportunity to think creatively about how best to present their cases. But some advocates chose not to submit exhibits at all, apparently assuming judges could rely on the official, paper record in each case.

This state of affairs often left the Court of Appeals with a problem. There's only one paper record, so only one of the three judges on a panel could have access to the record at a time. When parties didn't submit important records as exhibits, two judges from each panel had to rely on the briefs until their chambers got an opportunity to review the paper record.[1]

The Michigan Supreme Court adopted a new rule to eliminate this problem. Effective September 1, 2018, Michigan Court Rule 7.212(J) requires parties in most civil cases to submit appendices with appeal briefs. (Child-protection proceedings and noncriminal delinquency proceedings are exempt, and there are different rules for appeals from the Michigan Public Service Commission and the Michigan Tax Tribunal.)

Required Content

The appellant's appendix must include:

- The orders at issue in the appeal, along with any transcripts of findings of fact and conclusions of law;
- The trial-court docket;
- The relevant pages of transcripts, along with any surrounding pages that might provide context;
- Copies of any challenged jury instructions, relevant transcript pages, and requests for the instruction at issue; and
- Anything else that's relevant—although parties can exclude copies of lower-court briefs unless they're necessary for a preservation issue.

Appellees aren't required to submit an appendix but they can submit one if they're dissatisfied with the appellant's. The new rule cautions appellees not to include materials found in the appellant's appendix. The rule also encourages joint appendices when there are multiple parties on one side of the "v."

Submitting Appendices

Michigan Court Rule 7.212(J) contains a number of specifications for formatting and submitting appendices:

- It limits appendices to 250 pages. If you need to submit more than 250 pages of exhibits, you'll need to submit separate volumes.
- Parties must submit transcripts in full-page form rather than condensed, four-pages-to-a-sheet form.
- An appendix must have a cover with "Appellant's Appendix" or "Appellee's Appendix" in bold.
- An appendix must have a table of contents that lists the volume and page number of each relevant document.

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- If you're submitting a paper appendix, you must tab and bind each volume separately. You'll need to submit five copies.
- If you're submitting an appendix electronically, each appendix must be an independent PDF. You also need to bookmark each document.

Consequences for Failure to Comply

When the Michigan Supreme Court sought comments before adopting these amendments, the draft rule granted the Court of Appeals authority to sanction attorneys who didn't submit an appropriate appendix. The draft stated: "Failure to comply with any part of this rule may result in monetary sanctions against the attorney that failed to comply."[2]

That was a bit harsh. As the State Bar of Michigan's Appellate Practice Section stated in its comments to the proposed rule, it makes more sense for the court to use its usual notice-and-opportunity-to-cure procedure.[3] That is, the court should issue one of its standard notices of defect and give the party 21 days to fix the problem.

The Michigan Supreme Court evidently agreed with the Appellate Practice Section. It eliminated the proposed monetary-sanctions rule. Michigan Court Rule 7.212(J) is now silent about remedies for nonconforming appendices (or failure to file an appendix). It's likely, however, that the Court will follow its usual practice for nonconforming briefs, giving parties 21 days to fix any problems.

Best Practices

There's much to like about the new rule. Having to submit exhibits will make it a little harder for appellants to make unsupported claims about the record. We should also see more precision and uniformity in citations to the record in the Court of Appeals.

The rule's only real burden is that parties will have to finalize briefs a little earlier. It used to be possible to completely finish a Court of Appeals brief before assembling exhibits. Now, attorneys will need to complete a draft, prepare an appendix, and then return to the draft to add references to appendix page numbers. That will involve a little more planning. But that's surely a small price to pay for ensuring that each Court of Appeals judge has the records he or she needs to prepare for argument.

Appealability of Dismissals "Without Prejudice"

A fundamental rule of appellate jurisdiction is the need for a "final" decision. In Michigan, a final judgment or order is typically "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties." MCR 7.202(6)(a)(i). So what about dismissals "without prejudice," i.e., dismissals that permit the action potentially to be refiled later? Are those orders immediately appealable as a matter of right? It depends.

On the one hand, the Michigan Court of Appeals has strongly rebuked the notion that stipulated orders dismissing claims "without prejudice" may be appealed, even if they also dismiss other claims involuntarily. Since an order dismissing less than all of the claims of all of the parties is not a "final order" for the purpose of bringing an appeal as of right, it is tempting to consider stipulating to the dismissal of the remaining claims or counterclaims "without prejudice" or with some other language preserving the ability to reinstate those claims in the event of an appellate reversal. But the Court of Appeals rejected that approach in *City of Detroit v Michigan*, 262 Mich App 542; 686 NW2d 514 (2004). The Court explained that dismissing claims without prejudice creates the possibility of "piecemeal" appeals, which the court rules are designed to prevent:

> The parties' stipulation to dismiss the remaining claims without prejudice is not a final order that may be appealed as of right; it does not resolve the merits of the remaining claims and, as such, those claims are "not barred from being resurrected on that docket at some future date." *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 136; 624 NW2d 197 (2000). The parties' stipulation to dismiss the remaining claims was clearly designed to circumvent trial procedures and court rules and obtain appellate review of one of the trial court's initial determinations without precluding further substantive proceedings on the remaining claims. This method of appealing trial court decisions piecemeal is exactly what our Supreme Court attempted to eliminate through the "final judgment" rule.
>
> *Id*. at 545.

On the other hand, the Court has distinguished situations involving dismissals "without prejudice" that are involuntary. In *MLive Media Group v City of Grand Rapids*, 321 Mich App 263; 909 NW2d 282 (2017), the city of Grand Rapids filed a declaratory action in federal court seeking a determination of its rights and obligations with respect to recordings made of calls to a non-public police department telephone line. While that case was pending, the Grand Rapids Press, which had requested copies of the recordings under Michigan's Freedom of Information Act, filed a complaint in the Kent County Circuit Court seeking to compel disclosure of the recordings. The trial court dismissed the claim without prejudice, deferring to the federal action under the doctrine of comity. On appeal, the city argued that the Court of Appeals lacked jurisdiction over the appeal, citing *Detroit* and arguing that the dismissal without prejudice rendered the trial court's order non-final. The Court of Appeals disagreed, reasoning that *Detroit* was distinguishable because it involved claims dismissed by stipulation:

> [T]he trial court entered an order denying MLive's motion for summary disposition and dismissing MLive's only claim without prejudice after reviewing both parties' opposing arguments. Therefore, the order is final, MCR 7.202(6)(a)(i), and *Detroit* is distinguishable on the facts. [*Id*. at 268.]

The Court of Appeals has reached a similar result in cases involving dismissals without prejudice in favor of arbitration, so long as the trial court does not retain jurisdiction. See *Rooyaker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146; 742 NW2d 409 (2007) ("[B]ecause there was nothing left for the trial court to decide and it did not state that it was retaining jurisdiction [when it dismissed the case in favor of arbitration], we

conclude that the trial court's order was a final order appealable as of right.").

The same goes for cases dismissed under the doctrine of primary jurisdiction (i.e., where a case must initially be decided by an administrative agency). See *Attorney General v Blue Cross Blue Shield of Michigan*, 291 Mich App 64, 75-76; 810 NW2d 603 (2010) ("[T]here was nothing left for the trial court to decide regarding count II after its decision to refer the claim to the OFIR Commissioner, and the trial court did not state in the October 6, 2008, order dismissing that count without prejudice that it was retaining jurisdiction of that count. . . . Therefore, here as in *Rooyakker*, there was nothing left for the trial court to decide, and all claims were finally 'disposed' of within the meaning of MCR 7.202(6)(a)(i).").

As cases like *MLive*, *Rooyaker*, and *Attorney General* demonstrate (and likely others), dismissing a case "without prejudice" does not necessarily prevent an order from being appealed as a matter of right. So long as the dismissal order was not stipulated to, and the trial court did not retain jurisdiction, there is an argument that the order is final and may be appealed.

Endnotes

1 See generally the Court of Appeals' January 30, 2018 comments to ADM 2016-25, Proposed Amendment of MCR 7.2122 Requires Appellants to File an Appendix with the Court of Appeals, available at: https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Comments%20library%204%20recvd%20from%20Sept%202017%20and%20beyond/2016-25_2018-01-30_CommentFromCOA.pdf (last visited September 15, 2018).

2 Proposed Amendment of MCR 7.212, available at: https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2016-25_2017-10-17_FormattedOrder_PropAmendtOf7.212.pdf (last visited September 15, 2018).

3 Appellate Practice Section Public Policy Position, available at: https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Comments%20library%204%20recvd%20from%20Sept%202017%20and%20beyond/2016-25_2018-01-30_CommentFromAPS.pdf (last visited September 15, 2018).

Legal Malpractice Update

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Statute of Limitations & Redundant Claims in Legal Malpractice Actions

Black v Attorney Defendant, unpublished per curiam opinion of the Court of Appeals, issued May 17, 2018 (Docket No. 338411); 2018 WL 2269759; 2018 Mich App LEXIS 2477.

Facts:

Attorney defendant represented plaintiff Black related to a patent application. The engagement letter provided that the defendant would prepare and file a patent application with the United States Patent and Trademark Office ("USPTO"). The letter also described other steps that might occur in the event of a rejection of the application and the costs associated with that work. According to the letter, it wasn't necessary to enter into a new engagement agreement should additional work become necessary. If Black agreed to the costs, then the defendant would do the work.

The defendant filed the patent application on November 7, 2014. After filing, Black noticed an error that required filing an amended application. Black also discovered similar patents, which necessitated providing supplemental information to the USPTO.

On November 10, 2014, the defendant notified Black that he would file an amended application. The defendant renewed that promise as late as January 8, 2015. But there's no evidence that the defendant ever filed an amended application. The defendant also quoted additional fees to address the supplemental disclosures to the USPTO, but Black did not agree to the fees.

On May 10, 2016, the defendant notified Black that he was withdrawing as counsel. The withdrawal letter stated: "The agreed upon work was completed on November 7, 2014." By that time, Black had already hired counsel to represent him to pursue potential claims against the defendant.

Ultimately, the USPTO deemed the application abandoned. Black filed a lawsuit against the defendant on November 29, 2016 alleging legal malpractice, breach of fiduciary duty, and fraud claims. The trial court dismissed the lawsuit, finding that the defendant completed the work he was retained to do on November 7, 2014. Therefore, the two-year statute of limitations period had run. Moreover, the trial court held that all of Black's claims sounded in legal malpractice and were subject to that limitations period. Black appealed.

Ruling:

The Court of Appeals held that Black's claim wasn't time-barred. The court rejected the defendant's argument that the engagement letter only bound him to prepare and file the patent application. The terms of the letter and attorney's actions were enough to establish an attorney-client relationship that existed long after the November 7, 2014 filing of the patent. Most convincing to the court was the defendant's renewed promise on January 8, 2015 that he would file an amended application. So at the very least, based on the two-year statute of limitations period, Black had until January 8, 2017 to file a legal-malpractice claim.

But the Court of Appeals affirmed the trial court's dismissal of the breach of fiduciary duty and fraud claims as redundant. Citing *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39 (2005), the court held that the duty owed by the defendant to Black arose only from the attorney-client relationship. As to the fraud claims, those allegations also arose solely from the attorney-client relationship

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and were directly related to the quality of legal services provided. Consequently, Black's entire complaint sounded only in legal malpractice.

Fuqua v Attorney Defendant, unpublished opinion per curiam of the Court of Appeals, issued July 12, 2018 (Docket No. 336418); 2018 WL 3397800; 2018 Mich App LEXIS 2803.

The trial court dismissed the lawsuit, finding that the defendant completed the work he was retained to do on November 7, 2014.

Facts:

Fuqua hired the defendant to assist in bankruptcy proceedings. Fuqua claims she advised the defendant that her sole reason for declaring bankruptcy was to obtain mortgage modifications. Mortgage modifications are only allowed in Chapter 13 proceedings. But the defendant filed the petition under Chapter 7, which did not allow for mortgage modifications.

The attorney-client relationship devolved and the defendant sought to withdraw. At a hearing on December 19, 2013, the judge presiding over the bankruptcy proceeding stated he would permit the defendant to withdraw. But the order memorializing that decision wasn't entered until December 23, 2013.

On December 22, 2015, Fuqua filed a five count complaint alleging legal malpractice, breach of contract, fraud, breach of fiduciary duty, and collusion. The trial court dismissed all of plaintiff's claims on the defendant's motion. The court determined that the breach of contract, fraud, and breach of fiduciary duty claims all sounded in legal malpractice. Because any legal malpractice claim accrued at the December 19, 2013 hearing, the allegations were time-barred by the two-year limitations period controlling legal-malpractice claims. The court dismissed the collusion claim on a separate motion, not relevant to this discussion. Fuqua appealed.

Ruling:

The Court of Appeals agreed with the trial court that any professional-malpractice claims accrued at the December 19, 2013 hearing: the professional relationship was over at that point. "The fact that a written order granting the motion was not entered until four days later is simply not relevant." But the Court of Appeals disagreed that all of Fuqua's claims sounded in malpractice.

The Court of Appeals found that Fuqua properly pleaded a breach-of-contract claim because she alleged that the defendant warrantied that plaintiff would obtain the result she desired (mortgage modifications) when the defendant knew that was untrue. Because the limitations period for a breach-of-contract claim is six years, Fuqua's claim wasn't time-barred.

Fuqua's fraudulent-misrepresentation claim also wasn't time-barred. She alleged that the defendant misled her by telling her that she could obtain mortgage modifications by filing for Chapter 7 bankruptcy. She alleged that she relied on that representation and suffered injuries as a result. "These are precisely the sort of allegations to plead a claim of fraudulent misrepresentation." Consequently, the two-year malpractice statute of limitations didn't apply to this claim either.

The same is true for Fuqua's breach-of-fiduciary-duty claim. The Court of Appeals reiterated that an attorney-client relationship doesn't preclude a breach-of-fiduciary-duty claim. But to sustain a breach-of-fiduciary-duty claim against a former attorney, a plaintiff must allege more than mere negligence. By alleging intentional misconduct (a more culpable state of mind) rather than negligence, Fuqua properly pled breach of fiduciary duty.

In sum, the Court of Appeals affirmed that plaintiff's legal-malpractice claim was time-barred, but reversed the dismissal of the other counts.

Practice Note:

Not all claims against attorneys are subject to the statute of limitations controlling professional-malpractice claims. As illustrated in these two cases, courts are not bound by the labels that parties attach to their claims. Instead, courts must examine the substance of each count to determine what is truly alleged.

MDTC Legislative Report

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On the whole, things have been pretty quiet at the Capitol building since my last report on June 6th. The Legislature adjourned for its summer recess after an additional flurry of intense activity completed on June 12th, and there were no sessions in July or August, except for a brief session of the House on August 15th featuring only the introduction of a few new bills. It was the kind of summer that legislative staffers in Lansing dream of, but most of our legislators were kept very busy in their respective districts with constituent matters and campaigning for re-election, or in some cases, election to their next political post.

This year's campaign season promises to be an especially wild ride, and the gloves have now come off in Lansing and communities throughout the state. As I predicted last time, the Republican majority passed **Senate Bill 897 (Shirkey – R)** imposing new work requirements for able-bodied Medicaid recipients on June 7th, on the heels of its veto-proof passage of the voter-initiated law repealing the Prevailing Wage Law the day before. Each of those events incited howls of protest from Democrats on the House floor and angry spectators in the gallery, and the mood was not improved when the presiding officer declared approval of immediate effect for both measures by voice vote when the constitutionally-required two-thirds vote for immediate effect was plainly lacking.

The House and Senate reconvened on September 5th, and the politically-charged contest was quickly resumed with action approving voter-initiated laws to raise the minimum wage and require employers to provide paid sick leave. Most of the Republican members voted to approve those measures, but many Democrats doubted their sincerity in light of an openly-expressed plan to repeal or modify them later, when that action could be taken by a simple majority vote instead of the generally unattainable three-quarters vote required to repeal or amend an initiated law approved by the voters. Supporters of the minimum wage initiative have promised to sue if the people's reserved right to propose laws by voter initiative is thwarted in that manner by further action in the lame duck session, and this, in turn, will hopefully provide some needed judicial guidance as to what is, and is not, permissible with respect to the adoption of initiated laws.

The November election will serve as a referendum on our President, Republican leadership in general, and some important ballot proposals which I will touch upon. Thus, both parties are gearing up for a decisive struggle which promises to make for some fascinating viewing.

New Public Acts

As of this writing on September 7th, there are a total of 338 Public Acts of 2018. Aside from the controversial measures previously discussed, a great many of the 168 new acts added since my last report in June are uninteresting, involving repeals or elimination of outmoded laws, regulations and reporting requirements, correction of cross-references, and other such inconsequential matters. The new public acts that may be of interest to our members include the following:

2018 PA Nos. 182 and **183 – Senate Bill 871 (O'Brien – R)** and **Senate Bill 872 (Knezek – D)** These amendatory acts are products of a bipartisan package of Senate bills that were introduced in response to the sordid business of MSU team doctor Larry Nassar and his habit of sexually abusing girls and young women referred to him for medical treatment. **Public Act 182** will amend the Code of Criminal Procedure, MCL 767.24, to extend the statutory limitation period for bringing charges of second-degree and third-degree criminal sexual conduct in cases where the victim is under 18 years

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of age. Under current law, charges for those offenses may be brought within 10 years of the offense or by the victim's 21st birthday, whichever is later. The statute as amended will allow charges of second-degree and third-degree CSC involving a victim under 18 years of age to be brought within 15 years after the offense (or identification of the perpetrator by DNA), or by the victim's 28th birthday, whichever is later. This amendatory act will take effect on September 10, 2018.

Public Act 183, immediately effective on June 12, 2018, has amended the Revised Judicature Act, MCL 600.5805, and added a new § 600.5851b, to provide new extended periods of limitation for civil actions seeking damages for criminal sexual conduct. Section 5805 has been amended to provide a new 10-year period of limitation for civil actions based upon conduct that would constitute CSC under MCL 750.520b through MCL 750.520g (first, second, third and fourth-degree CSC and assault with intent to commit any of those offenses). For purposes of this new provision, it will not be necessary for a criminal prosecution or other proceeding to have been brought as a result of the conduct in question, or that a conviction result if any such prosecution or proceeding is brought. The new § 5851b will provide a longer period of limitation for suits arising from acts of CSC committed against a minor. As enacted, this new provision will allow the victim to file suit within 3 years after the time the victim discovered or should have discovered the injury and the causal relationship between the injury and the CSC offense, or the victim's 28th birthday, whichever is later. The legislation will allow retroactive application to December 31, 1996, limited to cases involving the specific circumstances of Nassar's case, but new claims arising from those offenses committed more than 2 years before the effective date of the legislation must be brought within 90 days.

2018 PA No. 186 – House Bill 5726 (Leutheuser – R), taking effect on September 11, 2018, will create a new "Pyramid Promotional Scheme Act," which will provide criminal penalties for promoting or participation in a "pyramid promotional scheme," as defined therein, and authorize the Attorney General to pursue enforcement action in the circuit court for Ingham County or the judicial circuit in which a violation has occurred. **Public Acts 187, 188** and **189 – House Bill 5727 (Hornberger – R)**, **House Bill 5728 (Noble – R)** and **House Bill 5729 (Iden – R) –** will make corresponding amendments to the Franchise Investment Law, the Code of Criminal Procedure and Michigan Consumer Protection Act.

2018 PA No. 186 – Senate Bill 226 (Jones – R) will amend the Revised Judicature Act, MCL 600.2559, to allow process servers to charge a fee of $5.00 for photo and GPS verifications of service requested by plaintiffs, and to increase the fees for service of process listed therein by $3.00, in accordance with legislation previously enacted in 2012. This amendatory act will take effect on September 26, 2018.

2018 PA No. 330 – House Bill 5811 (Farrington – R) will amend the Michigan Notary Public Act to require the Secretary of State and the Department of Technology, Management and Budget to review, and authorize them to approve, procedures and requirements for remote performance of notarial acts by electronic communication.

New Developments

New Developments of interest include:

Senate Bill 1017 (MacGregor – R) would create a new "Premises Liability Act," which would codify the duties of care owed by possessors of real property to invitees and licensees in accordance with existing case law. This bill was reported by the Senate Judiciary Committee on September 5, 2018, and will now await consideration by the full Senate on the General Orders Calendar.

The ever-popular but elusive goal of no-fault auto insurance reform has been addressed once again by recent attention to a pair of tie-barred Senate Bills – **Senate Bill 787 (Jones – R)** and **Senate Bill 1014 (Hune – R)**. Those bills would effect a number of amendments to the Insurance Code designed to reduce the cost of no-fault auto insurance, including new provisions allowing persons age 65 years or older to choose between a policy providing unlimited personal protection insurance (PIP) benefits and a policy limiting those benefits to a maximum of $50,000 when applying for or renewing an automobile insurance policy; requiring adjustment of the premiums charged to members of the Michigan Catastrophic Claims Association to reflect the election of the reduced maximum for PIP benefits; limit the amounts payable as PIP benefits for attendant care provided in the home; and create a new Michigan Automobile Insurance Fraud Authority in the Department of the Attorney General to provide support to law enforcement and prosecuting authorities to combat auto insurance fraud. These bills were passed by the Senate and referred to the House Insurance Committee on June 7, 2018.

[T]hings have been pretty quiet at the Capitol building since my last report on June 6th.

Questions for the Voters

When discussing matters legislative, it is also appropriate to note action taken by the people pursuant to their right to propose adoption of laws by voter initiative under Const 1963, art 2, § 9, and amendments of the Constitution impacting the performance of legislative functions proposed by voter initiative under Const 1963, art 12, § 2. A significant number of important proposals have been advanced in accordance with the voter initiative laws. The necessity for the electorate's approval or disapproval of some of those measures has been obviated by the Legislature's approval of initiated laws as previously discussed, but others will be presented to the voters on the November general election ballot.

Ballot Proposal 1 will present the voters with an opportunity to approve or disapprove an initiated law – a new "Michigan Regulation and Taxation of Marihuana Act" – which would allow personal possession, use, and cultivation of marihuana under state law, subject to regulations prescribed therein.

Proposal 2 proposes an amendment of the Constitution to establish a new 13-member "Independent Citizens Redistricting Commission for State Legislative and Congressional Districts" as a permanent commission in the legislative branch – a commission which would have exclusive authority to develop and establish redistricting plans in open proceedings, with corresponding

election district maps for Michigan's state legislative and congressional districts, subject to limited review by the Supreme Court. The amendment has been proposed by the Voters Not Politicians ballot proposal committee to remedy widely-perceived abuses associated with partisan "gerrymandering" of state legislative and congressional election districts.

The ever-popular but elusive goal of no-fault auto insurance reform has been addressed once again by recent attention to a pair of tie-barred Senate Bills…

The creation of an independent commission for establishment of election districts is not a new idea. The 1963 Constitution provided for apportionment of the state Senate and House districts by a "Legislative Commission on Apportionment," but the constitutionally-prescribed commission has not been utilized for apportionment of those election districts since 1972, due to the Supreme Court's decision in *In re Apportionment of State Legislature*, 413 Mich 96; 321 NW2d 565 (1982), which held that use of the weighted land area/population formulae prescribed by the existing Const 1963, art 4, § 6 violated the Equal Protection Clause of the U.S. Constitution, and that the invalid provisions were not severable. More recently, the Legislature has had the responsibility for performing the periodic reapportionment of election districts for the Michigan Senate and House of Representatives, subject to review and independent action by the Supreme Court, pursuant to 1996 PA 436, MCL 4.261 *et seq*., as amended. The reapportionment of Michigan's congressional election districts has been performed in similar fashion pursuant to the provisions of 1999 PA 221, MCL 3.61, *et seq*. and 1992 PA 222, MCL 3.71, *et seq*.

Proposal 2 would amend the pertinent provisions of the legislative article to re-establish the commission originally created by the 1963 Constitution and extend its function to also include apportionment of Michigan's congressional districts, with new provisions designed to remedy the constitutional defects identified by the Supreme Court in 1982, require transparency of the Commission's proceedings and deliberations, and ensure that the redistricting process could no longer be dominated or controlled by one political party. To achieve the desired political balance, the proposed changes would require that the commission membership represent the major political parties and independents, with four members affiliated with each of the two major parties and five members who are not affiliated with either of those parties. To provide further protection from partisan political control, current and former lobbyists, partisan elected officials and candidates for elected office, and other specified persons subject to potential partisan political influence would be excluded from service as members of the commission. To provide the desired transparency, all proceedings and deliberations of the commission would be conducted in open meetings, and its records would be available to the public. The proposed amendment would also establish requirements for drawing of election districts, including compliance with applicable federal law, including the Voters Rights Act, and avoidance of any disproportionate advantage to any political party, elected official or candidate.

I have sought, as always, to provide objective analysis of these proposed changes, but lest there be any suggestion that my discussion of Proposal 2 has been in any way biased or editorial, I will make full disclosure of my interest by noting that I have represented Voters Not Politicians over the last several months in the proceedings before the Court of Appeals and the Supreme Court, defending against the unsuccessful efforts which have been made to prevent the submission of its proposal on the general election ballot.

A third proposal of interest sponsored by the Promote the Vote ballot committee was approved by the Board of State Canvassers as **Proposal 3** on September 6, 2018. That proposal proposes amendment of the Constitution to provide for automatic registration to vote when applying for, updating or renewing a Michigan driver's license or personal identification card; to allow registration to vote up to and including election day; to allow voting by absentee ballot without providing a reason for doing so; and to allow straight-ticket voting in general elections.

Proposal 2 proposes an amendment of the Constitution to establish a new 13-member "Independent Citizens Redistricting Commission for State Legislative and Congressional Districts" as a permanent commission in the legislative branch…

Online Resources

Our readers are again reminded that copies of legislative materials, including bills, resolutions, legislative analyses, the House and Senate Journals, and a detailed history of each bill and resolution, may be found on the Legislature's very excellent website. The website includes copies of all public acts and the official compilation of Michigan statutory law. The available bills and resolutions include the versions as originally introduced and as passed by each house, and also includes links to bill substitutes which have been reported from the House and Senate Committees or adopted in proceedings before the full House or Senate. Copies of the ballot proposals to be submitted on the 2018 general election ballot may be found on the Secretary of State's website.

Insurance Coverage Report

By: Drew W. Broaddus, *Secrest Wardle*
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KVG Properties, Inc v Westfield Ins Co, __ F3d __ (CA 6, 2018) (Docket No. 17-2421).

In this August 21, 2018 published decision, the Sixth Circuit – applying Michigan law in diversity – held that a landlord was not entitled to first-party property coverage for damage caused by tenants who had been growing marijuana in their rental units. The landlord sought coverage under a Building and Personal Property Coverage Form ("BPP Policy"). *KVG Properties,* __ F3d at __; slip op at 1. Under this Form, Westfield agreed to pay for "direct physical loss of or damage to Covered Property … caused by or resulting from any Covered Cause of Loss." *Id.* The policy defined a "Covered Cause of Loss" as any "Risk Of Direct Physical Loss." *Id.* Westfield denied the landlord's claim based on what the parties dubbed a "Dishonest or Criminal Acts Exclusion." *KVG Properties,* __ F3d at __; slip op at 2. The exclusion stated that Westfield would not "pay for loss or damage caused by or resulting from" any "dishonest or criminal act by you … or anyone to whom you entrust the property for any purpose." *Id.*

KVG had leased several pieces of real property in Wixom to a group of commercial tenants. KVG authorized these tenants to use the property for general office or light industrial business. On October 29, 2015, the U.S. Drug Enforcement Agency raided the premises and caught the tenants growing what the appellate panel described as "lots" of marijuana. *KVG Properties,* __ F3d at __; slip op at 2. "KVG speedily evicted the tenants, but the damage had already been done: To accommodate their 'business,' the tenants removed walls, cut holes in the roof, altered ductwork, and severely damaged the HVAC systems." *Id.* The total cost of repair was around $500,000. *Id.*

Westfield denied KVG's claim "following an investigation." *KVG Properties, Inc v Westfield Ins Co*, 296 F Supp 3d 863, 866 (ED Mich, 2017). In a January 8, 2016 letter, Westfield conveyed to the insured its determination "that the damage to your property was the result of modifications made by your tenant." *Id.* "This resulted in long-term exposure to condensation and damage to the electrical and HVAC systems." *Id.* The letter also cited several policy exclusions. *Id.* Once KVG filed suit, Westfield moved for summary judgment based on policy exclusions for "Illegal/Dishonest Acts," "Unauthorized Construction or Remodeling," and "Repeated Moisture or Humidity," *Id.* at 867, 870. The district court found that Westfield was entitled to summary disposition based on all three. *Id.* KVG appealed.

In affirming, the Sixth Circuit (Judges Sutton, McKeague, and Donald) noted the general principle – repeatedly announced by the Michigan Supreme Court – that "courts engage in a two-step analysis when determining coverage under an insurance policy: (1) whether the general insuring agreements cover the loss and, if so, (2) whether an exclusion negates coverage." *KVG Properties,* __ F3d at __; slip op at 3, citing *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 382; 565 NW2d 839 (1997). The panel found that the loss was quite clearly covered, but that the conduct of KVG's tenants "was criminal under either state or federal law and that these acts were the main cause of KVG's loss." *KVG Properties,* __ F3d at __; slip op at 3-4. Since "[c]overage under a policy is lost if any exclusion within the policy applies to an insured's particular claims,"[1] the panel affirmed on the basis of the "Dishonest or Criminal Acts Exclusion" alone and did not address the other two exclusions. *KVG Properties,* __ F3d at __; slip op at 4.

The panel considered the legality of KVG's tenants' conduct, noting that "[i]n the abstract, this [was] an interesting question" because "[c]ultivating marijuana is a crime under federal law … but it is protected by Michigan law under certain conditions…." *KVG Properties,* __ F3d at __; slip op at 4, citing the Michigan Medical Marihuana Act ("MMMA"), MCL 333.26421 et seq. "Under different circumstances, KVG

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might have a strong federalism argument in favor of coverage." *Id.* "Since the MMMA was passed by ballot initiative, we would exercise even more care, lest we (as unelected judges) tread directly on the will of the People of the State of Michigan, who cannot easily correct any error we commit." *Id.* But the panel found no need to "face that difficult issue today, because no reasonable jury could find that KVG's tenants complied with Michigan law." *Id.* at 5.

While "the insurer bears the burden of proving facts showing that an exclusion applies,"[2] here "KVG itself claimed, in Michigan court, that its tenants violated the law." *KVG Properties,* __ F3d at __; slip op at 5. "In its eviction pleadings against each tenant, KVG repeatedly claimed that the tenant illegally grew marijuana in the unit and stated that the illegal growing of marijuana was a continuing health hazard." *Id.* Also, neither side disputed "that federal agents raided the premises as part of a criminal investigation." *Id.* At the time of the raids, federal officials were operating under guidance from the Deputy Attorney General stating that they should not prioritize "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana." *Id.* (citation omitted). Therefore, the mere execution of the raid had "some tendency to show" that the tenants *were not* "in clear and unambiguous compliance" with Michigan law. *Id.* at 6.

This evidence shifted the burden under FR Civ P 56 to KVG, to show the legality of the tenant's conduct. *KVG Properties,* __ F3d at __; slip op at 6. KVG was unable to do so, instead merely speculating "that its tenants could have been complying with Michigan's marijuana laws." *Id.* This was insufficient to avoid summary disposition. *Id.* Moreover, the panel rejected KVG's suggestion that a criminal conviction was necessary in order for Westfield to invoke the exclusion. *Id.*

KVG also advanced an argument that because the tenants' conduct constituted "vandalism," the loss was covered irrespective of the "Dishonest or Criminal Acts Exclusion." Neither the district court nor the Sixth Circuit were able to make much sense of this argument, which was apparently based on case law and not the policy terms. *Id.* at 3 n 1; *KVG Properties*, 296 F Supp 3d at 867. Ultimately, this argument went up in smoke because exclusions, by their very nature, remove coverage that would otherwise be provided. See *Hawkeye-Security Insurance Co. v Vector Construction Co,* 185 Mich App 369, 384; 460 NW2d 329 (1990). See also *Hawkeye-Security Ins Co v Bunch,* 643 F3d 646, 652 (CA8, 2011) ("Exclusions by their very nature set limitations on broader grants of coverage.").

"[E]ven if the Court could conceive of a set of facts where an insurance company would owe such a duty to the occupant of the home when the insurance contract specifically excludes any liability for mold, such facts are not present in this case."

Tudor Ins Co v Altman Mgt Co, unpublished per curiam opinion of the Court of Appeals, issued August 21, 2018 (Docket Nos. 335841 and 335890); 2018 WL 3998730.

Here, the primary (Tudor) and excess (National Union) insurers of a property management company (Altman) had no duty to defend or indemnity Altman for a personal-injury suit due to the insured's failure to timely notify its insurers.

The underlying personal-injury claim arose out of "a carbon monoxide leak in a building managed by Altman." *Tudor Ins,* unpub op at 2. The underlying plaintiff filed suit on June 6, 2011, and timely served Altman. *Id.* at 3. Altman forwarded the summons and complaint to its insurance brokers, but the brokers failed to notify either insurer of the claim. *Id.* Altman was unaware of the brokers' failure, "and believing that Tudor was defending the case, did not take independent action to answer the complaint." *Id.* So no one answered, and the underlying plaintiff entered a default against Altman on July 25, 2011, which the plaintiff served on Altman on August 12, 2011. *Id.* A little over six months later, on February 29, 2012, the underlying tort claimant filed a motion for default judgment, requesting damages in the amount of $1 million. *Id.* A week later, Altman notified its brokers of the motion for default judgment, and one of the brokers finally forwarded a copy of the motion to Tudor on March 6, 2012. *Id.* Tudor assigned defense counsel, subject to a reservation of rights, and unsuccessfully tried to set aside the default. *Id.* The tort case was then set to go trial on damages only. *Id.*

Nearly a year later, on May 30, 2013, one of the brokers notified National Union of the lawsuit against Altman. *Tudor Ins,* unpub op at 3. National Union promptly denied coverage based on the delay in notification. *Id.* In August 2013, the personal-injury action went to case evaluation; the panel issued an award of $10 million, which Altman rejected. *Id.* On September 24, 2013, Altman notified National Union that an award against Altman would likely exceed its coverage with Tudor. *Id.* Subsequently, Altman and the tort claimant agreed to submit the damages issue to arbitration, which resulted in a $3.5 million award against Altman. *Id.*

Tudor filed a declaratory-judgment action "contending that it had no obligation to defend or indemnify Altman under its policy because Altman breached its duties under the contract by failing to report the service of the complaint prior to the entry of default." *Tudor Ins,* unpub op at 3. The trial court granted summary disposition to Tudor, finding that none of the failures that led to the late notice were attributable to Tudor; the particular broker that dropped the ball was not an agent of Tudor. *Id.* at 6. The trial court similarly found that National Union was relieved of any liability coverage for the claim, as National Union also was not timely notified and was prejudiced by that delay. *Id.* at 10. The insured and the underlying tort claimant (who intervened) appealed.

A panel of the Michigan Court of Appeals (Judges Swartzle, Shapiro, and Boonstra) unanimously affirmed in all respects. As to Tudor, the panel looked at the two brokers that the insured had been dealing with, AON and Westrope. *Tudor Ins,* unpub op at 7. The appellants made two arguments: "First, that Altman's notice to AON was sufficient to constitute notice to Tudor because AON was Tudor's express, implied, or apparent agent." *Id.* "Second, that because Westrope was Tudor's express or apparent agent

and Altman had followed Westrope's direction by sending the notice to AON, it constituted notice to Tudor." *Id.*

As to the first argument, the panel found no evidence in the record "to suggest that these two parties [AON and Tudor] entered into an explicit principal/agent relationship." *Id*. at 8. Rejecting the appellees' "dual agency" arguments, the panel found it "well established that an independent insurance agent or broker is an agent of the insured, not the insurer." *Id.*, quoting *Auto-Owners Ins Co v Mich Mut Ins Co,* 223 Mich App 205, 215; 565 NW2d 907 (1997). Here there was no evidence that the parties agreed to anything different. *Tudor Ins,* unpub op at 8.

Abraham illustrates that it is extremely difficult to hold property insurers liable for the negligence of contractors to whom they refer their insureds.

The panel similarly found no evidence "that AON was either an apparent or implied agent of Tudor…." *Id*. Quoting *Alar v Mercy Mem Hosp,* 208 Mich App 518, 528; 529 NW2d 318 (1995), the panel noted that "[a]pparent authority arises where the acts and appearances lead a third person reasonably to believe that an agency relationship exists." Apparent authority "must be traceable to the principal and cannot be established only by the acts and conduct of the agent." *Tudor Ins,* unpub op at 8. The argument failed because "AON never provided notice directly to Tudor" and "Tudor never took any action to suggest that notice to AON was required at all." *Id*. The insurance policy did not require Altman to use any particular means of notifying Tudor; it stated only that Altman "must see to it that we are notified as soon as practicable of an 'occurrence' or an offense which may result in a claim." *Id*. "In other words, so long as notice of a claim or suit timely reached it, Tudor was unconcerned with the means by which that was accomplished." *Id.* For similar reasons, the appellants' argument for implied agency failed due to their inability to establish the criteria described in *AFP Specialists, Inc v Vereyken,* 303 Mich App 497, 507; 844 NW2d 470 (2014).[3]

In summary, Tudor had no responsibility for AON's omissions because "the agreement between AON and Altman clearly states that AON was an agent of Altman," and "there is no agreement between Tudor and AON stating that AON represents Tudor." *Tudor Ins,* unpub op at 9. Tudor never "manifested an intent to have AON act on its behalf." *Id.* "Other than the evidence that AON was in the email chain where Tudor accepted notice of claims using the parties' method of delivery, there is no other evidence of any relationship between Tudor and AON." *Id.* And there was "no evidence demonstrating that Tudor exerted control over AON," nor was there "evidence that AON had the authority to bind Tudor." *Id.*

The panel had even less trouble rejecting the appellants' arguments for an agency relationship between Tudor and Westrope. *Id.* Although there was an "agreement between Tudor and Westrope" that gave "Westrope authority to act as its agent in offering Tudor policies," that agreement made "no reference to Westrope as having authority to determine how an insured should provide notice to Tudor…." *Id.* Rather, it stated that "this agreement does not permit [Westrope] to bind [Tudor]." *Id.* There was also no testimony that Tudor had provided such authority orally. *Id*. And nothing suggested that Westrope's agency extended to accepting notice of claims on behalf of Tudor. *Id.* So there was no agency relationship, expressed or implied. *Id.* at 9-10.

The arguments relating to National Union, the excess carrier, did not involve questions about agency but rather about the particular notice requirement in National Union's policy. As noted above, "National Union was not notified of the lawsuit until May 30, 2013, a year and nine months after the service of [the tort claimant's] summons and complaint and nine months after the trial court denied the motion to set aside the default." *Tudor Ins,* unpub op at 11. Appellants claimed that this notice was timely, given National Union's position as the excess carrier (i.e., not owing a duty to defend), and that alternatively, National Union suffered no prejudice. *Id.* at 10.

National Union's policy required the insured to provide notice of the suit "as soon as practicable," once a suit appears "reasonably likely to involve" the excess coverage. *Id.* at 11. "As soon as practicable" has been interpreted to mean "a reasonable time, dependent upon the facts and circumstances of the case." *Id.* at 11, quoting *Motor State Ins Co v Benton,* 35 Mich App 287, 290; 192 NW2d 385 (1971). The "reasonably likely to involve" language "required the insured to … use diligence and take appropriate steps to make an informed judgment regarding the nature and amount of the claim." *Tudor Ins,* unpub op at 11.[4]

The panel found that at the earliest, "Altman should have known that the excess policy might be implicated when [the underlying plaintiff] moved for default judgment in the amount of $1 million, and the trial court stated that the issue of damages was to be resolved by a factfinder." *Id.* at 12. The extent of the tort plaintiff's injuries and the entry of the default were sufficient to put Altman on notice that the lawsuit was "likely to involve" the excess policy issued by National Union. *Id.* So the notice was untimely. And National Union was prejudiced by that delay; "Because of the entry of the default, National Union was denied the opportunity to participate in defending the lawsuit, engage in discovery, present evidence relative to liability, present any meritorious defenses to the lawsuit, cross-examine witnesses at trial, or participate in the arbitration proceeding." *Id.*

Moreover, the panel rejected KVG's suggestion that a criminal conviction was necessary in order for Westfield to invoke the exclusion.

Abraham v Farmers Ins Exch, unpublished opinion per curiam of the Court of Appeals, issued August 21, 2018 (Docket No. 335353); 2018 WL 3998728.

This is not a true insurance **coverage** decision. Here, Farmers was sued under a negligence theory for directing its insured to an allegedly unqualified "mitigation company, following a residential water damage claim. *Abraham,* unpub op at 2. As it relates to Farmers, the panel

(Judges Swartzle, Shapiro, and Boonstra) unanimously agreed that the negligence claim failed.

Plaintiff argued that "Farmers owed and violated duties to: (1) hire a qualified mitigation company to mitigate the water damage, (2) warn her of the risks associated with mold and advise her to leave the home because of the mold, and (3) not to direct or control the scope of U.S. Disaster's work." *Id*. at 6. The trial court had dismissed these claims under MCR 2.116(C)(10). *Id.* at 6 n 8. The panel accepted, for the purposes of the (C)(10) record, "that Farmers selected U.S. Disaster to do the work…." *Id*. at 6. But the panel found no evidence that U.S. Disaster was unqualified "to remediate the flood itself" or any related "mold situation." *Id.*

[T]he Sixth Circuit – applying Michigan law in diversity – held that a landlord was not entitled to first-party property coverage for damage caused by tenants who had been growing marijuana in their rental units.

As to the second claim, plaintiff "failed to establish the existence of a duty by Farmers to warn her of the hazards of mold contamination and/or direct her to leave the house." *Id*. at 7. While plaintiff argued that Farmers owed her a duty to advise her regarding "the mold in the premises," neither the trial court nor the appellate panel understood "how Plaintiff claim[ed] this duty arises…." *Id.* The panel quoted the trial court with approval: "even if the Court could conceive of a set of facts where an insurance company would owe such a duty to the occupant of the home when the insurance contract specifically excludes any liability for mold, such facts are not present in this case." *Id.* While Plaintiff tried to draw an analogy to *Conant v State Farm & Cas Co*, unpublished per curiam opinion of the Court of Appeals, issued May 23, 2006 (Docket No. 260524), the panel distinguished *Conant* because in that case, the allegations of negligence against the insurer were based on specific directions the insurer gave to the remediation contractor, regarding how to do its work. *Abraham*, unpub op at 7. "In this case, plaintiff has not proffered evidence that Farmers directed U.S. Disaster to take action that would create a new, or worsen an already-existing, hazard." *Id.*

Plaintiff's third claim against Farmers presented "a closer question," but the panel still found that there was no jury-submissible negligence theory. *Id.* Specifically, plaintiff alleged "that Farmers directed U.S. Disaster not to remove the subfloor and in so doing, improperly limitedthe scope of work." *Id.* The factual basis of this theory was plaintiff's testimony that she overheard a telephone conversation between an employee of U.S. Disaster and a Farmers' representative in which the representative told the U.S. Disaster employee not to remove the subfloor. *Id.* The panel found the plaintiff's testimony on this point to be "vague," as "she never specifically claims that she overheard Farmers' side of the conversation or that someone from U.S. Disaster told her what the representative said." *Id.* On the other hand, U.S. Disaster's representative testified that Farmers *did not* instruct U.S. Disaster to leave the subfloor in place. *Id.* Also, since Farmers had denied coverage for this aspect of the work, there was no logical explanation for why U.S. Disasters would have been taking direction from Farmers on this point. *Id.*

Abraham illustrates that it is extremely difficult to hold property insurers liable for the negligence of contractors to whom they refer their insureds. But that does not stop claimants from trying.

Endnotes

1 *KVG Properties,* __ F3d at __; slip op at 4, quoting *Hunt v Drielick,* 496 Mich 366, 374; 852 NW2d 562 (2014).

2 *KVG Properties,* __ F3d at __; slip op at 5, citing Hunt, 496 Mich at 373.

3 "An agency cannot arise by implication if the alleged principal expressly denies its existence, but it may arise from acts and circumstances within [the alleged principal's] control and permitted over a course of time by acquiescence or in recognition thereof." *AFP Specialists,* 303 Mich App at 507-508. The "facts and circumstances giving rise to an implied agency must be (1) known to the alleged principal, (2) within the control of the alleged principal, and (3) explicitly acknowledged or at least acquiesced in by the alleged principal." *Id.* An "implied agency must rest upon acts and conduct of the alleged agent known to and acquiesced in by the alleged principal prior to the incident at bar." *Id.* "Moreover, the implied agency must be based upon facts … for which the principal is responsible…." *Id. See Tudor Ins,* unpub op at 8-9.

4 The panel noted the absence of Michigan authority on this point and looked to *Evanston Ins Co v Stonewall Surplus Lines Ins Co,* 111 F 3d 852, 861 (CA 11, 1997) for guidance.

Municipal Law Report

By Lisa A. Anderson

Municipal Law and Zoning: A Brief Introduction

Michigan has one of the largest local government networks in the nation, with 2,875 local government entities divided across 83 counties.[1] Within the 83 counties are 1,240 townships, 533 cities and villages, and hundreds of special districts and authorities, each with unique characteristics.[2] Local governments help maintain critical public infrastructure and provide essential services to nearly ten million Michigan residents.[3] These services often involve maintaining public roads, sidewalks, water and sanitary sewer systems, providing public safety services, and more.

Land use planning and regulation, accomplished primarily through zoning, is one of the important functions of local government and has long been recognized as a reasonable exercise of police power.[4] Local governments have no power of their own and derive their authority from powers expressly delegated and those fairly implied under the State constitution and statutes.[5] The power to zone and regulate land comes from the Michigan Zoning Enabling Act ("MZEA").[6] The MZEA allows local units of government to enact a zoning ordinance and establish zoning districts to direct the orderly development of land and help ensure that public needs for housing, transportation, and infrastructure are planned and provided within the local community.

When a local government enacts a zoning ordinance it must also establish a zoning board of appeals ("ZBA") to provide relief to property owners who demonstrate that strict adherence to zoning regulations will cause an unnecessary hardship or practical difficulty in the development of their land.[7] Decisions made by a ZBA may be appealed to circuit court by a person aggrieved by a ZBA decision.[8] This raises the question of who is aggrieved.

The Aggrieved-Party Rule

In *Olsen v Jude and Reed, LLC*, ___ Mich App ____; ___ NW2d ____; 2018 WL 3244150 (July 3, 2018) (Docket No. 337724, 337726), the Michigan Court of Appeals ruled that neighboring landowners were not aggrieved by a zoning decision simply because they relied on the zoning ordinance to be enforced as it was written and because they owned property in close proximity to the applicant and were entitled to notice of the hearing on the applicant's variance request. The Court also found that aesthetic, ecological, or practical harms are not enough to establish aggrieved-party status.

In *Olsen*, the owner of a residential lot applied to the Chikaming Township ZBA for variances from the zoning ordinance. The application requested a 20-foot variance from the rear yard setback and a variance to the minimum buildable lot requirement of the ordinance. The owner requested the variances to permit it to build a cottage on property that was less than half the size of what was required under the zoning ordinance. The owner argued that the lot would be unusable without the variances. The ZBA held a public hearing and sent notification of the hearing to all property owners and building occupants within a 300-foot radius of the applicant's property as required under the MZEA.[9] Several neighbors attended the ZBA hearing with attorneys to oppose the variance requests. The ZBA approved the variances and the neighbors filed an appeal to circuit court.

In the circuit court appeal, the neighbors argued that they were aggrieved parties within the meaning of the MZEA and claimed they had a right to appeal the ZBA decision to circuit court for the following reasons: (1) they relied upon a previous

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denial of a variance which found that the property was not buildable, (2) they relied upon the enforcement of the zoning ordinance as written, (3) they were entitled to statutory notice of the public hearing on the variance application under the MZEA, and (4) they would suffer aesthetic, ecological, practical, and other alleged harms from the variances. The circuit court agreed and ruled that the neighbors were aggrieved parties within the meaning of the MZEA because they were entitled to notice of the public hearing on the variance request. The circuit court found that the neighbors were also aggrieved because the variance to the rear yard setback reduced the distance from their property to the applicant's septic field. After finding that the neighboring property owners were aggrieved parties, the circuit court concluded that the applicant's variance request did not meet the necessary standards and should not have been approved. The court reversed the ZBA decision and an appeal was filed.

When a local government enacts a zoning ordinance it must also establish a zoning board of appeals ("ZBA") to provide relief to property owners who demonstrate that strict adherence to zoning regulations will cause an unnecessary hardship or practical difficulty in the development of their land.

The Court of Appeals held that the neighbors had failed to show that they were aggrieved by the ZBA decision and thus were not entitled to file an appeal to circuit court. The Court of Appeals reversed the circuit court judgment, explaining that a person can appeal a ZBA decision only if they suffered special damages not common to other similarly situated property owners. To demonstrate that they qualify as an aggrieved party entitled to file an appeal from a ZBA decision, a party must allege and prove that they experienced a "unique harm, dissimilar from the impact that other similarly situated property owners may experience." Incidental inconveniences such as increased traffic congestion, general aesthetic and economic losses, population increases, or common environmental changes are not enough to establish that a party is aggrieved. Additionally, merely owning or occupying adjoining property or qualifying for notice of a hearing on a zoning request will not suffice. Allegations of speculative harm are also insufficient. The Court rejected the argument that the variance to the rear yard setback and closer proximity of properties to the septic field created special damages. Instead, the Court concluded that the alleged harm caused by the close proximity of the septic field was based on speculation and anticipated future harm without proof that any harm would actually occur.

Practice Note:

Olsen provides clarification on the aggrieved-party standard under the MZEA. The Court of Appeals examined existing case law interpreting the phrase "aggrieved party" under prior legislation and adopted the historical meaning of the phrase. The Court also distinguished the aggrieved-party standard from the traditional concept of standing, explaining that a party seeking relief from a decision of the ZBA on appeal is not required to demonstrate standing but must show that they are aggrieved by the decision of the ZBA.

Neighboring property owners may have a right to appear before the ZBA and make public comments on a pending application, but do not have a right to challenge the decision in court without proof that they suffered special damages from the decision that are not common to other similarly situated property owners. Incidental inconveniences and speculative or anticipated future harm is not enough.

Endnotes:

1 United States Census Bureau, Local Governments in Individual County-Type Areas: 2012, 2012 Census of Governments. https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml.

2 Id.

3 United States Census Bureau, QuickFacts Michigan, Population Estimates of July 1, 2017, https://www.census.gov/quickfacts/fact/table/mi/PST045217.

4 *Village of Euclid, Ohio v Ambler Realty Co,* 272 U.S. 365; 47 S. Ct. 114 (1926).

5 *Whitman v Galien Twp,* 288 Mich App 672, 679; 808 NW2d 9 (2010); Const. 1963, art 7, §§22, 34.

6 MCL 125.3101, et seq. The MZEA was enacted in 2006 and consolidated the different enabling acts applicable to cities, villages, townships, and counties.

7 MCL 125.3601(1); MCL 125.3604(7).

8 MCL 125.3605.

9 MCL 125.3604(4).

No-Fault Report

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Death of the Innocent-Third-Party Rule? Well, Maybe Not … Supreme Court Rules That, Although The Innocent-Third-Party Rule Has Been Abrogated, Insurer Is Not Automatically Entitled To Rescind Coverages As To An "Innocent Third Party"

On July, 18, 2018, the Michigan Supreme Court released its long-awaited decision in *Bazzi v Sentinel Ins Co*, __ Mich __; __ NW2d __ (2018) (Docket No. 154442). In a 5-2 decision, the Michigan Supreme Court held that the so-called "Innocent Third Party" Rule was implicitly abrogated by the Court's earlier decision in *Titan Ins Co v Hyten*, 491 Mich 547; 817 NW2d 562 (2012). However, the Supreme Court also ruled that despite the abrogation of the "Innocent Third Party" Rule, the insurer is not automatically entitled to rescind coverages as to an "innocent third party." Instead, because rescission is an equitable remedy, the Court will need to "balance the equities" involved in any rescission action to determine if the rescission would be an appropriate remedy. A case-by-case inquiry will be required. Unfortunately, there will likely be no consistency between the circuit court judges examining the issue, because what one judge may deem to be "equitable" in favor of the insurer may be deemed by another judge, even sitting in the same circuit, to be "inequitable." Furthermore, the Supreme Court majority opinion provided no guidance as to how those equities should be balanced.

The dissenting opinion authored by Justice McCormack, joined by Justice Viviano, was quite direct and pointed. The dissent took issue with the majority's stance on the trial of the equities and the expanding costs of litigation that will ensue. In her opinion, because the no-fault act was intended to be comprehensive legislation that provided for mandatory benefits – sometimes to those not party to the policy under which they claim benefits, i.e., innocent third parties – the compulsory nature precludes an insurer's ability to seek equitable common law remedies, like rescission, that are inconsistent with the purposes of the act. Thus, Justice McCormack would have limited an insurer's defenses to those available under the act, which would not include rescission as to an innocent third party.

Underlying Facts And Lower Court Rulings

In *Bazzi*, Plaintiff's mother, Hala Bazzi, leased a vehicle for her personal and family use. Although the vehicle was leased in her name, individually, she procured a commercial auto policy from Sentinel Insurance Company, and the named insured was designated as Mimo Investment LLC. After the plaintiff was involved in a motor-vehicle accident, Sentinel denied coverage for the loss, arguing that Mimo Investment LLC was a sham corporation, the vehicle insured under the policy was not being used for commercial purposes by Mimo Investment, and no one had disclosed to Sentinel that the plaintiff would be a regular driver of the vehicle. Sentinel filed a third-party complaint against the plaintiff's mother and aunt (who was the resident agent for Mimo Investment LLC), which resulted in a default judgment allowing Sentinel to rescind the policy as to the plaintiff's mother and aunt. Thereafter, Sentinel moved for summary disposition of Mr. Bazzi's claim, arguing that because the policy was void *ab initio* as a result of the rescission, it was under no obligation to afford coverage to Mr. Bazzi, who it conceded was an "innocent third party." The circuit court denied Sentinel's motion for summary disposition based upon the "Innocent Third Party" Rule, which prohibited an insurer from rescinding its policy, based upon fraud in the procurement of the policy, after a person not party to the fraud had sustained injury. Sentinel filed an application for leave to appeal to the Court of Appeals, which was initially denied; however, the Supreme Court remanded the matter back to the Court of Appeals for consideration as on leave granted. *Bazzi* at __, slip op at 3.

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On remand, the Court of Appeals determined in a 2 – 1 split decision that the "Innocent Third Party" Rule was implicitly abrogated by the Michigan Supreme Court's decision in *Hyten, supra*. *Bazzi v Sentinel Ins Co*, 315 Mich App 763; 891 NW2d 13 (2016). Judge Beckering dissented, arguing that the "Innocent Third Party" Rule was separate and distinct from the "Easily Ascertainable" Rule that was abrogated by the Michigan Supreme Court in *Hyten*. *Id.* The plaintiff and his medical providers filed an application for leave to appeal to the Michigan Supreme Court, which the Court granted.

The Majority Opinion

The majority opinion was authored by Justice Wilder. Justice Wilder affirmed the Court of Appeals' decision that the "Innocent Third Party" Rule did not survive the Court's earlier decision in *Hyten*. In this regard, the Supreme Court affirmed the observation of the Court of Appeals' majority that the "Innocent Third Party" Rule and the "Easily Ascertainable" Rule were two sides of the same coin. The rationale behind both rules was premised upon the protection of third parties despite misrepresentations made in the procurement of the policies at issue. See *Hyten* at 568 569. Thus, based upon the rationale in *Hyten,* the abrogation of the "Easily Ascertainable" Rule implicitly abrogated the "Innocent Third Party" Rule as both doctrines had their roots in the Court of Appeals' decision in *State Farm v Kurylowicz,* 67 Mich App 568; 242 NW2d 530 (1976).[1]

The Supreme Court majority also rejected any distinction between rescission of optional coverages, such as the excess residual liability coverages that were at issue in *Hyten*, and the statutorily mandated coverages, such as $20,000.00/$40,000.00 liability coverage and, in this case, statutorily mandated PIP benefits. As noted by the Supreme Court majority:

> We reject the premise that there is a controlling distinction between mandatory coverage, i.e., statutorily mandated PIP benefits, and optional coverage. Whether statutory benefits or optional benefits are at issue, each is predicated on the existence of a valid contract between the insured and insurer. Moreover, our reasoning in *Titan* was not dependent on whether the coverage at issue was mandatory or optional. Rather, we recognized that common-law defenses are available when there are contractual insurance policies but limited when a statute prohibits the defense. … Although PIP benefits are mandated by statute, the no-fault act neither prohibits an insurer from invoking the common-law defense of fraud nor limits or narrows the remedy of rescission. Additionally, because *Titan* considered only optional benefits, there was no reason for this Court to opine on any purported statutory limitations on common-law defenses for mandatory coverage. As such, any implication derived from *Titan's* footnote 17 and accompanying text that MCL 500.3101(1) somehow limited the availability of rescission . . . was nonbinding *dicta*. [*Bazzi* at __, slip op at 12.[2]]

The *Bazzi* majority also found it important to point out that an insured's honesty in procuring insurance is of utmost importance. The Court stated:

> [A]lthough an innocent third party might have a reasonable right to expect that other drivers carry the minimum insurance required under the no-fault act, that expectation does not, by operation of law, grant an innocent third party an absolute right to hold an insurer liable for the fraud of the insured. **In other words, an insurer has a reasonable right to expect honesty in the application for insurance[9], and there is nothing in the no-fault act that indicates that the reasonable expectations of an innocent third party surmount the reasonable expectations of the insurer.**

[9] *Jacobs v Queen Ins Co,* 183 Mich 512, 520; 150 NW 147 (1914) (Noting that "a contract of insurance is one in which the utmost good faith is required of the insured") . . . See also *Barry Zalma*, Lexis Nexis Legal News Room, *the equitable remedy of rescission*: a tool to defeat fraud, . . . (posted April 21, 2015) (Accessed June 11, 2018) (Stating that "insurance contracts, unlike common-run-of-the-mill commercial contracts, are considered to be contracts of *utmost good faith*" and that "each party to the contract of insurance is expected to treat the other fairly in the acquisition and performance of the contract"). [Id. at 13 (emphasis added).[3]]

The second part of the Court's holding is more problematic. Although the Supreme Court ruled that the "Innocent Third Party" Rule was abrogated by the Court's decision in *Hyten*, the majority also ruled that the insurer was not automatically entitled to rescission as to the innocent third party. Rather, the Court noted that "fraud in the inducement to enter a contract renders the contract **voidable** at the option of the defrauded party …." *Bazzi* at __, slip op at 14 (citations omitted). Therefore, the insurer has the option of declaring a policy void *ab initio*, depending on the circumstances surrounding procurement of the policy. Where a policy is rescinded, it is as if the policy never existed, thereby, placing the parties in the same position they would have been in if the policy had never been issued. *Id.* at __, slip op at 14 -15.

The Court noted, however, that rescission is an equitable remedy and, as such, the equities must be balanced between the defrauded insurer and the innocent third party. The Court held that "although the policy between Sentinel and the insured, Mimo Investment, is void *ab initio* due to the fraudulent manner in which it was acquired, the trial court must now determine whether, in its discretion, rescission of the insurance policy is available as between Sentinel and plaintiff." *Id. at* __, slip op at 18. It is this point by the majority that is problematic because the Court does not elaborate on how a non-party to a contract (i.e., Mr. Bazzi) has standing to challenge the rescission of the policy. Even more, the Court fails to indicate legally how a policy can be rescinded as to the original parties (i.e., the named insured, Mimo Investment, and the insurer, Sentinel) yet still exist for the benefit of the plaintiff, Mr. Bazzi. If the policy between Mimo Investment and Sentinel is void *ab initio* and each is, presumably, returned to the position they would have occupied had the

policy never been issued, what remains? Thus, despite indicating previously that rescission returns the parties to the contract to the status quo, it would appear that Sentinel was not.

Other than a few generalized statements regarding the nature of equitable remedies, the Supreme Court majority provided no concrete examples as to how those equitable considerations should be applied in any given case. As noted by the Supreme Court majority:

> When a plaintiff is seeking rescission, the trial court must balance the equities to determine whether the plaintiff is entitled to the relief he or she seeks. Accordingly, courts are not required to grant rescission in all cases. For example, rescission should not be granted in cases where the result thus obtained would be unjust or inequitable, or where the circumstances of the challenged transaction make rescission infeasible. Moreover, when two equally innocent parties are affected, the court is required, in the exercise of [its] equitable powers, to determine which blameless party should assume the loss[.] [W]here one of two innocent parties must suffer by the wrongful act . . . of another, that one must suffer the loss through whose act or neglect such third party was enabled to commit the wrong. The doctrine is an equitable one, and extends no further than is necessary to protect the innocent party in whose favor it is invoked.
>
> In this instance, rescission does not function by automatic operation of the law. Just as the intervening interest of an innocent third party does not altogether bar rescission as an equitable remedy, neither does fraud in the application for insurance imbue an insurer with an absolute right to rescission of the policy with respect to third parties. Equitable remedies are adaptive to the circumstances of each case, and an absolute approach would unduly hamper and constrain the proper functioning of such remedies. This Court has recognized that [e] quity jurisprudence molds its decrees to do justice amid all the vicissitudes and intricacies of life and that equity allows complete justice to be done in a case by adapting its judgments to the special circumstances of the case. [Id. at __; slip op at 16 – 17 (internal quotations and citations omitted).]

With that, the Supreme Court remanded the matter back to the Wayne County Circuit Court with instructions for the court to "exercise its discretion" in determining whether or not rescission was appropriate under the circumstances of this case.

[T]he Supreme Court also ruled that despite the abrogation of the "Innocent Third Party" Rule, the insurer is not automatically entitled to rescind coverages as to an "innocent third party."

The Dissenting Opinion

In her dissent, Justice McCormack, joined by Justice Viviano, indicated that there is an inherent distinction between rescission of optional insurance coverages, such as the excess liability coverages at issue in *Hyten*, and statutorily mandated coverages, such as the $20,000.00/ $40,000.00 liability limits required by MCL 500.3009(1) and, in this case, PIP benefits. *Bazzi* (McCormack, J., dissenting) at __; slip op at 1 – 2. She reasoned that the no-fault act was a comprehensive legislative scheme mandating the availability of PIP benefits to all eligible claimants, which an innocent third party "always" is. *Id.* at __, slip op at 2. "PIP benefits arise out of the no-fault act . . . and we must construe a no-fault policy and the Act together as though the statutes were a part of the contract." *Id.*, citing *Rohlman v Hawkeye-Security Ins Co,* 442 Mich 520, 524-525; 502 NW2d 310 (1993). Thus, given the comprehensive and mandatory nature of the PIP benefits provided under the act, Justice McCormack would have held that the no-fault act limits rescission where an innocent third party is involved because rescission is not consistent with the compulsory nature of the act. *Bazzi* (McCormack, J., dissenting) at __; slip op at 2. Further, she would have held "that Sentinel may not independently seek to rescind the PIP coverage mandated by the no-fault act but that Sentinel may seek to avoid or reduce its obligations relative to the assigned claims insurer, Citizens Insurance Company, by raising defenses permitted by the Act." *Id.*

However, as in the majority opinion, Justice McCormack's opinion is problematic as well because the act does not provide – as suggested – an avenue in these situations for an insurer "to avoid or reduce its obligations relative to the assigned claims insurer … by raising defenses permitted by the Act." *Id.* Entitlement to and application for benefits under the assigned claims plan rests with the injured claimant, not a defrauded insurer. See MCL 500.3172(1). The only avenue an insurer possesses to place the assigned claims plan on notice is where there is a dispute between "2 or more automobile insurers" but not where an insurer is disputing its own obligation. See MCL 500.3172(3). Thus, the remedy Justice McCormack suggests simply does not exist because the assigned claims plan has no statutory obligation to respond to the notice of a defrauded insurer and need not get involved until the innocent third party claimant applies for benefits from the MACP. Justice McCormack also describes a number of "remedies for insurers," in the event they pay benefits out of priority, but in many cases, those remedies do not exist either. In her opinion, the insurance company should "pay first and haggle later." *Bazzi* (McCormack, J., dissenting) at __; slip op at 12. But that is not an option where the only other potential payee of PIP benefits is the assigned claims plan and the defrauded insurer has no direct means to bring them into the fold.

The Practical Impact of the *Bazzi* Decision Moving Forward

So what do we do now? Certainly the timing of the rescission action will be extremely important. For example, assume a situation where the innocent third party is occupying a motor vehicle whose owner procured an insurance policy through fraud. The insurance company pays benefits to the "innocent third party" for two years, but, after litigation ensues, the insurer discovers the fraud in the insurance application. By that time, it is too late for the innocent third party to file a claim with the MACP. Should an insurer nonetheless be permitted to rescind coverage under those circumstances?

In balancing the equities between an insurance company that failed to timely detect the fraud in the application with those of the innocent third party, who is suddenly left without insurance, the outcome seems clear – the insurer would be estopped from rescinding coverage.

Imagine, as well, a situation where a child is an occupant of a motor vehicle owned by a neighbor. The child will normally file a claim for no-fault benefits with his parents' insurer under MCL 500.3114(1). Again, the parents' insurer pays benefits for a few years, only to discover that the parents made a fraudulent misrepresentation in the application for insurance. Can the insurer rescind coverage and force the child to resort to the neighbor's insurer, which would be the next highest order of priority under MCL 500.3114(4)(a)? Under those circumstances, because the One-Year Notice provision is tolled, due to the claimant's minority status, it would not be too late to resort to the neighbor's insurer, although the child may lose entitlement to certain benefits that may have been incurred more than one year back from the date the neighbor's insurance company is notified of the loss. MCL 500.3145(1). However, what if the neighbor has moved and his insurer cannot be identified? What if the child is actually 18 years old, as that child would no longer be able to avail himself of any tolling of the one-year notice provision?

Each of the above examples demonstrates that time is of the essence in discovering and asserting any defenses based upon fraud that could result in rescission. And, the majority may have suggested as much in its opinion. Although the "Easily Ascertainable" Rule was abrogated by *Hyten*, the majority indicated that "where one of two innocent parties must suffer by the wrongful act . . . of another, that **one must suffer the loss through whose act or neglect such third party was enabled to commit the wrong.**" (Emphasis added, citation omitted) *Bazzi* at __, slip op at 17. Is the Court alluding, here, that it would behoove an insurance company to verify various information in the application for insurance in order to protect its equitable interests so that it cannot be argued that its "neglect" in failing to do so "enabled" the defrauding party? Conversely, a similar question may be asked of an injured claimant who was in a position to know of or who should have known of fraudulent acts of another in procuring a policy. Needless to say, it is not beyond the pale to say that the quotation above could be argued as an equitable version of the "Easily Ascertainable" Rule.

Furthermore, it seems that the Supreme Court's majority opinion would appear to invite forum shopping by both insureds and insurers, thereby driving up the cost of litigation. As pointed out by Justice McCormack, in her dissent:

> The result of the majority's opinion only fuels my skepticism: It recognizes that there are no *per se* rules in equity and therefore remands for the trial court to balance the equities. Although Sentinel prevailed here, its right to raise equitable defenses may prove to be a hollow victory.[12] The innocent-third-party doctrine allowed courts to cut short fruitless litigation. In addition to ensuring the speedy payment of benefits as the statute requires, the doctrine operated as equitable shorthand. In other words, it described the equitable balance of certain archetypal relationships, thus saving the parties (and courts) the time and expense of balancing the equities case-by-case. That certainty, efficiency, and stability is now lost.

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[12] Beyond ballooning legal expenses, the possibility of rescission also injects uncertainty that will warp an insurer's risk calculus. As we have recognized before, "The uncertainty associated with subjecting insurers and insureds to the whims of individual judges and their various conceptions of 'equity' would *increase* overall insurance costs because insurers would no longer be able to estimate accurately actuarial risk." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 589 n 62; 702 NW2d 539 (2005). [*Bazzi* (McCormack, J. dissenting) at __, slip opinion at p. 22.]

Justice McCormack went on to note:

> The majority instead remands for equitable balancing, but it is mum on what that proceeding will entail. Its silence allows it to avoid confronting the burdensome realities of its remedy. The majority states that 'equitable remedies are adaptive to the circumstances of each case, and an absolute approach would unduly hamper and constrain the proper functioning of such remedies.' It further points out that 'equity jurisprudence molds its decrees to do justice amid all the vicissitudes and intricacies of life' and that 'equity allows complete justice to be done in a case by adapting its judgments to the special circumstances of the case.' 'Complete justice' sounds good to me. But the remand order with instructions that the trial court *please ensure that complete justice is done, thank you*, does not paper over the problems with the remedy. [*Id.* at __, slip op at 22-23 (emphasis in original).]

Justice McCormack would then describe what may invariably occur in light of the majority's failure to provide guidance as to how an appropriate remedy should be fashioned:

> A remedy that is adaptive to the circumstances of each case requires that a court consider each case's unique circumstances. All of them. Parties will be required to litigate a new set of factual and legal disputes. Since no one factor is dispositive and any factor may be relevant, each party is incentivized to pursue every argument of conceivable merit, to fight each battle to its end, to concede nothing. And summary disposition is not a tool in a court's toolkit in disputes over equity, where any fact can be material and no rule is absolute. Thus, parties will litigate trials within a trial to demonstrate to the court that their opponent is the more blameworthy party. **They will dispute whether the insurer exercised reasonable diligence to discover the insured's misrepresentations in her application before issuing a policy**, whether the third party knew that the policy was obtained by the insured's fraud, and even whether the third party was

> driving negligently at the time of the accident; they will also litigate all possible legal avenues of relief, all possible alternative sources of recovery, and the third party's likelihood of success on the merits in each. And I don't expect smart lawyers to stop there in pursuing their clients' goals. [*Id.* at __, slip op at 23 (emphasis added).]

Perhaps Justice McCormack summed it up best by noting that "Lawyers, on the other hand, have lots of new litigation to pursue." *Id.* at __, slip op at 25. Not to mention, the emphasized section above clearly shows the dissent's position on whether the majority effectively adopted an equitable version of the "Easily Ascertainable" Rule.

Just as we saw when the Supreme Court released its decision in *Covenant Med Ctr v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017), there will probably be a learning curve as litigants and the courts learn how to apply the Supreme Court's holding in *Bazzi* to a variety of factual circumstances. With no clear guidance from the Supreme Court majority as to how the equities are to be balanced, each insurer which considers rescission of a policy will need to weigh the equities with the assistance of counsel to assess the strength of any potential rescission action. Such considerations may include:

What is the basis for the rescission (i.e., the fraudulent act);
- How egregious was the fraud;
- If the accurate (i.e., non-fraudulent) information was known, would the insurer have not undertaken the risk of the policy or would it have simply charged a higher premium;
- If only a higher premium would have been charged, how much more;

Did the alleged innocent party know or should he/she have known of the fraudulent activity;
- Who is the perpetrator of the fraud;
- What is the relationship between the perpetrator and the innocent party;
- What is the relationship between the vehicle that the policy covers and the innocent party;
- What is the relationship between the vehicle that the policy covers and the perpetrator;

Was the fraud intended to benefit the alleged innocent party (e.g., obtain cheaper coverage on his/her behalf, such as a parent for a child);

Does the innocent party have another source of PIP benefits available;
- When was the innocent party (or counsel) notified of the potential rescission;
- Is there another potential insurer in the chain of priority;
- Was the innocent party (or counsel) advised to notify the assigned claims plan and the deadline and contact information to do the same;

When was the defrauded insurer notified of the claim;
- Was there sufficient time under the statute to identify and notify another insurer potentially in the chain of priority;
- Was there sufficient time under the statute to advise the innocent party (or counsel) to notify the assigned claims plan;

Did the insurer know (or should have known) about the fraud;
- Was the information *easily ascertainable* from the resources reasonably available to the insurer;

Although this is by no means an exhaustive list and although it is a virtual certainty that each judge is going to assess the equities differently based upon his or her own experiences and biases, it would be wise for the insurers and counsel alike to be prepared to continually add to this list over time, for as Justice McCormack surmised, the iterations of relevant factors in an action for rescission are virtually limitless.

Endnotes

1 "[W]here an automobile liability insurer retains premiums, notwithstanding grounds for cancellation reasonably discoverable by the insurer within the 55-day statutory period as prescribed by [MCL 500.3220]. . . . the insurer will be estopped to assert that ground for rescission thereafter." *Kurylowicz* at 579, overruled by *Hyten, supra*. Thus, misrepresentations in the procurement of the policy (e.g., suspension of one's operator's license) would not prevent recovery against the insurer by third parties injured by the insured. *Id*.

2 This line of reasoning is consistent with past decisions rendered by the Court where it was sought to abrogate a common-law doctrine by implication based upon the language of a statute. For example, see *People v Moreno*, 491 Mich 38; 814 NW2d 624, 627–28 (2012):

> The common law remains in force unless it is modified. We must presume that the Legislature knows of the existence of the common law when it acts. Accordingly, this Court has explained that the abrogative effect of a statutory scheme is a question of legislative intent and that legislative amendment of the common law is not lightly presumed. While the Legislature has the authority to modify the common law, it must do so by speaking in no uncertain terms. Moreover, this Court has held that statutes in derogation of the common law must be strictly construed and **shall not be extended by implication to abrogate established rules of common law.** [*Id.* at 46 (internal citations and quotations omitted; emphasis added).]

The no-fault act addresses circumstances after the potentially triggering event (i.e., injury arising from the ownership, maintenance or use of an automobile) but is virtually silent regarding issues that may arise at the time the contract is entered, such as fraud in the procurement of the policy that, like here, is not discovered until after the loss occurs.

3 In this age where insureds are constantly trying to lower their already-high insurance premiums by, say, misrepresenting actual ownership of the vehicles to be insured under the policy, or failing to disclose youthful drivers in the household, insureds and their agents (particularly independent agents) need to be aware that such actions will result in a rescission of the policy, and perhaps an Errors and Omissions claim against the insurance agent.

4 MCL 500.3172(1):

> A person entitled to claim because of accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle in this state may obtain personal protection insurance benefits through the assigned claims plan if no personal protection insurance is applicable to the injury, no personal protection insurance applicable to the injury can be identified, the personal protection insurance applicable to the injury cannot be ascertained because of a dispute between 2 or more automobile insurers concerning their obligation to provide coverage or the equitable distribution of the loss, or the only identifiable personal protection insurance applicable to the injury is, because of financial inability of 1 or more insurers to fulfill their obligations, inadequate to provide benefits up to the maximum prescribed. In that case, unpaid benefits due or coming due may be collected under the assigned claims plan and the insurer to which the claim is assigned is entitled to reimbursement from the defaulting insurers to the extent of their financial responsibility.

Supreme Court Update

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Supreme Court Closes Potential Loophole to Workers Compensation Exclusive-Remedy Provision

On July 10, 2018, the Michigan Supreme Court clarified the scope of MCL 418.171(4)'s exception to workers compensation immunity. This exception allows employees of subcontractors to sue a principal where the principal uses coercion, intimidation, or other means to encourage employees to pose as subcontractors to evade payment of workers compensation benefits. Emphasizing the importance of applying clear statutes as written and not viewing a particularly statutory term or phrase in insolation, the Supreme Court concluded a provision in another subsection limiting this exception only to individuals who would not otherwise be considered a direct employee qualified the entire section, thus entirely excluding the principal's employees from this section's ambit. *McQueer v Perfect Fence Co*, 502 Mich 276; __ NW2d __ (2018) (Docket No. 153829).

Facts: On January 14, 2014, fencing company laborer David McQueer was injured on the job when the bucket of a Bobcat front-load struck him in the head. At the time, McQueer was installing fence posts with a more senior employee, Mike Peterson. Peterson was aware the proper method for installing fence posts involved using an auger or hand-digger to dig post holes between 3 and 6 feet deep. One of the company owners also warned Peterson that fence post installation was a misuse of a bobcat and guaranteed to hurt someone. Peterson nonetheless used the bobcat to install fence posts into frozen ground and McQueer felt compelled to go along with use of the bobcat due to Peterson's seniority. Sitting underneath the bobcat's bucket, McQueer was struck in the head by the bucket when the bobcat drove the post deeper into the ground than planned. McQueer contended that, on the way to the hospital after, Peterson told him not to disclose he was injured while working because McQueer was "not on the books" and therefore would receive no workers compensation benefits. McQueer also contended that the owner and his accountant visited him at the hospital to say McQueer was not covered under the company's workers compensation plan. McQueer ultimately received workers compensation benefits and the fencing company did not dispute it was his employer.

McQueer sued the company under various negligence theories, and the company moved for summary disposition based upon the exclusive remedy provision in MCL 418.131(1). McQueer argued his civil action was not barred, in pertinent part, because the company violated MCL 418.171(4) by encouraging him to pose as a nonemployee. The trial court granted summary disposition, concluding MCL 418.171 was not applicable to McQueer. The Court of Appeals reversed, finding McQueer established a question of fact as to whether the company violated MCL 418.171.

Ruling: The Michigan Supreme Court reversed the judgment of the Court of Appeals, holding that MCL 418.171 did not apply to McQueer because he was a direct employee of the company and this section applied only to employees of contractors. According to the Michigan Supreme Court, the Court of Appeals erred in concluding MCL 418.171 was applicable to McQueer because it failed to read the statute as a whole and misinterpreted the term "principal."

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The Michigan Supreme Court explained that MCL 418.117(1) refers to an employer as a "principal," and provides that if a principal contracts with a contractor not subject to the Workers Disability Compensation Act, then the principal shall be liable to pay workers compensation benefits to the contractor's workers as if the principal had been the direct employer. That is, MCL 418.171(1) creates a statutory employer situation intended to prevent employers from escaping workers compensation liability by contracting with unisured contractors to do work that is part of the employer's trade, business, or occupation. But MCL 418.171(4) provides an exception nonetheless allowing the imposition of civil liability for a "principal" who willfully acts to circumvent MCL 418.171(1) or 418.611 (an employer's obligation to secure compensation insurance) by using coercion, intimidation, deceit, or other means to encourage persons who would otherwise be considered employees to pose as contractors. Despite McQueer's coercion allegations to the contrary, he was provided with benefits and it was undisputed he was the company's employee, so MCL 418.171 did not apply to him, explained the Supreme Court. The Supreme Court relied upon two other provisions of the statute to explain its conclusion. First, reading the section as a whole, it held MCL 418.171(3), which specifies the statutory employer relationship is created "**only if** the contractor engages persons to work other than persons would not be considered employees …," qualifies all of MCL 418.171 (emphasis added). Second, "principal" is not synonymous with "employer," but instead has a specialized meaning in this context—an employer who contracts with a contractor that does not have adequate workers compensation coverage. This demonstrates this section does not protect direct employees, as reading the two words as equivalent would render the other requirements of MCL 418.171(1) superfluous.

Practice Pointer: This opinion once again emphasizes the importance of careful consideration of a statute as a whole when determining its scope. In this instance, extending the application of MCL 418.171 to direct employees may have been plausible solely upon reading its first subsection, especially in light of McQueer's allegations. It was also plausible, as the dissent hints, because it means the exception allowing civil liability is not available to would-be employees who are encouraged to pose as contractors where there is no intervening contractor. But absent any statutory indication to the contrary, significance had to be given to its specific reference to a "principal," as well as the explicit qualification in another subsection which further defines to whom the section applies. Failure to engage in this type of analysis may obtain a temporary victory but ultimately will be a waste of time and effort if the Supreme Court reverses your judgment.

MEMBER NEWS

Work, Life, and All that Matters

Member News *is a member-to-member exchange of news of* ***work*** *(a good verdict, a promotion, or a move to a new firm),* ***life*** *(a new member of the family, an engagement, or a death) and* ***all that matters*** *(a ski trip to Colorado, a hole in one, or excellent food at a local restaurant). Send your member news item to Michael Cook (Michael.Cook@ceflawyers.com).*

Court Rules Report

By: Sandra Lake, *Hall Matson PLC*
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PROPOSED AMENDMENTS

2002-37/2018-20 – Indigency and fee waivers

Rule affected:, 2.002
Issued:, June 13, 2018
Public hearing:, September 20, 2018

Two proposals are being considered to establish standards for indigency and fee waivers. While the proposals are similar, there is a significant difference in the methods for determining whether a party is indigent.

2017-12 – Transferring a case to the Court of Claims
Rule affected:, 2.228
Issued:, February 28, 2018
Public hearing:, September 20, 2018

The addition of this rule would require a defendant to transfer a case to the Court of Claims at or before the time the defendant files an answer. This proposed addition arose from the case of *Baynesan v Wayne State University*, (docket 154435), where the defendant sought transfer a month before trial.

2017-20-Clarification of postjudgment order in a domestic relations case
Rule affected:, 7.202
Issued:, April 19, 2018
Public hearing:, September 20, 2018

The proposed amendment modifies the definition of a final order in a domestic relations action by removing the "order affecting the custody of a minor" language and redefining it as an "order that, as to a minor, grants or denies a motion to change legal custody, physical custody, domicile, parenting time, grandparenting time, school enrollment or religious affiliation; or authorizes or denies medical or mental health treatment."

ADOPTED AMENDMENTS

2016-23 – Service of process on a partnership
Rule affected:, 2.105
Issued:, March 28, 2018
Effective:, May 1, 2018

This amendment adds that service of process on a partnership or a limited partnership may be made upon an "agent for service of process." This addition is intended to make the court rule consistent with MCL 449.1105(2).

2017-19 – Mediation in child protection cases
Rule affected:, 2.410, 2.411, and addition of 3.970
Issued:, March 28, 2018
Effective:, May 1, 2018

These amendments and the addition of MCR 3.970 provide explicit authority and procedures for judges to order mediation in child protection proceedings.

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2002-37 – E-Filing and electronic records

Rule affected:, Numerous
Issued:, May 30, 2018
Effective:, September 1, 2018

Numerous court rules have been amended in an effort to modernize and implement a state-wide e-filing system. General rules concerning the form of the case caption, verification, filing documents under seal, the form and effect of signatures, etc. have been moved from Chapter 2 to MCR 1.109. The amendments further provide for the adoption of an electronic filing system by the courts and the establishment of standards relating to same.

2014-29 – Entry of consent judgments

Rule affected:, 2.602
Issued:, February 28, 2018
Effective:, May 1, 2018

After a second proposed amendment, new subsection (C)(1-4) was added setting forth the procedure for entry of a conditional dismissal, including the statute of limitations applicable to an action that is conditionally dismissed. The consent order must be signed and approved by all parties and shall clearly state the terms for reinstatement of the case.

2016-40 – Taxation of post-judgment costs

Rule affected:, 2.625 and 3.101
Issued:, September 27, 2017
Effective:, May 1, 2018

These amendments address recent amendments to MCL 600.4012 and clarify the authority and process for recovering postjudgment costs and fees after judgment and provide clarity for procedures applicable to garnishment proceedings.

2016-25 – Appellant's obligation to file an appendix

Rule affected:, 7.212
Issued:, June 14, 2018
Effective:, September 1, 2018

MCR 7.212 now requires an appellant to separately file an appendix with the appellant's brief on appeal. The appendix shall contain a table of contents and copies of the following documents (if they exist): the judgment or order appealed from; trial court docket sheet; relevant pages of non-compressed transcripts (or complete transcripts, but only if the index is included); a copy of the challenged jury instruction(s); any other relevant exhibit or evidence submitted to the trial court. Trial court briefs are not required to be submitted unless they pertain to a contested preservation issue. The appellee may only file an appendix that includes documents not contained in appellant's appendix. Additional detailed rules are included concerning the appendix, including tabbing and/or bookmarking.

Amicus Report

By: Anita Comorski, *Tanoury, Nauts, McKinney & Garbarino, P.L.L.C.*
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The MDTC has participated as amicus curie in two cases that are currently scheduled for oral argument before the Supreme Court's upcoming session. Following are updates on these two cases.

The MDTC filed an amicus brief in *Yu v Farm Bureau General Insurance Company of Michigan*.[1] The MDTC's amicus brief was authored by Peter J. Tomasek of Collins Einhorn Farrell, PC. The facts of the *Yu* case, and the arguments contained in MDTC's amicus brief, were covered in some detail in the prior issue of the *Quarterly*. This case is currently scheduled to be argued before the Supreme Court on October 10, 2018.

The MDTC has also filed an amicus brief in *Dye v Esurance Property & Casualty Ins Co*.[2] The MDTC's amicus brief was authored by Nicholas S. Ayoub of Hewson & Van Hellemont, P.C. Factually, the *Dye* case arose out of a motor-vehicle accident wherein plaintiff Matthew Dye was injured and subsequently sought no-fault personal protection insurance ("PIP") benefits. The car plaintiff was driving at the time of the accident was titled in his name, but plaintiff's father (Paul Dye) had obtained insurance for the vehicle from defendant Esurance Property & Casualty Insurance Company. Plaintiff Matthew Dye did not have a policy in his name. Esurance, in turn, pointed to GEICO as being first in priority, based upon Matthew's status as a resident relative of GEICO's insured (and Matthew Dye's wife), Lisa Dye. Esurance claimed that defendant GEICO Indemnity Company was the higher priority insurer.

Impacting the determination of which insurer has priority is the Court of Appeals decision in *Barnes v Farmers Ins Exchange*, 308 Mich App 1; 862 NW2d 681 (2014). Michigan's no-fault act requires the "owner or registrant of a motor vehicle" to maintain "personal protection insurance [PIP], property protection insurance, and residual liability insurance." *Barnes*, 308 Mich App at 6. Pursuant to MCL 500.3113(b), a "person is not entitled to be paid personal protection insurance for accidental bodily injury if at the time of the accident … [t]he person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by MCL 500.3101 or MCL 500.3103 was not in effect." The *Barnes* Court held that pursuant to "the plain language of MCL 500.3113(b), when none of the owners maintains the requisite coverage, no owner may recover PIP benefits." *Barnes*, 308 Mich App at 8-9.

On counter-motions for summary disposition, the trial court granted plaintiff's motion and denied GEICO's, finding that Paul Dye was an "owner" of the vehicle and that GEICO therefore had no coverage defense under *Barnes*. GEICO appealed to the Court of Appeals by leave granted. The Court of Appeals reversed the summary disposition ruling in plaintiff Matthew Dye's favor, but found that questions of fact precluded summary disposition in GEICO's favor on the ownership issue.

On application and cross-applications for leave to appeal, the Supreme Court only granted, in part, plaintiff's application for leave to appeal as cross-appellant "limited to the issue whether an owner or registrant of a motor vehicle involved in an accident may be entitled to personal protection insurance benefits for accidental bodily injury where no owner or registrant of the motor vehicle maintains security for payment of benefits under personal protection insurance. See MCL 500.3101(1); MCL 500.3113(b); *Barnes v Farmers Ins Exch*, 308 Mich App 1 (2014)."

The MDTC's amicus brief argued that the *Barnes* decision reached the correct conclusion. As the MDTC noted, the "no-fault system provides for what essentially amounts to universal insurance coverage for anyone who sustains 'accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle' in this state." MCL 500.3105. This coverage is achieved through the statutory priority

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rules which define the insurer who is responsible for providing coverage from the person's own carrier, to the insurer of a resident relative, to the insurer of the owner of the vehicle he or she was occupying, or if not an occupant, from the insurer of the owners or registrants for vehicles involved in the accident, to the insurer of the driver of the vehicle occupied/involved in the accident, and, finally, if no applicable insurance can be identified, the injured person is entitled to claim benefits through the assigned claims plan.

As the MDTC argued, if, in contrast to this carefully crafted priority system, coverage were created where a disinterested person lists a vehicle within his or her insurance coverage, the result would be to create havoc within the insurance industry.

The *Dye* case is scheduled to be argued before the Supreme Court on October 9, 2018.

We intend to provide updates as to the Supreme Court's ultimate decisions on both of these important cases when the Court's opinions are released.

This update is only intended to provide a brief summary of the complex issues addressed in the amicus briefs filed on behalf of the MDTC. The MDTC does maintain an amicus brief bank on its website accessible to its members. For a more thorough understanding of the issues addressed in these cases, members are encouraged to visit the brief bank to review the complete briefs filed on behalf of this organization.

Endnotes

1 Michigan Supreme Court Docket No. 155811.

2 Michigan Supreme Court Docket No. 155784.

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: Matt Cross
Regional Chairperson (Traverse City)
MDTC Member since 2015
Cummings, McClorey, Davis & Acho, PLC, Associate Attorney
Wayne State University Law School – 5 years of experience.

Q: *Why did you become involved in MDTC?*
A: I knew other members of the firm I worked for at the time who considered MDTC to be a valuable resource.

Q: *What inspired you to become an MDTC Leader?*
A: I simply wanted to help the organization in any way that I could. I saw there was a vacancy in the Traverse City area when I relocated here, and I jumped on the opportunity.

Q: *How would you describe your leadership style?*
A: Collaborative and team-oriented. I think people are more productive and happier when they are included and made to feel part of a team rather than a subordinate just taking orders.

Q: *How has your MDTC involvement enhanced your personal/professional life?*
A: The camaraderie among those on the email listserv is pretty great. Any time I ask for input on a plaintiff's expert, I always get at least three responses with old transcripts and pointers.

Q: *Why would you encourage other MDTC members to seek leadership roles?*
A: Being in a leadership role allows you to provide valuable input into the directive of the MDTC.

Q: *Are you involved in other organizations or activities?*
A: Michigan Association of Municipal Attorneys

Q: *If you weren't a legal professional, what type of career would you choose?*
A: I would go back to working as a firefigher, which I did before going to law school.

Q: *What advice do you have to new MDTC members? To new attorneys?*
A: Get involved. Whether it's MDTC or some other organization, I think it's important to get involved, especially as a new attorney fresh out of law school; you sort of get thrown into the deep end and it can feel a bit overwhelming, so having mentors to talk with is invaluable.

Q: *What else should we know about you?*
A: Between the time I worked as a firefighter and went to law school, I worked in the music industry in New York City. I have two dogs: both American Bulldog/Pitbull rescues. I like dogs more than most people, and I'm immediately suspicious of anyone who feels differently!

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