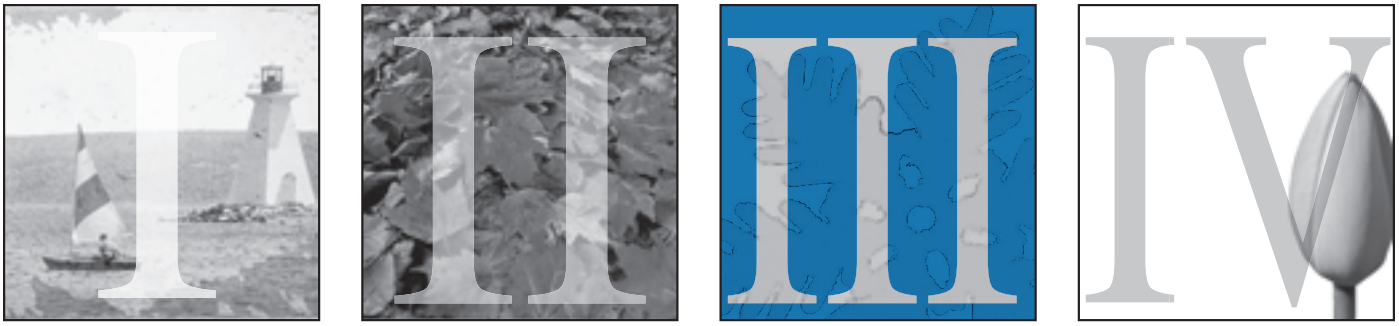
MICHIGAN DEFENSE
QUARTERLY

Volume 25, No. 3 January 2009



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Michigan Defense Quarterly

Vol. 25 No. 3 • January 2009

Michigan Defense Quarterly is a publication of the Michigan Defense Trial Counsel, Inc. All inquiries should be directed to Madelyne Lawry, 517-627-3745.

EDITOR'S NOTES

In this issue, we cover a broad range of topics. **Murray Feldman** and **Theresa Pinch** of Strobl & Sharp, P.C. summarize the current and perhaps future issues in the area of worker compensation law and practice. **Craig Neckers** and **Marvin G. DeVries,** Ph.D. analyze the effect and the unfairness of using a non-compounded interest rate to reduce verdicts to present value. **Brendan Atkins** and **Steven Hickey** of Hickey, Cianciolo, Fishman & Finn, P.C. provide an analysis of the accrual date of claims involving latent injuries. **Scott Knapp** and **Erin Stovel** of Dickinson Wright review a recent decision that provides a stronger defense against class action lawsuits that are intended to generate blackmail settlements.

And our Young Lawyers Series continues with a piece by **Scott Holmes** of Foley & Mansfield on dispositive motions.

We also have our regular reports on court rules (by M. Sean Fosmire of Garan Lucow Miller, P.C.), legislative matters (by Graham K. Crabtree of *Fraser, Trebilcock, Davis & Dunlap*) and the supreme court (**Joshua Richardson** of *Foster, Swift, Collins & Smith*).

Be sure to check the **Schedule of Events** to keep up to date with what MDTC and DRI are up to.

Opinion: We invite other members to send us personal opinions on topics of interest to our readers. A length of about 1000 to 2000 words would be ideal.

Articles: All articles published in the *Quarterly* reflect the views of the individual authors. We always welcome articles on any topic that will be of interest to our members in their practices. Although we are an association of lawyers who primarily practice on the defense side, the *Quarterly* always tries to emphasize analysis over advocacy, and favors the expression of a broad range of views, so articles from a plaintiff's perspective are always welcome. Author's Guidelines are available from the editor (hcarroll@VGpcLAW.com) or the assistant editor, Jenny Zavadil (jenny.zavadil@bowmanandbrooke.com).

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PRESIDENT'S CORNER

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For my President's Corner in the last two issues of the ***Quarterly***, I highlighted the many contributions of some of MDTC's Past Presidents. The theme for this year continues in this column. Showcasing the contributions of previous MDTC leadership has been a pleasure of mine. With so much meaningful voluntarism in our organization, my job has been easy. The hard part is finding the time to thank all the contributors.

On November 6, 2008 at an annual gathering of MDTC's Past Presidents, I had the distinct pleasure of presenting MDTC's first ever *President's Special Recognition Award* to the law firm of Smith, Haughey, Rice & Roegge, P.C. ("Smith Haughey"). For me, selecting Smith Haughey as recipient was an obvious choice. Members may not realize, however, just how important Smith Haughey is to our organization. Smith Haughey boasts three Past Presidents of MDTC: William W. Jack, Jr., Patrick F. Geary, and Albert Engel, III. Each guided MDTC under a careful watch with the perspective from the "west side of the state" and its associated diplomacy.

In addition to producing three Past Presidents, Smith Haughey also advanced two recipients of the MDTC Excellence in Defense Award in L. Roland Roegge and William W. Jack, Jr. These exceptional civil litigators give meaning to consummate professionalism and successful representation of clients. By celebrating the honor of receiving the Excellence in Defense Award, as both of these advocates have done, they have individually lent credibility to our organization.

Smith Haughey also distinguishes itself through its numerous Section and Regional/Area Chairs. These volunteers have helped to recruit members and organize MDTC patrons with similar professional interests. They have fostered the exchange of useful information and done so with professionalism. The firm has encouraged countless authors for the ***Quarterly***. In publishing articles, they have helped to simplify the complex for our member attorneys and judges and also advanced the law as participants in our amicus efforts.

Finally, Smith Haughey has provided the lifeblood of our organization: *members*. Today Smith Haughey represents one of the largest firm based membership groups within MDTC. In these difficult economic times, when law firms limit complimentary organization memberships, the firm encourages its lawyers to join MDTC as a "key" membership. They also encourage lawyers in the firm who exceed the firm's sponsorship limitation to join on their own.

As important as all of these past contributions are, today Smith Haughey continues to provide active leadership. Todd Millar of Traverse City was recently a board member and now serves as Michigan's DRI Representative. Mark Gilchrist joined our board in May and has proved a steadfast participant and MDTC supporter. In sum, it continues to be a pleasure to work with Smith Haughey's fine lawyers who give so much to MDTC. The firm clearly earned the MDTC President's Special Recognition Award.

In mentioning the Past President's Dinner in November, it was an absolute thrill to see so many of our distinguished leaders in one gathering. Notably, Ed Kronk (Butzel Long), a not so distant Past President, offered a meaningful observation and toast. Kronk said, "All of MDTC's Presidents should recognize and thank Executive Director Madelyne Lawry, for without her, we'd all be toast! Here's to Madelyne." I could not agree more. MDTC is on a roll, despite troubling economic times for lawyers, law firms, vendors and supporters. As a result of Madelyne's careful stewardship of the organization, MDTC remains healthy.

What's next?

During the first and second quarters of 2009, MDTC will establish and promote a new Commercial Litigation Section. This section is being carefully crafted to meet the mission of MDTC recognizing that many of our finest lawyers have expanded their trial expertise to commercial disputes. It has become clear to the board that our members have a diverse trial practice. Many set the standard for trial and appellate expertise in commercial disputes. Larry Campbell (Dickinson Wright) and Todd Millar (Smith Haughey) have agreed to help create this new section and mentor future section chairs. I look forward to sharing more details regarding the Commercial Litigation Section this spring.

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WHAT IT MEANS TO BE DISABLED: RECENT DECISIONS IN WORKERS' COMPENSATION AND THEIR PRACTICAL IMPLICATIONS

By: Murray R. Feldman and Theresa A. Pinch
Strobl & Sharp, P.C.

Executive Summary

Workers' compensation law has undergone many changes since its adoption in 1912, but recent cases have brought about especially significant changes. In one case, the Supreme Court held that the fact that an injury prevents an employee from performing the work for which the employee's skills and training qualify him or her does not constitute a disability where the employee can do other work at the same wage.

In another case the court held that where an employee has a pre-existing condition, evidence of a symptom consistent with that condition is insufficient to establish a personal injury that arises out of and in the course of employment. Instead the employee must show an injury that is distinct from the pre-existing condition.

A third case, addressing the issue of disability, held that the employee must disclose his or her qualification and bears the burden of proving the types of jobs for which he or she is qualified, how the injury prevents the employee of performing those jobs, and that any jobs for which the employee is qualified are unavailable. In connection with this the court described an expanded scope of discovery in workers' compensation cases.

The result is to make the workers' compensation process more time-consuming, more complicated and less economical for both employees and employers.

A brief history of workers' compensation

Before 1912, an employee injured while doing his job had only one remedy against his employer: to sue in tort and try to prove negligence. This was a complex, time-consuming and expensive process involving traditional theories of liability and defenses. The employer had three key defenses: that the worker was negligent; that the worker assumed the risk; or that a co-worker had been negligent. Legislators eventually recognized this posed a severe hardship for employees and a significant economic risk to employers.

Out of this scenario was born in 1912 "the great compromise" between employees and employers, known as the Workers' Disability Compensation Act.[1] The WDCA is a no-fault system under which the employee does not have to prove negligence and the employer's traditional defenses are eliminated. In exchange for the employer's near-automatic liability, the employee's benefits were limited. An injured employee can receive wage loss benefits, reasonable and necessary medical benefits, and vocational rehabilitation services. Under the exclusive remedy provision,[2] workers' compensation became the employee's sole remedy against the employer for work-related injuries and the employee could not seek damages for pain and suffering, loss of enjoyment of life, or any of the other types of tort damages a jury might award.

In exchange for the employer's near-automatic liability, the employee's benefits were limited.

In the majority of instances, there is no dispute regarding an injured worker's entitlement to and receipt of workers' compensation benefits. Most of the time, an injured worker provides proper notice to the employer and benefits are paid without question. There are, however, those cases that result in litigation because of a dispute between the parties, whether about the injured worker's employment status, the nature and extent of the injury, or whether there is any resulting disability.

Michigan's WDCA has undergone significant changes since its inception in 1912. This article is intended to provide attorneys with a sufficient

Much like the three storms that converged in the movie The Perfect Storm, the triumvirate of Sington, Rakestraw, and Stokes has cumulatively brought about changes which have permanently altered the practice of workers' compensation law in Michigan.

overview of the workers' compensation system and recent changes in the law to recognize the role workers' compensation plays relative to other areas of the law.

The basics

The WDCA is administered by the Board of Magistrates, individuals with practical experience in the field of workers' compensation who are appointed by the governor. A magistrate can render one of three decisions: (1) an open award, in which the employee is found to be entitled to benefits indefinitely; (2) a closed award, in which the employee is found to have been entitled to benefits only for a specific, identifiable period of time; or (3) a denial of benefits, in which the employee is found not to be entitled to any benefits.

If either party is dissatisfied with the magistrate's decision, that party can appeal by right to the Workers' Compensation Appellate Commission [WCAC]. The WCAC may not reverse a magistrate's findings of fact if they are supported by "competent, material, and substantial evidence on the whole record."[3] If either party is dissatisfied with the opinion of the WCAC, it may seek leave to appeal to the Court of Appeals and to the state Supreme Court.

The perfect storm of workers' compensation: *Sington, Rakestraw, and Stokes*

At the most basic level, to be entitled to workers' compensation benefits, an injured worker must prove: (1) that he or she was an employee of a covered employer; (2) that he or she was injured in the course and scope of work activities; (3) that he or she was disabled by his work-related injury; and (4) that he or she sustained wage loss. Recent changes in the law have impacted the concepts of disability and loss of wage earning capacity. Much like the three storms that converged in the movie *The Perfect Storm*, the triumvirate of *Sington*,[4] *Rakestraw*,[5] and *Stokes*[6] has cumulatively brought about changes which have permanently altered the practice of workers' compensation law in Michigan.

Sington's definition of disability

The primary focus of *Sington* was defining "disability" within the context of "wage earning capacity."[7] The WDCA defines disability as:

> "disability" means a limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work related disease. The establishment of disability does not create a presumption of wage loss.[8]

Simply put, under Haske, the inability to perform any one job within one's qualifications and training was sufficient to establish disability; under Sington, the ability to perform any one job within one's qualifications and training is sufficient to defeat a claim of disability, if one's wage earning capacity is not diminished.

Prior to *Sington*, the Michigan Supreme Court had held in *Haske*[9] that the definition of disability "encompassed any work-related injury that rendered an employee unable to do one or more particular jobs within the employee's qualifications and training."[10] In an about-face, *Sington* explicitly overruled *Haske*[11] and held that the mere inability to perform one aspect of a particular job did not necessarily render the employee incapable of performing some other job within the employee's qualifications and training that might allow him or her to earn the same wages.[12]

Rakestraw's approach to pre-existing medical conditions

The Michigan Supreme Court undertook consideration of the concept of disability from a medical perspective in *Rakestraw*.[13] In *Rakestraw*, the injured worker was seeking workers' compensation benefits for the symptomatic aggravation of a nonwork-related condition. The court held:

> A claimant attempting to establish a compensable, work-related injury must prove that the injury is medically distinguishable from a preexisting nonwork-related condition in order to establish the existence of a 'personal injury' under §301(1).[14]

The court noted it had previously articulated the principle that "where an employee claims to have suffered an injury whose symptoms are consistent with a preexisting condition, the claimant must establish the exis-

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> *"A symptom such as pain is evidence of injury, but does not, standing alone, conclusively establish the statutorily required causal connection to the workplace. In other words, evidence of a symptom is insufficient to establish a personal injury 'arising out of and in the course of employment.'"*

tence of a work-related injury that extends 'beyond the manifestation of symptoms of the underlying preexisting condition."[15] Ultimately, in *Rakestraw* the court reaffirmed its prior decisions, finding "a symptom such as pain is evidence of injury, but does not, standing alone, conclusively establish the statutorily required causal connection to the workplace. In other words, evidence of a symptom is insufficient to establish a personal injury 'arising out of and in the course of employment.'"[16] The court continued, "as a practical consideration, a claimant must prove that the injury claimed is distinct from the preexisting condition in order to establish 'a personal injury arising out of and in the course of employment' under §301(1)."[17]

Stokes' analysis of disability as defined by Sington

In *Stokes*,[18] an opinion rendered in June 2008, the Michigan Supreme Court fleshed out the skeletal implications from *Sington* in explaining what is required for a *Sington* analysis of disability. In doing so, the court reiterated its stance on the burden of proof in workers' compensation claims, detailed the elements for a prima facie claim of disability, and articulated its position on discovery as it relates to disability.

Stokes is replete with the directives "must" and "shall" relative to what the claimant must prove to establish disability and sets forth four elements the claimant must prove before the burden of production shifts to the employer.

1. The injured claimant must disclose his or her qualifications and training, including education, skills, experience, and training, whether or not they are relevant to the job he was performing at the time of the injury.[19]
2. The claimant must prove what jobs, if any, he or she is qualified and trained to perform with the same salary range as his or her maximum earning capacity at the time of the injury.[20]
3. The clamant must show that the work-related injury prevents him or her from performing some or all of the jobs identified as within the claimant's qualifications and training that pay his or her maximum wages.[21]
4. If the claimant is capable of performing any of the jobs identified, the claimant must show that he or she cannot obtain any of these jobs.[22]

Stokes also significantly altered the concept of discovery as it relates to workers' compensation. As a practical matter, workers' compensation litigation historically has not allowed for traditional litigation discovery methods. *Stokes* changed this standard by repeatedly referring to the

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employer's absolute right to discovery in order to refute the claim of disability.[23]

While not explicitly referring to an employee's right to discovery, *Stokes*' recognizes that under the act, "the magistrate has the authority to require discovery when necessary to make a proper determination of the case."[24]

The implications of *Sington, Rakestraw, & Stokes*

Thanks to *Sington*, *Rakestraw*, and *Stokes*, what was once designed as a faster, less complicated, and more economical alternative to traditional litigation for an injured worker's claims against the employer has become more time-consuming, more complicated and less economical for both employees and employers.

An employee who could once prove a case by showing that as a result of an injury at work, he or she could no longer do his job must now prove much more. The employee must prove not just a work-related injury, but an actual disability. The employee must prove that he or she cannot perform any job within his or her qualifications and training that provides his or her maximum wages. Moreover, if the employee had a preexisting medical condition, he must now establish a medically distinguishable condition evidenced by a change in the underlying pathology.

As the injured workers' obligations have evolved, so too have those of the employers. The employer must obtain extensive information from the employee about the injured employee's qualifications and training. Beyond considering the requirements of the injured worker's previ-

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ous job, in many cases the employer must retain a vocational expert to conduct a vocational assessment to determine how the worker's background fits into the economic realities of Michigan's jobs and economy.

Relationship to other areas of law

1. Workers' Compensation and Third Party Negligence Claims

While workers' compensation is an employee's exclusive remedy against the employer for work-related injuries, it does not preclude the injured worker from bringing suit against a third party if the injury was attributable to negligence by another. A common example of such a situation is when an employee is injured at work by a defective piece of machinery. Under those facts, the employee would have a claim for workers' compensation against the employer and a claim against the equipment manufacturer sounding in negligence. However, the injured worker is not entitled to a double recovery for his or her injuries. If the employee recovers against the third party in negligence, the workers' compensation insurer is entitled to subrogation, meaning it receives reimbursement from any recovery against the third party for its expenditures of benefits to the employee.[25] The employer or carrier who obtains reimbursement as the result of a third-party tort action must bear its proportionate share of attorney fees and costs of the third-party litigation.[26] The distribution of proceeds from the third-party recovery is governed by a complicated formula set forth in *Franges v GMC*.[27] If the worker does not initiate a case against the third party within one year, the employer has the right to do so on behalf of the injured worker.[28]

2. Workers' compensation and automobile claims

In addition to negligence claims against third parties, there are specific rules and exceptions governing the relationship between workers' compensation claims and no-fault automobile insurance claims. This scenario often arises when the employee is a driver or when the employee drives within the scope of employment. It is important to note the distinction between the types of claims available under no-fault law because they are treated differently with respect to workers' compensation.

Michigan's no-fault statute provides for two types of claims by a person injured in an auto-related accident: (1) first-party no fault benefits and (2) third-party claims sounding in negligence. A person injured in an auto accident typically has a claim for benefits against his own insurer for wage loss benefits, medical care, and replacement services. "Where an employee is injured in a motor vehicle accident in the course of his employment . . . the workers' compensation carrier is not entitled to reimbursement out of third-party recoveries for payments which substitute for no-fault benefits."[29]

In short, the employer or its insurer may not assert a lien against the injured employee's first party no-fault benefits. Instead, to prevent double recovery, the no-fault insurer may reduce the no-fault benefits by the amount of workers' compensation payable.[30] This is particularly important to remember when settling a workers' compensation claim with automobile no-fault implications. Under Michigan's no-fault insurance law, the no-fault insurer is allowed to set off the entire amount of workers' compensation benefits that the claimant **could have received** if he or she had not settled the workers' compensation claim. The insurer is not bound by the insured's decision to settle and can set off the entire amount of workers' compensation benefits that the insured had a right to demand or insist on.[31]

In addition to seeking wage loss benefits, medical care, and replacement services under a first party no-fault claim, one injured in an automobile accident can sometimes seek third-party benefits from others involved in the accident. Third-party benefits are characterized as pain and suffering damages. They are available to an injured party **only** when there has been death, permanent serious disfigurement, or serious impairment of a body function.[32] Unlike a first-party no-fault claim, the employer or carrier that paid workers' compensation benefits may recover all damages received in a third-party action (a tort action) for damages in excess of the first-party benefits, without regard for whether

In short, the employer or its insurer may not assert a lien against the injured employee's first party no-fault benefits. Instead, to prevent double recovery, the no-fault insurer may reduce the no-fault benefits by the amount of workers' compensation payable.

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The WDCA provides for reductions of workers' compensation benefits for old-age Social Security, payments under a self-insurance plan, wage continuation plan, disability insurance policy, pension, profit-sharing program or retirement plan.

the third-party damages are for the same elements of loss as the workers' compensation benefits.[33]

3. Workers' compensation and other employment-related claims

In some circumstances, an employee who is receiving workers' compensation benefits may also be receiving other employment related benefits concurrently. Generally, "an employer's workers' compensation liability is reduced for virtually any other benefits the worker receives to the extent that the employer paid for the benefits."[34] The WDCA provides for reductions of workers' compensation benefits for old-age Social Security, payments under a self-insurance plan, wage continuation plan, disability insurance policy, pension, profit-sharing program or retirement plan. Identified below are some specific benefits and a brief explanation of their relationship to workers' compensation benefits.

- **Unemployment benefits:** In some situations, there may be a partial conflict when an employee claims both workers' compensation and unemployment benefits. To be eligible for workers' compensation, one must be disabled, but to be eligible for unemployment benefits, one must be able and available to work. Under the WDCA, the employer is entitled to an offset or coordination of workers' compensation benefits unemployment benefits paid "for identical periods of time and chargeable to the same employer."[35]
- **Social Security benefits:** There is a distinction between Social Security disability benefits and Social Security retirement benefits. Receiving Social Security disability benefits does not affect an employee's right to workers' compensation benefits, but the receipt of Social Security retirement benefits does result in a reduction of workers' compensation benefits.[36] This is particularly important to keep in mind with older employees because Social Security disability benefits automatically convert to retirement benefits at "retirement age" as defined by the Social Security Act, after which coordination is permitted.[37] The employer is permitted to coordinate 50% of the amount of the old-age insurance benefits received or being received under the Social Security Act.[38]
- **Welfare benefits:** There is no direct legal relationship between workers' compensation benefits and benefits paid by the Michigan Department of Human Services or Department of Social Services. It is important to keep in mind, though, that in practice, a worker relying on these programs while waiting to receive disputed workers' compensation benefits may sign a repayment agreement before benefits are given, under which the worker promises to repay the benefits if the workers' compensation claim is successful.
- **Disability benefits:** Many employers provide their employees with short-term and/or long-term disability benefits. "An employer's liability for worker's compensation benefits is to be reduced by the after-tax amount of the payments received by the worker from a self-insurance or wage continuation plan or under a disability insurance policy provided by the same employer from whom the compensation benefits were being received."[39] If the employee did not contribute directly to the plan or to the payment of premiums, the employer is entitled to full coordination; if the employer and employee both contributed to the cost of disability insurance, the workers' compensation benefits are reduced proportionately.[40] It is not uncommon for the provider of disability benefits to assert a lien against any potential workers' compensation benefits, to obtain repayment of benefits it paid out to the employee if the injury is found to be compensable under the Act.

Conclusion

These are only a few of the fundamental issues in workers' compensation today. Some of the other issues that arise in workers' compensation include: calculating an average weekly wage; aggravation of pre-existing conditions or conditions of the aging process; impact on illegal aliens; specific loss benefits from amputation or loss of industrial use; death benefits; dependency; various State-administered funds; favored work; the one-year and two-year-back rules; the 100-weeks rule; independent medical exams; willful misconduct, minors; occupational diseases; out-of-state injuries; redemptions and voluntary pay agreements, among others.

Two of the certainties in our world are that there will always be employers and employees and there will always be people who are injured while doing their jobs. As the Michigan Supreme Court continues to interpret the meaning of the Workers' Disability Compensation Act and reinterpret its prior decisions, who knows what the future will hold for this area of the law? Come back for future articles on the ever-changing practice of workers' compensation in Michigan.

Murray R. Feldman is the chairperson of the State Bar of Michigan Workers' Compensation Section and a shareholder at Strobl & Sharp, P.C. where he practices in Workers' Compensation Defense, Labor & Employment, and Insurance Litigation. In addition to over 30 years' experience in Workers' Compensation, Mr. Feldman is also a Special Assistant Attorney General for the State of Michigan and an adjunct professor at the University of Detroit Mercy School of Law where he teaches Workers' Compensation. Mr. Feldman is admitted to the State Bar of Michigan, the 6th Circuit Court of Appeals, the 3rd Circuit Court of Appeals, the 4th Circuit Court of Appeals, and the U.S. Supreme Court. Mr. Feldman can be contacted at mfeldman@stroblpc.com or at (248)205-2719.

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Endnotes

1. MCL 418.101, *et seq.*
2. MCL 418.131
3. MCL 418.861a(3).
4. *Sington v Chrysler Corp*, 467 Mich 144; 648 NW2d 624 (2002).
5. *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220; 666 NW2d 199 (2003).
6. *Stokes v Chrysler, LLC*, Michigan Supreme Court docket #132648, decided 6/12/08.
7. *Sington*, 467 Mich at146.
8. *Id.*, 467 Mich at 150, 155, *quoting* MCL 418.301(4).
9. *Haske v Transport Leasing, Inc*, 455 Mich 628; 566 NW2d 896 (1997).
10. *Id.*, 467 Mich at 153, *quoting Haske*, supra.
11. *Id.*, 467 Mich at 161-162.
12. *Id.*, 467 Mich at 147, 155.
13. *Rakestraw, supra.*
14. *Id.*, 469 Mich at 222, *citing* MCL 418.301(1).
15. *Id.*, 469 Mich at 228 (*citing Kostamo v Marquette Iron Mining Co*, 405 Mich 105; 274 NW2d 411 (1979); *Miklik v Michigan Special Machine Co*, 415 Mich 364; 329 NW2d 713 (1982); and *Farrington v Total Petroleum, Inc*, 442 Mich 201; 501 NW2d 76 (1993)).
16. *Rakestraw*, 469 Mich at 230-231.
17. *Id.*, 469 Mich at 231-232, citing MCL 418.301(1).
18. *Stokes, supra*.
19. *Id.*, at 14.
20. *Id.*
21. *Id.*, at 16.
22. *Id.*
23. *Id.*, at 16-17, 22-23.
24. *Id.*, at 17, 29, citing MCL 418.851 and 418.853.
25. MCL 418.827(1).
26. MCL 418.827(5) and (6).
27. *Franges v GMC*, 404 Mich 590; 274 NW2d 392 (1979).
28. MCL 418.827(1)
29. *Hearns v Ujkaj*, 180 Mich App 363, 369; 446 NW2d 657 (1989); see also *Michigan Bell Tel Co v Short*, 153 Mich App 431; 395 NW2d 70 (1986).
30. Larson, *supra*, pp. 575, 577.
31. *Gregory v Transamerica Ins Co*, 425 Mich 625; 391 NW2d 312 (1986). *See also McKim v Home Ins Co*, 163 Mich App 828; 415 NW2d 315 (1987).
32. MCL 500.3135
33. *Great American Ins Co v Queen*, 140 Mich 73; 300 NW2d 895 (1980); *Commercial Union Assurance Co v Dockins*, 141 Mich App 570; 367 NW2d 360 (1985); *Hearns v Ujkaj*, 180 Mich App 363, 369; 446 NW2d 657 (1989).
34. MCL 418.354.
35. MCL 418.358.
36. 42 USC 424a.
37. 42 USC 423(a)(1)(B).
38. MCL 418.354(1).
39. MCL 418.354(1)(b).
40. MCL 418.354(1)(c).

PRESIDENT'S SPECIAL RECOGNITION AWARD

Left to Right: Mark Gilchrist, Joe Engel, Todd Millar, Robert Schaffer, Pat Geary and Brian Pearson (Photo credit to the Legal News)

The Michigan Defense Trial Counsel (MDTC) is pleased to announce the law firm Smith, Haughey, Rice & Roegge, P.C. received the First Ever ***President's Special Recognition Award*** on November 6, 2008. The award was presented at the MDTC's annual gathering of Past Presidents which occurred at the Troy Marriott together with the current officers, board of directors, section chairs and regional chairs from the organization.

MDTC's current President, Robert H S. Schaffer, is giving this award to recognize Smith Haughey for outstanding Leadership, Professional Achievements and Contributions to the Michigan Defense Trial Counsel, Inc. Smith Haughey has produced three past Presidents of the MDTC, including William W. Jack Jr., Patrick F. Geary, and Albert Engel III and also two recipients of the Excellence in Defense Award, L. Roland Roegge and William W. Jack Jr. In addition, Smith Haughey has provided leadership through many Board Members, dedicated Regional Chairs, engaged Section Chairs, and recognized Speakers. The firm's members have been authors and contributors to the MDTC *Quarterly*, program chairs for various events and maintain a large membership.

ACCRUAL OF LATENT DISEASE CLAIMS UNDER *TRENTADUE v BUCKLER LAWN SPRINKLER CO.*

By: Brendan J. Atkins and Steven M. Hickey
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Executive Summary

The Supreme Court's decision in *Trentadue* that the statute of limitations had run when harm to Plaintiff's decedent took place, and not when Plaintiff discovered the possible cause of action, has implications for the application of the statute of limitations defense in cases involving latent injuries, although the specific facts of the case make its application in other cases less than clear. In toxic tort cases, a threshold question is what constitutes "harm" to plaintiffs, and when does "harm" occur. The *Trentadue* decision does not address these questions, at least in the context of latent injury claims.

It is possible that claims based on breach of an implied warranty of quality or fitness might be treated differently, because of a separate statutory provision for discovery, but since negligence underlies every claim of breach of warranty of quality, *Trentadue's* rejection of a discovery principle may yet be applied.

In time there may develop some clarity in the law pertaining to latent injury cases and the accrual of claims. *Trentadue* changes existing law but does not provide much in the way of such clarity. Trial and error through the course of extended motion practice lies ahead.

For decades, Michigan courts applied the so-called common-law "discovery rule" to determine the date of accrual of tort claims, including latent disease-based product liability claims.[1] Under this rule, plaintiff's cause of action accrued, and the limitations period commenced to run, when the plaintiff discovered, or through the exercise of reasonable diligence should have discovered, the possible cause of action associated with the injuries sustained.[2]

This has changed with the Michigan Supreme Court's recent decision in *Trentadue v Buckler Automatic Lawn Sprinkler Co*.[3] Although *Trentadue* did not arise in a product liability context, the court declared that there is no legal basis for interpreting the accrual of claims under a discovery rule. In fact, the *Trentadue* decision expressly overrules those precedents by which the 'discovery rule' became part of Michigan's common law.[4] The court held that the language of Michigan's accrual statute, MCL 600.5827, requires that accrual will be determined by the date when plaintiff was "harmed."[5]

A brief summary of the factual context and procedural history of the *Trentadue* matter follows, followed by an analysis of certain practical problems that attend its application outside the context of "typical" bodily injury cases. The purpose of this article is to analyze the impact of this decision on latent-disease product liability cases governed by Michigan law.

Trentadue v Buckler Automatic Lawn Sprinkler Co

Trentadue arose from the rape and murder of a woman at her leased residence on an estate in 1986. The crime was unsolved until 2002, at which time DNA evidence established the identity of the person who committed the rape and murder, an employee of a sprinkler contractor working on the estate. In that same year the victim's representative filed suit against the alleged killer, his employer (the contractor), the owner of the estate and others, with claims sounding in negligence.

The defendants, with the exception of the alleged killer, moved for summary disposition arguing that the action was barred by the three-year statute of limitations applicable to wrongful death claims. The trial court granted the motion on the statute of limitations and denied as to other motions unrelated to this analysis. The Michigan Court of Appeals reversed the ruling on the limitations period, holding that the common law discovery rule tolled the accrual of the cause.

The Michigan Supreme Court granted leave and then rejected the lower courts' reliance on the "discovery rule." The court rejected the argument that the claims of the estate did not accrue until the identity of the killer was discovered. In so ruling, the court relied in particular on the language of two statutes. One is MCL 600.5805(10), which states: "The period of limitations is 3 years after the time of the death or injury for all

other actions to recover damages for the death of a person, or for injury to a person or property." The other is MCL 600.5827, which states:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections **the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results.** (Emphasis added).

The court quickly pointed out that the meaning of these words in MCL 600.5827 had been interpreted in earlier decisions to mean that "[t]he wrong is done **when the plaintiff is harmed** rather than when the defendant acted" (emphasis added).[6]

The *Trentadue* court acknowledged that it had applied the discovery rule in prior decisions, including a pharmaceutical products liability action involving claims of latent disease, *Moll v Abbott Laboratories*,[7] a DES case in which it was alleged that a mother's ingestion of diethyl stilbesterol caused injuries to her daughter in utero, resulting in the daughter's cancer which manifested decades after birth. Despite this precedent, the *Trentadue* court declared that the Michigan legislature had specifically exercised its power to establish tolling based on discovery under particular circumstances (*e.g.*, medical malpractice claims and claims of fraudulent concealment), but had not provided for a general discovery rule that tolls or delays the time of accrual in other matters. As such, the court concluded that "courts may not employ an extra-statutory discovery rule to toll accrual in avoidance of the plain language of MCL 600.5827."

In the context of the facts before it, the court ruled that the wrong was done when the decedent was raped and murdered in 1986. Plaintiff's claims accrued at the time of the decedent's death, even though Plaintiff did not discover, and likely could not have discovered, the identity of the killer until DNA technology made this possible some 10 years or more after the 3 year limitations period had expired.

The Trentadue court acknowledged that it had applied the discovery rule in prior decisions.

Application of *Trentadue* to latent injury claims

The *Trentadue* court's proscription of the common-law "discovery rule" was broad, although the decision arose from circumstances involving a patent, not latent, injury. Many questioned whether the court intended its ruling to apply in cases of latent disease or injury, although there were reasons to believe that the court intended just such a result. The question has been addressed at least once, as of this writing, by the Michigan Court of Appeals in a recent, unpublished decision, *Bearup v General Motors Corp*.[8] Plaintiffs in *Bearup* brought a product liability action against a manufacturer and seller of metalworking fluids, alleging that defendant failed to warn of adverse health effects allegedly caused by inhalation of mist from the fluids. According to plaintiffs, their injuries included, but were not limited to, reduced and impaired breathing capacity, respiratory problems, reduced oxygen diffusion capacities, loss of lung function, chemical sensitivity and hypersensitivity, reduced blood oxygen levels, and interstitial lung disease, some of which injuries were "latent" in nature.

The Trentadue court's proscription of the common-law "discovery rule" was broad, although the decision arose from circumstances involving a patent, not latent, injury.

Defendant moved for summary disposition based in part on the statute of limitations, arguing that plaintiff's claims were barred by application of the "discovery rule."[9] The manufacturer also moved for summary disposition based on the "sophisticated user" doctrine, based on General Motors' status as a bulk purchaser of their metalworking fluid products. The trial court granted summary disposition to defendant on both grounds.

Analyzing the trial court's grant of summary disposition based on application of the "discovery rule," the Michigan Court of Appeals noted that the Supreme Court's decision in *Trentadue* "completely eliminated" the common-law discovery doctrine in Michigan, and that, after *Trentadue,* the discovery rule only applies if the legislature specifically provides for same. The *Bearup* court also acknowledged that the Supreme Court specifically stated that prospective-only application of its decision in *Trentadue* is inappropriate, and ruled that the trial court erred in applying the discovery doctrine in analyzing the timeliness of plaintiffs' claims and in granting summary disposition on statute of limitations grounds. Nevertheless, the Court of Appeals declined to address the accrual issue further, stating that additional discussion was unnecessary in that summary disposition was properly granted based on application of the "sophisticated user" doctrine.[10]

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Unfortunately, the Trentadue court's decision provides scant practical guidance as to the appropriate means of analyzing accrual in the context of latent disease or injury-based tort claims, absent application of a "discovery rule."

When does harm occur?

Unfortunately, the *Trentadue* court's decision provides scant practical guidance as to the appropriate means of analyzing accrual in the context of latent disease or injury-based tort claims, absent application of a "discovery rule." In most injury cases, the point at which the plaintiff is "harmed" is readily discernable. In cases of latent injury, which are common to many toxic exposure actions, the precise moment at which plaintiff is harmed is a mystery, even to science. Indeed, the very meaning of "harm" becomes complicated in latent injury matters.

Consider a typical case, in which the plaintiff's injury occurs simultaneously with the symptoms of that injury, or within a relatively short time before the development of those symptoms. In a latent disease case the injury may start with discrete, microscopic changes at a cellular level before the existence of disease or injury could manifest clinically, and before any symptoms would be noticed by even the most sensitive individual. Thus, there could be a significant gap in time (perhaps years, or decades) between the changes that constitute the initial stages of "injury" and the manifestations of harm to the plaintiff, such as symptoms, pain, etc.

"Harm" vs the manifestation of "harm"

It is at this point of the accrual analysis where guidance from *Trentadue* is lacking. Is there "harm" to the plaintiff when the first cellular changes constituting "injury" take place, even though they have yet to manifest in the form of symptoms of which the plaintiff could be aware? Alternatively, is it more practical to treat "harm" as something that is at least clinically discernable, if not symptomatic?

In its 2005 decision in *Henry v Dow Chemical Co*,[11] the Michigan Supreme Court noted, in rejecting a medical monitoring claim, that "mere exposure to a toxic substance and the increased risk of future harm" does not constitute an "injury" for tort purposes. Rather, the court concluded, it is a "present physical injury," not fear of an injury in the future, that gives rise to a cause of action under a negligence theory. Interestingly, the *Henry* court stated in a footnote that, in rejecting claims for medical monitoring, persons exposed to toxic substances would not necessarily experience statute of limitations problems if physical harm only later became manifest, given the existence of the "discovery rule."

The legislature, when it enacted MCL 600.5827, set forth a purely objective standard of accrual, one that triggers the running of the three-year statute of limitations on a single event: "at the time the wrong upon which the claim is based was done regardless of the time when damage results." The Supreme Court in *Trentadue* declared that some judicial gloss on this statute is acceptable, citing its *Boyle* decision, in which "the time the wrong was done" became "the time when 'harm' came to the plaintiff," while stating that judicial gloss in the form of the discovery rule (from its decision in *Johnson v Caldwell*, *supra*) is unacceptable. What then constitutes "harm," or when does "harm" occur?

Rather, the court concluded, it is a "present physical injury," not fear of an injury in the future, that gives rise to a cause of action under a negligence theory.

Defense counsel can reasonably anticipate that the trial courts will require, … "present physical injury" to trigger the accrual of a latent injury claim.

"Manifest" injury

Trentadue is bereft of guidance as to the determination of accrual in a latent injury context. The predominant majority of sister jurisdictions apply a variation of the "discovery rule" in such matters, but there is limited case law from a few jurisdictions which may provide some reasonable direction. One such case is *Griffin v Unocal Corp*,[12] where the Supreme Court of Alabama addressed the issue of accrual and "manifest present injury" in the context of toxic tort cases in which there was no applicable statutory discovery rule.[13] The *Griffin* court adopted the following meaning of "accrued":

> The proper construction of the term "accrued" in § 6-2-30(a) in the context of toxic-substance exposure cases should honor the rule that a cause of action accrues only when there has occurred a manifest, present injury. I understand "man-

ifest" in this context to mean an injury manifested by observable signs or symptoms or the existence of which is medically identifiable. "Manifest" in this sense does not mean that the injured person must be personally aware of the injury or must know its cause or origin. All that is required is that there be in fact a physical injury manifested, even if the injured person is ignorant of it for some period after its development. This approach is mandated by the rule . . . that "plaintiff's ignorance of the tort or injury, at least if there is no fraudulent concealment by defendant, [does not] postpone the running of the statute [of limitations] until the tort or injury is discovered." An oft-declared companion rule is that "this Court will not apply the discovery rule unless it is specifically prescribed by the Legislature."

We operate within our proper sphere when we undertake to determine the construction that should be ascribed to the legislatively prescribed term "accrued" in § 6-2-30(a); we would operate outside that sphere were we to attempt to add to the text of § 6-2-30(a) so as to superimpose some sort of discovery feature. Thus, I reject the notion that our prior and present requirement of a "manifest," present injury means that the injury must be obvious to and known by the injured party. That would simply represent the creation of a type of discovery rule. I reaffirm that creation of a discovery rule lies within the province of the legislature, which is equipped to weigh the competing public-policy arguments and to fashion variations of discovery principles tailored to the particular nature of each affected cause of action. . . .

Thus, as used in the phrase "manifest, present injury," the word "manifest" designates a condition that has evidenced itself sufficiently that its existence is objectively evident and apparent, even if only to the diagnostic skills of a physician.

An injury manifests itself "when it has become evidenced in some significant fashion, whether or not the patient/plaintiff actually becomes aware of the injury."[14]

If the ordinary negligence and gross negligence claims were deemed untimely under a Trentadue-governed accrual analysis, a discovery rule analysis would, at first blush, still be required with respect to implied warranty claims, if pleaded.

The reasoning adopted by the Alabama Supreme Court in *Griffin* is arguably in accord with the decisions of the Michigan Supreme Court in both *Trentadue* and *Henry.* Moreover, the requirement of a "present physical injury" does not operate to bar a cause of action before it accrues. Further, under MCL 600.5827, a definitive diagnosis is not required before a claim is properly deemed to have accrued.[15] Defense counsel can reasonably anticipate that the trial courts will require, consistent with *Henry*, a "present physical injury" to trigger the accrual of a latent injury claim. The constellation of facts which may give rise to a viable statute of limitations defense under *Trentadue* is not readily subject to prognostication, and counsel's analysis will necessarily have to be made on a case-by-case basis.

The "discovery rule" and implied warranty claims

As noted by the Michigan Court of Appeals in *Bearup v General Motors Corp*, after *Trentadue,* the discovery rule applies only if the legislature specifically provides for it. There is no statutory accrual provision among the statutes cited in MCL 600.5827 (specifically, MCL 600.5829 through 600.5838) that is applicable to ordinary negligence or gross negligence-based product liability claims, *e.g.,* negligent failure to warn. Therefore, the rule of accrual espoused in *Trentadue* (in essence, a claim accrues when there is harm, irrespective of a claimant's discovery of the harm or its cause) would apply to such claims. However, among the referenced statutes is MCL 600.5833, governing accrual of breach of warranty of quality or fitness claims. This statute does indeed include a discovery rule applicable to such claims. Specifically, the statute provides:

> In actions for damages based on breach of a warranty of quality or fitness the claim accrues at the time the breach of the warranty is discovered or reasonably should be discovered.

Consequently, if the ordinary negligence and gross negligence claims were deemed untimely under a *Trentadue*-governed accrual analysis, a discovery rule analysis would, at first blush, still be required with respect to implied warranty claims, if pleaded. However, in many instances, the continued viability of a "discovery rule" analysis pursuant to MCL 600.5833 will not necessarily preclude a successful defense on statute of limitations grounds in cases

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involving allegations of design defect and failure to warn.

It is well-settled that "[t]he distinction between the elements of negligence and breach of implied warranty is that, in the former, plaintiff must prove that the product defect was caused by the manufacturer's negligence, whereas under the warranty theory, plaintiff need only establish that the defect was attributable to the manufacturer, regardless of the amount of care utilized by the manufacturer."[16] However, the Michigan Supreme Court, while recognizing the continued separate existence of the two theories in certain contexts, has held "that in a products liability action against a manufacturer, based upon defective design, the jury need only be instructed on a single unified theory of negligent design."[17] Moreover, when liability in a product liability context turns on the adequacy of a warning, the issue is again one of reasonable care, regardless of whether the theory pled is negligence or implied warranty.[18]

Since reasonable care underlies both theories, if a plaintiff has pleaded theories sounding in both negligence and breach of implied warranty based on allegations of defective design or failure to warn or reasonable care or reasonable safety, and assuming that a particular claim is not also otherwise readily disposed of under a "discovery rule" analysis, an appropriate motion for summary disposition as to the negligence claims may also seek to dispose of the breach of implied warranty claims pursuant to *Smith*, *Prentis* and their progeny.[19]

Latent injury cases following *Trentadue*: practical considerations

The possibility of motion practice on the statute of limitations has become stronger in latent injury cases as a consequence of the *Trentadue* decision. The difficulty is not "sniffing out" the possibility for a statute motion. The difficulty is figuring out how to interpret the evidence to make the argument for accrual.

The possibility of motion practice on the statute of limitations has become stronger in latent injury cases as a consequence of the Trentadue decision.

Take, for example, a toxic exposure case in which plaintiff's work around a toxic substance is alleged to have caused a lung condition which results in shortness of breath as the first of many signs and symptoms associated with the disease related to this toxin. Suppose further that the disease has what is known as a "latency" period, which means that the exposure-related condition does not manifest clinically or symptomatically for a period of 15 or 20 years after the onset of exposure.

Suppose also, in this hypothetical, we obtain medical records during discovery that reveal a comment made by plaintiff to a treating physician that his shortness of breath started "about two years ago." If that statement was recorded on a date that fell three years before filing, it would be reasonable to assume that symptoms manifested 5 years before the commencement of suit. Complicating things, however, is the fact that there may have been little or no clinical correlation between these complaints and the hallmarks of the disease that plaintiff claims he developed from exposure.

Taken to its logical extreme, it would seem that Trentadue compels us to consider "accrual" to refer to the earliest manifestation of harm, even if plaintiff was unaware of it, and even if physicians found no evidence of harm in any clinical sense at that time.

Assume further, in this scenario, that the undiagnosed symptoms did not become part of an exposure-related diagnosis until later, say one year before the filing of suit. Did the "harm" take place when the symptoms started, or did it manifest when the condition was diagnosed with the support of clinical data that had not been detected, or at least not generated, before that time? *Trentadue* sheds no light on the meaning of the word "harm" in these respects.

Taken to its logical extreme, it would seem that *Trentadue* compels us to consider "accrual" to refer to the earliest manifestation of harm, even if plaintiff was unaware of it, and even if physicians found no evidence of harm in any clinical sense at that time. For example, if every inhalation of the hypothetical toxin is an insult or injury to the lung, did the cause accrue with the onset of exposure, before the first symptom? This seems a ridiculous conclusion, and difficult to reconcile with the above-referenced ruling in *Henry v Dow Chemical Co*, even if it is a logical extension of the *Trentadue* court's reasoning.

So is it better to consider accrual to be understood as the court in Alabama articulated it? If the "harm" occurs and the cause accrues when "manifested by observable signs or symptoms," then does the plaintiff's shortness of breath trigger the running of the period of limitations? It may be so, for we recall that even the Alabama court in *Griffin* held that "manifest harm" does not mean that the injured person must be personally aware of the injury or its cause. "All that is required is that there be in fact a physical injury manifested, even if

the injured person is ignorant of it for some period after its development."

Discovery tactics

Discovery in cases of occupational exposure must include subpoenas to secure the worker's compensation files generated at or near the last date of employment, if there are such files. Often the "Basic Report of Injury" contains characterizations made by plaintiff's worker's comp attorney about the nature of harm and its alleged relationship to the job. For example, the plaintiff may have signed a Basic Report that identifies his or her injuries as "lungs, heart" and more, occurring as a result of "exposure to dust, fumes and toxins in the workplace."

This information, if prepared and filed by the plaintiff outside the limitations period, may serve as evidence of "harm" of the sort envisioned by the *Trentadue* court. Admittedly, this sounds much like evidence of plaintiff's "discovery" of injury. Still, we should consider such evidence as relevant under *Trentadue*, but viewed a bit differently than under the old common-law "discovery rule."

If, as in the hypothetical "Basic Report of Injury," the plaintiff signed a statement declaring that he suffered injuries to the lungs as a result of dust and fumes in the workplace, this can be treated as an admission that plaintiff had discovered his work-related injuries at least as of that point. Although *Trentadue* tells us that plaintiff's discovery of the injury and its potential relationship to the job is not relevant under the statute, this declaration by plaintiff provides circumstantial evidence that there was an injury, that there was "harm," and that the cause had accrued at least as of the time plaintiff filed the "Basic Report" and probably somewhat earlier. This fact, even without the discovery rule, is legally and logically relevant to the statute analysis under *Trentadue*.

Gathering medical records from treating physicians is common practice in injury cases, but the manner in which we analyze them under Trentadue will be arguably different.

Said differently, if the "harm" analysis of *Trentadue* focuses upon the manifestation of clinical signs and/or symptoms, it must be relevant that at least as of the date of the "Basic Report" the plaintiff was experiencing symptoms that may have constituted an injury. Thus, even without a "Basic Report of Injury" to work with, questions of the plaintiff at deposition as to when he or she first noticed symptoms or discovered a potential cause for the symptoms would seem clearly relevant.

Analyzing medical records

Gathering medical records from treating physicians is common practice in injury cases, but the manner in which we analyze them under *Trentadue* will be arguably different. Instead of looking for the first diagnosis of the disease over which suit is brought, we may now be looking for even earlier records of clinical signs and symptoms of that disease. Remember, it is not necessary to establish that plaintiff or his physicians knew that the condition was actionable, only that there was "harm," at which point plaintiff's obligation to exercise due diligence is triggered and the limitations period starts to run.

It is difficult to believe that even the tiniest clinical finding consistent with the injury or disease ultimately complained of will suffice to trigger the statutory period to running, particularly since such findings are most often non-specific, not "agent-specific" of a particular disease, much less a particular cause. However, some constellation of clinical signs, reported symptoms and other data may suffice to convince a court that accrual took place, under a *Trentadue* analysis, even before plaintiff and his doctors knew of the ultimate diagnosis and its relationship to defendant's product.[20]

Conclusion

In time there may develop some clarity in the law pertaining to latent injury cases and the accrual of claims. *Trentadue* changes existing law but does not provide much in the way of such clarity. Trial and error through the course of extended motion practice lies ahead.

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The authors wish to acknowledge the assistance of ***Arti V. Shah****, also an associate in the firm, for her research and other assistance in the preparation of this article.*

Endnotes

1. *Johnson v Caldwell*, 371 Mich 368, 379; 123 NW2d 785 (1963); *Moll v Abbott Laboratories*, 444 Mich 1; 506 NW2d 816 (1993).
2. *Moll*, at 29
3. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378; 738 NW2d 664 (2007).
4. *Id* at 393.

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5. "The wrong is done when the plaintiff is harmed rather than when the defendant acted." *Id* at 388 (citing *Boyle v General Motors Corp*, 468 Mich 226, 231-232, n5; 661 NW2d 557 (2003)).
6. *Id.*
7. *Moll v Abbott Laboratories*, 444 Mich 1, 506 NW2d 816 (1993).
8. *Bearup v General Motors Corp*, 2008 WL 4684098 (Mich App).
9. Specifically, the defendant metalworking fluids manufacturer contended that plaintiffs either discovered or should have discovered an injury and a causal connection between the injury and the defendant more than three years before they filed their cause of action. Plaintiffs, in turn, argued that symptoms alone were not sufficient to put them on notice of their injuries or the cause of their injuries, and that their cause of action did not accrue until they received medical diagnoses.
10. In a footnote, the *Bearup* Court also stated: "In light of *Trentadue,* we would urge the Legislature to enact statutory discovery rules for product liability actions involving latent injuries and other cases in which a plaintiff suffers a latent injury or is otherwise unable to discover the existence of a cause of action." *Bearup v General Motors Corp*, 2008 WL 4684098 (Mich App) at 7, fn. 8. On September 26, 2007 a Senate Bill was introduced (SB No. 817) and referred to the Committee on Judiciary, with its sponsors seeking to amend MCL 600.5827 to read as follows: "Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections 5829 to 5838 or, in cases not covered by sections 5829 to 5838, when the plaintiff discovers or through the exercise of reasonable diligence should have discovered the elements of the cause of action, including the identity of the defendant." The bill sponsors sought to have the amended statute apply to actions arising before the date of enactment as well. No further action on the bill has taken place as of this writing.
11. *Henry v Dow Chemical Co*, 473 Mich 63; 701 NW2d 684 (2005).
12. *Griffin v Unocal Corp*, 990 So2d 291 (2008); *see also Wade v Danek Medical Inc*, 182 F3d 281 (CA 4 1999) (applying Virginia law and acknowledging that, under same and except where a statutory exception applies, the limitations period begins running at the time of initial injury, not at the time of diagnosis or discovery).
13. In *Griffin*, the court adopted the reasoning of the dissent of one of its justices in a prior case as its opinion in the *Griffin* matter. The portion of *Griffin* quoted herein is from the text of the dissent so adopted, attached to the *Griffin* opinion as an appendix.
14. *Griffin v Unocal Corp*, 990 So2d at 310-311, citing *Travis v Ziter,* 681 So2d 1348, 1354 (Ala 1996) and *Marriage & Family Center v Superior Court* (1991) 228 CalApp3d 1647, 1654 [279 CalRptr 475].
15. A definitive diagnosis was not a prerequisite to accrual even under the "discovery rule." *See, e.g. Mascarenas v Union Carbide Corp*, 196 Mich App 240, 246; 492 NW2d 512(1992)
16. *Smith v ER Squibb & Sons Inc*, 405 Mich 79, 89; 273 NW2d 476 (1979).
17. *Prentis v Yale Manufacturing Co*, 421 Mich 670, 695; 365 NW2d 176 (1984).
18. *Smith v ER Squibb & Sons Inc*, 405 Mich 79, 90; 273 NW2d 476 (1979).
19. *See also Glavin v Baker Material Handling Corp,* 144 Mich App 147, 373 NW2d 272 (1985).
20. *Hohendorf v Meagher*, 188 Mich App 400, 470 NW2d 418 (1991); *Stinnett v Tool Chemical Co Inc*, 161 Mich App 467, 411 NW2d 740 (1987).

FIGHTING BLACKMAIL SETTLEMENT IN CLASS ACTIONS

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Executive Summary

The cost of defense has often prompted defendants to settle claims that are weak and even groundless, and until recently class actions have been a particular cause of these "blackmail" settlements. A recent decision of the United States Supreme Court has "retired" the former standard by which the sufficiency of complaints was evaluated, and replaced it with a stricter standard. Under the new standard, the plaintiff must plead a claim that is plausible on its face.

This new standard has already been used successfully by class action defendants, and it should be the first line of defense.

> [S]omething beyond the mere possibility of loss causation must be alleged, lest a plaintiff with a largely groundless claim be allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.
>
> — Justice Souter, *Bell Atlantic Corp v Twombly*[1]

Justice Souter's words resonate among corporate representatives who have been, or could be, served with a class action complaint containing only "a formulaic recitation of a cause of action's elements," filed by plaintiffs who plan to conduct a multi-million dollar fishing expedition through the corporation's electronic records in hopes of exacting a sizable settlement. Fortunately for those corporate representatives, the United States Supreme Court's decision in *Twombly* has, thus far, proven to be a powerful weapon in the battle against such "blackmail" settlements.

In *Twombly*, the Court clarified plaintiffs' minimum standard of adequate pleading by "retiring" the literal reading of the standard articulated in *Conley v Gibson*[2] — dismissal for failure to state a claim is appropriate only where "it appears beyond doubt that the plaintiff can prove no set of facts" in support of the claim entitling plaintiff to relief — and holding that plaintiffs must, at a minimum, plead "enough facts to state a claim to relief that is plausible on its face."[3] With that "new" minimum standard of adequate pleading, defendants in class action lawsuits have secured Rule 12(b)(6) dismissals earlier in litigation and, thus, avoided blackmail settlements.

With that "new" minimum standard of adequate pleading, defendants in class action lawsuits have secured Rule 12(b)(6) dismissals earlier in litigation and, thus, avoided blackmail settlements.

The "Blackmail" Settlement

A "blackmail" settlement[4] in class action litigation occurs when a defendant settles a lawsuit for greater than its perceived value simply to avoid the substantial costs (both financial and in the expenditure of employee hours) of litigation[5] — particularly given the new Federal Rules of Civil Procedure governing e-discovery.[6] Indeed, experts estimate that companies spend millions of dollars complying with e-discovery requests alone.[7]

Given the potentially astronomical costs of class action litigation, defendants often seek to end the litigation as quickly as possible. And, before submitting to a blackmail settlement, defendants frequently file a motion to dismiss pursuant to Rule 12 based upon a jurisdictional or procedural defect or, more commonly, the class action complaint's failure to state a claim upon which relief can be granted. But, even with regard to claims of dubious merit, a Rule 12(b)(6) motion is no guarantee of a swift dismissal. Indeed, a court may still permit a

plaintiff to amend its complaint or defer ruling on the motion to allow class, and even merits discovery. Such a ruling can subject defendants to multi-million dollar fishing expeditions and palpable settlement pressures.[8] As such, for many risk-averse class action defendants, the Rule 12(b)(6) motion is both the first, and conceivably last line of defense before submitting to a blackmail settlement.

Over the past decade, insurance companies have experienced settlement pressures at an alarming rate and, thus, the importance of early Rule 12(b)(6) dismissals has increased. From 1993–2002, prior to class certification, insurance company defendants settled with the putative class representative in only 12% of class actions. After a class was certified, insurance company defendants settled with the plaintiff class in 90% of class actions.[9] While this substantial jump is, to be sure, due in large part to the court's certification decision, and the resultant fear of an adverse judgment, the gap is also likely a result of the fear of looming discovery costs and a failed Rule 12(b)(6) motion.

Bell Atlantic v Twombly

In *Bell v Twombly*, plaintiff consumers filed a multi-billion dollar class action against the nation's largest telecommunications providers for their alleged anti-competitive misconduct in violation of the Sherman Act.[10] In response, and prior to class certification, the defendant filed a motion to dismiss the action pursuant to Rule 12(b)(6).[11]

Affirming the trial court's dismissal of the plaintiffs' claims, the United States Supreme Court held that Rule 8(a)(2)'s "plain statement" pleading standard[12] requires "some factual enhancement" such that the plaintiff demonstrates that it is "plausibly" entitled to relief. The practical significance of that pleading standard, the Supreme Court explained, is to prevent "a largely groundless claim [from] tak[ing] up the time of a number of other people"[13] and to ensure that "this basic deficiency . . . [is] exposed at the point of minimum expenditure of time and money by the parties and the court."[14]

Affirming the trial court's dismissal of the plaintiffs' claims, the United States Supreme Court held that Rule 8(a)(2)'s "plain statement" pleading standard requires "some factual enhancement" such that the plaintiff demonstrates that it is "plausibly" entitled to relief.

The Supreme Court further explained that adherence to this minimum pleading requirement is especially crucial because "only by taking care to require allegations that reach the level suggesting [plausibility] . . . can [we] hope to avoid the potentially enormous expense of discovery…"[15] Without such a requirement, the Court noted, "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [the jury.]"[16]

In clarifying the "plain statement" pleading standard under Rule 8(a), the Supreme Court "retired" the liberal *Conley* standard for Rule 12(b)(6) dismissal motions. Class action plaintiffs had, in opposing motions to dismiss, often cited to *Conley* for the proposition stated above that defendants are entitled to dismissal only where they can demonstrate that the "plaintiff can prove [absolutely] no set of facts in support of his claim that would entitle him to relief."[17] Noting that the *Conley* standard was misunderstood by courts for over 50 years, the *Twombly* Court held that the "no set of facts" language is "not the minimum standard of adequate pleading to govern a complaint's survival."[18] Instead, the Court held that "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[19] That is, "[f] actual allegations must be enough to raise a right to relief above the speculative level."[20] And, more specifically, a complaint alleging conspiracy must allege facts that imply conspiracy instead of mere "parallel conduct and a bare assertion of conspiracy."[21]

Noting that the Conley standard was misunderstood by courts for over 50 years, the Twombly Court held that the "no set of facts" language is "not the minimum standard of adequate pleading to govern a complaint's survival."

Class Action Defense after *Twombly*

Twombly provides defendant insurance companies with both a sword, in the clarified and more demanding pleading standard; and a shield, in the retirement of the *Conley* standard, in their battles against blackmail settlements. By doing so, *Twombly* may well have an immediate impact on reducing the costs incurred by class action defendants, and the number of early blackmail settlements. Indeed, within two months of the *Twombly* decision, the Second Circuit Court of Appeals recognized *Twombly*'s application to "cases where massive discovery is likely to create unacceptable settlement pressures."[22]

Through the clarified "plausibility" pleading standard, the Supreme Court has provided to defendant

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insurance companies a potential weapon against unnecessary discovery costs and blackmail settlements. Under *Twombly*, a class action complaint must now state "enough factual matter" to plausibly suggest that plaintiffs are entitled to relief. The clarified standard is a marked departure from the former pleading practice allowed by some circuits where a class action plaintiff frequently received a free pass to the pre-certification discovery phase via delayed or deferential rulings on 12(b)(6) motions. And, because the often misinterpreted *Conley* standard has been retired, insurance company defendants Rule 12(b)(6) motions now have greater viability. That is, where *Conley*'s plaintiff-friendly "no set of facts" threshold had previously kept otherwise meritless claims afloat through costly discovery, the Court's explicit "retirement" of the *Conley* standard should prompt trial courts to more closely scrutinize pleadings for compliance with the requirements of Rule 8(a), and provide to class defendants an early opportunity to dismiss the litigation.

For one large group of insurers, *Twombly* proved to be a very useful weapon. In *Solomon v. Blue Cross Blue Shield Association*, a plaintiff class of physicians filed a complaint against a collection of Blue Cross Blue Shield entities alleging that the defendants conspired to violate RICO, and acted as an enterprise to commit the RICO predicate acts of mail and wire fraud.[23] The defendant insurers filed a joint Rule 12(b)(6) motion arguing that the plaintiff class's allegations of conspiracy and of the predicate RICO crimes lacked adequate specificity under the standard set forth in *Twombly*.[24] Before the Rule 12(b)(6) motion was filed, and while it was pending, the plaintiff class amended its complaint on five separate occasions and the "limited" non-merits discovery phase continued, which included over 200 depositions and the production of over 1.6 million pages of documents.[25] In response to their mounting litigation costs, some defendants agreed to settle their portions of the case for an estimated $128 million.[26]

The insurers who chose to await the judge's decision were heavily rewarded. Judge Federico A. Morano of the Southern District of Florida agreed with the defendants, and dismissed the action. In dismissing the action, the judge relied upon *Twombly*:

> The *Twombly* decision … adds new bite to the RICO requirement that the Plaintiffs describe the agreement to conspire in the complaint. ... The Supreme Court [in *Twombly*] upheld the dismissal of the complaint because "a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality" … [and] explained that "without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory."… The Supreme Court observed that the complaint "mentioned no specific time, place, or person involved in the alleged conspiracies" leaving the defendants "little idea where to begin" in formulating their answers.[27]

Through the clarified "plausibility" pleading standard, the Supreme Court has provided to defendant insurance companies a potential weapon against unnecessary discovery costs and blackmail settlements.

Because the plaintiffs' complaint and RICO Case Statement similarly failed to contain any factual allegations about the defendants' agreement to commit the predicate acts of mail and wire fraud (*i.e.*, the complaint contained no allegations as to who made the agreement, and/or how and when the agreement was made), and because all of the plaintiffs' allegations regarding the alleged agreement to conspire were conclusory, the court concluded that *Twombly* warranted dismissal because the plaintiffs' "allegations of conspiracy and fraud lack[ed] the required specificity."[28]

Given that the success that class action defendants have already had when relying upon *Twombly* (case in point, *Twombly* permitted the remaining *Solomon* defendants to secure a dismissal and, thus, avoid blackmail settlements), where the facts allow, future class action defendants should utilize the *Twombly* ruling in their first line of defense. This strategy may avoid substantial costs and litigation-related stress on the corporation.

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Endnotes

1. *Bell Atlantic Corp v Twombly*, 127 SCt 1955, 1966 (2007) (internal quotations omitted).
2. 355 US 42, 45-46 (1957).
3. 127 S Ct at 1974.
4. *See* Charles Silver, *"We're Scared to Death":*

Class Certification and Blackmail, 78 N.Y.U. L. Rev. 1357, 1357-58 (2003) (noting that the term "blackmail settlement" originated in the opinions of the Honorable Richard Posner, Frank Easterbrook, and Henry Friendly).

5. *See In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995) (Posner, J.).
6. *See, e.g.*, Fed. R. Civ. P. 26, 34 and 45.
7. *See* Mike France, *Taking the Fear Factor Out of E-Mail*, BusinessWeek, Dec. 20, 2004, *available at* http://www.businessweek.com/magazine/content/04_51/b3913099.htm.
8. *See* Mark Moller, *Class Action Lawmaking: An Administrative Law Model*, 11 Tex. Rev. L. & Pol. 39, 51 n.42 (2006) (discussing a class action against insurance companies in which the court left a 12(b)(6) motion unresolved for three years); 5B Charles Allen Wright & Arthur R. Miller, Federal Practice and Procedure § 1357, at 557 (3d ed. 2004).
9. Nicholas M. Pace, et al., *Research Brief: Anatomy of an Insurance Class Action* (2007), *available at* http://www.rand.org/pubs/research_briefs/2007/RAND_RB9249.pdf.
10. *Twombly*, 127 S. Ct. at 1961-63.
11. *Twombly v Bell Atlantic Corp.*, 313 F. Supp. 2d 174 (S.D.N.Y. 2003).
12. Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief."
13. *Twombly*, 127 S. Ct. at 1966 (quoting *Dura Pharma., Inc. v Broudo*, 544 US 336, 347 (2005)).
14. *Twombly*, 127 S. Ct. at 1966 (quotation omitted).
15. *Id*. at 1967.
16. *Id*.
17. *Conley*, 355 US at 45-46.
18. *Twombly*, 127 S. Ct. at 1969.
19. *Id*. at 1964-65.
20. *Id*. at 1965.
21. *Id*. at 1966.
22. *Iqbal v Hasty*, 490 F.3d 143, 157 (2nd Cir. June 14, 2007).
23. *Solomon v Blue Cross & Blue Shield Assoc.*, No. 03-CIV-MORENO/SIMONTON, Order Dismissing Third Amended Complaint With Prejudice, 2 (S.D. Fla. May 23, 2008).
24. *Id*. at 3.
25. *Solomon v Blue Cross & Blue Shield Assoc.*, No. 03-CIV-MORENO/SIMONTON, Memorandum of Law in Support of Separate Motion to Dismiss National Account Services Company LLC ("NASCO") as a Defendant at 1 (S.D. Fla. June 21, 2007).
26. *See* MoreLaw.com, Case Report for *Solomon v Blue Cross and Blue Shield Plans* (Apr. 28, 2007), *available at* http://www.morelaw.com/verdicts/case.asp?n=1%3A03-cv-22935-FAM+&s=FL%20%20%20%20%20%20%20%20&d=33111.
27. *Solomon v Blue Cross & Blue Shield Assoc.*, No. 03-CIV-MORENO/SIMONTON, Order Dismissing Third Amended Complaint With Prejudice, 5-6 (S.D. Fla. May 23, 2008).
28. *Id*. at 5-7.

Editor's Note: A previous article ("Future Damages – Reduction to Present Value," Vol. 18, No. 2, Michigan Defense Quarterly, November 2001) addressed the legal rationale behind the application of a 5% non-compounded discount rate to reduce damages to present value and argues that the rationale for applying a non-compounded interest method was deficient. In this article, the authors present a detailed economic analysis of how the rule works in practice.

MICHIGAN'S DISCOUNT RATE: 5.0% NON-COMPOUNDED AND UNFAIR?

By: Marvin G. DeVries, Ph.D.
Craig S. Neckers, J.D.

Executive Summary

Most states allow reductions of future damages to present value based on reasonable assumptions and using compound interest assumptions. Michigan, however, mandate that reductions to present value use 5% interest and a non-compounded (simple interest) assumption.

This is at odds with real world practices, and leads to serious imbalances in the calculation and award of damages. The inequity results from the artificiality of the use of simple interest and from the fact that compound interest is used in calculating the future damages, but simple interest is used to reduce that figure to present value.

In addition to being out of touch with real-world practices and internally inconsistent, the Michigan practice results in an unwarranted windfall for personal injury plaintiffs.

Economists are often retained to calculate losses in legal matters in which economic issues exist. The economist usually reviews information about earnings, employment, benefits, household services and other relevant factors, and frequently reviews data made available by government agencies and other sources.

In those cases in which economic losses are expected to continue into the future the economist must determine the rate at which those losses will grow over a specific period of time such as the life expectancy of the injured party, retirement age, or the anticipated work-life expectancy of the decedent. The economist then must reduce those losses to present value assuming a particular discount rate. In some cases, that discount rate is subject to the economist's judgment and may be based on interest earned on corporate bonds or treasury notes. However, in a personal injury case pending in a Michigan state court, the discount rate is set by statute at five percent.[1] This is unlike most jurisdictions where both the growth rate and the discount rate are subject to an analysis by the economist. Should future wages grow annually at 2% or 4%, more or less? Should the reduction to present value assume a discount rate of 3% or 5%, or more or less?

> *[I]n a personal injury case pending in a Michigan state court, the discount rate is set by statute at five percent. This is unlike most jurisdictions where both the growth rate and the discount rate are subject to an analysis by the economist.*

Simple reduction, compound growth

Whether a jurisdiction allows the economist to determine growth and discount rates or not, these factors are always applied in a compound manner. Always that is, unless the economist is working on a matter in a Michigan state court. In those cases, not only is the discount rate fixed at 5%, but the calculation done to apply that 5% rate requires the economist to assume the rate of interest is simple, not compound. However, the growth rate an economist assumes is not subject to the same simple interest restriction. When making the calculation about the growth of wages, the economist assumes it will grow in a compounded fashion as that is the way the real world works. Not so when the economist makes the reduction to present value. Then, the economist is required to ignore reality and make the calculation based on a simple interest formula. Is that fair? No. Is it the law? Without any doubt. Should the law change to reflect the reality of economic forces in calculating losses into the future in personal injury matters? That depends on the legislature and the governor.

When making the calculation about the growth of wages, the economist assumes it will grow in a compounded fashion as that is the way the real world works. Not so when the economist makes the reduction to present value. Then, the economist is required to ignore reality and make the calculation based on a simple interest formula.

Though MCL 600.6306 has been effective since 1986, there has been debate over the years regarding whether the "gross present cash value" of future damages should be determined using a simple or compound interest calculation. Over the years case law has reflected a preference for simple interest.[2] In one instance, the Court of Appeals held that a compound interest calculation was required, although that was not in the context of a personal injury matter.[3]

Nation v WDE

The Supreme Court of Michigan has addressed the issue of compound versus simple interest. In *Nation v WDE Electric Co*,[4] the court granted leave to decide whether simple or compound interest should be used to reduce future damages to gross present cash value. The trial court reduced plaintiff's future damages using compound interest, rejecting plaintiff's request that simple interest be used.[5] The Court of Appeals affirmed, relying not on its own statutory construction, but rather on the logic from *Kirchgessner v United States*,[6] which held:

> The statute calls for the future damages to be reduced for each year, using the five percent rate. Were we to adopt a simple interest rate methodology, the later years would be discounted to present cash value at substantially less than five percent. We see no basis for utilizing a simple interest rate in determining 'gross present cash value,' and find no error in the compound method.[7]

The federal court was particularly persuaded that the legislature took into account the difficulty in reducing future damages to present value using a compound rate when in the 1986 legislation it took that responsibility from the jury and vested it in the trial court.

Michigan's Supreme Court in *Nation* reversed and held:

> Under tort reform legislation passed in 1986, § 6306 transferred the obligation to perform the calculation [the reduction to present value] to the trial judge. We decline the invitation to hold that this transfer abrogated the method in place under the common law scheme.…
>
> For nearly eighty years before the enactment of § 6306, Michigan approved the use of simple interest to reduce damages to present value.[8]

It is beyond question that the court must reduce future damages to present value using a five percent calculation, but that does not eliminate questions about the fairness of the court's interpretation of the statute.

According to the standard jury instructions, the overriding concept to be taken into account by a jury in awarding damages is that it must reasonably, fairly and adequately compensate the plaintiff for each of the elements of damage proved.

It is beyond question that the court must reduce future damages to present value using a five percent calculation, but that does not eliminate questions about the fairness of the court's interpretation of the statute. Specifically, (1) is a 5.0% discount rate appropriate and (2) is a non-compounded rate appropriate?

When asked to determine a discount rate, most economists assume that a very safe investment instrument should be used. U.S. Government Treasury Securities fulfill this requirement. The average market yield over the last ten years was 4.7% for five-year securities, 5.0% for ten-year securities and 5.6% for twenty-year securities. The annual yields in 2006 were 4.75% for five-year securities, 4.8% for ten-year securities and 5.0% for twenty-year securities. Furthermore, the National Association of Forensic Economists surveyed its members in 2006 concerning the values of key economic variables and found the average discount rate (compounded) was 5.08% and the median rate was 5.0%.[9] Therefore, the specified use of a 5.0% discount rate in Michigan seems reasonable at least under the present circumstances.

Simple vs compound

However, requiring simple rather than compound interest is **not** appropriate, and can result in **substantial** overpayments, as will be illustrated.

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MICHIGAN'S DISCOUNT RATE: 5.0% NON-COMPOUNDED AND UNFAIR?

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According to the standard jury instructions, the overriding concept to be taken into account by a jury in awarding damages is that it must reasonably, fairly and adequately compensate the plaintiff for each of the elements of damage proved.[10] If, for example, an individual is injured and unable to earn wages in the future, the appropriate remedy is an award which when invested would provide an amount equivalent to the wages plaintiff would have earned but for the injury. An economist would make a calculation taking into account an appropriate growth rate for wages into the future and an interest rate for investment of the balance of the settlement so that when the plaintiff reached retirement age all of the award including interest earned would have been used fairly and adequately to compensate the plaintiff for the lost earning capacity.

For example, assume the plaintiff was injured at age 17, and unable to earn wages of $25,000 annually at age 18. Assume wages would increase an average of 3.5%[11] per year and that the plaintiff would work to age 67. To reduce the future wages to present value the Michigan discount rate of 5.0% non-compounded is assumed.

Table 1 shows initial wages of $25,000 for 2008 with an increase of 3.5% to $25,875 for 2009, which is then divided by the 5.0% non-compounded discount factor of 1.05 for a present value of $24,643. This process is repeated each year. The result is a Cumulative Present Value of $1,401,743.

It is further assumed the plaintiff upon receipt of the damage award of $1,401,743 would invest that amount (after withdrawing $25,000 for the first year) in an investment instrument earning 5.0% per year. Table 2 shows the year by year changes as interest is earned and funds are withdrawn. Note that the Amount Withdrawn column in Table 2 is identical to the Wages column in Table 1. Also note that the Amount Available at age 67 is not zero, but $5,504,780. The Beginning Balance (the damages awarded) of $1,401,743 has grown to $5,504,780 over a period of fifty years while simultaneously paying all the wages that would have been earned if there was no injury. Is that a windfall for this plaintiff? Does the amount awarded reasonably, fairly and adequately compensate this plaintiff for his loss of earning capacity? It does, and then some. Why is that? Obviously, the Beginning Balance ($1,401,743) does not have to be that large to adequately compensate this plaintiff for all the wages he would have earned over the fifty-year period. Why is that? How does that happen?

Table 3 shows the calculation of Cumulative Present Value (the same as in Table 1) with only one change - the 5.0% discount rate is **compounded**. The Cumulative Present Value after 50 years is $897,704, not $1,401,743.00.

Table 4 is similar to Table 2 except the Beginning Balance is $897,704 rather than $1,401,743. Again, the Wage column in Table 3 is the same as the Amount Withdrawn column on Table 4. The Ending Balance at age 67 is $3.00 (Due to the rounding in the computer program the Ending Balance is not exactly zero). Since the Amount Withdrawn in 2008 of $25,000 is less than the interest received $44,885, the Beginning Balance in Year 2009 increases and this increase continues until 2036 when the Ending Balance begins to decrease. It decreases until 2057 when the Amount Withdrawn is equal to the Ending Balance of the preceding year. Therefore, the settlement amount of $897,704 when invested at a 5.0% rate **compounded** provides exactly the wages this plaintiff would have earned. It makes the individual whole, at least as it concerns this economic loss, and fairly, adequately and reasonably compensates him for his loss.

Therefore, the 5.0% **non-compounded** discount rate, results in a damages award that is $504,039 ($1,401,743–$897,704) greater than needed to replace the wages plaintiff would have earned but for the injury. Plaintiff receives an award that is 56.1% more than needed to make him whole. Since the $504,039 is an overpayment, plaintiff could invest that amount at an annual compound rate of 5.0% and after fifty years have $5,504,780 or 613.2% more than the amount needed. Obviously, there is a substantial inequity in this illustration resulting from the use of a 5.0% non-compounded discount rate.

Not all cases will cover fifty years. The overpayment will be less over shorter time periods. To illustrate, consider a man who is 48 years old and cannot work the next twenty years to his retirement. The average earnings for all men (all races and all education levels) was $66,508 in 2006 reported by the U.S. Census Current Population Survey in 2007. Using a growth rate of 3.5% per year, the Cumulative Present Value of Wages at age 67 is $1,366,453 with a 5.0% non-compounded discount rate and $1,247,134 with a 5.0% compounded discount rate. The overpayment is $119,319. However, if invested in government treasuries at a 5.0% yield he will have $301,513 in twenty years. This represents a total overpayment of 24.2% ($301,513/$1,247,134). Making the same calculations for men of all races with a high school education produces an initial overpayment of $89,078 that when invested results in a total overpayment of $225,096 or 24.2%. These overpayments are significant and would not exist if a compound discount rate was used.

The illustrations are not applicable solely to wages lost or earning capacity impaired. Economists increasingly are asked to determine the Cumulative Present Value of Life-Care Plans, which for young children can go on

TABLE 1 **ECONOMIC DAMAGES: JOHN SMITH**

Discount Year	Present Age	Cumulative Wages	Factor	Value	Present Value
2008	18	25000	1.0000	25000	25000
2009	19	25875	1.0500	24643	49643
2010	20	26781	1.1000	24346	73989
2011	21	27718	1.1500	24103	98091
2012	22	28688	1.2000	23907	121998
2013	23	29692	1.2500	23754	145752
2014	24	30731	1.3000	23640	169391
2015	25	31807	1.3500	23561	192952
2016	26	32920	1.4000	21514	216467
2017	27	34072	1.4500	23498	239965
2018	28	35265	1.5000	23510	263475
2019	29	36499	1.5500	23548	287023
2020	30	37777	1.6000	23610	310633
2021	31	39099	1.6500	23696	334329
2022	32	40467	1.7000	23804	358134
2023	33	41884	1.7500	23934	382067
2024	34	43350	1.8000	24083	406150
2025	35	44867	1.8500	24252	430103
2026	36	46437	1.9000	24441	454844
2027	37	48063	1.9500	24647	479491
2028	38	49745	2.0000	24872	504363
2029	39	51486	2.0500	25115	529478
2030	40	53288	2.1000	25375	554853
2031	41	55153	2.1500	25652	580506
2032	42	57083	2.2000	25947	606453
2033	43	59081	2.2500	26258	632711
2034	44	61149	2.3000	26587	659298
2035	45	63289	2.3500	26932	686229
2036	46	65504	2.4000	27293	713523
2037	47	67797	2.4500	27672	741195
2038	48	70170	2.5000	28068	769263
2039	49	72626	2.5500	28481	797744
2040	50	75168	2.6000	28911	826654
2041	51	77799	2.6500	29358	856012
2042	52	80522	2.7000	29823	885835
2043	53	83340	2.7500	30305	916140
2044	54	86257	2.8000	30806	946946
2045	55	89276	2.8500	31325	978271
2446	56	92400	2.9000	31862	1010133
2047	57	95634	2.9500	32418	1042552
2048	58	98981	3.0000	32994	1075545
2049	59	102446	3.0500	33589	1109134
2050	60	106031	3.1000	34204	1143338
2051	61	109743	3.1500	34839	1178177
2052	62	113584	3.2000	35495	1213672
2053	63	117559	3.2500	36172	1249844
2054	64	121674	3.3000	36871	1286714
2055	65	125932	3.3500	37592	1324306
2056	66	130340	3.4000	38335	1362641
2057	67	134902	3.4500	39102	1401743
Totals:			**3274948**		**1401743**

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TABLE 2 **ECONOMIC DAMAGES: JOHN SMITH**

Year	Age	Beginning Balance	Amount Withdrawn	Amount Available	Interest Received	Ending Balance
2008	18	1401743	25000	1376743	70087	1445580
2009	19	1445580	25875	1419705	72279	1490690
2010	20	1490690	26781	1463910	74535	1537105
2011	21	1537105	27718	1509387	76855	1584857
2012	22	1584857	28668	1556169	79243	1633977
2013	23	1633977	29692	1604285	81699	1684499
2019	24	1684499	30731	1653768	84225	1736456
2013	25	1736456	31807	1704649	86823	1789882
2016	26	1789882	32920	1756961	89494	1844809
2017	27	1844809	34072	1810737	92240	1901274
2018	28	1901274	35265	1866009	95064	1959309
2019	29	1959309	36499	1922810	97965	2018951
2020	30	2018951	37777	1981174	100948	2080233
2021	31	2080233	39099	2041134	104012	2143190
2022	32	2143190	40467	2102723	107160	2207859
2023	33	2207859	41884	2165975	110393	2274274
2024	34	2274274	43350	2230925	113714	2342471
2025	35	2342471	44867	2297604	117124	2412484
2026	36	2412484	46437	2366047	120624	2484349
2027	37	2484349	48063	2436287	124217	2558101
2028	38	2558101	49745	2508356	127905	2633774
2029	39	2633774	51486	2582288	131689	2711403
2030	40	2711403	53288	2658115	135570	2791021
2031	41	2791021	55153	2735868	139551	2872661
2032	42	2872661	57083	2815578	143633	2956357
2033	43	2956357	59081	2897276	147818	3042140
2034	44	3042140	61149	2980991	152107	3130040
2035	45	3130040	63289	3066751	156502	3220089
2036	46	3220089	65504	3154584	161004	3312313
2037	47	3312313	67797	3244516	165616	3406742
2038	48	3406742	70170	3336572	170337	3503401
2039	49	3503401	72626	3430775	175170	3602314
2040	50	3602314	75168	3527146	180116	3703504
2041	51	3703504	77799	3625705	185175	3806990
2042	52	3806990	80522	3726469	190350	3912792
2041	53	3912792	83340	3829453	195640	4020925
2044	54	4020925	86257	3934669	201046	4131402
2045	55	4131402	89276	4042126	206570	4244233
2046	56	4244233	92400	4151832	212212	4359424
2047	57	4359424	95634	4263790	217971	4476979
2048	58	4476979	98981	4377998	223849	4596898
2049	59	4596898	102446	4494452	229845	4719174
2050	60	4719174	106031	4613143	235959	4843800
2001	61	4843800	109743	4734057	242190	4970760
2052	62	4970760	113584	4857177	248538	5100036
2053	63	5100036	117559	4982477	255002	5231600
2054	64	5231600	121674	5109927	261580	5365423
24x5	65	5365423	125932	5239491	268271	5501466
2o56	66	5501466	130340	5371126	275073	5639682
2057	67	5639682	134902	5504780	0	0

TABLE 3 **ECONOMIC DAMAGES: JOHN SMITH**

Year	Age	Wages	Discount Factor	Present Value	Cumulative Present Value
2008	18	25000	1.0000	25000	25000
2009	19	25875	1.0500	24643	49643
2010	20	26781	1.1025	24291	73934
2011	21	27718	1.1576	23944	97877
2012	22	28688	1.2155	23602	121479
2013	23	29692	1.2763	23265	144744
2014	24	30731	1.3401	22932	167676
2015	25	31807	1.4071	22605	190281
2016	26	32920	1.4775	22282	212562
2017	27	34072	1.5513	21963	234526
2018	28	35265	1.6289	21650	256175
2019	29	36499	1.7103	21340	277516
2020	30	37777	1.7959	21035	298551
2021	31	39099	1.8856	20735	319286
2022	32	40467	1.9799	20439	339725
2023	33	41884	2.0789	20147	359872
2024	34	43350	2.1829	19859	379731
2025	35	44867	2.2920	19575	399306
2026	36	46437	2.4066	19296	418602
2027	37	48063	2.5270	19020	437622
2028	38	49745	2.6533	18748	456370
2029	39	51486	2.7860	18480	474850
2030	40	53288	2.9253	18216	493067
2031	41	55153	3.0715	17956	511023
2032	42	57083	3.2251	17700	528723
2033	43	59081	3.3864	17447	546169
2034	44	61149	3.5557	17198	563367
2035	45	63289	3.7335	16952	580319
2036	46	65504	3.9201	16710	597029
2037	47	67797	4.1161	16471	613500
2038	48	70170	4.3219	16236	629735
2039	49	72626	4.5380	16004	645739
2040	50	75168	4.7649	15775	661514
2041	51	77799	5.0032	15550	677064
2042	52	80522	5.2533	15328	692392
2043	53	83340	5.5160	15109	707500
2044	54	86257	5.7918	14893	722393
2045	55	89276	6.0814	14680	737073
2046	56	92400	6.3855	14470	751544
2047	57	95634	6.7048	14264	765807
2048	58	98981	7.0400	14060	779867
2049	59	102446	7.3920	13859	793726
2050	60	106031	7.7616	13661	807387
2051	61	109743	8.1497	13466	820853
2052	62	113584	8.5572	13274	834127
2053	63	117559	8.9850	13084	847211
2054	64	121674	9.4343	12897	860108
2055	65	125932	9.9060	12713	972820
2056	66	130340	10.4013	12531	885352
2057	67	134902	10.9213	12352	897704
Totals		**3274948**			**897704**

Continued on page 30

Continued from page 29

TABLE 4

ECONOMIC DAMAGES: JOHN SMITH
WAGES

Year	Age	Beginning Balance	Amount Withdrawn	Amount Available	Interest Received	Ending Balance
2008	18	897704	25000	872704	44885	916339
2009	19	916339	25875	890464	45817	934987
2010	20	934987	26781	908207	46749	953617
2011	21	953617	27718	925899	47681	972194
2012	22	972194	28688	943506	48610	990681
2013	23	990681	29692	960989	49534	1009039
2014	24	1009039	30731	978307	50452	1027223
2015	25	1027223	31807	995416	51361	1045186
2016	26	1045186	32920	1012266	52259	1062880
2017	27	1062880	34072	1028807	53144	1080247
2018	28	1080247	35265	1044982	54012	1097232
2019	29	1097232	36499	1060732	54862	1113769
2020	30	1113769	37777	1075992	55688	1129792
2021	31	1129792	39099	1090693	56490	1145228
2022	32	1145228	40467	1104760	57261	1159998
2023	33	1159998	41884	1118115	58000	1174020
2024	34	1174020	43350	1130671	58701	1187204
2025	35	1187204	44867	1142337	59360	1199454
2026	36	1199454	46437	1153017	59973	1210668
2027	37	1210668	48063	1162605	60533	1220735
2028	38	1220735	49745	1170991	61037	1229540
2029	39	1229540	51486	1178055	61477	1236957
2030	40	1236957	53288	1183669	61848	1242853
2031	41	1242853	55153	1187700	62143	1247085
2032	42	1247085	57083	1190002	62354	1249502
2033	43	1249502	59081	1190421	62475	1249942
2034	44	1249942	61149	1188793	62497	1248233
2035	45	1248233	63289	1184943	62412	1244191
2036	46	1244191	65504	1178686	62210	1237621
2037	47	1237621	67797	1169824	61881	1228315
2038	48	1228315	70170	1158145	61416	1216052
2039	49	1216052	72626	1143426	60803	1200598
2040	50	1200598	75168	1125430	60030	1181702
2041	51	1181702	77799	1103903	59085	1159098
2042	52	1159098	80522	1078577	57955	1132505
2043	53	1132505	83340	1049166	56625	1101624
2044	54	1101624	86257	1015367	55081	1066136
2045	55	1066136	89276	976860	53307	1025703
2046	56	1025703	92400	933303	51285	979968
2047	57	979968	95634	884334	48998	928550
2048	58	928550	98981	829569	46428	871047
2049	59	871047	102446	768601	43552	807031
2050	60	807031	106031	701000	40352	736050
2051	61	736050	109743	626307	36803	657623
2052	62	657623	113584	544039	32881	571241
2053	63	571241	117559	453682	28562	476366
2054	64	476366	121674	354693	23818	372428
2055	65	372428	125932	246495	18621	258820
2056	66	258820	130340	128480	12941	134905
2057	67	134905	134902	3	0	0

for seventy years or more. The total overpayments in those instances will be significantly higher than the sums over paid in a fifty-year time period. Those medical care, home health care or institutional care costs can result in estimates of $100,000 or more per year, and increase at a rate greater than 3.5%. In these situations, the overpayments would be **extremely** high.

It is likely that when plaintiff's and defendant's attorneys attempt to settle a case before trial they are quite aware of the higher Cumulative Present Value that results from the use of a 5% non-compounded discount rate (in the above initial illustration $504,039). They may not realize, however, that this difference can be invested at 5.0% compounded and grow to over $5,500,000 after fifty years. Therefore, the real inequity is not merely 56.1% higher than it ought to be ($897,704 instead of $504,039) but 613.2% higher ($5,504,780 instead of $897,704).

What can we conclude?

1. Using a 5.0% non-compounded discount rate in any calculation projecting future economic losses will result in an initial overpayment to plaintiff. In one illustration the amount is $504,039 ($1,401,743 minus $897,704).
2. If plaintiff invested the $504,039 at 5.0% **compounded** for fifty years the total overpayment would equal $5,504,780 or 613.2% more than is needed to fairly and adequately compensate the plaintiff for this loss.
3. Interest rates in the real world, whether used for calculating investment earnings or discounting to present value, are compounded
4. The Michigan Legislature should act to correct what is technically incorrect, not reflective of real world practices and producing potentially substantial inequities in jury or judge's awards.

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Endnotes

1. MCL 600.6306(1)(c) states that a judgment shall include "all future economic damages, less medical and other health care costs, and less collateral source payments determined to be collectible under section 6303(5) reduced to gross present cash value." MCL 600.6306 (2) defines "gross present cash value" as "the total amount of future damages reduced to present value at a rate of 5% per year for each year in which those damages accrue".
2. *Gage v Ford Motor Co*, 423 Mich 250, 259; 377 NW2d 709 (1985).
3. In *Pontiac School District v Miller, Canfield, Paddock & Stone*, 221 Mich App 602; 563 NW2d 693 (1997), at the trial court level, the jury returned a verdict awarding the plaintiff roughly $4 million in present damages and $21 million in future damages. *Id.* at 611-612. In the Court of Appeals, criticism surrounded plaintiff's calculations of damages using simple rather than compound interest. *Id.* at 633. Though the court acknowledged that a simple interest rate was generally used to reduce future damages to present value, it was not applicable in this case. The court concluded rather that the defendant "successfully rebutted the presumption for using the five percent simple interest rate because it presented undisputed evidence that the present value of plaintiff's future damages was determined by using actual market rates that are compounded". Id. at 636. The future damages at issue "consisted of fixed-debt obligations that were susceptible of a sum certain determination unaffected by inflation."
4. 454 Mich 489; 563 NW2d 233 (1997).
5. *Id.* at 491.
6. 958 F2d 158 (CA 6, 1992).
7. *Id.* at 162
8. *Nation* at 493.
9. "2006 Survey of Forensic Economists: Their Methods, Estimates and Perspectives". *Journal of Forensic Economists*, Vol 19, No. 1.
10. M Civ JI 50.01.
11. This was the average increase in the Employment Cost Index for Wages over the last twenty years according to the Bureau of Labor Statistics. For simplicity sake employee benefits, are not included.

MDTC'S NEW ASSISTANT EDITOR

MDTC Welcomes Its New Assistant Editor

Jenny L. Zavadil, of Bowman and Brooke, LLP has signed on as MDTC's new Assistant Editor. She will assist the current editor in working with authors, editing submissions to the *Michigan Defense Quarterly*, and preparing it for the printer.

Anyone who would like to submit an article or other writing for consideration for use in the Quarterly can submit it either to the current editor, Hal Carroll (hcarroll@VGpcLAW.com) or Jenny at (jenny.zavadil@bowmanandbrooke.com).

Young Lawyers Series

IV. DISPOSITIVE MOTIONS – AVOIDING THE "CYLINDRICAL FILE"

By: Scott S. Holmes
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Executive Summary

This article is the fourth installment in our series providing an introduction to the basics of litigation from a defense perspective. In the first article, we discussed pleading and responding to a cause of action. In the second article, we offered tips and tricks for raising cross claims, third party claims, and pursuing indemnity. In the last article, we addressed seeking discovery and responding to discovery-related issues. This article focuses on preparing the dispositive motion.

My eighth-grade science teacher was very particular about the work we turned in. He demanded that each assignment have the student's name and date at the top of the first page. When an assignment was turned in without conforming to this requirement, he would announce to the class that he had an assignment from someone that he was going to place in the "cylindrical file." The "cylindrical file" was a round, metal container lined with a black bag. It is more commonly referred to as a trash can.

The dispositive motion will likely be the most important filing you make in a case. Although judges are not necessarily known for discarding briefs, common mistakes found in dispositive motions may tempt them to. This article should help young attorneys avoid the cylindrical file located in their local judge's chambers.

The Facts

One of the most important parts of the dispositive motion is the facts you lay out to frame your case. Your facts serve as an essential summary of what your case is about. It is easy to overlook this section when you have been dealing with the case for months. However, you will show up for the motion hearing at a distinct disadvantage if you do not take the time to use your facts to weave a strategic narrative of your position. Yes, facts are facts, but all facts are not equal. Know what your legal arguments will be and make sure that your facts adequately lay the foundation for them.

The dispositive motion will likely be the most important filing you make in a case.

"You only get one chance to make a first impression."

A poorly drafted fact section can cost you crucial consideration and understanding at a time when your position is front and center in the judge's mind, not actively opposed, and he or she has much more time to consider it than will be available at the hearing. The judge can take the necessary time to understand your side. Do not waste this opportunity by including irrelevant or difficult to understand information and avoid commentary and argument.

Worse yet, you do not want to force the judge to refer to your opponent's brief to understand what you have written.

If the judge does not understand your facts as they are contained in your brief, he or she will not be able to fully consider your arguments. This means you will have to fill in the blanks or clarify at the hearing when you should be arguing the merits. Worse yet, you do not want to force the judge to refer to your opponent's brief to understand what you have written. You want to finesse your facts to quickly, efficiently, but thoroughly guide the judge through the background of the case while building the foundation for your legal arguments.

"Details, details, details."

The facts section should be used to give the detailed information that supports the legal arguments you will make later. Because your analysis section should contain only the facts necessary to relate your position to the law, you should only be including information that is essential to the law being applied. However, information that is not essential to form the foundation for the law may still be important to understanding the case. For this reason, you should offer the entire package in the facts section and leave the essentials for the analysis section.

Do not waste time and space noting or arguing the opposing side's

perspective of the facts. If a fact is in dispute, simply note that in the sentence or at the beginning of the paragraph. Do not try to argue it in the brief. The most important thing to keep in mind when drafting the facts section is to strike a balance between space and relevancy.

"History is full of dates, but it's the events that make them important."

One final note: pay attention to your use of dates. Dates usually have at least moderate importance in a lawsuit, but do not overuse them. Most judges will tell you that when they see a date in a factual summary they instinctively assume that it has some importance or relevance to the issues at hand. As a result, they take note of it while reading to see how it will apply. If you litter your facts with every date the plaintiff or defendant thought about their controversy, the judge will become desensitized to the dates that may ultimately determine the outcome of one or more of your arguments. For every date you include, ask yourself, "how much does including this date help support my arguments or explain important factual information?" If it does not significantly help or explain anything, delete it.

The Standard of Review

Do not overlook the standard of review section. It seems useless to spend more than the time it takes to cut and paste your boilerplate language, but making a mistake here is inexcusable. Yes, judges know the appropriate law and will not even read the section, but you better believe their law clerk will notice if you are wrong. You do not want to be the attorney who has to explain at the beginning of the hearing that you simply cut and pasted the wrong standard and agree with the court that a (C)(8) motion cannot be based on deposition testimony. Even worse, you do not want to be the associate who has to answer to the senior attorney who suffered this embarrassment in court.

Most judges will tell you that when they see a date in a factual summary they instinctively assume that it has some importance or relevance to the issues at hand.

The Legal Argument

"Law and Order"

First things first. Organize the argument section as if the success of your motion depended on it, because it most likely will. Most attorneys contend that you should start with the arguments you believe are most likely to succeed. The idea is one of diminishing returns – that a judge's attention and concentration is strongest in the early sections of your brief as opposed to the later sections. Let's face it, no matter how artful or eloquent your legal writing is, your Brief in Support of Motion for Summary Disposition in your patent infringement case will never bump the next Da Vinci Code from the New York Times Best Sellers List or find its way into Oprah's Book Club (although embellishing your facts may still land you a publishing deal). As a result, stacking your best arguments up front may offer you the best chance for success on the issues most important to you. Do not leave your best arguments for a final, climactic chapter. If you do, you may find at the hearing that the judge opted to wait for the movie.

[S]tacking your best arguments up front may offer you the best chance for success on the issues most important to you. Do not leave your best arguments for a final, climactic chapter.

"Briefs should be written on a case-by-case basis."

There are three ways to address cases in a dispositive motion: 1) a full explanation of the facts, arguments, and holding(s); 2) a brief explanation of the facts and holding; and 3) a one sentence parenthetical summation of the case in a citation. Know when to use each. You never want to force a judge to read two pages devoted to a case that is only marginally helpful or applicable to your situation, or establishes a simple legal principle. Furthermore, you never want a judge to have to request and independently research a case you chose to give inadequate attention to in your brief. The worst possible situation is to neglect to give the proper attention to a case that may hold the key to your success on the issue.

For example, consider a recently drafted memo that addressed the process of corporate dissolution and its effects on pending and future claims. One of the cases established critical notice guidelines for corporations filing for dissolution. Although this information is extremely important in notice disputes, the simplicity of the holding would rarely justify a detailed explanation of the case in a dispositive motion. A simple, one sentence summary of the holding is enough to establish the principle, and judges will appreciate not having to read multiple paragraphs leading to such a basic, uncontested conclusion. For example,

> *See Freeman v Hi Temp Products, Inc.*, 229 Mich App 92; 580 NW2d 918 (1998) (holding that certification of dissolution of corporation becomes effec-

Continued on page 34

Continued from page 33

> tive when it is endorsed by administrator, not filed, for purposes of establishing when publication of notice of dissolution may be effectuated).

It seems simple, but any current or former law clerk will tell you that many attorneys do not practice this. Again, pay attention to your judge's attention span and front load the most important cases for each argument.

"You only call when you want something. So what is it?"

Of crucial importance to the argument section is to follow basic legal writing principles by directly explaining the application of the law you cited to the specific facts of your case. If you do not, then the judge will, and he or she may do it in a way you did not anticipate or, worse yet, may not do it at all. Too often people lay out the law and argument but leave it up to the reader to reach what they see as the "logical conclusion." Do not make the judge do that much work. Plainly lay it all out so the reader does not have to work to know exactly what you want and why you think the law supports that result.

The Conclusion

Your conclusion should be short and specific. One or two sentences is enough and is very common among attorneys. The most important thing you can do in your conclusion is to clearly and concisely lay out for the judge what you are seeking with each of your arguments. The conclusion should give a recap of the applicable law and facts. For example,

> Bad:
>
> "Because plaintiff has failed to satisfy the elements of her cause of action, this Court should dismiss her claim."
>
> Good:
>
> "Plaintiff has failed to establish that defendant's design was the proximate cause of her injury. As a result, this Court should dismiss her claim of negligence."

Too often people lay out the law and argument but leave it up to the reader to reach what they see as the "logical conclusion." Do not make the judge do that much work.

Conclusions such as this read well and contain all the necessary information to quickly and effectively recap your position for the judge.

Citations

This article would not be complete without a discussion of citations — a part of legal writing that many attorneys loathe. Believe it or not, there is a proper form and use of citations and few attorneys correctly follow it. The Bluebook is one reference for citations, but Michigan's Supreme Court has also adopted a Michigan Uniform System of Citation, which is contained in the court rules volume. Although proper citation use is always advised and always impressive, at the very least you should strive to be consistent in the way you cite materials.

When citing to specific parts of cases, especially quotations, always give a pinpoint (page) cite. This allows the reader to immediately find the proposition or language being cited without having to weed through what sometimes amounts to dozens of unrelated pages. The judge's law clerk will thank you and anything you can do to help the law clerk will in turn help the judge.

When string-citing multiple cases in support of a proposition you have made, try to include parenthetical summaries of each case.

Finally, when string-citing multiple cases in support of a proposition you have made, try to include parenthetical summaries of each case. Judges will generally accept that the cases cited support your proposition, but they are able to understand the range and type of support when parenthetical summaries are included – without having to look up the case.

Final Checks

Proofread your **entire** motion and brief! It is shocking how many spelling errors, grammatical errors, missing words, run-on sentences, and difficult to understand sentences are regularly found in all types of court filings, including dispositive motions. There is no substitute for actually *reading* your work once it is completed. Spell check will not change *statue* to *statute* or recognize when a sentence is confusing. Your staff will catch most of the problems, but the drafter should also give a final read-through. Remember, if you do not understand something you wrote, it is unlikely the judge will.

Exhibits should be cited to in a consistent manner in your brief. Because exhibits are frequently added to and removed from use in a brief, it is important to make a final check before filing to make sure that your citations correspond to the correct exhibit. Finally, clearly mark your exhibits using pre-printed and easily readable exhibit tabs or markers.

Good luck at the hearing!

The author would like to acknowledge and thank Calli B. Duncan, Bill E. Osantowski, and Jana M. Berger for their contributions and assistance in writing this article.

Recent Case Note:
Brown et al. v Cassens Transport Co, et al., 546 F3d 347 (6th Cir, October 23, 2008)

RICO CLAIMS — SUING THE OPPOSITION'S EXPERTS

By: Hal O. Carroll
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The Sixth Circuit has held that a plaintiff can maintain a RICO claim against a witness who provides defense evaluations in worker compensation cases.

The facts

Plaintiffs are present or former employees of Defendant Cassens who have submitted worker compensation claims. Plaintiffs allege that one of the defendants, Dr. Margules, is a "cut-off" doctor who conspired with Cassens and Defendant Crawford, a claims adjuster and engaged in a pattern of racketeering activity.

The decision

In earlier RICO cases, one of the impediments was a requirement that the defrauded person have relied on the allegedly fraudulent statements. In *Cassens*, the Sixth Circuit initially applied that rule, following its own precedents, but the Supreme Court vacated that judgment and remanded for reconsideration in light of the decision in *Bridge v Phoenix Bond & Indemnity Co,* ___ US ___; 128 SCt 2131 (2008), in which the Supreme Court held unanimously that detrimental reliance was not required.

On remand, the Sixth Circuit reversed the district court's dismissal of the RICO claims "because the WDCA [Worker Disability Compensation Act] does not preempt [plaintiffs'] RICO claims and because plaintiffs have sufficiently pleaded a pattern of racketeering activity given that reliance is not an element of a civil RICO fraud claim."

The Sixth Circuit also held that the conduct did not amount to the intentional infliction of emotional distress, and affirmed the dismissal of that claim..

Implications of the decision

The factual allegation that underlies the RICO claim is that the defendant doctor is a "cut-off" doctor who consistently issues defense-favorable opinions. Since it is common for litigants — plaintiffs as well as defendants — to make consistent use of favorable witnesses, the implications are broad.

Note also that there is nothing in the rule that limits its application to worker compensation cases in particular or even to personal injury cases in general.

All experts who consistently testify for one side of the other will now be subject to being the target of personal litigation. Any expert in any field of activity can now be subjected to a claim that he or she, by issuing opinions that consistently favor one side or the other, is engaging in a "pattern" of "racketeering activity."

An unanswered question is what level of orientation to one side or the other (80-20?, 70-30?) will be sufficient to put the witness into vulnerable territory.

Practice tips

Defense counsel should familiarize themselves with the elements of a RICO claim, both as a defensive matter to protect defense witnesses and as an offensive mater to be prepared to attack (or counterattack) plaintiff witnesses.

Counsel should be aware, before hiring the expert, of the details of the expert's activities, both in other areas of practice as opposed to testifying, and within the expert's activities as a witness.

Finally, if the expert uses a written contract and the contract has an indemnity clause, the law firm that hires the expert may have its own exposure.

Recent Case Note:
Holman v Rasak, ___ Mich App ___ (November 19, 2008)

DEFENDANTS MAY CONDUCT EX PARTE INTERVIEWS OF TREATING PHYSICIANS

By: Richard J. Joppich
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The Michigan Court of Appeals details the entitlement and methods of obtaining defense ex-parte physician interviews under the HIPAA regulations in a published decision.

The Decision

In *Holman v Rasak,* ____ Mich App___, decided November 18, 2008 (docket no. 279879), the Michigan Court of Appeals held that the circuit court had erred in concluding that oral interviews could not be the subject of qualified protective orders under HIPAA, and that the defense was entitled to conduct ex parte interviews with the plaintiff's physicians if a qualified protective order, consistent with 45 CFR 164.512(1)(e), is put in place. Plaintiff's arguments that the defense should only be entitled to records under HIPAA, or if allowed to obtain verbal information, the information should be limited to depositions, were both rejected by the court of appeals through an analysis of the methods of obtaining protected health information contained within HIPAA and under the historic reasoning from *Domako v Rowe,* 438 Mich 347, 360-361 (1991) which recognized the pre-HIPAA waiver of the physician patient privilege in personal injury and medical malpractice cases.

The Effect of the Decision

This decision should quell the growing number of plaintiff objections to defendants meeting ex-parte with physicians. However, it does not avoid the need for compliance with the specific methods to permissibly obtain such information in litigation. HIPAA compliant authorizations for release of protected health information in both written and verbal or oral form must still be obtained from the plaintiff. If such authorization is not permitted voluntarily, the defense must obtain a qualified protective order under HIPAA which includes entitlement to ex parte meetings.

This decision should quell the growing number of plaintiff objections to defendants meeting ex-parte with physicians. However, it does not avoid the need for compliance with the specific methods to permissibly obtain such information in litigation.

Plaintiffs no longer can viably claim that HIPAA is limited to written information or that it precludes release of verbal information.

Practice Tip

Defense counsel should preliminarily request plaintiff execution of a HIPAA compliant authorization which includes the release of written and verbal protected health information. If plaintiff refuses or fails to authorize the release of verbal information voluntarily, or limits the authorization to just written records, move for a qualified protective order requesting alternative relief of striking the injury claims as plaintiff's refusal of consent is in essence an assertion of the physician patient privilege and thus waives the right to present medical evidence at the time of trial.

Possible Implications

At the time of this summary it is not yet known if the case will be appealed to the supreme court, but if not, plaintiffs' efforts to avoid defense ex-parte meetings by assertion of HIPAA is essentially eliminated. This does not eliminate, however, the physician's potential refusal of such meetings despite authorization or qualified protective order. We may also see more plaintiffs demanding defense disclosure of the scheduling of meetings with treating physicians and then scheduling meetings immediately before or after defense meetings.

Opinion

Editor's note: The Quarterly welcomes expressions of opinion on any matter of interest to the members and the profession. All opinions are those of the author. The following was first printed in the Detroit Free Press prior to the November election and is reprinted here with permission.

THE PARTISAN NOMINATION PROCESS FOR MICHIGAN SUPREME COURT JUSTICES

Time for a Change

Political parties serve the people by selecting *partisan* candidates for political office. However, Michigan's system of nominating candidates for the *nonpartisan* position of Supreme Court Justice is in desperate need of review. The former Chief Judge of the Michigan Court of Appeals, Judge William Whitbeck, was quoted in an article in the Lansing *State Journal* published August 11, 2007

> . "[Judge Whitbeck] worries the public will increasingly see the Michigan Supreme Court as being driven by politics, not law, because the court has issued so many 4-3 decisions. 'The problem I see with it is the general public . . . (and media) say, "They're voting in blocks. They're voting along party lines. The next step for the general public is . . . 'It's all politics. It doesn't have anything to do with the law.' And when we get to that point, then we're in trouble. . . . It seems to me that you can look at voting patterns and say folks are voting by block . . . that tends to follow partisan lines.'" [1]

A dialogue by the public and the Michigan Legislature about changing our system of "non partisan" selection of Supreme Court candidates is critical before our court loses all credibility with the public.

Much has been written about the four Supreme Court Justices appointed by Governor Engler, a Republican. Little has been written about the Supreme Court led by Chief Justice G. Mennen Williams, a former Governor, with a Democratic majority. This is unfortunate because the latter was a time of Democratic dominance of the court where different majorities, also along party lines, were recorded.

It is important to note that it is NOT my intent to join the attack on any justice personally, nor on their motives but rather to focus on the problem as perceived by many, voting on political lines. Instead we should focus on the possible solutions.

Where candidates for the Supreme Court are nominated at a political party convention and supported financially by these same political parties, we should not be at all surprised if they vote as a group

I submit that where candidates for the Supreme Court are nominated at a political party convention and supported financially by these same political parties, we should not be at all surprised if they vote as a group, for whatever reason. We are naïve to think otherwise.

Why does Michigan do it this way? The Michigan Constitution simply provides that "nomination for justices of the supreme court shall be in the manner prescribed by law."[2] The statute passed by the legislature reads "… [e]ach political party may nominate the number of candidates for the office of justice of the supreme court as are to be elected at the next ensuing general election." We can assume this is a power that the legislators of both parties voted for themselves and will fight to keep.

Possible solutions

One possible solution is the so-called "Missouri Plan." A seven-member commission is comprised of three lawyers, one from each appellate district, elected by the Bar. Three other members are citizens, one from each judicial district, that are appointed by the Governor. The seventh member is the sitting Chief Justice of the Supreme Court. This commission picks three candidates and presents that slate to the Governor who selects one for the Supreme Court. After one year, the Justice stands for election. This justice must retain a majority vote to complete a full term in office.

Another possibility is to follow the same procedure for nominating Supreme Court justices that Michigan follows for all other judicial nominations. Incumbent judges file an affidavit of candidacy and non-incumbents file a petition signed by a certain number of registered voters. Other plans exist in other states such as appointment with retention elections and, surprisingly, life tenure.

Former US Supreme Court Justice Sandra Day O'Connor wrote in the

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THE PARTISAN NOMINATION PROCESS

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November 15, 2007 Wall Street Journal,

> "… judicial elections, which occur in some form in 39 states, are receiving growing attention from those who seek to influence them. In fact, motivated interest groups are pouring money into judicial elections in record amounts. Whether or not they succeed in their attempts to sway the voters, these efforts threaten the integrity of judicial selection and compromise public perception of judicial decisions."

It is time for all of us to discuss options for changing a system that many believe is less than optimal, if not broken.

Peter L. Dunlap
Immediate Past President
Michigan Defense Trial Counsel
The Statewide Association of Attorneys
Representing the Defense in Civil Litigation

Endnotes

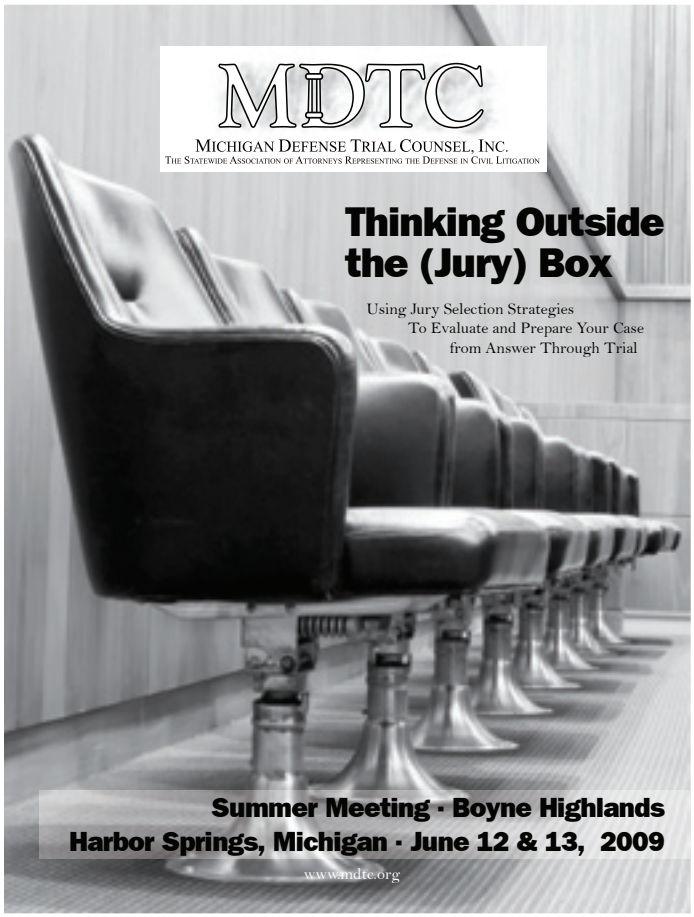
1. Lansing State Journal, August 11, 2007
2. Constitution of Michigan of 1963, Article VI, Section 2.

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 the editor, Hal Carroll (hcarroll@VGpcLAW.com) or the Assistant Editor, Jenny Zavadil (Jenny.Zavadil@det.bowmanandbrooke.com).*

MDTC board member and Technology Chairperson **Tim Diemer** has been selected for inclusion in the 2008 Michigan Super Lawyers Magazine as a "Rising Star." Tim specializes in appellate practice with the law firm of John P. Jacobs, P.C.

John T. Eads, III, of Kopka, Pinkus, Dolin & Eads, has been inducted into the American Board of Trial Attorneys and is the youngest member of ABOTA



SUPREME COURT UPDATE

By: Joshua Richardson
Foster, Swift, Collins & Smith

Surprisingly, the Michigan Supreme Court issued no civil opinions between September 1, 2008 and December 1, 2008. During that time, however, the Supreme Court, in lieu of granting leave to appeal, overturned numerous Court of Appeals decisions by way of court order. Below is a sampling of those orders, as well as a review of Michigan Supreme Court opinions issued earlier in the year.

SUPREME COURT ORDERS:

Arbitration Award Vacated Based on Party's Ex Parte Communication with Arbitrator after Case Was Submitted

On October 1, 2008, in lieu of granting leave to appeal, the Michigan Supreme Court reversed the Court of Appeals' decision in *Gates v USA Jet Airlines, Inc*, unpublished opinion per curiam of the Court of Appeals, decided February 5, 2008 (Docket No. 272860), for the reasons stated in the Court of Appeals dissenting opinion. Through the Court of Appeals dissenting opinion, the court vacated an arbitration award based on a party's ex parte communications with the arbitrator after the case had been submitted in violation of the applicable express arbitration rules.

Decision Vacated as to Civil Rights Issues Not Directly Before the Court

On September 24, 2008, in lieu of granting leave to appeal, the Michigan Supreme Court vacated in part the Court of Appeals' holding in *Safiedine v City of Ferndale*, 278 Mich App 476; 753 NW2d 260 (2008) that "substantive antidiscrimination provisions that grant rights and protections apply only to natural, not juridical, persons." The Supreme Court noted that the Court of Appeals correctly held that "the corporate plaintiffs, as juridical persons, could not state a claim for a violation of [MCL 37.2302] because that section only protects 'an individual.'" However, the question of whether other provisions of the civil rights act permit claims by juridical persons was not properly before the Court of Appeals.

Court of Appeals Erred by Approving Workers' Compensation Appellate Commission's Erroneous Modification of Benefits Award

On September 17, 2008, in lieu of granting leave to appeal, the Michigan Supreme Court reversed the Court of Appeals' decision in *Stone v RW Lapine, Inc*, unpublished opinion per curiam of the Court of Appeals, decided April 3, 2008 (Docket No. 275684). The Supreme Court held that the Court of Appeals erred by approving the Workers' Compensation Appellate Commission's (WCAC) basis for modifying the magistrate's benefit award. Specifically, the Supreme Court found that the "WCAC exceeded its authority by substituting its own favorable view of the testimony of the plaintiff's medical expert for the unfavorable assessment provided by the magistrate without providing a weighing of the proofs and an analysis as to why that expert's credibility should be evaluated in a contrary manner." The WCAC also incorrectly shifted the burden of proving a work-related injury from the plaintiff to the defendants, by "presuming the plaintiff's entitlement to benefits upon the mere rejection of some of the magistrate's numerous reasons for ruling in a contrary manner."

Finally, the Supreme Court noted that Court of Appeals erred by upholding the WCAC's ruling that "the average weekly wage must be calculated pursuant to MCL 418.371(3) in every instance where it can be determined using that subsection." Instead, a plaintiff's average weekly wage may be calculated under other subsections, including MCL 418.371(6), where those subsections provide a more accurate measure of wages.

SUPREME COURT OPINIONS:

Employee's Refusal to Attend Mandatory Work Events Constitutes Intentional and Willful Misconduct

On July 30, 2008, in *Brackett v Focus Hope, Inc*, 482 Mich 269; 753 NW2d 207 (2008), the Michigan Supreme Court held that an employee's refusal to attend an employer-mandated event constituted willful misconduct and barred recovery of workers' compensation benefits.

Facts: Plaintiff, Patricia Brackett, was hired by Defendant, Focus Hope, in January of 2001. At that time, Focus Hope's chief executive officer informed plaintiff that the Martin Luther King, Jr., birthday celebration was the company's most important

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event of the year, and that all employees were expected to attend. Though usually held in Detroit, the event was moved to Dearborn in 2002. Plaintiff advised her supervisor that she would not attend the event because she had bad experiences in Dearborn and believed the racial history of the city made it an inappropriate site for the event. After missing the event, Focus Hope's chief executive officer met with plaintiff and informed her that she would be docked two days' pay and would lose certain job responsibilities. Plaintiff and the chief executive officer then exchanged memos regarding plaintiff's decision not to attend the event. As a result of this exchange, plaintiff left work claiming she suffered a mental disability. Plaintiff then sought workers' compensation benefits based on this alleged disability. The magistrate found in favor of plaintiff, holding that plaintiff's mental disability arose from actual employment events that were reasonably perceived by plaintiff. The magistrate's decision was affirmed by both the Workers' Compensation Appellate Commission and the Court of Appeals.

Holding: The Supreme Court, however, reversed and held that plaintiff's intentional refusal to attend her employer's most important event constituted willful misconduct. Under MCL 418.305, "[i]f the employee is injured by reason of his intentional willful misconduct, he shall not receive compensation under the provisions of the act." Thus, because plaintiff was disciplined as a result of her willful misconduct in refusing to attend the mandatory event, she was not entitled to workers' compensation benefits.

Significance: Workers' compensation benefits may not be obtained when an employee's claimed disability results from that employee's willful refusal to attend employer-mandated events.

Sudden Emergency Doctrine May Not Apply Where A Driver's Black-Out Is Caused by a Known Illness

On July 23, 2008, in *White v Taylor Distributing Co, Inc*, 482 Mich 136; 753 NW2d 591 (2008), the Michigan Supreme Court held that summary disposition was improper based on the sudden emergency doctrine because factual questions existed as to whether a driver's black-out from a known stomach illness was "totally unexpected."

Facts: Plaintiffs, Sherita and Derrick White, filed suit after being struck by a tractor trailer while stopped at a red light. Plaintiffs argued that the truck driver was presumed negligent under MCL 257.402(a) because he struck their vehicle from behind. Defendants, truck driver and distributing and leasing companies, moved for summary disposition based on the sudden emergency doctrine, claiming that the truck driver suffered from a stomach illness and blacked out just prior to hitting plaintiffs' vehicle. The trial court granted the defendants' motion, and plaintiffs appealed. The Court of Appeals reversed the trial court's decision.

Holding: The Supreme Court affirmed the Court of Appeals' reversal, holding that questions of fact precluded summary disposition based on the sudden emergency doctrine. The court noted that "a sudden emergency sufficient to remove the statutory presumption [under MCL 257.402(a)] must be 'totally unexpected.'" Additionally, to invoke the sudden emergency doctrine, "the emergency must not be of the defendant's own making." Because the truck driver testified that he began feeling ill and suffered severe diarrhea approximately one hour before the accident, his black-out may not have been totally unexpected. The court held that this issue was for the jury to decide and, therefore, summary disposition was improper.

Significance: This holding demonstrates that summary disposition based on the sudden emergency doctrine may be difficult to obtain where the emergency, though perhaps unexpected, is not entirely unforeseeable.

Passage of Time Irrelevant in Determining Whether FOIA Requests Were Properly Denied

On July 16, 2008, in *State News v Michigan State University*, 481 Mich 692; 753 NW2d 20 (2008), the Michigan Supreme Court held that the passage of time and course of events after a public entity denies a FOIA request are irrelevant to determining whether such denial was proper at the time it was made.

Facts: On March 2, 2006, State News submitted a Freedom of Information Act (FOIA) request to Michigan State University (MSU) seeking a police report for an assault occurring on MSU's campus. At the time of the request, the criminal investigation surrounding the assault was ongoing. Relying on the privacy and law-enforcement-purposes exemptions, MSU ultimately denied the FOIA request. State News then filed suit against MSU. During a show cause hearing, MSU presented evidence regarding the private nature of some of the information within the police report. The trial agreed that such information was private and might interfere with law-enforcement proceedings. As a result, and without reviewing the requested information in camera, the trial court dismissed State News' complaint with prejudice. On appeal, the Court of Appeals reversed and remanded back to the trial court. Among other reasons, the Court of Appeals held that the trial court erred in finding that the privacy exemption applied because the passage of time and the course of events might have rendered some, if not all, of the requested information a matter of public knowledge.

Holding: The Supreme Court reversed the Court of Appeals' decision in part, holding that on remand the trial court must determine whether the police report was exempt at the time of MSU denied the request. The court noted that, when considering a FOIA exemption, the determinative legal question is whether the exemption was proper at the time it was asserted. Subsequent developments are, therefore, "irrelevant." Moreover, the passage of time does not change the inquiry because "FOIA does not prevent a party that unsuccessfully requested a public record from submitting another FOIA request for that public record if it believes that, because of changed circumstances, the record can no longer be withheld from disclosure." Despite reversing the Court of Appeals' decision in part, the Supreme Court ultimately remanded the case back to the trial court because it was unclear whether some of the requested information had been in the public domain at the time MSU denied the FOIA request.

Significance: This holding clarifies that a public body's denial of a FOIA request will be upheld, regardless of subsequent events, so long as it was valid at the time it was made. The public body is under no obligation to amend its denial simply because the requested information later becomes a matter of public knowledge.

MICHIGAN COURT RULES

ADOPTED AND PROPOSED AMENDMENTS

By: M. Sean Fosmire
Garan Lucow Miller, P.C.
Marquette, Michigan

Further information on these and other proposals and orders may be found at the Supreme Court web site http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm and at the Michigan Lawyers Weekly subscribers-only web site http://www.milawyersweekly.com/subscriber/mi/mitreas.cfm

ADOPTED

Number	Rule	Subject	Description
2007-09	2.306	Depositions	Limits on objections that can be raised and on conferring with the witness while the deposition is pending.

PROPOSED

Date	Rule	Number	Subject	Description
9-16-08	2.614	2008-04	Judgments	Would allow the trial court to extend the 21-day period within which motions for rehearing, reconsideration, or other relief from judgment may be filed, for good cause shown. This will conform with other rule amendments previously adopted. *comments open until 1-1-09*

MDTC LEGISLATIVE REPORT

By: Graham K. Crabtree
Fraser, Trebilcock, Davis & Dunlap
Prepared December 1, 2008

Lame Duck Season

In every even-numbered year between the November general election and Christmas, there is a magical season called lame-duck. It is a time when the unexpected can happen in Lansing as departing legislators enjoy greater freedom to act without fear of political repercussions, and those who are staying on are sometimes willing to gamble that the voters will not remember what was done in the waning days of the last legislative session when the next general election rolls around.

These circumstances sometimes allow significant changes to materialize when the political stars and planets align themselves in just the right way. I am reminded, for example, of the lame-duck session of 2002, when a large departing class of term-limited legislators made it possible to repeal the draconian mandatory minimum sentences for major controlled substance offenses, with departing Governor Engler affixing his signature on Christmas day. In my Senate staffer days, I would have scoffed at the suggestion that such a thing could have been possible because, as everyone knows, legislators on both sides of the aisle live in mortal fear of ever being labeled "soft on crime." But this quietly-arranged triumph of justice and common sense helped me to understand that nearly anything is possible in lame-duck, and as an added bonus, my political memory is now blessed with that refreshingly strange image of John Engler as Santa Claus.

So as usual, the overwhelming question for the end of this even-numbered year is: What's on tap for the lame-duck session this time?

[P]olitical memory is now blessed with that refreshingly strange image of John Engler as Santa Claus.

Probably nothing as monumental as the example previously discussed; the political firmament is not aligned for change in the way that it was six years ago. When the 95th Legislature convenes in January, the balance of power in Michigan will be the same. Governor Granholm has two more years in the driver's seat, and although the Democrats will enjoy a more solid majority in the House of Representatives with 67 seats, the Senate was not up for election this year, so the same Republican majority will therefore reign supreme in that body for the next two years. Thus, although the bills not sent to the Governor's desk will die when the 94th Legislature declares its *sine die* adjournment at the end of the year, many of the same issues will be promptly reintroduced in the next session for further consideration by a similarly-inclined cast of characters.

The possibilities have included legislation implementing Blue Cross/Blue Shield's wish list; legislation to establish a new smoking ban in places of employment and public accommodation; legislation to roll back the unpopular surcharge on the new Michigan Business Tax…

As of this writing (December 1st) there has been a lot of talk about the agenda for the lame-duck session, but little action of any great significance. This comes as no surprise because, as always, the lame-duck session has had to yield to the more popular firearm deer season. As usual, it is expected that our legislators will take up where they left off when they return from the north woods in the first week of December. As for the issues to be taken up, the word around town has included speculation about a number of possibilities. The possibilities have included legislation implementing Blue Cross/Blue Shield's wish list; legislation to establish a new smoking ban in places of employment and public accommodation; legislation to roll back the unpopular surcharge on the new Michigan Business Tax; cost-saving measures in the Department of Corrections to pay for the aforementioned tax relief; and various measures to bolster the sagging economy and provide relief from mortgage foreclosures. But most of these issues may well be eclipsed by the now painfully familiar topic of how to further trim the budget. Revenues have fallen seriously short of projections this year, and the Governor has announced that she will soon be issuing an executive order to implement the necessary budget cuts.

I will make no further attempts to forecast the agenda or accomplishments of this year's lame duck session. Experience has taught that an attempt to do so is always speculation

at best, and any predictions made here will have been validated or proven wrong before publication of these comments. So why have I brought up the topic of lame-duck? One reason is that it is simply one of my favorite topics — perhaps the most interesting political phenomenon of any legislative session. Another more practical reason is that the Legislature has done very little of any significant interest to civil litigators since my last report in September, and I had to think of something interesting to talk about here.

It is perhaps more constructive, but equally uncertain, to make predictions about the new 95th Legislature. As noted previously, the balance of power will remain the same despite the significantly stronger Democratic majority in the House, and it is a safe bet that many of the same initiatives will be reintroduced as new Bills early next year. Thus, it is likely that we will see the same or similar tax relief and economic development proposals, the same potpourri of new criminal penalties, and the same or similar efforts to expand and erode the existing tort reform measures, to name a few examples.

Thus, it is likely that we will see the same or similar tax relief and economic development proposals, the same potpourri of new criminal penalties, and the same or similar efforts to expand and erode the existing tort reform measures, to name a few examples.

How these topics will be addressed remains to be seen. In Washington, the Democrats will be firmly in charge; they will have a tremendous opportunity to turn things around, and will bear most of the blame if they fail to do so. In Michigan, each party will retain the power to thwart the other party's legislative objectives. But in this writer's humble opinion, the legislative leaders of both parties would be well advised to lay aside political differences (to the extent that this is possible) and work cooperatively for the good of the state. As I write these words, I can hear dozens of current legislative staffers scoffing at the suggestion that such a thing could be possible. Perhaps they, too, will be pleasantly surprised.

JOIN AN MDTC SECTION

MDTC has revised its practice sections, effective immediately. Below is a list of the section, with the names of their chairpersons. All MDTC members are invited to join one or more sections. If you are interested in joining a section, just contact the section chair.

Appellate & Amicus Curiae:	Hilary A. Dullinger, Co-Chair Mary Massaron Ross, Co-Chair	hdullinger@plunkettcooney.com mmassaron@plunkettcooney.com
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Professional Liability & Health Care:	Richard J. Joppich	richard.joppich@kitch.com
Trial Practice:	David M. Ottenwess	dottenwess@om-law.com
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Practice Tip

REMEMBERING AND IMPEACHMENT

By: Ed Kronk
Butzel Long, P.C.

Impeachment of a witness with prior testimony is a potentially useful trial weapon that is all too frequently poorly wielded. The results can be a mess.

How often is the impeachment attack built on a string of "Do you remember" questions? Why? Who cares if the witness **remembers** coming to your office for a deposition, or if her attorney was there, or, worst of all, if "the following questions were asked and you gave the following answers"? You know the witness was there and what the Q and A was. So tell the witness—don't ask. The problem with all those standard "Do you remember" inquiries is what do you do if the witness says "No, I don't remember that," or "That is definitely NOT what I said." That is precisely the risk you run with asking the witness to validate your impeachment by a series of questions about the witness's memory. You want to skip past the memory and get to the point.

So what to do? Recall and embrace the old maxim for cross exam—unless you have a good tactical reason not to, always, always lead. Thus, set up the impeachment this way:

While brandishing a copy of the transcript so the witness and the jury all know you have it and after having given the witness a copy to look at, you start with, "On March 15, 2001 you were in my office to give testimony…." "Your lawyer was there with you…." "You swore to tell the truth…." (etc. etc., with the set up—all leading)."

Then you get to the punch line. After having set up what the witness said earlier in the trial, you turn to the prior transcript (or written statement). Refer the witness and opposing counsel to a page and line, and then you begin: "Follow along with me while we read the questions you were asked and what you said in response."

You read—not the witness. The problem with letting the witness read is you have relinquished control. You don't know what the witness will do with inflections or emphasis, or whether the witness will blurt out some disclaimer in the middle of reading an answer. Unless the answer is a simple "yes" or "no," never let the witness read.

After you finish reading the Q & A, resist all temptation to use the "R" word, *i.e.* "Do you remember those questions and answers?" Equally dangerous is "Were those the questions asked and were those your answers?" Instead, the clean up question is simply, "Did I read that correctly?" Period. Move on.

This way you retain maximum control of the witness and improve your odds of setting up a clean impeachment.

Practice Tip

KEEPING YOUR CLIENTS INFORMED OF IMPORTANT DATES

Once the Court schedules important dates such as discovery deadlines and dates for the case evaluation, settlement conference and trial, we all send a letter to the client and insurer informing them of the dates. To go one step further, why not include those dates in each subsequent letter to your clients and the insurer by including them in the letter's heading? That way, you never have to worry about whether anyone has forgotten the dates or failed to take necessary steps in advance of the deadlines. Every time a letter arrives or an insurance adjuster looks at her file, the relevant dates are staring back at her. It's a good way to constantly remind you, too!

Example:

Dear Insurance Adjuster:
Re: Paul Plaintiff v Dan Defendant
IME deadline: 09/09/02
Your Claim No: X-12345
Case Evaluation: 12/12/08
Date of Loss: 01/01/07
Settlement Conf: 1/12/09
Discovery deadline: 08/08/02
Trial begins: 5/11/09

AMICUS COMMITTEE REPORT

By: Hilary Dullinger
Mary Massaron Ross
Plunkett Cooney

In the last few months, MDTC has filed several amicus briefs in support of the defense, both at the application and merit stages.

Environmental cleanup costs. On August 25, 2008, **Michael F. Smith**, **Kimberly Horsley Allen**, and **Susan L. Johnson** of **Butzel Long** filed an amicus brief supporting the defendant's application for leave to appeal in *MDEQ v Waterous Company*. The brief maintained that the Court of Appeals erred when it concluded that Michigan's Natural Resources and Environmental Protection Act ("NREPA"), Part 201, MCL 324.20120a, holds a prior owner of property to environmental cleanup responsibilities that go beyond that owner's historical use of the site. Adopting a plain language approach, the brief pointed out that this conclusion was contrary to the text of the statute.

Impairments and "normal lifestyle." On November 3, 2008, MDTC filed an amicus brief with the Michigan Supreme Court in *Benefiel v Auto-Owners Insurance Company*. *Benefiel* is a no-fault underinsured motorist case wherein the Supreme Court granted leave to determine whether review of a plaintiff's "whole life" in order to determine the plaintiff's "normal lifestyle" should include the time period before the onset of pre-existing, non-permanent impairments. Writing for the MDTC, **John Bursch** and **Gaetan Gerville-Reache** of **Warner Norcross & Judd LLP** maintained that the time period prior to the onset of pre-existing temporary impairments may be relevant to determining the plaintiff's "normal life." The amicus brief also maintained that, pursuant to prior judicial decisional authority discussing burdens of proof, the plaintiff - not the defendant — should bear the burden of proving that pre-existing injuries are not permanent. The Supreme Court entertained oral argument in *Benefiel* on November 13, 2008. The decision is currently pending.

Summary disposition. The Michigan Supreme Court has issued opinions in several cases in which the MDTC has authored amicus curiae briefs on behalf of the defense. On July 23, 2008, the Court issued its decision in *White v Taylor Distributing Company*. The issues presented in *White* dealt primarily on the interplay between MCR 2.116(C)(10) and MCR 2.116(G)(4), and whether the former rule permits a trial court to deny summary disposition to the moving party on the ground that judgment is not appropriate under subsection (G)(4), even in the absence of countervailing evidence. **Hal O. Carroll** of **Vandeveer Garzia** authored the amicus brief on behalf of the defense. The Court affirmed the Court of Appeals decision, concluding that genuine issues of material fact existed which precluded summary disposition for the defendant. Specifically, the Court held that the defendant's inconsistent statements regarding the cause of his illness (which allegedly caused the vehicle accident) created a fact question for the jury.

Open and obvious. The Michigan Supreme Court denied the defendant's application for leave to appeal in *Jackson-Ruffin v Metro Cars, Inc*. The MDTC amicus brief, authored by **Beth A. Wittman** of **Kitch Drutchas Wagner Valitutti & Sherbrook**, maintained that the Court of Appeals erred in holding that the open and obvious doctrine did not apply to the plaintiff's alleged slip and fall on icy steps while disembarking from the defendant's passenger shuttle. The brief argued that the instant case was a premises liability case, rather than a third-party ordinary negligence claim to which the open and obvious danger doctrine does not apply. In an order issued October 22, 2008, the Court denied leave, stating that it was not persuaded that the questions presented should be reviewed.

Class actions. On November 5, 2008, the Michigan Supreme Court granted leave to appeal in *Henry v Dow Chemical Company*. The Court has listed among the issues to be briefed "whether the 'rigorous analysis' requirement for class certification that is applied in the federal courts also applies to state class actions." The amicus brief supporting Dow Chemical Company's application for leave to appeal was filed by **Mary Massaron Ross** and **Hilary A. Dullinger** of **Plunkett Cooney**.

In current matters, the MDTC will be submitting amicus briefs in December 2008 supporting the defense position in *Romain v Frankenmuth Mutual Insurance Co*, and *Alfano v Sysco Food Services of Detroit*. **Phillip J. DeRosier** of **Dickinson Wright** will author the brief in *Romain*. **Matthew Nelson** and **John Bursch** of **Warner Norcross and Judd LLP** will author the amicus brief in *Alfano*.

The Appellate and Amicus Section extends a sincere thanks to all who have drafted amicus briefs on behalf of the MDTC in 2008. If you are interested in drafting briefs on behalf of the MDTC and would like to be added to our list of brief authors, please let us know. Happy Holidays!

DRI REPORT

By: Todd W. Millar
Smith Haughey Rice & Roegge

Greetings from DRI. I have the pleasure of serving the next three years as your DRI State Representative. I also have the responsibility of filling rather large shoes. Jose Brown has done an excellent job the last three years as the DRI State Representative and he deserves our thanks for a job well done. I only hope that I can do half as good a job as he did.

While I have numerous responsibilities as the State Representative, two stand out as a top priority. First, I am a conduit between you and the national DRI organization. I also serve as a conduit between MDTC and DRI. If I can be of any assistance in answering any questions about DRI or help facilitate any communications with DRI, please call on me. If nothing else, I can probably determine who at DRI can get you the information or assistance you need.

Second, I am charged with membership development for the state of Michigan. Membership in both MDTC and DRI comes with great benefits. The CLE and opportunities to cross-market in both organization are top notch. To help promote membership, DRI has rolled out the following programs:

Free Membership to State or Local Defense Organization (SLDO) Members

Any defense lawyer who is a member of his or her state or local defense organization such as MDTC qualifies for a free one-year membership in DRI. The defense lawyer must be a first time member of DRI.

Seminar Attendee Promotion

A defense lawyer who has either attended a DRI seminar or the DRI Annual Meeting qualifies for a one year, half-price membership in DRI. The defense lawyer must be a first time member of DRI.

Advocate Campaign: (a.k.a. "Member Get a Member")

DRI members (except Officers and Board members) who recruit new "full dues paying" members receive a $100 fully transferable discount coupon for each member recruited. Coupons are redeemable at DRI seminars and the Annual Meeting. Coupons may be combined for a given seminar or the Annual Meeting. Individual discount coupons are valid for two years from the date of issue. There is no limit to the number of coupons an advocate can accumulate. The advocate's name MUST appear on the "referred by" space provided on the application.

Young Lawyer Campaign

Young Lawyers receive a certificate for FREE attendance at a future DRI seminars or the Annual Meeting. The certificate is good for two years from the young lawyer's join date. The certificate is non-transferable, and the holder must surrender the certificate at the time of pre-registration for the seminar of his/her choice.

As you can see, if you have never been a member of DRI but do maintain your MDTC membership, you are entitled to a free one year membership in DRI. There is no reason not to take advantage of this wonderful benefit and test the waters.

If you want to get a sense of what DRI can do for you, check out the newly redesigned DRI website at www.dri.org. It has recently been updated to be more user friendly and much more of the web site is now open to all users, not just members. I would suggest you check the upcoming seminars as I am sure you will find one that pertains to your practice. If you have been a DRI member in the past, you will know the contribution made to your practice by the *For The Defense* magazine. Now you can visit the magazine at its new web site www.forthedefense.org. You can look up old issues of the magazine as well as participate in numerous blogs and discussion groups. Check it out. I think you will find it very useful.

I am looking forward to the next three years. If you have any questions about these or any other DRI program, please do not hesitate to contact me. I look forward to serving you for the next three years.

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MEDICARE REIMBURSEMENTS — MAKING A LIST, CHECKING IT TWICE

By: Christopher R. Gullen, Esq.

Parties to personal injury claims of Medicare beneficiaries who continue ignoring their duties to the federal government could get a wake up call next year. Like Santa, Uncle Sam is making a list and checking it twice; going to find out who's naughty and nice.

The Centers for Medicare and Medicaid Services (CMS) apparently believes that the parties to personal injury claims of government healthcare beneficiaries are neglecting to meet their duties under federal law, such as the duty to report the claim, and the duty to reimburse Medicare for payments it made for medical treatment arising out of the injury underlying the claim.

Around Christmas 2007 Congress passed and President Bush signed into law Public Law 110-173, the Medicare, Medicaid and SCHIP Extension Act of 2007, now frequently referred to as the Mandatory Insurer Reporting law (or MIR) - 42 USC sec. 1395y(b)(7) and (8). Under the new law group health, workers' compensation, liability and no fault insurers and self-insurers will be required to provide information to CMS-beginning in 2009- on each claim of a Medicare, Medicaid or SCHIP beneficiary. Triggers for reporting include a decision to honor a claim and issuance of a check to pay a settlement, judgment or award.

Once that reporting is done, CMS will have a quick and easy list of which of its beneficiaries received a settlement for an injury claim, what type of injury was suffered and who the settling party was. That will be very helpful information, making it easy to determine:

Whether CMS made any payments for treatment of that same injury, and

- Whether the parties to the settlement made arrangements to reimburse CMS for any payments it made for that treatment, and
- If no reimbursement was made, who CMS can go after to get reimbursement, and
- Who CMS can go after to collect the penalties ($1,000 per claim per day's delay in reporting and double damages for failing to reimburse conditional payments.)

Uncle Sam is looking for a little cash to help fund the Medicare trusts, and with the new reporting that will start in 2009, he is expected to have no trouble finding lots of new pockets to dip into to help keep those trusts going.

Even before the December 2007 amendment to the Medicare Secondary Payer law, Congress made clear it was not going to listen to any quibbling about lack of liability on the underlying personal injury claim. Under the existing law, if an insurer or self-insured enters into a settlement of the personal injury claim, that insurer or self-insured is primary to Medicare for medical expenses related to that injury.[1]

Uncle Sam is looking for a little cash to help fund the Medicare trusts, and with the new reporting that will start in 2009, he is expected to have no trouble finding lots of new pockets to dip into to help keep those trusts going.

Chris Gullen limits his practice to Medicare regulation and compliance issues. He is a former Director of Risk Management for Kmart Corporation, responsible for administration of the company's liability and workers' compensation claims. He can be reached at chris@gullenlaw.com

Endnotes

1. 42 USC section 1395y(b)(2)(B)(ii).

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2009–2010

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January 14	Excellence in Defense Nomination Deadline
January 22	Future Planning Meeting, Shanty Creek
January 23	Board Meeting, Shanty Creek
March 5	Board Meeting, Okemos
March 31	Young Lawyers Golden Gavel Award Nomination Deadline
May 1–2	DRI Central Region Meeting, Greenbrier, West Virginia
June 13–14	Summer Meeting, Boyne Highlands
September 11	Open Golf Outing, Mystic Creek
September 16–18	State Bar Annual Meeting – Respected Advocate Award Hyatt Regency, Dearborn
October 1	Civil Defense Basic Training, Troy Marriott
November 4	Board Meeting, Troy Marriott
November 4	Past Presidents' Dinner, Troy Marriott
November 5	Winter Meeting, Troy Marriott

2010

January 22, 2010	Future Planning, Turtle Creek, Williamsburg, MI
May 14–15, 2010	Summer Meeting, Double Tree, Bay City