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President's Corner

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The Art Of Being A Mentor

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The lifecycle of the practice of law begins twice a year for many graduates of various law schools, and in fact begins when they receive that letter in the mail from the State Bar of Michigan, informing them that they have passed the Bar and will be admitted with their license, commonly referred to as a "P-Number." Those students, and newly admitted lawyers, embark upon a career with enthusiasm and learn quickly that there is in fact a reason that this profession is called "the practice of law."

There are several fine law schools in the State of Michigan that provide their students with the basic foundation necessary to understand the law and a brief glimpse, to the extent possible, as to the mechanics necessary to practice their profession. However, the knowledge to be able to traverse many legal obstacles in the practice of that profession is not automatic.

In the July 2010 edition of the *Michigan Defense Quarterly*, I spoke to the need to practice and demand courtesy and professionalism from the bench and bar alike, and the need to restore the image of Michigan in the eyes of our neighboring states. The next step in pursuit of the ideals of courtesy and professionalism comes by way of a commitment to undertake to properly mentor a younger lawyer. Those of us who have had the privilege of practicing in this noble profession for many years, recognize immediately those lawyers who provided the basic foundation that allowed us to obtain notoriety in our profession. The mentors who have allowed us all to do much more than carry files to a courthouse and observe, are the ones who gave us all our start and our ability to practice law. In order for this profession to continue to prosper not only by financial means, but also by reputation, we must all undertake what is our clear obligation – to give back to another lawyer, that which we have received in the beginning of our careers.

This is therefore a call to arms of sorts to each and every member of the State Bar of Michigan to give back to younger lawyers by way of becoming a mentor. The art of becoming a mentor is in fact as unique as the art of the practice of law. An effective mentor is more than someone who simply reviews written work product. A mentor is someone who takes the time to discuss challenging legal issues presented in their cases, as well as procedural issues, the meaning of the Michigan Court Rules and the Michigan rules on practice and procedures. Mentoring means having faith in the student so as to allow that individual to develop skills of questioning witnesses, and of preparing for and advancing oral arguments. It comes in allowing a younger lawyer to sit as a second chair and actually participate in the trial proceedings. At the same time, being an effective mentor also comes by recognition that it is human to err, and in doing so, the best corrective measure comes in understanding.

There is even a greater call and purpose in acting as a mentor to younger lawyers. We cannot begin to expect civility and courtesy in the practice of law by young lawyers if we do not extend those same qualities in the manner in which we mentor younger lawyers. Most certainly, if we do not undertake to mentor younger lawyers, they cannot learn of the unique, unspoken requirements of being a member of the State Bar of Michigan. It is therefore a call to duty for each and every one of us to act as a mentor to a younger lawyer and not only teach them the practice of law but

The next step in pursuit of the ideals of courtesy and professionalism comes by way of a commitment to undertake to properly mentor a younger lawyer.

also, the manner in which conduct has an impact upon the image and the nobleness of this profession.

Michigan Defense Trial Counsel has a section devoted to young lawyers in practice and gives the Golden Gavel Award award each year to a young lawyer who has practiced less than 10 years. We are pleased to offer educational resources to our young lawyers, such as the Young Lawyers Breakfast Conference and are pleased to recognize our young defense lawyers who exemplify the Golden Gavel Award, by acting as a mentor to others, participating in community activities and who exemplify a noble practice of law. It is the pledge of MDTC to continue to offer avenues for young lawyers to participate, such as the Young Lawyers Section, but also offering them a means by which publication is possible for virtue of the E-Newsletter and the *Michigan Defense Quarterly*. It is our pledge to continue in these efforts.

Editor's Note: *Ms. Brown and Mr. Uhlar regularly provide the "No-Fault Report" in each issue of Michigan Defense Quarterly. In light of the importance of the McCormick decision, the authors have expanded the report into the following article.*

The Serious Impairment Threshold: The Pendulum Swings Back

McCormick v Carrier overrules *Kreiner v Fischer*

By: Susan Leigh Brown and Miles L. Uhlar, *Schwartz Law Firm P.C.*

Executive Summary

The reversal of the Kreiner decision by McCormick brings about major changes in the application of the No-Fault law's bar against third party tort claims. McCormick holds, in effect, that any objective manifestation of any impairment to any "important" body function which has any influence on the day to day life of the plaintiff for any period of time suffices to breach the threshold and get a plaintiff to a jury. By replacing the requirement for medical evidence with a requirement that the alleged impairment be evident to someone besides the plaintiff, the opinion broadens the class of cases that will be treated as above the threshold. The opinion's abrogation of any temporal requirement for a serious impairment further expands the category of qualified plaintiffs. Another significant change rendered by McCormick is that the impairment need only have "an influence on some of the person's capacity to live in his or her normal manner of living." These changes will lead to a large increase in third party personal injury litigation.

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The long anticipated demise of the serious impairment threshold, as previously defined by former Chief Justice Clifford Taylor's Michigan Supreme Court, began within a few months of the political shift on the Court that came with Taylor's defeat by current Justice Diane Hathaway. It took over a year to develop the opinion in *McCormick v Carrier*.[1] Gymnastics were needed on the front end just to get the case before the highest court. And in the end more gymnastics (mostly linguistic) were needed to achieve the goals of the Plaintiff's bar and other opponents of *Kreiner v Fischer*[2] – returning "third party" cases, as tort cases are known in the No Fault business, to viability after 6 years of relative aridity.

The History of the Case

The Michigan Supreme Court, while still in its former incarnation, denied the initial application for leave to appeal the *McCormick* case in October, 2008.[3] However, the "new" Court granted plaintiff's motion for reconsideration of the denial of leave to appeal, helped along by amicus curiae briefs submitted by anti-insurance industry groups Coalition Protecting Auto No-Fault, [4] and Michigan Association for Justice.[5] True to form, the Justices engaged in verbal sparring even on that decision, with Justice Corrigan's dissent pointing out, some think ironically, that a change in composition of the court was insufficient cause to revisit final orders issued by the predecessor court.[6] Nonetheless, rather than wait for a "new" case with appropriate facts to emerge from the many serious impairment cases pending before the Court of Appeals when Justice Hathaway was elected, the Supreme Court chose to make a number of bold statements, clearly intended to negate what it and many others view as the conservative, pro-insurance standards erected by the previous regime under the auspices of "constructionist" interpretation of statutes. The *McCormick* opinion is fraught with the kind of personal attacks between the Justices that we in Michigan have unfortunately become accustomed to. As expected, when one gets past the insults and nastiness, the opinion also furthers the deconstruction of prior precedent, particularly in the personal injury arena.

What McCormick Changes

The new interpretation of MCL 500.3135(7) significantly lowers the threshold which must be breached by plaintiff's hoping to overcome the general abolition of tort liability in third party No Fault cases. This will make it easier for people allegedly injured in auto accidents in Michigan to obtain non-economic damages from at fault

The new interpretation of MCL 500.3135(7) significantly lowers the threshold which must be breached by plaintiff's hoping to overcome the general abolition of tort liability in third party No Fault cases.

drivers – in spite of the 1973 abolition of tort liability in all but three types of cases wrought by the No Fault Act. Trial courts will now be loathe to dismiss cases on summary disposition motions based on the threshold inquiry, paving the way for the filing of more suits now that the specter of early dismissal has been eliminated.

If history repeats itself, as it often does, as the changes wrought by *McCormick* continue to be applied in future cases, the injuries required to cross the threshold will become less severe, as the plaintiff's bar tests the outer reaches of even *McCormick* until there is either another significant change within the Court which leads to yet another reversal of fortunes, quite literally, or the Legislature steps in to curb the tide of third party suits. But, in order to fully appreciate where this area of law is heading, a look at its origins is warranted.

A Brief History of the Serious Impairment Threshold

The No Fault Act was enacted in 1973. In return for lifetime unlimited medical benefits to victims of motor vehicle accidents, three years of wage replacement (up to a statutory maximum) and household assistance payments (limited to $20 per day) – all without regard to fault in the accident – the Legislature abolished tort liability for non-economic damages. This included eliminating damages for pain and suffering and excess economic damages above and beyond the statutory limits on wage loss and household assistance, except in limited circumstances: where the victim suffered permanent serious disfigurement, death – or the root of all litigation difficulties since the enactment – serious impairment of body function.[7] As noted by the Supreme Court in *Shavers v Attorney General*[8] and reiterated by former Chief Justice Thomas Kavanagh in his concurrence in *Cassidy v McGovern,* the first Supreme Court case to tackle the meaning of "serious impairment of body function,"

> '[t]he statutory scheme of no-fault insurance resulted from dissatisfaction with traditional theories of liability founded on fault. Among the deficiencies sought to be remedied were the overcompensation of minor injuries, the under-compensation of serious injuries, long payment delays, an overburdened court system, and discrimination against those with low income and little education."[9]

The *Cassidy* opinion further eloquently elucidates the trade off represented by the Act:

> At least two reasons are evident concerning why the Legislature limited recovery for noneconomic loss, both of which relate to the economic viability of the system. First, there was the problem of the overcompensation of minor injuries. Second, there were the problems incident to the excessive litigation of motor vehicle accident cases. Regarding the second problem, if noneconomic losses were always to be a matter subject to adjudication under the act, the goal of reducing motor vehicle accident litigation would likely be illusory. The combination of the costs of continuing litigation and continuing overcompensation for minor injuries could easily threaten the economic viability, or at least desirability, of providing so many benefits without regard to fault. If every case is subject to the potential of litigation on the question of noneconomic loss, for which recovery is still predicated on negligence, perhaps little has been gained by granting benefits for economic loss without regard to fault.[10]

The Cassidy court was united in its belief that the statutory language "serious impairment of body function" was ambiguous and required the judiciary to apply principles of statutory construction.

Cassidy v McGovern was the Supreme Court's first attempt to define the serious impairment threshold.

The term "serious impairment of body function" was not defined in the original Act.

The First Analysis: *Cassidy v McGovern*

Cassidy v McGovern was the Supreme Court's first attempt to define the serious impairment threshold. The majority opinion was authored by former Chief Justice Mary S. Coleman and signed by three Republicans and three Democrats. Democratic Justice Kavanagh (not to be confused with Justice **C**avanagh) dissented in part.[11] The *Cassidy* court was united in its belief that the statutory language "serious impairment of body function" was ambiguous and required the judiciary to apply principles of statutory construction.

The *DiFranco* majority rebelled against what it viewed as the stringency of *Cassidy* and, applying what it referred to as a "textual approach" (the same description that would later be given by the majority in *McCormick),* overruled *Cassidy* in large part.

Cassidy added scope to that phrase by finding that: (1) although the facts varied from case to case, courts could, under proper circumstances, decide whether the threshold was met as a matter of law as long as there was no material factual dispute concerning the nature and extent of the plaintiff's injuries;[12] (2) the injury had to be objectively manifested; (3) the injury had to affect an "*important*" body function (otherwise, as the Court noted, "if *any* body function were to be considered the intended meaning, arguably a serious impairment of the use of the little finger would meet the threshold requirement");[13] and (4) that "the Legislature intended an objective standard that looks to the effect of an injury on the person's general ability to live **a** normal life."[14]

The Court did not lose sight of the actual words employed by the Legislature, like "serious", and the words that surround "serious impairment of body function" – "death" and "permanent serious disfigurement" – in finding that an impairment had to be objectively manifested and "serious", but not necessarily permanent, to breach the threshold.

The Reaction: *DiFranco v Pickard*

Four years after *Cassidy* was decided, the backlash from the plaintiff's bar and others manifested itself in *DiFranco v Pickard,*[15] with a majority opinion by *McCormick's* author, Justice Cavanagh. The *DiFranco* majority rebelled against what it viewed as the stringency of *Cassidy* and, applying what it referred to as a "textual approach" (the same description that would later be given by the majority in *McCormick),* overruled *Cassidy* in large part. Most of the analysis applied by the majority in *DiFranco* and repeated in Justice Cavanagh's dissent in *Kreiner* is resurrected in *McCormick*, some of it nearly verbatim.

In *DiFranco*, the Court found that trial courts generally could not decide the threshold question as a matter of law. The Court cited an advisory opinion issued shortly after the No Fault Act was passed for support of this position.[16] In the *DiFranco* opinion, Justice Cavanagh studied the legislative history of the No Fault Act at great length as a means of disavowing the *Cassidy* test and held, among other liberating principles for plaintiffs, that the Legislature did not intend to require proof of "major or extensive" disability in order to pass the threshold.[17] The *DiFranco* court went on to reject the requirements that (1) an "important" body function need be impacted, (2) the injury had to be "objectively manifested" and (3) the impairment had to affect the plaintiff's general ability to lead a normal life. The *DiFranco* court stated, rather dramatically, that the *Cassidy* formula had nearly "wiped out" tort claims in defiance of legislative intent (as that intent was discerned by the *DiFranco* Court).[18]

The Legislature Responds: 1995 Amendment

Apparently Justice Cavanagh and those who signed the *DiFranco* opinion did not read the collective mind of the Legislature very effectively because, in 1995, MCL 500.3135 was amended in a manner which attempted to define "serious impairment of body function" in terms almost identical to those expressed by the *Cassidy* court. The amendment resurrected: (1) the authority of courts to decide the threshold issue as a matter of law; (2) the need to establish that an "important" body function was impaired; (3) the need for an *objective manifestation* of impairment; and (4) the requirement of evidence that the injury affected the person's general ability to lead *his or her* normal life. The amended statute was a nod to *Cassidy* **except** that the statute added a degree of subjectivity to the final element, the effect on the person's life. Where *Cassidy* specifically noted that the effect on the victim's life was *not* to be decided in light of the particular plaintiff's lifestyle, the statutory language is to the contrary.

In 1995, MCL 500.3135 was amended in a manner which attempted to define "serious impairment of body function" in terms almost identical to those expressed by the *Cassidy* court.

Prior to the 1995 Amendment, decisions in the trial courts and Court of Appeals as to the threshold were all over the map, and this remained true following the amendment. However, in the wake of the amendment the plaintiff's bar argued often and vehemently that to pass the threshold, plaintiffs should only need to demonstrate that an impairment had *some* effect on his or her lifestyle, regardless of the relative importance of the affected activity, and without regard to the degree of impairment or extent of the impairment.[19] That liberal view of the threshold led to a conservative backlash and *Kreiner*.

Kreiner v Fischer

Kreiner reminded its readers that the No

The death of *Kreiner* was probably politically inevitable as soon as the Supreme Court lost a Republican and added a Democrat. And, so it has happened.

Fault Act *abrogated* tort liability in return for PIP benefits except in cases of serious injury. The express intent of the Legislature was to severely curtail the number of tort cases and the amounts to be recovered therefrom, thereby reducing litigation as well. Noting that courts continued to struggle with the definition of serious impairment, just as they had before the amendment to the statute, the *Kreiner* court suggested a non-exhaustive list of factors to be considered and attempted to use dictionary definitions of the words added in the 1995 amendment. The net effect was that a plaintiff generally could only survive summary disposition if the injury affected the "course and trajectory" of his or her life and was supported by medical evidence. Many courts interpreted those words to require a degree of permanency, while others did not. Some courts also required medical evidence of injury in the aftermath of *Kreiner*. To some degree, this left soft tissue cases in the proverbial dust.

Although the plaintiff's bar raised a hue and cry that *Kreiner* completely eviscerated tort liability except in catastrophic cases and required plaintiffs to prove permanent injury, even a cursory review of the appellate decisions after *Kreiner* disproves that alarm.[20] Nonetheless, lobbyists and activists were spurred to action by the allegedly "draconian" test articulated in *Kreiner*. Given the ferocity of the attacks on that decision and others made by the Taylor-Markman-Young-Corrigan Supreme Court majority which further limited No Fault litigation recoveries, the death of *Kreiner* was probably politically inevitable as soon as the Supreme Court lost a Republican and added a Democrat. And, so it has happened.

The McCormick Definition

Under *McCormick*, several prior factors used under *Cassidy, Kreiner* and the 1995 statutory amendment have been redefined in favor of plaintiffs. Under *McCormick*, there is *no temporal* requirement for impairment. Indeed, that factor, grafted onto *Kreiner* by subsequent cases, was the battle cry for the opponents of the decision. Some appellate courts had read *Kreiner* to require that the impairment had to last for a long time – "long," of course, not being defined either. The *McCormick* opinion, authored by Justice Cavanagh, harshly criticizes *Kreiner's* addition of a list of factors to consider in determining if an impairment is serious enough to warrant submission to a jury, concluding that such a list is unnecessary because the statute is crystal clear – if one can understand the English language or read a dictionary.

Although several of the factors in *Kreiner* represented no significant change in existing jurisprudence, *Kreiner* opponents latched onto the "duration" factor to demonstrate that the *Kreiner* court violated principles of statutory construction by adding permanency of the impairment as a prerequisite to surviving dispositive motions, contrary to the plain language of the statute and even the *Cassidy* decision. This particular finding by Justice Cavanagh in *McCormick* is highly ironic given that, in his own *DiFranco* opinion, though he stated that the statute was unambiguous, he nonetheless added a list of factors to be considered in discerning the presence of a serious impairment of body function.

Under *McCormick*, there is *no temporal* requirement for impairment.

McCormick holds, in effect, that *any* objective manifestation of *any* impairment to *any* "important" body function which has *any* influence on the day to day life of the plaintiff for *any* period of time suffices to breach the threshold and get a plaintiff to a jury.

In addition to criticizing the addition of a list of factors, the *McCormick* court also holds that the *Kreiner* court improperly used the dictionary to define the words of the statute in defense oriented terms. Then, using the dictionary, much as the *Kreiner* court did, the *McCormick* court replaces the *Kreiner* laundry list of factors with a list of its own. *McCormick* holds, in effect, that *any* objective manifestation of *any* impairment to *any* "important" body function which has *any* influence on the day to day life of the plaintiff for *any* period of time suffices to breach the threshold and get a plaintiff to a jury. In so doing, *McCormick* adds the word "any" before nearly every statutory term, despite the harsh remonstrations against the *Kreiner* majority for adding "course and trajectory."

Further, *McCormick* holds that "objectively manifested" does not mean that there must be medical evidence of an injury, but only that an impairment of

McCormick holds that "objectively manifested" does not mean that there must be medical evidence of an injury, but only that an impairment of some kind must merely be observable to someone other than the plaintiff.

some kind must merely be observable to someone other than the plaintiff. Taken to its logical conclusion, any plaintiff who limps, grimaces, restricts use of a limb or even a finger, groans, or displays other pain behaviors which his or her friends and family can observe, arguably meets the "objectively manifested" element of the statute.

The *McCormick* court correctly notes that the statute uses the word "impairment", not "injury". The court then uses this observation to extend the Legislature's language beyond its intent. It is unlikely, for example, that there would be any impairment without some form of injury, whether it be physical or psychological. Lip service is paid to the "usually requires medical evidence" language of both *DiFranco* and *Cassidy*, but the door is opened wide to cases where there is no medical evidence at all and only subjective complaints and "manifestations" that another layperson can observe. Read: alleged soft tissue, traumatic brain injury and post traumatic stress disorder claims where no positive medical findings exist – only subjective complaints by plaintiffs.

The other significant change rendered by *McCormick* is that the impairment need only have "an influence on some of the person's capacity to live in his or her normal manner of living."[21] So, we're back to the pinkie injury that Justice Coleman worried about in *Cassidy*, which was the actual injury suffered by the oft-forgotten second plaintiff in the *Kreiner* decision, Mr. Straub. An argument can be made that "use of the hands," even the non-dominant hand as was the case with Mr. Straub, is an important body function. A fracture of the pinkie is objectively manifested because it can be seen on x-ray. A splinted pinkie causes, for example, a person to hold a steering wheel differently while not preventing driving, thus "influencing" the way that task is performed – a task which most people engage in daily. A broken pinkie would also cause a little disruption in say, buttoning buttons, much like a broken finger nail does when one is used to having long nails with which to manipulate buttons. Voila! Serious impairment.

While Straub's broken pinkie had a much more significant effect on his day to day activities than the above — for example, he was an amateur guitarist who could not play while his finger was splinted — nothing in the *McCormick* decision requires an analysis of the degree of the "influence" an "impairment" must have or the degree of importance a restrictive activity must have on a person's "capacity" to keep up his or her pre-accident lifestyle. Perhaps most significantly however, the elimination of the need for objective *medical* evidence of impairment truly removes all limits from soft tissue cases and cases in which only psychological injury is alleged. Although even under *Cassidy*, there was no hard and fast rule that medical proof of injury was *always* required – for instance, a lost limb would be an obvious serious impairment requiring no medical evidence — *McCormick* goes to great lengths to ensure "objective manifestation" does not mean "objective medical proof of injury."

The elimination of the need for objective *medical* evidence of impairment truly removes all limits from soft tissue cases and cases in which only psychological injury is alleged.

The *McCormick* court provides several definitions from Webster's, Random House and American Heritage dictionaries for words, including "objectively," "manifest," "impairment," "general," "affect," "lead" and "life". Having criticized the *Kreiner* court for cherry picking the definitions of "general," "lead" and "life" to support its "course and trajectory" language, the *McCormick* court commits the same offense, rejecting the definitions preferred by the *Kreiner* Court and applying those more helpful to plaintiffs. Most notably, however, one very significant word used in the statute, indeed in every version of the statute and every proposed amendment thereto, goes not only undefined but wholly *unmentioned* in the *McCormick* analysis / semantic lesson: "**serious**."

Being an English Literature major many moons ago, this writer has a personal affinity for the Oxford English Dictionary, believing it to contain more connotations and historical uses of words in our language than say, Webster's, American Heritage or Random House dictionaries. The OED, as we bookworms call it, or more precisely for this article, the Concise Oxford English Dictionary, 10th Edition-Revised, (2002) defines "serious" in the form in which it is used in MCL 500.3135, as "3) significant or worrying in terms of danger or risk; serious injury 4) substantial in terms of size, numbers or quality."

The *McCormick* court has achieved much of what the *DiFranco* court set out to do, notwithstanding the intervention of the Legislature in 1995, which largely obliterated that decision.

Similarly, Roget's Thesaurus, 1962 Edition, lists, as the relevant synonyms of "serious", such words as "weighty, heavy, ponderous, grave…of importance or significance, of consequence, of concern or moment, of weight, not to be overlooked" … "remarkable, marked, unforgettable, monumental, extraordinary, exceptional, special, rare" or "vital, essential, of vital importance, fundamental, radical…" None of these definitions or synonyms for "serious" could be employed in the *McCormick* analysis. With few exceptions (the word "important" before body function" and the "general ability to lead one's normal life" still being necessary elements of proof), the *McCormick* court has achieved much of what the *DiFranco* court set out to do, notwithstanding the intervention of the Legislature in 1995, which largely obliterated that decision.

Application to Pending Suits

The opinion is silent as to whether it will be applied only to cases filed after July 31, 2010 or retroactively to cases currently pending in the Court of Appeals and circuit courts. Generally, judicial decisions, as opposed to Legislative enactments, are given at least limited retrospective effect, meaning that they are applied to pending suits in which the issue has been raised and preserved and, more often than not, are given full retroactive effect, applying to all pending suits regardless of whether the issue has been preserved in them.[22] Likely the momentum of pro-plaintiff sentiment will cause courts to give *McCormick* full retroactive effect, and the current Supreme Court seems to wish to "do unto" its predecessors as it feels the former majority did unto it. However, if the new version of the court decides to further separate itself from the actions of the former majority, and apply the Golden Rule by *not* doing what it predecessor did, instead of employing "an eye for an eye" mentality, *McCormick* may only be given limited retroactive effect when that question is inevitably before it. When the former majority abrogated 19 years of judicial gloss on the No Fault Act's "one year back" rule in *Devillers v Auto Club Insurance Association,*[23] the Taylor-Markman-Young-Corrigan majority gave it full retroactive effect, a move which benefited defendant insurance companies. Justices Weaver, Kelly and Cavanagh dissented in part because they believed that the opinion should only be given limited retroactive effect so as not to punish plaintiffs who had narrowly escaped the re-imposition of the one year limitation period on PIP suits. Now that full retroactivity will benefit plaintiffs at the expense of the insurance industry, it remains to be seen if the new majority will adhere to their former view of retroactivity.

The Overall Impact of *McCormick*

Despite the recent commentary by proponents of the decision,[24] there can be little doubt that many more third party tort suits will be filed in Michigan. The primary purpose of the years of lobbying and numerous bills drafted in the Michigan House and Senate in reaction to *Kreiner* was to provide more compensation for plaintiffs.[25] Trial courts, particularly in more liberal jurisdictions like Wayne County, will be less likely to dismiss cases. This will further encourage new suits and increase "cost of defense" settlement offers to avoid the additional cost and risk of a full blown trial. Plaintiff's attorneys' chances of getting even small fees will, consequently, improve.

One proponent of the change was quoted in the August 9th edition of Michigan Lawyers' Weekly as predicting a decrease in the number of appeals filed on serious impairment issues and little or no increase in litigation because insurance companies will settle prior to litigation in light of the *McCormick* ruling.[26] While some cases, particularly those with low policy limits (the State-required minimum liability coverage is $20,000), may very well go uncontested by insurers at least at first, the author does not believe that the number of appeals will decrease. There will simply be a change in the identity of the appellants. Where the appellants were more often spurned plaintiffs after *Kreiner*, the appellants now will more likely be defendants who have lost on summary disposition motions and been subjected to a jury verdict where the plaintiff's "impairment" is dubious or not "serious."

It does seem unlikely, given the increased financial exposure to which the *McCormick* decision will subject defendants and their insures, and the recent resignation of Justice Weaver and appointment of Justice Alton Davis, that the insurance industry will not fight back. Moreover, the current interpretation of the statute has a statistically low chance of being any more workable than its many predecessors. No matter the protestations to the contrary, the statutory language is obviously not clear. If it were clear, the long judicial and legislative odyssey of "serious impairment" would never have happened. There were flurries of suits filed following *Cassidy,*

DiFranco, the 1995 statutory amendment, and *Kreiner* all trying to test the limits of the newest version of the definition and scope of the serious impairment exception to the abolition of tort liability for auto accidents. There is no evident reason that this alteration will not have the same effect.

Whether the removal of the perceived obstacles created by the *Kreiner* decision increases insurance premiums paid by Michigan drivers or causes insurance companies with a smaller share of the Michigan No Fault market to stop writing insurance in Michigan remains to be seen. However, it stands to reason that the cost of the inevitable increase in third party tort verdicts and settlements which were the purpose of the reversal of *Kreiner* will be passed to the premium holders and taxpayers (the State of Michigan self-insures its vehicles)[27] in this State.

Moreover, the decision hints, less than subtly, that the Court will entertain a case seeking to void as unconstitutional the portion of the statute which permits courts to decide the threshold issue as a matter of law. Clearly, as was vainly attempted in *DiFranco*, the majority intends to resurrect the Advisory Opinion of 1973 and give it the force of precedent when the right case presents itself. By telegraphing that intent, the court sends a clear warning to circuit courts: "dismiss third party suits on the serious impairment threshold at your own peril." Not many trial judges relish reversal of their rulings.

Although the previously introduced bills in both the House and Senate in reaction to *Kreiner* went even further toward compensating plaintiffs in third party cases than the *McCormick* decision went, the proponents of those many bills are likely at least somewhat satisfied with *McCormick*, which very closely echoes House Bill 4301 and the amicus briefs filed by CPAN and MAJ. While virtually no competing language was presented on behalf of supporters of *Kreiner*, that silence was likely the result of a waiting game. One wants to see one's opponent's strategy before committing one's troops to a particular defense. If and when the opened proverbial floodgates of litigation start pouring forth increased payments on third party cases, either through settlement or verdicts, the "defense-insurance industry" version of the many bills introduced in response to *Kreiner* are likely to appear in the Senate. Should a Republican be elected Governor, the chances of any such proposed legislation being enacted (with relative alacrity) would likely improve, particularly if recently appointed Justice Davis does not survive the election and is replaced by a Republican-backed candidate. Given the nature of the No Fault Act, however, it seems unlikely that any statute can resolve the competing interests afoot or prescribe a sufficiently accurate definition of "serious impairment" to stop the pendulum swings to and fro every 5 or 6 years.

Part of a Broader Pattern of Change Still Not Fully Defined

The overall message of *McCormick* appears to reach farther than its dramatic impact on 3rd Party No Fault cases. It seems to signal an apparent intent by this Court to undo what the prior court did -- to reverse decisions issued by the previous Taylor, Markman, Young and Corrigan majority when the Court views them to be incorrect interpretations of law. And as another recent ruling makes clear, all areas of No Fault law will be targeted. On the same day the *McCormick* decision decimated *Kreiner*, the Supreme Court reversed another controversial no-fault decision issued by the former regime. In *University of Michigan Board of Regents v Titan Insurance Company,*[28] in a majority opinion authored by Chief Justice Kelly, the Court overruled *Cameron v ACIA,*[29] which had applied the one year statute of limitation for first party personal protection (PIP) benefits without any tolling for disabilities such as infancy.

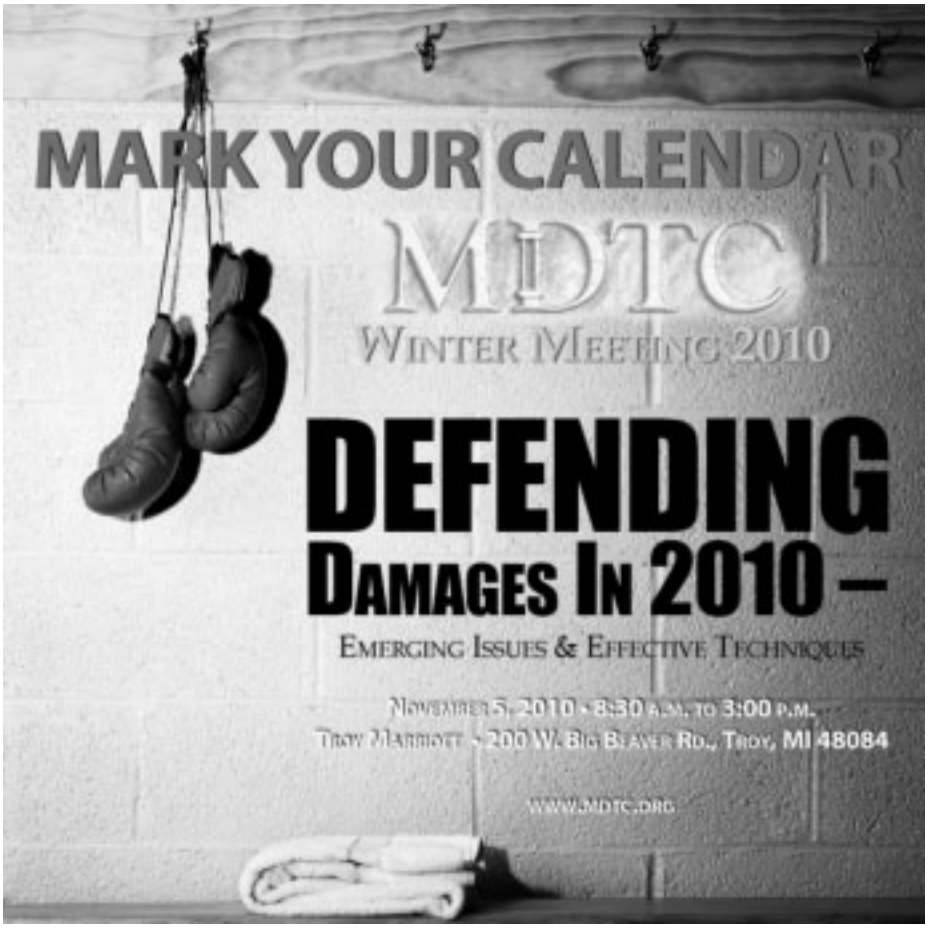
However, in *Regents*, the same Justices who formed the majority on *McCormick* could not agree on the proper application of *stare decisis* or the frequency with which it should be ignored. Justices Weaver and Hathaway wrote separate opinions to clarify their departure from Chief Justice Kelly's majority opinion interpretation of the doctrine. Thus while one can say with confidence that the Court as composed before the recent resignation of Justice Weaver stood ready, willing, and more than able to rewrite the No Fault scheme, the full ramifications of their enthusiasm for reversal of precedent in other areas of law remains to be seen. Further, the appointment of Justice Davis and the upcoming election may very well "impair" or "have an impact" on the "course and trajectory" of this Court's "general ability" to "go through" its particular life plan.

Endnotes

1. ___ Mich ___ (July 31, 2010)
2. 471 Mich 109 (2004)
3. 482 Mich 1018 (2008)
4. CPAN is a self described coalition of professional associations and consumer groups which has, as one of its principles: "Maintain a Threshold Injury Standard That is Fair and Balanced" …The legislature defined "serious impairment of body function" in a 1995 amendment, which has recently been interpreted by the appellate courts in such a way as to disqualify many innocent accident victims who suffer significant bodily injuries. Some of these victims have suffered traumatic brain injuries, but were denied compensation because their injuries did not affect their normal life in a manner that was "serious enough." As a result of these court decisions, the important balance between guaranteeing payment of medical and wage loss benefits for all victims while insuring the right to recover noneconomic damages for those victims who suffered serious injury as a result of the negligence of careless drivers has been lost. This important balance must be restored."

And which promises to continue to "fight court battles" against the insurance industry: "In spite of these efforts, the battle continues and next year it is sure to reach new levels of intensity. Make no mistake about it - the Michigan auto insurance industry will continue its efforts to dramatically alter the fundamental nature of the Michigan No-Fault Law. These industry attacks on the no-fault system will be multifaceted and will include ongoing efforts to adopt medical fee schedules, impose managed care, authorize the sale of stripped down "PIP choice" insurance policies that will pay for only a fraction of medical expenses in catastrophic injury cases, and enact new restrictions on the rights of innocent victims to recover damages from at-fault drivers. Along, the way, the insurance industry will continue to resist efforts for meaningful insurance rate reform and will oppose any legislation that would stop unfair, bad faith claim denials. ***That is why CPAN is needed now more than ever!"*** http://www.protect-no-fault.com/about.htm. The Michigan Association for Justice is likewise a plaintiff oriented association of lawyer which describes itself: "The 2,000 members of the Michigan Association for Justice are people who became lawyers so they could help Michigan's working families seek justice when they are injured by an unsafe product, drunk driver or by another person's negligence." http://www.michiganjustice.org/MI/index.cfm?event=showPage&pg=Mission.

5. 485 Mich 851 (2009)
6. 485 Mich 851 (2009) J. Corrigan dissenting.
7. MCL 500.3135(1)
8. 402 Mich 554 (1978) reh den 403 Mich 958 (1978) cert den sub nom *Allstate Insurance Company v Kelley,* 442 US 934, 99 S Ct 2869 (1979)
9. *Cassidy v McGovern,* 415 Mich 483, 509 (1982)
10. *Id* at 500
11. Justices G. Mennen Williams, Charles Levin, John W. Fiztgerald and James L. Ryan, with Justice Thomas Kavanagh concurring in part and dissenting in part; the participating justices were evenly split on party lines, three Republicans, three Democrats. Justice Riley did not participate.
12. *Id* at 502
13. *Id* at 504
14. *Id* at 505
15. 427 Mich 32 (1986)
16. *Id* at 51 citing *Advisory Opinion re: Constitutionality of 1972 PA 294*, 389 Mich 441 (1973)
17. *Id* at 60
18. *Id* at 55
19. 471 Mich at 121
20. See, e.g. *Crittendon v. Johnson*, 2009 WL 793987 Court of Appeals, March 26, 2009, *Lafler v. Esurance Ins. Services*, 2009 WL 485285 Court of Appeals, February 26, 2009, *Ransom v. Utility Contracting Co.*, 2008 WL 1808516 Court of Appeals, April 22, 2008, *Donovan v. Metro Plant Services*, 2008 WL 612228 Court of Appeals, March 6, 2008; *Geerdes v. Glupker*, 2007 WL 4248564 Court of Appeals, December 4, 2007, in which a jury verdict in favor of Defendant was vacated, *Fitzgerald v Waste Management Inc*, et al, Montcalm County Circuit Court Lawyers Weekly No. 10-54575, *Luther v. Morris*, 2005 WL 94795 Court of Appeals 2005 in which the Court of Appeals reversed the trial court's dismissal of plaintiff's case even after the Supreme Court remanded the case for reconsideration in light of *Kreiner* in 471 Mich 908 (2004), *Ream v. Burke Asphalt Paving*, 2005 WL 233541 Court of Appeals (2005) in which likewise the Court of Appeals reaffirmed a jury verdict for Plaintiff even after vacation of its original order and remand to reconsider in light of *Kreiner.*
21. *McCormick slip op at p 20*
22. *Michigan Ed.Emp.Mut.Ins.Co v Morris* 460, Mich 180 (1999); 1 Mich. Pl. & Pr. § 1:16 (2d ed.)
23. 473 Mich 562 (2005)
24. 24 Mich L W 947, August 9, 2010
25. Senate Bill 1429 (2004) never voted on; Senate Bill 618 (2005) referred to Committee, never voted on; House Bill 4846 (2005) never voted on; House Bill 4940 (2005) never voted on; Senate Bill 124 (2007) House Bill 4301-passed the House, stalled in the Senate; Senate Bill 83 (introduced January 27, 2009 referred to Committee); House Bill 4680 passed the House the same week that the motion to reconsider *McCormick* was granted, April 2, 2009. It should not escape notice that Justice Cavanagh's decision adopts most if not all aspects of the definition of serious impairment promoted by the Plaintiff's bar in House Bill 4301, Senate Bill 83 and the amicus briefs submitted to the Court by the Coalition to Protect Auto No Fault and the Michigan Association for Justice as well as the Negligence Section of the State Bar of Michigan and the Office of Insurance and Financial Regulation, now headed by Kenneth Ross, a Granholm 2003 appointee.
26. *Ibid*
27. 24 Mich LW 947, August 9, 2010 at page 13
28. ___ Mich ___ (July 31, 2010)
29. 476 Mich 55 (2006)



Simple Steps To Lower Your E-Discovery Risk Profile

By: Jonathan E. Moore, *Warner Norcross & Judd LLP*

Executive Summary

The well-known and highly publicized cases involving sanctions for mistakes and abuses in the e-discovery process provide ample reminder of the dangers lurking in the e-discovery process. Counsel must be careful to protect against these risks by following certain well-defined steps. First, counsel should issue a written litigation hold notice to individuals likely to possess potentially relevant electronic documents containing instructions to preserve all such materials. Counsel should also confirm that that any default document-retention policies and auto-delete and other data-destruction practices have been suspended and remain suspended throughout the litigation.

As the litigation progresses, counsel should make sure to monitor the client's compliance with these requirements and issue periodic reminders of the preservation obligations. Counsel should also oversee the searching, retrieval, and collection of electronic documents for production. Applying these procedures can significantly reduce the risk of incurring sanctions for violations of discovery requirements.

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Electronic discovery is a complex, rapidly developing area of the law. And it is unreasonable to expect all lawyers — or even all litigators — to become an expert on the subject. But courts do expect that all lawyers representing clients in litigation will have a sufficient understanding of e-discovery issues, not only to comply with applicable discovery obligations, but also to advise their clients and to engage in informed negotiations with opposing counsel.[1] The well-known and highly publicized cases involving sanctions for mistakes made in the e-discovery process provide ample reminder of the dangers lurking in the e-discovery process. Accordingly, this article identifies some of the biggest "extra" e-discovery risks that litigators too often take on, as well as several key steps to take to reduce those risks and comply with court-imposed discovery obligations.

Avoid Taking Unnecessary Risks

The following is a list of several common "extra" e-discovery risks that a litigator may create in any case, in order of importance from riskiest to least risky. You can think about these as the "unforced errors" of e-discovery: risks unnecessarily created by decisions that the litigator makes in the e-discovery process.

Biggest "Extra" E-Discovery Risks

1. Failing to issue a written litigation hold notice.
2. Failing to confirm suspension of auto-delete functions and default retention policies.
3. Failing to confirm and monitor compliance with litigation hold.
4. Allowing client personnel to search and collect electronic materials.

The Litigation Hold Notice

Courts have long required parties to implement a "litigation hold" once litigation is reasonably anticipated, and to instruct individuals likely to possess potentially relevant electronic documents to preserve all such materials in their possession, custody, or control.[2] Although it has always been a best practice to issue written litigation hold notices, some litigators have until recently viewed issuance of a written notice to be optional, preferring to provide preservation instructions to their clients orally.

But in recent years courts have increasingly imposed the express requirement that a litigation hold notice be issued in writing, and have found purported litigation holds based on oral communications to be insufficient.[3] Moreover, the requirement

As soon as litigation is reasonably anticipated, you should prepare a written litigation hold notice to be distributed to all client personnel who may possess potentially relevant evidence.

of a written litigation hold notice is not just for defendants, but applies equally to plaintiffs, as well. Indeed, some courts have specifically found that the duty to preserve evidence and issue a written litigation hold notice actually may accrue earlier for a plaintiff than for a defendant — noting that a plaintiff typically anticipates litigation even prior to filing the lawsuit.[4] And several recent cases resulting in sanctions for litigation hold errors have involved failures by plaintiffs' lawyers either to issue a litigation hold notice or to properly implement the hold.[5]

As soon as litigation is reasonably anticipated, you should prepare a written litigation hold notice to be distributed to all client personnel who may possess potentially relevant evidence. When is litigation reasonably anticipated? At a minimum, once a complaint has been filed.[6] But courts have also found litigation to be reasonably anticipated based on earlier events, such as a potential plaintiff's engagement of counsel to pursue a potential claim,[7] or the receipt of a cease-and-desist letter or other correspondence threatening litigation.[8] The duty to preserve may also be triggered by receipt of a preservation notice[9] or by the filing or threatened filing of an administrative action.[10]

One prevalent "trick of the trade" among e-discovery litigators is to use the earliest date of the opponent's assertion of work-product protection to determine the date on which a litigation hold notice should have been issued. Because the claim to work-product protection also entails the assertion that the document was prepared in anticipation of litigation, early dated work-product entries on the privilege log can be used as an admission that litigation was reasonably anticipated as of that date. The opponent can then use any delay between that date and the subsequent issuance of a litigation hold notice as an opportunity to seek sanctions for spoliation.

The litigation hold notice should provide a brief description of the litigation and the claims, defenses, and time period involved, and instruct each recipient to preserve all documents — both paper and electronic — that may contain potentially relevant information. The notice should also list and describe representative categories of documents, as well as the sources and locations of electronic data that should be included.

Although merely transmitting a written litigation hold notice is only the beginning, it is a crucial first step that greatly reduces your e-discovery risk profile and provides a foundation for a successful e-discovery process.

Auto-Delete and Default Document Retention Policies

Whether according to an express document retention policy or merely as a matter of convenience, prior to receiving a litigation hold notice your client's personnel may be routinely purging electronic data to free up system resources or as part of ordinary system maintenance. They may also have a practice of deleting electronic data (including email) when employees leave the organization. It is very important that at the outset of the litigation — either before or simultaneously with issuance of the litigation hold notice — that you confirm with appropriate personnel that these default document-retention policies and auto-delete and other data-destruction practices have been suspended and remain suspended during the pendency of the litigation. There are numerous sanctions cases that deal specifically with the failure to verify that the client has suspended these default procedures.[11] A recommended best practice is to include suspension instructions in the litigation hold notice, to be confirmed through both oral communications and written statements from the IT personnel asserting that the appropriate actions have been taken. It may be necessary to refine the instructions based on information gathered from the client's IT personnel about the organization's systems and the specific steps involved in ensuring compliance.

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Monitoring Compliance

Issuing a written litigation hold notice is not sufficient by itself. You cannot sim-

ply send out the notice to the client and then sit back and hope that in-house counsel or other client contact distributes the notice to the right people and that they follow the instructions. Courts require outside counsel to monitor the client's compliance with the litigation hold — to take affirmative steps to confirm that the recipients have reviewed the notice and are complying with it, and to modify the scope of the hold and the list of custodians subject to it as the case progresses.[12]

One of the key components to any defensible e-discovery process is proper documentation of the steps taken. For receipt of litigation hold notices, this is often accomplished through a written questionnaire form that is filled out and signed by each of the recipients. This form can be in paper form, or in electronic form issued by email with receipt confirmation, to be filled out and returned by email.

The courts also require counsel to issue periodic reminders to the participants of the requirements of the litigation hold. One suggestion is to set up a repeating alert in your calendar to remind you once per quarter to re-issue the litigation hold notice to the list of recipients, and also to confer with human resource and IT personnel at the client to determine whether there have been any system or personnel changes that should be taken into account in modifying the contours of the litigation hold. Monitoring compliance is actually pretty easy and straightforward, and really just involves making sure you dot a few "i"s and cross a few "t"s. But failing to follow through with these simple procedures can lead to serious and expensive problems in the e-discovery process.

In-house Collection

Unlike the previous three "extra" risks discussed above, which are never appropriate to take on, this fourth item requires a more nuanced discussion. On the one hand, it is true that allowing client personnel to perform the searching, retrieval, and collection of electronic documents for production does significantly increase your e-discovery risk profile. The in-house approach is undeniably less defensible than retaining a reputable outside consultant to conduct a forensically sound collection. And it does increase the risks, not only of your e-discovery process being challenged by your opponent, but also to potential either for sanctions or a "re-do" order from the court.

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On the other hand, using client personnel can be an excellent way to dramatically reduce the cost of e-discovery, which is often by far the largest cost component of the entire case. E-discovery consultants are expensive, and often forensic collections result in higher volumes of electronic data that will later need to be culled down and reviewed. And because the biggest driver of e-discovery costs is attorney review time, an overinclusive collection of electronic materials exponentially increases the ultimate total costs. A targeted, informed, and right-sized collection process will always be much cheaper than simply turning a forensic consultant loose with a giant data vacuum cleaner to suck up the company's data.

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Moreover, the risks associated with in-house collection efforts can be substantially reduced (though not eliminated) by establishment of a clear, well-designed set of protocols and instructions, active supervision, and proper documentation. In-house personnel may be just as capable of executing a defensible process as outside personnel. The key is to make sure that the process is reasonable under the developing legal standards and accepted practices in the field. This requires not only an understanding of the applicable law with respect to e-discovery, but also an understanding of the technical capabilities, functions, and limitations of your client's systems.

It is crucial that you work closely with one or more knowledgeable and reliable IT specialists in your client's IT department. Having litigation support professionals with technical mastery can also be invaluable in this area. Furthermore, you should consider whether it may be necessary or advisable to engage an e-discovery specialist to aid in designing and overseeing the process.

Additional Risk Factors

In addition to these unnecessary "extra" risks within your control, there also may be additional risks at work in your case beyond your control. There is a certain baseline level of e-discovery risk that you will face, regardless of how careful you are, which is due to such matters as the sophistication of the client and its information technology (IT) systems; the size of the organization and number of employees involved; or the nature of the

case and the claims and defenses raised. Below is a list of some of the most common additional factors that may cause your case to have an elevated baseline risk profile:

Additional E-Discovery Risk Factors

- No existing document retention policy, or policy not followed
- IT systems/personnel unsophisticated
- Multiple offices and data locations, especially foreign sites
- Large number of employees
- *David v. Goliath* cases: large corporation defending claims brought by individual
- Employment discrimination
- Class action
- Shareholder suit
- Representing multiple parties
- Use of personal computers and portable devices and media by employees for business purposes
- High-stakes litigation increasing incentive for destruction of evidence
- Fraud allegations
- Potential criminal liability

Once litigation has commenced, it is of course too late to upgrade the client's computer hardware or draft a new document retention policy, and there is typically nothing you can do about the fact that you represent a large corporation with dozens of offices and thousands of employees in a lawsuit brought by a single individual. But it is important to recognize the extent to which these factors cause your e-discovery risk profile to be elevated — so that you can take appropriate steps to address those risks, to the extent possible. The presence of one or more of these factors should alert you to consider whether it may be appropriate to seek the help of a third-party e-discovery consultant or an attorney who specializes in e-discovery practice to help tailor a specific e-discovery plan to the particular needs of the case. You should also keep in mind that these factors may have a substantial effect on your bargaining position with opposing counsel concerning any potential agreement on discovery limitations, search parameters, and other e-discovery issues.

Although you may begin the litigation with a default e-discovery risk profile you cannot control, you can control the actions and decisions you make. And you can make sure not to unnecessarily increase your risk level by making any of the "unforced errors" described above. Moreover, the simple steps described in this article to reduce your e-discovery risk profile are not even terribly time consuming or expensive. And they more than pay for themselves in their reduction to risks of spoliation sanctions and unnecessary e-discovery litigation expenses that they enable.

Endnotes

1. See, e.g., Fed. R. Civ. P. 26(f)(3)(C); MCR 2.301(B)(5); *Zubulake v UBS Warburg LLC*, 229 FRD 422, 432 (SDNY, 2004).
2. See, e.g., *Zubulake v UBS Warburg LLC*, 220 FRD 212, 218 (SDNY, 2003); *School-Link Techs, Inc v Applied Res, Inc*, No 05-2008, 2007 WL 677647, at *1–2 (D Kan, Feb 28, 2007); *Forest Labs, Inc v Caraco Pharm Labs, Ltd*, No 06-CV-13143, 2009 WL 998402, at *4 (ED Mich, Apr 14, 2009).
3. See, e.g., *Pension Comm of the Univ of Montreal Pension Plan v Bank of Am Secs, LLC*, 685 F Supp 2d 456, 465 (SDNY, 2010) ("[T]he failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.") (emphasis in original); *Acorn v County of Nassau*, No CV 05-2301, 2009 WL 605859, at *4 (EDNY, Mar 9, 2009).
4. See, e.g., *Cyntegra, Inc v Idexx Labs, Inc*, No 06 Civ 4170, 2007 WL 5193736, at *3 (CD Cal, Sept 21, 2007); *Pension Comm*, 685 F Supp 2d at 466.
5. See, e.g., *Innis Arden Golf Club v Pitney Bowes, Inc*, 257 FRD 334, 340 (D Conn, 2009); *Pension Comm*, 685 F Supp 2d at 463; *Bd of Regents of Univ of Neb v BASF Corp*, No 4:04CV3356, 2007 WL 3342423, at *4 (D Neb, Nov 5, 2007); *Forest Labs*, 2009 WL 998402, at *3.
6. *Kronish v United States*, 150 F3d 112, 126 (CA 2, 1998).
7. *Hynix Semiconductor Inc v Rambus, Inc*, No C-00-20905, 2006 WL 565893, at *21 (ND Cal, Jan 5, 2006); *Innis Arden*, 257 FRD at 340.
8. *Fox v Riverdeep, Inc*, No 07-Civ-13622, 2008 WL 5244297, at *7 (ED Mich, Dec 16, 2008); *Arista Records LLC v Unsenet.com, Inc*, 608 F Supp 2d 409, 430 (SDNY, 2009).
9. *Swofford v. Eslinger*, 671 F Supp 2d 1274, 1278 (MD Fla, 2009).
10. *Adorno v Port Auth*, 258 FRD 217, 228 (SDNY, 2009).
11. See, e.g., *Aero Prods Int'l, Inc v Intex Recreation Corp*, No 02 C 2590, 2005 WL 4954351, at *3–4 (ND Ill, Feb 11, 2005); *Arista Records*, 608 F Supp 2d at 430, 431–33; *Bolger v Dist of Columbia*, 608 F Supp 2d 10, 30 (DDC, 2009); *Broccoli v Echostar Communications Corp*, 229 FRD 506, 510 (D Md, 2005).
12. See, e.g., *Zubulake*, 229 FRD at 430 ("Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched."); *Acorn*, 2009 WL 605859, at *4 ("[O]nce a litigation hold is implemented, counsel is required to oversee compliance with the litigation hold and to monitor the party's efforts to retain and produce relevant documents.").

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Social Networking Sites

By: Devon Glass, Esq., *Church Wyble, PC*, Lansing

Executive Summary

Social networking sites have become ubiquitous, so it is highly likely that the client will be registered on one or more sites. It is important for defense counsel to inquire of each client what sites he or she participates in, and then conduct a separate search to determine the client's online presence. Counsel must also warn the client against making any postings online that relate to the litigation or could affect the result. Statements made by the client on any social networking site are admissible because they are not hearsay under MRE 801(d)(2). In addition, even if the statements or other postings, such as photographs, do not directly relate to the litigation, if it relates to a character trait for truthfulness then it can be admissible under MRE 608.

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By now, most attorneys have at least a passing familiarity with social networking, even if they don't know exactly what it involves. Sites like Facebook, MySpace, Twitter, LinkedIn, among many others, are internet-based platforms where people can interact with their virtual friends in a variety of ways. This newly developed platform of individual expression and interaction is a great way for people to keep friends and family updated on his or her life, but there can be serious unintended complications if the individual is involved in litigation. The problems are not limited to plaintiffs. Defense counsel also need to be aware of how social networking sites can affect the defense of a claim.

Social Networking 101

The purpose of social networking sites is to allow people to use the internet to facilitate communication with friends and family without concern for where people are physically located. All you need to get started with a social networking site is an email address – that's it. Once you establish an account, what you do with it is up to you.

When social networking first started it was typically utilized by college students and teenagers, basically children with no concept of the negative consequences of their online actions. Over the past 5 years, the use of these sites has grown to include pretty much everyone who has internet access. It's open to anyone who wants to take the time to become involved. Many sites allow access from mobile phones to upload pictures and text, increasing the ability of an individual to share their life in real time.

After joining one of the sites, you can add "friends" by discovering people you know in real life who already have an account on the particular social networking site you've joined. Most of the sites make it easy by allowing you to import your contacts from your email so you don't have to spend time searching for each person who could possibly be a member of the site you've joined. You have to request to add someone as a friend and that person can accept or decline the request. The decision is up to the person who is being asked by you to be your "friend."

As you add more and more "friends," this gives you access to their area of the social networking site and vice versa. This can allow you to view the other person's pictures, personal information, and who they are "friends" with on the site, among other things, depending on how much access you are allowed based upon the individual's privacy settings, but more on that later. When you upload pictures to many of the social networking sites, you are able to identify the people in the pictures by "tagging" them with the virtual identity of whoever is in the picture. The sites then allow the picture to be shared across social networking profiles based upon who is "tagged" in the pictures.

For example, if you upload a picture of yourself and your friend Steve and tag him in the picture, Steve's social networking profile will show this picture in his profile as well as yours because he was tagged in the picture; essentially, the picture is shared

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property even though you are the one who uploaded it. If you ever delete the picture then the image is no longer available on both profiles. Similarly, if Steve decides he does not want to have himself tagged in the photo you've uploaded, he can untag himself from the picture and it's no longer shared between the profiles although it would remain on your profile.

Individuals on the various social networking sites have complete control over what information they want to share and what information they want to restrict. Many sites allow you to restrict access based upon each individual person who you are "friends" with. If you are "friends" with your mother or your children, there may be aspects of your social networking profile you don't want to share. You can restrict access to portions of your profile in a variety of ways, down to only sharing one aspect of your profile with only one other person if you wanted. After limiting access, the other person does not know what they are missing as anything associated with the restricted content is eliminated from view based upon the restrictions.

Social networking is not limited to sites like Facebook or MySpace, it can also involve blogging, which is basically an online personal journal. Blogging is derived from the word weblog and is one of the most expressive aspects of social networking. Most people blog anonymously to give them freedom to say what they truly feel. There are millions of blogs on a variety of subjects that are not personal in nature on topics like politics, sports, or fashion. Anyone with an email address can setup a blog and begin typing their innermost thoughts for the whole world to see, as long as the world knows how to find them. The blog content is controlled entirely by the individual who setup the account and it flows in one direction only, from the user to the reader. Some blogs allow comments, but that is a decision made by the person who set up the blog account and not the reader.

Twitter is a very abbreviated version of a blog, allowing a person to broadcast any message they like as long as it's 140 characters or less. The last sentence was 141 characters, so the period would have to be cut out to make it fit in Twitter, just to give you an idea. When someone uses Twitter to send a message, it's referred to as a "tweet," and it can be received by anyone who is following you on Twitter. You can follow pretty much anyone on Twitter as long as the person tweeting does not block you. Many celebrities use Twitter, with Ashton Kutcher being one of the most followed individuals on Twitter with over 4 million people reading his 140 character messages. If you have a Twitter account, you can reply to someone's tweet with your own tweet and begin a discussion.

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Twitter is a very abbreviated version of a blog, allowing a person to broadcast any message they like as long as it's 140 characters or less.

Although each social networking site has its own unique way of allowing communication between people online, they share one thing in common: the individual who owns the social networking account controls what information is shared about their life. They can tweet anything, tag embarrassing photos of themselves, or even blog about their lawsuit. It's a wide open place and you need to educate your clients about the perils of sharing too much information.

What You Should Tell Your Client About Social Networking

Now that you have an idea of what social networking sites are all about, the next step is talking to your client about what they should and should not do on their social networking site. The first time you talk or meet with any of your clients, you should ask them what sites they use and how active they are on the sites they use. This will give you a good lead on what might exist out there so you don't waste too much time searching every social networking site that exists. I would still recommend doing a basic internet search to check and see what's out there about your client. However, if your client has a common name, it can complicate your searches or lead you down the wrong path and identify the wrong person.

Once you've figured out if your client has a social networking site, there are a number of things you need to discuss with them. The most important thing to advise your clients is to make sure not to discuss any aspect of the litigation what-

The first time you talk or meet with any of your clients, you should ask them what sites they use and how active they are on the sites they use. This will give you a good lead on what might exist out there so you don't waste too much time searching every social networking site that exists.

soever. This may seem like a no brainer, but clients may not understand the implications of discussing the case on a social networking site. Because the nature of social networking sites is to broadcast information to people in a non-private matter, anything your client writes or does on a social networking site is admissible, since it is a statement by a party that is not hearsay under MRE 801(d)(2). Any statements or actions made online can have significant implications for a claim, especially if your client is disparaging the opposing client or discussing privileged matters. Once the statements or actions are made, it's very difficult to retract them or explain them away. Even if you client deletes the statements or actions, there are various websites that archive the internet as a whole so anyone can see what one webpage looked like before changes were made.

One way to protect your client is to encourage them to set their profile to private. This will prevent any random person from accessing their profile and will limit access to only those people your client accepts as a "friend," or whatever the particular site calls them. This really only works for sites like Facebook, MySpace, LinkedIn, and it can work with limited success on Twitter. If you discover a social networking profile for the person who is not your client and the profile is set to private, do not try to gain access to the profile by requesting to be their "friend" or other type of follower. This would almost certainly violate MRPC 4.1, 4.2, 4.3, or 4.4 and can subject you to potential sanctions.

Unfortunately, there are not many safeguards to protect any blogging your client may be involved in, so it's best to recommend they stop blogging altogether or limit blogging to non-litigation subjects. Another thing you can ask your client to do is untag themselves from questionable pictures or associations. However, if you discover potentially damaging information on any of the social networking sites, it's likely unethical to ask them to delete information entirely, as you are intentionally covering up discoverable information.

It's also important to make sure you keep up with your clients to make sure they are following the rules and not doing damage to their image or the claim. It may be advisable with certain clients to randomly monitor any of the social networking sites to make sure the client is complying with your instructions.

The Consequences of Not Advising Your Client

Everyone can probably tell a story or two about a client they heard about who screwed up a claim because of social networking. Some of the stories out there include a woman who lost a big third party auto claim because she had pictures of herself dancing at her daughter's wedding or the juvenile criminal offender who had a plea deal revoked by the judge because she made it clear she was going to engage in the criminal behavior immediately after her court hearing. While there are many anecdotes and stories about the client who tanked their claim thanks to a post on Facebook or a Tweet, many of these stories are not published in the newspaper or broadcast in any way that makes them verifiable for print. This makes it difficult to actually perceive the loss that can occur since we don't know how accurate the stories actually are, and there is not much incentive for someone to publicize the failing of their client.

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If you discover potentially damaging information on any of the social networking sites, it's likely unethical to ask them to delete information entirely, as you are intentionally covering up discoverable information.

Since there are not many verifiable litigation related complications from social networking, a good and very recent example of the negative consequences comes from the great white north, Canada. Nathalie Blanchard was on leave from her job at IBM following a diagnosis of major depression by her doctor. She was on disability for over a year and a half when all of a sudden her benefits stopped. When she inquired to the insurance company as to why the benefits were no longer being paid, she was advised her Facebook profile made her appear able to work and no longer depressed, so they were no longer obligated to pay her benefits.

There are many instances when you can find a particularly embarrassing picture, tweet, or blog, that can seriously damage a defendant's credibility. Even if the topic is not necessarily related to the subject litigation, if it relates to a character trait for truthfulness then it can be admissible under MRE 608.

The pictures on Ms. Blanchard's profile were of her from her birthday party, on vacation in Florida and at a male strip club. The pictures showed her smiling and appearing to have fun, therefore, not depressed, which was enough for her disability benefits to be terminated. Although Ms. Blanchard claims she was advised by her doctor to engage in activities that helped her forget her problems, the case is now headed to court in Canada.

Whether you agree or disagree with the decision of Ms. Blanchard's insurance company to terminate benefits, it certainly makes it clear that what you share online often finds its way to someone you don't want to share with. While the negative consequences appear to fall disproportionately on plaintiffs, this does not mean you should not investigate defendants. If there is an issue of whether the defendant was drinking or using narcotics, social networking sites are rife with valuable information about the defendant's use or abuse of these substances prior to the litigation. There are many instances when you can find a particularly embarrassing picture, tweet, or blog, that can seriously damage a defendant's credibility. Even if the topic is not necessarily related to the subject litigation, if it relates to a character trait for truthfulness then it can be admissible under MRE 608. If your client denies doing an activity identified on their social networking profile, that is an issue of credibility and your client's image begins to deteriorate in front of opposing counsel or the jury.

The impact of statements or online content does not end with litigation. Many settlement agreements contain non-disclosure clauses and an online statement made subsequent to such an agreement would most likely violate a non-disclosure clause. This can put the settlement in jeopardy, nullifying hours of work thanks to a moment of poor decision making by your client.

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While it's not possible to control what your client does when you are not looking, if you don't advise your client of the negative consequences that can result from careless social networking then you are doing your client a disservice. I would highly recommend drafting a form letter to all of your clients advising them of how they should handle social networking sites during your representation and afterwards. It may not always protect your client from harm, but at the very least it allows you to protect your client's potential claims or defenses. Regardless of whether you are looking into these issues with regard to your client, you can be rest assured the opposing side will be and it's a good idea to know what you are getting into before being ambushed during a deposition or trial.

New Members

MDTC Welcomes These New Members

Gregory A. Light, Garan Lucow Miller, PC, Lansing

Kerr L. Moyer, Bensinger Cotant & Menkes, PC, Grand Rapids

John G. Zevalking, Collins Einhorn Farrell & Ulanoff, P.C., Southfield

Christina Kay McDonald, Dickinson Wright, PLLC, Grand Rapids

Bernard S. Edelson, Law Office of Bernard S. Edelson, Bingham Farms

Michael J. Tauscher, Scopelitis Garvin Light Hanson & Feary, PLC, Detroit

Anthony Pignotti, Juip Richtarcik Law Firm, Detroit

Michael Stephen Weisenbach, Dykema Gossett, PLLC, Bloomfield Hills

Forensic Accounting: Strengthening The Case Against Fraud

By: William F. Edwards, *Rehmann Corporate Investigative Services*

Executive Summary

Corporate fraud is nothing new, but it has been increasing in recent years, both in high-profile cases and in others that are not as well known. The forensic accountant can assist a corporation in preventing or detecting fraud, and can assist the attorney in prosecuting or defending civil fraud cases.

The forensic accountant can also work with the attorney in cases where business valuation is at issue, and in issues of economic damages in breach of contract disputes. The expertise of the forensic accountant should be utilized from the early stages through trial, beginning with developing a theory of the case, a discovery strategy, the analysis of the data, and arranging the presentation to the court or jury.

William F. Edwards, CPA is the Director of Financial Investigations for Rehmann Corporate Investigative Services (CIS), a member of the Rehmann family. He is located in the Troy office oversees fraud investigations and the research of legal documents served on corporations. Prior to joining Rehmann CIS, Bill served as a vice president in the Fraud Services Department of Comerica Bank. Prior to that, he was as employed as a Special Agent with the Federal Bureau of Investigation for 29 years. He can be reached at 248.293.7187 or by email at bill.edwards@rehmann.com.

Fraud – a Growing Problem

Corporate fraud has become a commonplace occurrence in both public and private companies and it is on the rise. In fact, according to a recent industry report, U.S. organizations lost seven percent of their annual revenues to fraud, translating to approximately $994 billion in fraud losses annually.[1]

When confronted with a case of fraud, the first line of defense should be to retain a reputable fraud investigation team to conduct an in-depth investigation. A fraud investigation is a detailed examination of the wrongful activity which produces a fact-based report on the players allegedly involved, and the manner and extent of their fraudulent activity. This type of investigation can uncover the truth and produce the evidence that management needs to determine how to proceed.

In most cases, the job of a reputable fraud investigation team does not end at the conclusion of the investigation. With a report in hand, the investigator presents the findings to the appropriate law enforcement agency and provides professional support through the prosecutorial process.

The Evolution of Forensic Accounting

Forensic accounting evolved with the growth in malpractice and financial irregularities involving companies and their principals. Although these occurrences have taken place since the beginning of the enterprise, in recent history they have caused havoc in the investment community and affected the stability of the economy.

Forensic accounting is applied when there is a need for a financial investigation to detect fraud that could result in criminal prosecution, or civil disputes that could result in monetary settlements or sanctions. Engagements relating to criminal matters generally arise in the aftermath of fraud and could involve a range of activities from the misrepresentation of financial records to the misuse of company funds. Forensic accountants are engaged in civil cases ranging from breach of contract to business valuation to marital disputes.

Forensic Accounting vs Auditing

To differentiate between forensic accounting and auditing, one must first take into account the overall objective of the examination. In forensic accounting, the examination is fraud-driven, while in auditing the focus is on ensuring compliance with regulations.

Forensic accounting is fraud-driven and is applied primarily on a historical basis to detect fraud and criminal transactions within the financial records of both public and private entities. One could describe forensic accounting as a combination of auditing and investigating.

Through experience in law enforcement, a forensic accountant gains the ability to express the information gained from the examination in terms that are useful to the judicial process, whether civil or criminal. In both civil and criminal cases, the forensic accountant usually works closely with the attorney in developing the facts through discovery, as well as presenting the evidence at trial or for settlement.

Unlike auditing, forensic accounting has nothing to do with determining adherence to generally accepted accounting standards. Its primary objective is to identify financial evidence of fraudulent activity. The job requires clear and concise reporting and these reports are considered as evidence in both criminal and civil courts. When presenting this evidence before a court of law, the forensic accountant is considered to be an expert. The ideal forensic accountant has experience both as an auditor and CPA and as a seasoned law enforcement officer who is experienced in criminal investigations. Through experience in law enforcement, a forensic accountant gains the ability to express the information gained from the examination in terms that are useful to the judicial process, whether civil or criminal. In both civil and criminal cases, the forensic accountant usually works closely with the attorney in developing the facts through discovery, as well as presenting the evidence at trial or for settlement.

Following the Trail of Evidence

In order to effectively "follow the money," the forensic accountant must identify the person or persons involved and the environment whereby the suspected fraud has taken place. Interviews should be conducted to gain a full understanding of the internal controls in place or the lack thereof. A full understanding must be obtained of the internal and external information and document flow in order to identify the potential sources of evidence.

Early on, consideration should be given to utilizing a computer forensics expert to image logical hard drives and other information gained through e-discovery. This will allow the investigator to capture historical emails, identify hidden files and files that may have been deleted. The attorney may find it helpful to consult with the accountant in the framing of e-discovery requests, as well as written interrogatories and depositions.

Related accounting records must be obtained, organized and evaluated. Depending upon the complexity and size of the suspected fraud, evidence can be manually reviewed or, if necessary, loaded into investigative software. Investigative software can allow a 100 percent analysis of the money flow, search for transaction patterns and the creation of customized reports.

Red Flags

Through the analysis process, the investigation is looking for red flags (transactions that are suspicious and do not coincide with the normal flow of business), such as:

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The attorney may find it helpful to consult with the accountant in the framing of e-discovery requests, as well as written interrogatories and depositions.

- Nonexistent services
- Expenditures in even or round numbers
- Suspicious or unusual debits or credits (explanation for debit or credit does not fit)
- Intercompany transactions
- Accounts labeled "other" or "suspense"
- Abundance of professional/consulting fees/management fees
- Transfers to other banks
- Excessive petty cash balances
- Money transfers out of the country that do not fit the normal day-to-day business
- Investments in suspicious companies
- Inconsistent endorsements on checks

When we think of high profile cases in recent history that would have consumed insurmountable resources in the forensic accounting arena, we think of the Enron and Bernard Madoff investigations. Both investigations consisted of forensic accountants (investigative accountants from both the Federal Bureau of Investigation and Securities and Exchange Commission) and attorneys from the Department of Justice. Both of these investigations were extremely complex in terms of the volume of financial records reviewed, witnesses interviewed and legal issues addressed.

Preventative Measures

Internal controls are of the utmost importance to prevent internal and

external fraud. The problems arise when established companies fail to review those controls and make the necessary adjustments. As the fraud environment changes, these systems, procedures and policies must be periodically scrutinized by an independent eye to ensure that they are effective.

One way to prevent internal and external fraud is by way of a risk assessment. Risk assessments can be used to identify possible risks to assets, to estimate the likelihood of security failures and to identify appropriate controls for protecting assets and resources. Once a risk assessment is completed, management should evaluate the outcome to prioritize solutions for potential problems. Things to take into account include the severity of likely ramifications and the expense of implementing cost-effective and reasonable safeguards or controls.

In the event that internal controls fail to protect a company from fraudulent activity, it is essential to conduct a thorough fraud and forensic accounting investigation to uncover the fraud and the fraud perpetrator. The resulting evidence from such and investigation can arm the offended company with the kind of evidence necessary to mount a successful prosecutorial outcome.

Endnotes

1. According to The Network, Inc., a leading provider of governance, risk and compliance solutions, third quarter 2009 findings of its Quarterly Corporate Fraud Index.

Young Lawyers Series

I. STARTING THE CASE: THE EARLY STAGE

Cross Claims and Third Party Claims
Making Others Pay Your Client's Legal Bills and Liabilities

By: Timothy A. Diemer, *Jacobs and Diemer, P.C.*

Executive Summary

In the last issue, this series began with a discussion of the basics of drafting and filing a complaint and answer. In this issue, the series continues with a discussion of cross-claims and third party claims. The cross-claim is used to assert liability against the plaintiff. The third party complaint is used to invoke the obligation of an insurer and indemnitor, or both, to defend and/or indemnify the defendant. As a prerequisite to suing an insurer and/or indemnitor, it is necessary to "tender the defense" to the potential insurer and/or indemnitor. When tender is made and refused, the third party complaint is filed to bring the insurer and/or indemnitor into the action.

In the July edition of *Quarterly*, we tackled drafting a complaint and responding with an answer. With this installment, we will explore the next stage of the proceedings, raising cross claims and third-party claims with an eye toward asserting potential insurance and indemnity rights. If your client is sued, nothing will ease the fears of litigation like having someone else foot the bill. There are two primary ways you can make someone else pay for your client's legal fees and liabilities: insurance and indemnity. The way to enforce insurance and indemnity rights is through cross claims and third party claims.

A cross claim is a cause of action that a party asserts against an already existing party on the same side of the "v." For defense attorneys, this will be a claim against a co-defendant. A third party claim, on the other hand, is one filed against a non-party. As indicated last time, both cross claims and third party claims are treated as "pleadings" under MCR 2.110(A).

Rules of Pleading Apply

Whether you file a cross claim or a third party claim, the same basic rules of pleading apply. The cross defendant or third party defendant must file an answer, MCR 2.110(B), which is due within 21 days MCR 2.108(4). All of the requirements for filing a complaint also apply, such as the requirement that the pleader must provide sufficient facts so as to adequately apprise the other party of the nature and basis of the cause of action. MCR 2.111(A) and (B). If the cross or third party claim is vague and not clearly designated as a pleading, the court can treat it as such and require that an amended pleading be filed. MCR 2.110(C)(2).

MCR 2.110(C) provides that a cross claim or third party claim "may" be filed with your answer, but simultaneous filing is not required. You do, however, need to be aware of issues concerning waiver. While a cross claim may be filed with your answer, if you fail to file it with the answer, you have to seek leave of the court or an agreement by opposing counsel in order to file a cross claim. MCR 2.203(D); MCR 2.118.

Third Party Claim Against an Insurer

Third party claims are a little trickier than cross claims, since a third party claim is often asserted against your client's insurer. If you represent a defendant who is served with a complaint and you believe that a liability policy covers the suit, be prepared to file an action against the insurer if the insurer refuses to provide a defense. Remember that it is also necessary to "tender" the claim to insurer – inform the

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There are two primary ways you can make someone else pay for your client's legal fees and liabilities: insurance and indemnity.

insurer that your client has been sued, and demand coverage under the policy.

MCR 2.204 specifically notes that third party claims arise often in the insurance context: "a defending party, as a third-party plaintiff, may serve a summons and complaint on a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim." This language applies to a defendant's suit against its insurer, but strangely enough, some courts refuse to allow third party actions against an insurer on the basis that it is inappropriate to have a defendant's liability insurer as a party in the case. This general notion is correct, but filing a third party action does not make the insurer a party to the initial lawsuit by the plaintiff.

The fact that coverage lawsuits against insurers are contemplated by MCR 2.204 is demonstrated by the fact that the rule expressly states that third party practice is "[s]ubject to the provisions of MCL 500.3030." MCL 500.3030 prohibits plaintiffs from filing a direct action against a defendant's insurer:

> In the original action brought by the injured person, or his or her personal representative in case death results from the accident, as mentioned in section 3006, the insurer shall not be made or joined as a party defendant, nor, except as otherwise provided by law, shall any reference whatever be made to such insurer or to the question of carrying of such insurance during the course of trial.

Michigan Rule of Evidence 411 confirms this policy, "Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully."

Read together, these various provisions mean that an insurer cannot be made a party defendant in the underlying personal injury action, but there is no prohibition against third party claims. Despite this common sense approach, some judges refuse to allow a defendant to pursue a third party action seeking coverage from an insurer. So, by way of warning, if you intend to file a third party action on a policy of insurance, be prepared that a judge may dismiss the case on this basis. If so, you can still file a separate declaratory action seeking coverage, and it should be assigned to the same judge.

Third Party Claim Against an Indemnitor

When devising a battle plan for initial case handling after receipt of a complaint, it is wise to also look to see whether your client has a right to indemnity from another entity. The procedure is the same as with an insurer. If this other entity is already a party to the lawsuit, file a cross claim; otherwise, file a third party claim and bring a stranger into the proceedings. As with the claim against the insurer, you must also be sure to tender the defense to the indemnitor. In some cases, you may sue both the insurer and the indemnitor.

Indemnity clauses are common in contracts, especially in construction contracts, and in many purchase orders. The important thing is to read every contract and look for potential sources of indemnity. One common example of using indemnity to your advantage is when the underlying plaintiff is an employee of a subcontractor. This employment relationship alone is generally sufficient to meet the causality requirement in an indemnity agreement. The fact that the employee could not sue his employer has no bearing on whether your client is entitled to contractual indemnity from the employer for the employee's injury.

A cross claim or third party claim "may" be filed with your answer, but simultaneous filing is not required.

Some courts refuse to allow third party actions against an insurer on the basis that it is inappropriate to have a defendant's liability insurer as a party in the case. This general notion is correct, but filing a third party action does not make the insurer a party to the initial lawsuit by the plaintiff.

One notion you should ignore is that express contractual indemnity bears any relationship to the primary concept for all lawyers: fairness (well, maybe not all lawyers). Instead, an indemnity contract can require a party that is free of fault to indemnify a party who is at fault. When considering a contractual indemnity action, you should put tort concepts aside; equity has nothing to do with contractual indemnity.

If you are successful on an indemnity claim, you can often spare your client not only the cost of any judgment or liability, but an indemnity obligation may also entitle your client to defense costs and attorney fees. Nothing will make your client happier than having someone else foot the legal bill. It is also an easy way as a young lawyer to impress your senior partner.

In the next issue, we will take a look at the theory and practice of discovery.

JOIN AN MDTC SECTION

MDTC has revised its practice sections. Below is a list of the sections, 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.

Amicus Curiae	Hilary Ballentine hballentine@plunkettcooney.com
Appellate Practice	Beth A. Wittman bethwittman@kitch.com
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Labor and Employment	Barbara E. Buchanan beb@kellerthoma.com
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By: Graham K. Crabtree, *Fraser, Trebilcock, Davis & Dunlap*
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MDTC Legislative Report

With most of this year's budget bills in conference committee and numerous legislators on the campaign trail, the activity of the Legislature has been relatively quiet since my last report. Most of the summer's entertainment in Lansing has been furnished by the customary election year shenanigans (Will the *real* Tea Party please stand up?) and the recent unseemly ruckus at the Hall of Justice. Now, as we head into the Fall and the final stretch of this legislative session, it appears that an agreement for finalization of the budget has been reached which will hopefully avoid another embarrassing shutdown of state government. Under that agreement, if it holds together, the troublesome hole will be plugged without any new tax revenues by a variety of alternative measures, including a 208 million dollar transfer from the School Aid Fund, a tax amnesty program, and a new round of early retirements.

Viewed in the light of recent experience, the campaign rhetoric has been relatively subdued thus far, but it is unrealistic to expect that this will continue for long. As I mentioned last time, there will be a large turnover in the Legislature as term-limited Representatives and Senators move on to other pursuits. The coming election will offer opportunities for the voters to choose between many candidates offering more of the same and a few who might actually bring about some changes. We will have an opportunity to vote on whether persons convicted of violating the public trust should be disqualified from election or appointment to public office, which should be a no-brainer. We will also be asked to weigh in on whether a new constitutional convention should be convened – a question which will require a much more thoughtful weighing of pros and cons. When I write again in December, the voters will have spoken as to all of these issues, and the consequences will be interesting, wherever the chips may fall.

New Public Acts

As of this writing (September 13, 2010), there are 158 Public Acts of 2010. The new ones worth noting include:

County Medical Examiners. 2010 PA 108 – House Bill 4893 (Valentine – D). This Act has amended MCL 52.205, prescribing the duties of county medical examiners, to expand their authority to retain body parts for determination of cause or manner of death, or as evidence of crime; establish procedures for return or disposal of such body parts when no longer needed for those purposes; and provide immunity from civil liability for good-faith performance of these duties.

Real Property Records. 2010 PA 123 – Senate Bill 791 (Van Woerkom – R). This Act has created a new "Uniform Real Property Electronic Recording Act," which provides new authority for recording, use and legal recognition of real estate documents submitted and recorded electronically. Under the new Act, which took effect on July 19, 2010, a county register of deeds will be permitted, but not required, to accept electronic documents for filing. A register of deeds who elects to do so will be required to comply with standards yet to be determined by a newly-created Electronic Recording Commission.

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Most of the summer's entertainment in Lansing has been furnished by the customary election year shenanigans (Will the *real* Tea Party please stand up?)

Construction Liens. 2010 PA 147 – House Bill 5830 (Hammel – D). This Act has amended the Construction Lien Act to eliminate the insolvent Homeowner Construction Lien Recovery Fund and the former provisions governing the administration of, and payment of claims from, that fund. In a new section MCL 570.1118a, the Act retains the provisions of former MCL 570.1203(1) and (2), precluding attachment of construction liens against residential structures when proof of payment of the contractor has been made by affidavit.

New Initiatives

A few noteworthy Bills and Resolutions have been introduced since my last report. They include:

Satisfactions of Judgment. Senate Bill 1379 (Switalski – D). This Bill proposes to amend the Revised Judicature Act to add a new section MCL 600.6099, which would require the filing of a satisfaction of judgment within 28 days after full payment of a civil judgment. The new provision would require that the filing be made by the party benefited by the judgment, or by that party's attorney. Failure to timely file a satisfaction of judgment would be a misdemeanor, punishable by a fine of not less than $25 nor more than $200.

Immigration Law. House Bill 6256 (Meltzer – R) and Senate Bill 1388 (McManus – R). These Bills separately propose the enactment of the same new "Immigration Law Enforcement Act." The new provisions, likely inspired by the controversial Arizona law on the same subject, would require law enforcement officers to take action to determine the immigration status of a person lawfully stopped, detained or arrested, if there is a reasonable suspicion that the person is an alien unlawfully present in the United States. The new Act would provide procedures for determination of immigration status in such cases, and prescribe actions to be taken if a detained person is found to be unlawfully present in this country.

Medical Malpractice – Evidence – Expression of Sympathy. House Bill 6263 (Meadows – D) would amend the Revised Judicature Act to add a new section MCL 600.2155, providing that statements, writings or actions expressing "sympathy, compassion, commiseration, or a general sense of benevolence relating to the pain, suffering, or death of an individual" would be inadmissible as evidence of an admission of liability in medical malpractice cases. The substance of the Bill is identical to House Bill 6073 (Marleau-R), discussed in my last report, but includes tie-bars to House Bill 4571 (Meadows – D), proposing relaxation of the qualifications for expert witnesses and the requirements for notices of intent and affidavits of merit in medical malpractice cases, and (House Bill 4680 – Meadows), the "*Kriener* fix" Bill passed by the House in April of 2009. These Bills have been referred to the House Judiciary Committee, but have not been scheduled for hearing. The utility of the tie-bars in HB 6263 has been dramatically reduced by recent case law and court rule amendments addressing the procedural requirements for medical malpractice cases and the Supreme Court's recent reversal of *Kreiner,* but HB 4571 may still have some relevance with respect to expert witness qualifications.

Governmental Immunity – Sidewalks. Senate Bill 1475 (Kuipers – R) would amend the Governmental Immunity Act to expand the responsibility of municipal corporations for maintenance of sidewalks adjacent to county highways. As amended, MCL 691.1402a would require municipal corporations to maintain sidewalks adjacent to municipal, county, or state highways, without regard to prior knowledge of the defect causing injury now required by § 2a(1)(a).

Electronic Mail Fraud. House Bill 6327 (Robert Jones – D) would create a new "Electronic Mail Fraud Regulatory Act," providing new causes of action with substantial civil penalties for fraudulent use of e-mail, the internet, or other electronic communication to obtain or disseminate identifying information or identification documents.

No-Fault – PIP – Stolen Vehicle. House Bill 6289 (Byrum – D) would amend the Insurance Code, MCL 500.3113, to deny payment of PIP benefits to any person who, at the time of an accident, was using a motor vehicle or motorcycle unlawfully taken, unless that person reasonably believed that he or she, or the driver, was entitled to use the vehicle.

Cyber Bullying. Senate Bill 1459 (Hunter – D) would amend the Penal Code to add a new section MCL 750.411w, providing new criminal penalties for "cyber bullying" of persons less than 18 years of age.

MCL 600.2912I would require the plaintiff to produce clear and convincing evidence of gross negligence proximately causing the alleged injury in any medical malpractice action based upon provision of emergency medical care

Old Business

Tort Reform Proposals. As I've mentioned in my prior reports, a number of Bills have been introduced, mostly in the House, addressing additional tort reforms and what my Republican friends would probably call "reverse tort reform." None of these measures have become law; it is virtually impossible for any of them to be passed by both Houses, given the current balance of power. But there has been some action with respect to some of these initiatives which may suggest a possibility of further consideration and compromise in the lame duck session. It's also entirely possible that a plan for passage of some of these Bills by the House before the election is being contemplated as a way to embarrass the party that won't play along.

Medical Malpractice – Emergency Care – Gross Negligence. As I've noted before, House Bill 6163 (Meadows – D) would amend the Revised Judicature Act to add a new section. MCL 600.2912I would require the plaintiff to produce clear and convincing evidence of gross negligence proximately causing the alleged injury in any medical malpractice action based upon provision of emergency medical care in a hospital emergency department or obstetrical unit, or emergency services provided in a surgical operating room, cardiac catheterization laboratory, or radiology department immediately following evaluation or treatment of the patient in an emergency department. This Bill is interesting because the subject

Actions against state licensed architects, professional engineers, contractors, and land surveyors would be subject to other applicable periods of limitation.

matter is rather atypical of Democratic sponsorship.

Open and Obvious – Comparative Fault. The motivation for this may be found in the Bill's tie-bar to House Bill 5744 (Kandrevas – D) and HB 5745 (Lipton – D), which would amend MCL 600.2959 to add a new subsection (2), providing that "whether a condition is open and obvious may be considered by the trier of fact only in assessing the degree of comparative fault, if any, and shall not be considered with respect to any other issue of law or fact, including duty." HB 5745 would amend MCL 600.1483 to add a new subsection (5), providing that the caps on non-economic damages in medical malpractice cases would not apply in any case where the trier of fact determines, by a preponderance of the evidence, that the defendant, or an individual for whose actions the defendant is responsible, has falsified, altered or destroyed medical records pertaining to the treatment at issue, in violation of MCL 750.492A. On June 30, 2010, the House Judiciary Committee reported HB 5744 and HB 5745 without amendment, and these Bills are now awaiting consideration on the Second reading Calendar. HB 6163 has been referred to the House Judiciary Committee, but has not been scheduled for hearing.

"Right of Publicity." House Bill 5964 (Byrnes-D) would create a new "Right of Publicity Act," which would establish a new civil cause of action for unauthorized commercial exploitation of a living or deceased individual's name, likeness, or other personal attributes – his or her "right of publicity." The available remedies would include money damages, attorney fees, and equitable relief. The House Judiciary Committee heard testimony form a variety of interested parties in August, but the Bill was not reported.

"SLAPP" Lawsuits. House Bill 5036 (Ebli – D) would amend the Revised Judicature Act. The new section, MCL 600.2977, would provide individuals with new protection against lawsuits (sometimes referred to as "SLAPP" suits) brought for the primary purpose of hindering their participation in the process of government. A Bill Substitute (H-2) passed by the House on August 19, 2010, is broader in scope than the Bill originally introduced; it would also provide individuals with protection against such suits filed for the purpose of hindering the defendant's exercise of the right of free speech under the state and federal constitutions. The Bill has now been referred to the Senate Judiciary Committee.

Architects, Engineers, Etc. – Statute of Limitations. Senate Bill 882 (Sanborn – R) would amend the Revised Judicature Act, MCL 600.5839, to provide that actions against state licensed architects, professional engineers, contractors, and land surveyors would be subject to other applicable periods of limitation provided in Chapter 58. The evident purpose of the proposed amendment is to accomplish a legislative abrogation of the Supreme Court's decision in *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36 (2006), which held that the Legislature had intended to establish the six-year period prescribed under § 5839(1) as a period of both limitation and repose with respect to such actions. This Bill was passed by the Senate on December 1, 2009. It was reported by the House Judiciary Committee without amendment on June 30, 2010, and is now awaiting consideration on the Second Reading calendar.

Where Do You Stand?

As I've mentioned before, MDTC's Board of Directors regularly discusses pending legislation and positions to be taken on Bills and Resolutions of interest. Your comments and suggestions are appreciated, and may be submitted to the Board through any Officer, Board Member, Regional Chairperson or Committee Chair.

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Appellate Practice Report

SUPREME COURT

Appellate Jurisdiction—Filing a Timely Motion for Reconsideration in the Trial Court Does Not Divest the Court of Appeals of Jurisdiction

Nordstrom v Auto-Owners Insurance Co, 486 Mich 962; 782 NW2d 779 (2010)

For many years, the Court of Appeals has treated as premature claims of appeal filed while a motion for reconsideration is still pending in the trial court. See, e.g., *Krywy v State Farm Mutual Automobile Insurance Co*, unpublished opinion per curiam of the Court of Appeals, issued April 24, 2008; 2008 Mich App LEXIS 842 (Docket Nos. 274663, 277313) ("The record reflects that defendant filed its claim of appeal on the same day that plaintiff moved for reconsideration. If defendant filed first, then plaintiff's motion for reconsideration was not properly before the trial court, *but if plaintiff filed first, then defendant's claim of appeal was premature*.") (emphasis added).

In a recent order, however, the Supreme Court has held that the Court of Appeals has jurisdiction over a claim of appeal even if a motion for reconsideration has been filed. In *Nordstrom v Auto-Owners Insurance Co*, the plaintiff filed a timely motion for reconsideration of the trial court's order granting summary disposition to the defendant. Before the trial court had ruled on that motion, the plaintiff also filed a claim of appeal with the Court of Appeals. Adhering to its prior practice, the Court of Appeals dismissed the plaintiff's appeal for lack of jurisdiction "because a timely motion for postjudgment was pending when the appeal was filed." *Nordstrom v Auto-Owners Insurance Co*, unpublished order of the Court of Appeals, issued December 1, 2009 (Docket No. 294705). According to the Court, "[t]he time for filing a claim of appeal in this situation commences with the entry of an order deciding the motion for postjudgment relief." *Id.* In support, the Court cited MCR 7.204(A)(1)(b), which provides that an appeal as of right may be taken within "21 days after the entry of an order deciding a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed . . . ."

Although the Supreme Court's order in *Nordstrom* was not a full-blown opinion, it is well established that if an order from the Supreme Court can be understood, it is binding precedent. *Evans & Luptak, PLC v Lizza*, 251 Mich App 187, 196; 650 NW2d 364 (2002).

The plaintiff moved for reconsideration, arguing that under subparagraph (a), a claim of appeal may also be filed "21 days after entry of the judgment or order appealed from," and that this time period operates regardless whether a motion for reconsideration has been filed for purposes of subparagraph (b). The Court of Appeals denied the motion, reasoning that the time periods set forth in MCR 7.204(A)(1) "must be read together in context" such that "subparagraph (a) is inapplicable to the situation controlled in subparagraph (b), namely, where a motion for relief from the order being appealed has been filed in the lower court." *Nordstrom v Auto-Owners Insurance Co*, unpublished order of the Court of Appeals, issued January

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The Supreme Court has held that the Court of Appeals has jurisdiction over a claim of appeal even if a motion for reconsideration has been filed.

26, 2010 (Docket No. 294705). Thus, held the Court of Appeals, the plaintiff's claim of appeal was properly dismissed "because it was filed *before* the pending motion for reconsideration was decided by the trial court when subparagraph (b) requires a claim of appeal to be filed *after* a pending motion for relief from the order being appealed from has been decided by the lower court." *Id*.

The Supreme Court, however, reversed, finding that the Court of Appeals erred in dismissing the claim of appeal for lack of jurisdiction. The Supreme Court held that "the plaintiff was entitled to file a timely claim of appeal" under the plain language of MCR 7.204(A)(1)(a), and that "[t]he fact that the plaintiff had already filed a timely motion for reconsideration in the trial court, which remained pending when the claim of appeal was filed, did not operate to divest the Court of Appeals of jurisdiction." *Nordstrom v Auto-Owners Insurance Co*, 486 Mich 962; 782 NW2d 779 (2010).

The Supreme Court's order in *Nordstrom* is significant because it is a change from prior practice in the Court of Appeals (indeed, it is significant enough that a court rule amendment may be in order). The Court of Appeals has long dismissed appeals filed while postjudgment motions are pending, reasoning, as did the panel in *Nordstrom*, that such appeals are premature and that the Court of Appeals lacks jurisdiction over them. The Supreme Court has now clarified that MCR 7.204(A)(1) provides distinct time periods for filing a claim of appeal. Thus, although a motion for reconsideration or other post-judgment motion seeking relief from the judgment or order being appealed serves to toll the time for filing an appeal pursuant to MCR 7.204(A)(1)(b), it does not *preclude* a party from filing an appeal while such a motion is pending.

One question left open by the Supreme Court's order is what happens to a pending motion for reconsideration or other post-judgment relief once a claim of appeal has been filed. Though the Supreme Court cited MCR 7.208(A) in its order, it did not explain the effect of that rule, which provides that "[a]fter a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order . . . ." Presumably the filing of an appeal would deprive the trial court of jurisdiction to actually decide the motion for reconsideration, in accordance with this rule.

COURT OF APPEALS
Summary Disposition — Failure to File a Timely Response May Be Reasonable Grounds for Granting Summary Disposition[1]

Jackson v Baggett, unpublished opinion per curiam of the Court of Appeals, issued May 11, 2010 (Docket No. 289416).

In a recent case, the Michigan Court of Appeals upheld the trial court's grant of summary disposition in the defendant's favor where the plaintiff failed to timely file a response to the defendant's motion for summary disposition, even though the plaintiff asserted that he had a meritorious claim and that the interest of justice precluded the grant of summary disposition. This case has implications for both the plaintiff and defense bar when it comes to seeking appellate review of decisions on summary disposition motions.

Facts: The plaintiff, Michael Jackson, filed suit three days prior to the expiration of the statute of limitations, alleging injury in an accident involving a SMART bus. The defendants filed a motion for summary disposition arguing that Jackson did not provide written notice of the accident within 60 days, pursuant to MCL 124.419. MCR 2.116(G)(1)(a)(ii) required that Jackson serve his response at least seven days prior to the date the defendants' motion was scheduled for hearing – October 3, 2008. Even though the operation of this court rule provided Jackson with eleven weeks to respond to the defendants' motion, he failed to file a response. Although the defendants adjourned the hearing to October 8, 2008 at Jackson's request, the trial court issued an order on October 6, 2008, granting the defendant's motion on the basis that the plaintiff failed to file a timely response.

Unaware of the trial court's order, the plaintiff claimed that he filed a response to the motion at the end of the business day on October 7, 2008, along with alleged proof that he had provided timely notice of his claim. Upon learning that the trial court had already granted summary disposition to the defendants, the plaintiff filed a motion for reconsideration. The trial court denied the plaintiff's request for reconsideration "on the

The Court of Appeals determined that the trial court did not abuse its discretion in granting summary disposition because the plaintiff had failed to timely file a response as required by MCR 2.116(G)(1)(a)(ii)

ground that it could not take into account plaintiff's offer of proof to show timely notice of the claim because it was not timely filed" in accordance with MCR 2.116(G)(1)(a)(ii). Jackson appealed, arguing that the trial court abused its discretion by "overzealous adherence to the rule at the expense of justice."

Holding: Although the Court of Appeals acknowledged that "the law strongly favors adjudication of claims on their merits," the Court of Appeals determined that the trial court did not abuse its discretion in granting summary disposition because the plaintiff had failed to timely file a response as required by MCR 2.116(G)(1)(a)(ii), despite having eleven weeks to submit his response and having received an adjournment. The court also noted that the Michigan Supreme Court had previously reversed another panel of the Court of Appeals for finding that a trial court abused its discretion when it granted summary disposition after a defendant failed to file a brief by the deadline. Because the plaintiff's response was untimely, and because the defendants had provided their own affidavit from a SMART agent supporting their position that timely notice of the plaintiff's claim had not been received, which the plaintiff failed to rebut, the Court of Appeals held that summary disposition was properly granted.

Significance: This case serves as a caution to practitioners to carefully observe the court rules regarding timely responses and adhere to the dates set by the trial court. As the Court of Appeals' decision in *Jackson* demonstrates, the Court of Appeals will likely uphold the trial court's enforcement of those deadlines.

Proposed Court Rule Amendments Would Shorten the Time Limits for Filing Late Appeals – ADM File No. 2009-19

Defense practitioners should be aware of proposed court rule amendments being considered by the Supreme Court that would, among other things, shorten the time limits for filing appeals. See ADM File No. 2009-19. The most significant proposed change would be the elimination of the current provision in MCR 7.205(F) for filing late appeals.

As explained in an August 18, 2010, letter from the Chair of the State Bar of Michigan Appellate Practice Section Council opposing the proposed amendments, "[u]nder the current rules a party has 21 days to either file an appeal as of right (for final judgments or orders) or seek leave to appeal (for all other orders as to which an appeal as of right is not available), and then up to a total of 12 months to file a delayed application for leave to appeal." Although the proposed amendments would allow for an extension of up to 35 days for an appeal as of right and 21 days for an application for leave to appeal (upon a showing of "excusable neglect"), there would be "no further ability to seek leave to appeal, regardless of the circumstances."

The text of the proposed amendments is available on the Supreme Court's website, along with some twenty comments submitted to the Court by both attorneys and judges, including Attorney General Mike Cox and the Chair of the Rules Committee of the Michigan Court of Appeals. See http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm

Judgment Interest Calculation – Court of Appeals Clarifies the Method of Calculating Interest on a Money Judgment and Repudiates the Michigan State Court Administrative Office's Interpretation of MCL 600.6013(8)

The calculation of interest on money judgments is governed by MCL 600.6013(8). The statute provides in relevant part:

> [I]nterest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section.

It has long been established under the statute that interest on a judgment is calculated beginning on the date a complaint is filed, and that the applicable interest rate changes twice each year on January 1 and July 1. Left unresolved by prior appellate decisions, however, is whether the six-month interest recalculation intervals referenced in the statute are to occur on the six-month anniversaries of the filing of the complaint, or on each January 1 and July 1 following the complaint's filing.

The Court of Appeals recently addressed this matter of first impression in *Chelsea Investment Group LLC v City of Chelsea*, ___ Mich App ___; ___ NW2d ___ (Docket No. 288920, April

Left unresolved by prior appellate decisions, however, is whether the six-month interest recalculation intervals referenced in the statute are to occur on the six-month anniversaries of the filing of the complaint, or on each January 1 and July 1 following the complaint's filing.

27, 2010). There, as advocated by the defendants, the trial court calculated interest on the judgment at six-month intervals ending on each January 1 and July 1 following the filing of the complaint. According to the defendants, this interpretation was consistent with the Michigan State Court Administrative Office's July 27, 2009 publication, entitled, "Interest rates for money judgments under MCL 600.6013." With regard to MCL 600.6013(8), that publication stated:

Interest is calculated at 6-month intervals *on Jan 1st and July 1st of each year*, starting from the date the complaint is filed, compounded annually. The interest rate equals the rate paid on 5-year United States treasury notes, as certified by the state treasurer, for the 6 months preceding each Jan 1st and July 1st, plus 1%. [Emphasis added].

On appeal, the plaintiff argued that in calculating judgment interest in this manner, the trial court ignored the plain language of MCL 600.6013(8), and should have calculated the interest on the judgment at six month intervals from the date of the filing of the complaint – not on January 1 and July 1. The Court of Appeals agreed and held that the plain language of the statute requires that interest be recalculated at six-month recalculation intervals from the date of the filing of the complaint, and not on January 1 and July 1: "MCL 600.6013(8) simply requires that interest on a judgment be re-calculated every six months from the date of the filing of the complaint using the interest rates announced on July 1 or January 1, whichever is 'immediately preceding' the complaint's six-month anniversary date." Under this calculation method, for example, interest on a complaint filed in August 2008 would be calculated in February 2009 using the January 1 interest rate, and would be calculated again in August 2009, using the July 2009 interest rate.

The Court further noted that although the Michigan State Court Administrative Office's contrary interpretation of the statute was entitled to deference, this deference was not binding on the Court and could not overcome the statute's plain meaning. Accordingly, the Court held that it was not bound to follow this interpretation.

The defendants filed an application for leave to appeal in the Michigan Supreme Court on June 8, 2010, so it is not clear at this point whether the Court of Appeals' decision in *Chelsea Investment* will stand. In the meantime, it is important that practitioners be aware of the impact of *Chelsea Investment* on the calculation of interest on money judgments.

Endnotes

1. Special thanks to former Dickinson Wright PLLC summer associate Amy Sheppard for her work on this summary. Amy is currently a student at the University of Virginia School of Law.

By: Hilary Ballentine
Plunkett Cooney

MDTC Amicus Activity May 11–Sept. 17, 2010

Recent Opinions

***O'Neal v St. John Hospital* (MSC No. 138180)**

- Issues: whether claims in this medical malpractice case constitute loss of opportunity to which MCL 600.2912a(2) applies, whether *Fulton v William Beaumont Hosp*, 253 Mich App 70 (2002) was correctly decided, and whether different approach is required to correctly implement § 2912a(2)
- Author: Ottenwess & Associates (S. Ottenwess)
- Status: MDTC amicus brief filed 12/15/09; oral argument held 1/12/10
- Decision released 7/31/10 - MCOA opinion reversed
- *Fulton* overruled "to the extent it that it has led courts to improperly designate what should be traditional medical malpractice claims as loss-of-opportunity claims and has improperly transformed the burden of proof in a traditional malpractice case from *a* proximate cause to *the* proximate cause."
- Opining that *Fulton's* subtraction formula (subtracting the statistical likelihood of a better outcome without treatment from the statistical likelihood of a better outcome with treatment to determine if the resulting number is greater than 50) is an inaccurate way to determine whether the defendant's malpractice is a proximate cause of the injury because the *Fulton* subtraction formula makes it mathematically impossible for there to be more than one proximate cause. Therefore, *Fulton* "fundamentally altered plaintiff's burden of proof" by transforming the burden of proof in a traditional malpractice case from *a* proximate cause to *the* proximate cause.
- Therefore, Court of Appeals' opinion reversed and case remanded to Court of Appeals
- Justice Markman concurred in the result only (which Justice Corrigan joined in part), and Justice Young authored dissent (which Justice Corrigan joined)

***Brightwell v Fifth Third Bank of MI* (MSC No. 138920)**

- Issue: in Elliott-Larsen Civil Rights Act case, what is the proper venue – where decision to terminate plaintiffs' employment was made, or where plaintiffs worked and the allegedly discriminatory actions were implemented
- Author(s): Warner Norcross & Judd (M. Nelson, G. Kilby, A. Fielder)
- Stage: MDTC amicus brief filed 12/16/09; oral argument held 1/12/10
- Decision released 7/30/10 – MCOA opinion reversed

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- Under MCL 37.2801(2), a CRA violation occurs when the alleged discriminatory decision is made and the allegedly adverse employment actions are implemented.
- Venue is therefore proper in Wayne County because that is where the plaintiffs worked and where the allegedly discriminatory actions were implemented. The latter is where most relevant actions involving the employer-employee relationship occur. "Moreover, it is the severing of the employment relationship that is the truly adverse employment action."
- *Barnes v. Int'l Business Machines Corp*, 212 Mich App 233; 537 NW2d 265 (1995) overruled "because it restricted the analysis of a violation of the CRA to the adverse employment decision" and is inconsistent with the meaning of "violation" and occurred"
- Justice Young concurred in part and dissented in part on basis of majority's analysis regarding *when* implementation of the allegedly discriminatory decision occurs. (Justice Corrigan concurred with Justice Young); Justice Weaver dissented on the basis that leave should not have been granted absent any error on the Court of Appeals or material injustice

Upcoming Oral Arguments in Cases MDTC Has Briefed

***Colaianni v Stuart Frankel Development Corp* (MSC No. 139350)**

- Issue: whether *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378 (2007) (which essentially eliminated the common-law discovery rule) was correctly decided
- Author: Plunkett Cooney (M.M. Ross)
- Stage: leave granted on 1/29/10, currently pending before Michigan Supreme Court
- Status: MDTC amicus brief filed 6/7/10; oral argument scheduled for 10/7/10.

***Singer v Sreenivasan* (MSC No. 139799)**

- Issue: proper interpretation of case evaluation sanction rule, MCR 2.302, and whether prevailing parties can recover a "reasonable" attorney fee that is based on a rate higher than the actual rate charged
- Author: The Smith Appellate Law Firm (Michael F. Smith)
- Stage: leave granted 3/24/10, currently pending before Michigan Supreme Court
- Status: MDTC amicus brief filed 7/14/10; oral argument scheduled for 10/7/10.

Granted Recommendations and Forthcoming MDTC Amicus Briefs

***Pollard v Suburban Mobility Authority for Regional Transportation* (MSC No. 140322)**

- Issue: validity of a statutory notice requirement in cases involving governmental agencies
- Author: Zausmer, Kaufman, Caldwell & Tayler, P.C.(Carson Tucker)
- Stage: MSC requested oral argument on application for leave to appeal via order 6/11/10 (over Justice Young's dissent)
- Status: MDTC amicus brief to be filed

***Edwards v Cape to Cairo, LLC* (MSC No.141339)**

- Issue: proper interpretation of provision of Michigan Consumer Protection Act defining "trade or commerce"
- Author: Cardelli Lafear & Buikema PC (Anthony F. Caffrey)
- Stage: Supreme Court application for leave to appeal taken 7/1/10
- Status: MDTC amicus brief to be filed supporting application for leave to appeal

***Hamed v Wayne County* (MSC No. 139505)**

- Issues: (1) whether defendants Wayne County and Wayne County Sheriff's Department may be held liable to the plaintiff for quid pro quo sexual harassment under MCL37.2103(i); and (2) whether the plaintiff's incarceration in the Wayne County Jail is a public service within the meaning of MCL 37.2301(b); and (3) whether the trial court erred in permitting the plaintiff to amend her complaint to allege violations of the Michigan Civil Rights Act.
- Author: Johnson, Rosati, LaBarge, Aseltyne & Field, P.C. (Marcelyn A Stepanski)
- Stage: leave granted 6/23/10
- Status: MDTC amicus brief to be filed

Forthcoming Recommendations

- *Avram v McMaster-Carr Supply Co* (involving *Daubert* issue in asbestos case tried to verdict)
- *Evans v Grosse Pointe Public School System* (MSC granted leave 9/15/10)

By:Michael J. Sullivan and David C. Anderson, *Collins Einhorn Farrell & Ulanoff P.C.,*
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Case Reports: Legal Malpractice Update

PROXIMATE CAUSE – LACK OF STANDING, STATUTE OF LIMITATIONS, AND FRAUD

Zachary Savas v Lawyer Defendant, 2010 Mich App LEXIS 678 (April 2010) (unpublished)

The Facts: UNext solicited the plaintiffs and other investors through a memorandum. The memorandum stated, among other things, that UNext had an agreement with IBM's Lotus Development Corporation (Lotus). The plaintiffs and the other investors formed the Internet Education Fund (IEF), a limited liability corporation (LLC), for the sole purpose of investing and purchasing membership of UNext. Subsequently, UNext failed to generate revenues. IEF was later dissolved, and the plaintiffs retained defendant lawyer to pursue litigation against UNext for fraud. The plaintiffs alleged, among other things, that the UNext memorandum implied that UNext would continue its relationship with Lotus. The trial court in that case dismissed the action because of the failure to file the claim within the applicable statute of limitations. The court also ruled that the plaintiffs lacked standing to file the lawsuit because they were not the purchasers of UNext (i.e. it was IEF, the dissolved LLC, that purchased the shares). The plaintiffs then sued the lawyer, and alleged that their lawsuit was unsuccessful because of the lawyer's malpractice. The plaintiffs argued that the lawyer committed malpractice by failing to keep the plaintiffs reasonably informed about the status of the case and by failing to pursue the action in a competent matter.

The Ruling: The court held that the plaintiffs failed to establish "but-for" causation against the lawyer because the plaintiffs lacked standing to bring their claim against UNext since they were not the purchasers of the securities. Because the plaintiffs lacked standing, they were unable to demonstrate that the lawyer's alleged malpractice was a proximate cause of their injury. Additionally, the lawyer's failure to keep the clients reasonably informed did not proximately cause the injury because the plaintiffs never had standing to bring the action against UNext.

The court also held that the plaintiffs failed to establish but-for causation against the lawyer because the statute of limitations had run on the plaintiffs' claim against UNext at the time that the defendant lawyers were retained. The statute of limitations began to run after IEF's meeting with the UNext director, which is the point in time that the court determined that the plaintiffs were injured. Because the lawsuit was filed more than three years after the meeting with the UNext director, the court held that the action against UNext was filed outside of the applicable statute of limitations. Additionally, the plaintiffs did not meet their burden of proving that they could not have reasonably known that the injury occurred until a later point in time, and therefore, tolling of the statute of limitations would not have been possible under the discovery rule.

The court further held that even if the plaintiffs had standing, and they had filed the lawsuit within the applicable statute of limitations, then the only reasonable allegation of fraud that the plaintiffs made was that the UNext memorandum implied

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The court held that the plaintiffs failed to establish "but-for" causation against the lawyer because the plaintiffs lacked standing to bring their claim against UNext since they were not the purchasers of the securities. Because the plaintiffs lacked standing, they were unable to demonstrate that the lawyer's alleged malpractice was a proximate cause of their injury.

that UNext would continue its relationship with Lotus. However, the court held any statement made by UNext in regards to its relationship with Lotus was merely a forward-looking belief and not a factually inaccurate statement. Additionally, the plaintiffs provided no evidence that the statement that UNext actually had an agreement with Lotus was false. The plaintiffs failed to establish but-for causation against the lawyer.

Practice Tip: Whenever a lawyer defendant can show that the underlying case lacked merit, the legal malpractice case will fail for lack of proximate cause.

EXPERT WITNESSES – STANDARD OF CONDUCT *Reesor v Lawyer Defendant,* 2010 Mich App LEXIS 876 (May 2010) (unpublished)

Facts: The plaintiff in the current case was sued by Vector Pipeline (Vector). The plaintiff retained the defendant lawyer to represent her in the action. Although the plaintiff wanted to challenge jurisdiction and move the case to federal court, the defendant lawyer advised that the best option would be to continue the state action because not all of the claims could proceed in federal court. The plaintiff then discharged the defendant lawyer in the Vector action. The plaintiff proceeded to represent herself, and Vector succeeded in all its claims against her. Subsequently, the plaintiff sued the defendant lawyer and alleged, among other things, that the defendant lawyer committed malpractice because he failed to challenge the jurisdiction of the circuit court, failed to conduct proper discovery, failed to remove the action from case evaluation, failed to file an appropriate case evaluation summary, and failed to communicate regarding the status of the case and decision-making.

The Ruling: The court granted summary disposition because the plaintiff did not produce an expert witness to provide testimony regarding the standard of conduct. Expert testimony was required because the claims raised by the plaintiff involve matters that do not fall within the common knowledge and experience of an ordinary layman.

Practice Tip: Where a legal malpractice plaintiff has not listed a standard-of-care expert witness, and the alleged error is not within the common experience of a nonlawyer, defense counsel should consider a motion for summary disposition.

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).

"Skydiving Sisterhood": Jana Berger and Nicole DiNardo went skydiving in Tecumseh. They managed a 10,000 foot free-fall, reaching a speed of 120 m.p.h. and actually enjoyed it. They invite anyone brave enough to try it to join them.

(Extremely) Young Lawyer: David Campbell, MDTC's Young Lawyer Section Chair and Bowman and Brooke Associate, announces the birth of his first child, a son, Warden David Campbell, born August 15, 2010, and weighing 6 lbs 14 oz., at 21 inches.

"The Best": William D. Booth, Robert G. Kamenec, David K. Otis, and Mary Massaron Ross of Plunkett Cooney, have been named to the 2011 roster of The Best Lawyers in America®.

Supreme Court

By: Joshua K. Richardson
Foster, Swift, Collins & Smith, P.C.
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Supreme Court Update

Joshua K. Richardson graduated from Indiana University School of Law, 2007. His areas of practice include; Commercial Litigation, Construction Law, IT, Insurance Defense and Litigation. He can be reached at jrichardson@fosterswift.com or 517-371-8303.

One-Year-Back Rule Is Inapplicable To Actions Brought Pursuant To MCL 600.5821(4) And MCL 600.5851(1).

The Michigan Supreme Court, in *Regents of the Univ of Mich v Titan Ins Co*, ___ Mich ___; ___ NW2D ___ (2010), held that its prior decision in *Cameron v Auto Club Ins Ass'n*, 476 Mich 55; 718 NW2d 784 (2006) and the Court of Appeals decision in *Liptow v State Farm Mut Auto Ins Co*, 272 Mich App 544; 726 NW2d 442 (2006), which relied on *Cameron*, improperly determined that the damages-limiting portion of the one-year-back rule under MCL 500.3145(1) applied to actions involving the minority/insanity tolling provision of MCL 600.5851(1) and the statute of limitations exemption for state entities under MCL 600.5821(4).

Facts: Nicholas Morgan sustained injuries as a result of an automobile accident in March of 2000. Mr. Morgan was treated by the University of Michigan Health System at a cost of approximately $69,000.00. Though Mr. Morgan was not covered under a no-fault insurance policy, his claims were assigned to Titan Insurance Company by the Michigan Assigned Claims Facility. In 2006, almost six years after Mr. Morgan's treatment, the University of Michigan Health System and the University of Michigan Regents filed suit against Titan Insurance to recover the costs of Mr. Morgan's hospitalization. The trial court granted Titan Insurance's motion for summary disposition, holding that the one-year-back rule of MCL 500.3145(1) barred the plaintiffs' claims. The plaintiffs appealed.

On appeal, the Court of Appeals affirmed the trial court in a divided decision. The court held that, because *Liptow* was controlling, it was required to follow its holding. The *Liptow* court held that, although MCL 600.5821(4) exempts state entities from all statutes of limitations, the one-year-back rule of MCL 500.3145(1) is not only a statute of limitations, but a damages limitation. According to *Liptow*, although MCL 600.5821(4) exempts state entities from the one-year-back rule's one year statute of limitations, it did not exempt them from the one-year-back rule's damages limitations. The plaintiffs again appealed.

Holding: The Supreme Court reversed the Court of Appeals decision and held that the Court of Appeals' reliance on *Liptow* was misplaced because *Liptow*, and similarly *Cameron*, were improperly decided. The Supreme Court held that *Liptow* and *Cameron* improperly determined that the damages limitation one-year-back rule should apply even where the statute of limitations portion of the one-year-back rule is expressly trumped by statutory tolling and exemption provisions, including the minority/insanity tolling provision of MCL 600.5851(1) and the statute of limitations exemption for state entities under MCL 600.5821(4). The court noted that both MCL 600.5851(1) and MCL 600.5821(4), when read in context, were designed to preserve more than just the plaintiffs' rights to file suit. They were designed to preserve the plaintiffs' rights to recover damages. Thus, to the extent the one-year-back rule's statute of limitations is tolled or exempted under those provisions, so too is the one-year-back rule's damages limitation. Accordingly, a no-fault insurance plaintiff who qualifies under either MCL 600.5851(1) or MCL 600.5821(4) may recover benefits even if those benefits were incurred more than one year before the plaintiff filed suit. Because the court found the *Cameron* opinion, upon which *Liptow* relied, unworkable and improperly decided, it determined that a compelling justification existed for overturning it.

Significance: This holding not only expands the scope of the tolling and exemption provisions under MCL 600.5851(1) and MCL 600.5821(4), respectively; it also distorts the application and impact of the one-year-back rule's separate statute of limitations and damages limitations provisions.

"Historical Approach" To Standing In Michigan Is Reinstated

On July 31, 2010, the Michigan Supreme Court held that teachers had standing to sue a school district for failing to comply with its statutory duties, because the teachers had a "special injury or right or substantial interest that would be detrimentally affected in a manner different from the citizenry at large." *Lansing Schools Ed Assn v Lansing Bd of*

The Supreme Court held that *Liptow* and *Cameron* improperly determined that the damages limitation one-year-back rule should apply even where the statute of limitations portion of the one-year-back rule is expressly trumped by statutory tolling and exemption provisions.

Ed, ___ Mich ___; ___ NW2d ___ (2010). In so holding, the Supreme Court overruled *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001) and its progeny because the standing approach adopted in *Lee* "lacks a basis in Michigan Constitution and is inconsistent with Michigan's historical approach to standing."

Facts: The plaintiffs, Lansing School Education Association ("LSEA"), the Michigan Education Association ("MEA"), the National Education Association ("NEA"), and four teachers employed by the defendants, the Lansing School District and Lansing Board of Education, allege that the defendants failed to comply with their statutory duty under MCL 380.1311a(1) to expel students who physically assault teachers. In this case, each of the four individual teachers alleged that they were physically assaulted in their classrooms by students who were in sixth grade or higher. MCL 380.1311a(1) provides, in part, that where a student in grade 6 or higher physically assaults a school employee or volunteer at school, the school board "shall expel the pupil from the school district permanently." The students who purportedly assaulted the plaintiff teachers were suspended, but not expelled.

In response to the plaintiffs' lawsuit, the defendants filed a motion for summary disposition and argued: 1) that the plaintiffs lacked standing; 2) that MCL 380.1311a(1) does not create a private cause of action; and 3) that the defendants properly determined that the students had not assaulted the teachers. The trial court granted summary disposition, holding that it lacked authority to supervise the defendants' exercise of discretion. The plaintiffs appealed to the Court of Appeals, which affirmed the trial court's decision on other grounds and held that the plaintiffs lacked standing to raise their claims.

Holding: On appeal, the Supreme Court reversed and held that the Court of Appeals' reliance on *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001) and its progeny was misplaced. The court determined that the standing doctrine, as adopted in *Lee v Macomb Co Bd of Comm'rs*, "departed dramatically from Michigan's historical approach to standing" by holding that standing is "required" by the Michigan Constitution and determining that Michigan's historical standing doctrine should be abandoned in favor of the federal approach under the federal constitution. In overturning *Lee* and its progeny, the Supreme Court explained that the proper approach to standing is Michigan's historical doctrine, which was merely "intended to 'ensure sincere and vigorous advocacy' by litigants." Under the historical approach, where a cause of action is not otherwise provided for at law, standing should nonetheless be found where litigants have a "special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant."

Applying that approach to the case at issue, the court held that, despite the fact that Revised School Code, MCL 380.1 *et seq.*, does not create a private cause of action, the plaintiffs had standing because they "have a substantial interest in the enforcement of MCL 380.1311a(1) that will be detrimentally affected in a manner different from the citizenry at large if the statute is not enforced." In particular, the court noted that the statute was expressly created to protect school employees, including teachers, and requires expulsion of student only where those students assault such employees - not where they assault members of the public at large.

Significance: By departing from the *Lee v Macomb Co Bd of Comm'rs* approach to standing, including the notion that standing is required by the Michigan Constitution, the Supreme Court has again lowered the threshold necessary for plaintiffs to maintain causes of action in Michigan. This holding imparts on courts the discretion to determine standing on a case-by-case basis by examining whether the plaintiff exhibits a "special" injury, right or interest that is sufficiently different from "the citizenry at large."

Compelling And Undisputed Extrinsic Evidence May Trump Otherwise Clear Language In Release Agreements

On August 23, 2010, the Michigan Supreme Court in *Shay v Aldrich*, ___ Mich ___; ___ NW2d ___ (2010) overruled *Romska v Opper*, 234 Mich App 512; 594 NW2d 853 (1999) and held that courts may consider extrinsic evidence of the intended scope of release agreements where parties not expressly named in the release agreements attempt to rely on the agreements' broad language.

Facts: The plaintiff, Thomas Shay, filed suit against five police officers from two cities, Melvindale and Allen Park, alleging that the police officers from

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Melvindale assaulted him during a visit to plaintiff's home in 2004 and the police officers from Allen Park, who were present at the time, failed to act. The plaintiff ultimately settled with the police officers from Allen Park, but not the police officers from Melvindale. In settling with the Allen Park officers, the plaintiff entered into broad-language release agreements. The release agreements stated, in part, that the plaintiff agreed to release the Allen Park officers, their insurer, and "all other persons, firms and corporations, form any all claims, demands and actions," resulting from the alleged incident.

Thereafter, the nonsettling Melvindale officers filed a motion for summary disposition, arguing that the "all other persons" language of the Allen Park officers' release agreements acted to release the Melvindale officers from liability, as well. The Melvindale officers relied on *Romska v Opper* to assert that a release including the term "all other parties" is unambiguous and, accordingly, "there was no need to look beyond the language of the release" to determine its scope. The trial court rejected the Melvindale officers' argument, however, and held that the release agreements were ambiguous. Relying on extrinsic evidence, the trial court determined that the release agreements were intended only to release the Allen Park officers from liability. The Melvindale officers appealed.

On appeal, the Court of Appeals reversed the trial court's decision, holding that *Romska* was controlling and that, because the "all other persons" language was unambiguous, the release agreements were to be applied as written. As such, the Court of Appeals held that release agreements barred not only the plaintiff's claims against the Allen Park officers, but also his claims against the Melvindale officers. The plaintiff appealed.

Holding: The Supreme court reversed the Court of Appeals decision and held that *Romska* was improperly decided. The court held that, although under an objective interpretation where only the language of the agreement is reviewed, the Melvindale officers constituted third-party-beneficiaries of the release agreements, traditional theories of contract interpretation should be applied to determine the scope of the agreements. In applying contract interpretation principles to the release agreements at issue, the Supreme Court determined that the language of the release agreements was patently unambiguous but latently ambiguous. In reaching this conclusion, the court examined extrinsic evidence presented by the plaintiff, including an affidavit from the Allen Park officers' attorney, which stated that the release agreements were intended to release only the Allen Park officers from further liability. The court also noted that it was "undisputed that the Melvindale officers were not involved in the Allen Park Officers' settlement negotiations with plaintiff, were not named in the executed releases, and did not sign the releases."

Given these extrinsic factors, the court held that allowing the Melvindale officers to rely on and enforce the otherwise clear language of the release agreements would go against the "cardinal" principle of contract interpretation - to determine the parties' intent. Thus, the court determined that *Romska* was improperly decided to the extent it prohibits courts from reviewing extrinsic evidence of the intended scope of a release agreement when a nonsettling party seeks to enforce third-party-beneficiary rights based on the broad language of the release agreement.

Significance: Though just under the circumstances, the Supreme Court's decision is seemingly at odds with traditional notions of contract interpretation and essentially carves out an exception to the parol evidence rule where otherwise unreviewable extrinsic evidence is undisputed and compelling. To that end, the court cited century-old cases to support its conclusion that courts may consider extrinsic evidence to determine whether latent ambiguities in agreements exist.

Exclusionary Zoning Claim Not Ripe For Judicial Review

On July 15, 2010, in *Hendee v Putnam Twp*, 486 Mich 556; ___ NW2d ___ (2010), the Supreme Court held that landowners' exclusionary zoning claim was not ripe for judicial review where the landowners failed to apply for rezoning or otherwise exhaust their administrative remedies.

Facts: The plaintiffs, Jeffrey, Michael and Louann Hendee, own a 144-acre tract of undeveloped land that had previously been used as a dairy farm. Seeking to sell the land to a development company, the plaintiffs filed an application for rezoning with the defendant, Putnam Township, to rezone the land from A-O (agricultural-open), which allows only

The Supreme Court determined that the language of the release agreements was patently unambiguous but latently ambiguous. In reaching this conclusion, the court examined extrinsic evidence presented by the plaintiff, including an affidavit.

the development of farms and 10-acre single family home lots, to R-1-B (single-family rural residential), which would permit additional residential development. The township denied the plaintiffs' request. The township also denied the plaintiffs' requests for a planned unit development ("PUD") and their request for a use variance that would have allowed the development of up to 95 one-acre residential lots on the property. The plaintiffs later filed, but withdrew, an application to rezone the property to permit the development of a manufactured housing community ("MHC"). Thereafter, the individual plaintiffs and the proposed purchaser of their property, Village Pointe Development, LLC, filed a complaint against the township, arguing that the township's denial of their requests for rezoning: 1) deprived the plaintiffs of equal protection; 2) deprived the plaintiffs of substantive due process; and 3) constituted an unconstitutional taking. The plaintiffs also claimed that the township's zoning ordinance was exclusionary in violation of former MCL 125.297a. Significantly, the plaintiffs' claim relied entirely on their withdrawn application for rezoning to permit the MHC as the basis for relief.

After a nine-day bench trial, the trial judge found in favor of the plaintiffs and granted their request for injunctive relief, allowing them to develop the MHC on their property. The township appealed. On appeal, the Court of Appeals affirmed in part and reversed in part. Specifically, the Court of Appeals reversed the trial court's decision with respect to the constitutional challenges, but affirmed the trial court's decision that the township's zoning was exclusionary. The Court of Appeals further held that the plaintiffs' claims were ripe because, even assuming the plaintiffs were required to seek rezoning or a use variance for the MHC, such efforts would have been futile given the township's earlier denials. The township appealed.

Holding: The Supreme Court reversed and held that, based on the plaintiffs' applications and requests for rezoning to allow the 95-unt PUD, including its request for a use variance to the Zoning Board of Appeals, the plaintiffs could have filed suit with respect to the 95-unit PUD. Since the plaintiffs failed to seek rezoning or a use variance for the MHC, however, their claims based on the MHC were not ripe for judicial review. Citing to the its previous decision in *Paragon Props Co v City of Novi*, 452 Mich 568; 550 NW2d 772 (1996), the Supreme Court noted that a plaintiff's complaint becomes ripe for judicial review only after a zoning authority has reached a final decision and the plaintiff has exhausted his or her administrative remedies. Because the plaintiffs failed to seek rezoning of their property for the MHC development, there was no decision, let alone a final decision, by the township upon which the plaintiffs' claim could be based. Indeed, given the plaintiffs' withdrawal of the MHC rezoning application, "the township was never afforded an opportunity to review a rezoning request for a 498-unit MHC." Although the plaintiffs argued that any attempt to seek rezoning or a use variance for the MHC would have been futile, the Supreme Court noted that before the futility doctrine can apply, a plaintiff must make at least one meaningful application for rezoning. Because no application for rezoning with respect to the MHC was made here, the plaintiffs' claims were not ripe for review.

As an aside, the Supreme Court explained that the ripeness and finality rules under *Paragon* apply even where a "facial" challenge to the zoning ordinance is made because, before a zoning ordinance can be deemed facially improper, the zoning authority must have the opportunity to determine the effect of the ordinance in light of evidence that a demonstrated need for the proposed use of the land exists. Since the plaintiffs failed to seek rezoning or a use variance for the development of the MHC on their property, the township had no such opportunity, and the plaintiffs' exclusionary zoning claim "was not ripe for judicial review."

Significance: This holding reinforces the requirement that plaintiffs seeking to challenge a zoning ordinance must make at least one meaningful application for rezoning before seeking judicial review of their claims. The failure to take such action, even if it might otherwise seem futile, will render the plaintiffs' claims not ripe for judicial review.

Guest Column

By: William C. Whitbeck

A Modest Proposal

The Michigan Supreme Court has lately been much in the news. Justice Betty Weaver's unexpected departure from the Court and Governor Granholm's appointment—minutes later—of a Court of Appeals judge to fill the resulting vacancy were both startling and important events.

But the Court has been growing in importance for a number of reasons. Among them is the Court's role in reapportionment. Reapportionment is a crucial element of the political process; whoever draws the lines for Michigan's electoral districts heavily influences political outcomes in our state for the next ten years. And under most circumstances, the Michigan Supreme Court makes the ultimate decision between competing Republican and Democratic reapportionment plans.

Also, courts have increasingly, for better or for worse, become the arbiters of last resort on policy matters. If interest groups or political parties cannot get their way in the Legislature on policy issues, it is common for them to turn to the courts as an alternative method of establishing their positions as matters of law. And the Michigan Supreme Court has not been shy about marching into the policy battlefield, albeit with very mixed and often changing results.

So, the Court is important by virtue of its powers and political because of those same powers, particularly with respect to reapportionment and policy-making. And it is political for one other reason: like all judges in Michigan, members of the Supreme Court are elected. The process at the lower court level is, however, straightforward and non-political. Incumbent judges go on the non-partisan ballot by filing a certificate of incumbency while non-incumbent challengers file nominating petitions signed by a specified number of voters. The political parties play no official role in this process.

But there is a twist when it comes to the justices of the Supreme Court, a twist that applies uniquely to these seven justices out of the over 600 judges and justices in the state. Contrary to popular belief, this twist is not contained in the Michigan Constitution. All the Constitution says concerning the election of Supreme Court justices is they shall be nominated as "prescribed by law" and "elected at non-partisan elections as provided by law."

The statute in question, MCL 168.392, contains the bewildering twist. It states that the candidates for the non-partisan position of Supreme Court justices may be nominated at the conventions of the partisan political parties!

Thus, we have the bizarre spectacle of candidates for justice of the Michigan Supreme Court emerging from the party conventions—with highly partisan nominating speeches still ringing in their ears—to campaign for an office that the Constitution designates as non-partisan. It is little wonder that the Court has, of late, consisted of two separate camps that correspond, not coincidentally, with the political affiliations of the justices. And it is no wonder at all, given their political importance, that the political parties and their often anonymously funded outriders spend millions upon Supreme Court elections.

"Reformers"—including dubious groups on the far left associated with shadowy billionaire hedge fund operator George Soros—have, for their own purposes, fixated upon judicial elections. They are seeking to abolish such elections in Michigan and elsewhere by instituting the even more politicized process of "merit selection."

My response is a modest one. Why not simply provide by law, not constitutional change, that candidates for justice of the Michigan Supreme Court will be nominated by incumbency certificates or nominating petitions, and not by the political parties? This might reduce the current bitter partisan rancor on the Court. And every lawyer, indeed every citizen, in Michigan should greet any such reduction with nothing less than profound relief.

Book Review

Reviewed by: Hal O. Carroll

Michigan's County Courthouses

John Fedynsky, The University of Michigan Press, 2010, Ann Arbor

Michigan's County Courthouses is a fascinating tour of Michigan's counties and their courthouses. Note that I said "counties and their courthouses." It is much more than a book of photographs. The author has clearly spent a lot of time and energy researching the legal history of each county.

History, if it is told well, is about the stories of real people and how they coped with the challenges they faced. This is a book of fascinating stories. The reader can open it at random and find an interesting story about Michigan's past, both distant and recent. One thing that the reader can learn from these stories is how many fights there were about where the county seat should be. There are many stories here about fights (legal and physical), close votes, and the occasional use of trickery to move a county seat from one contender to another. In this book, you can learn why it took forty state police troopers to get the courthouse in Schoolcraft County built. The not always peaceful "good old days" are well recounted here. Ontonagon's "trial of the century" (the 19th century) makes for an interesting read. Then there is the story of the defendant who beat a charge of inebriation when he challenged the testimony that "his eyes were bloodshot" by taking out his glass eye. Not to be outdone by the wild west, Gogebic County can boast of the last stagecoach robbery east of the Mississippi. And E. M. Miller's close call is a compelling read – wrongly convicted of murder, sentenced to hang, imprisoned when Michigan abolished capital punishment, then released when the state's star witness made a deathbed confession.

Stores like this fill the book. This is an excellent book for any law firm to have in its waiting room, of course, but for this reviewer's money, it is a perfect "motion day" book. Slim enough to fit in any briefcase, it can provide fascinating reading while the lawyer is waiting in a modern courtroom. Or for that matter, in between working on modern files, the attorney can take a short trip to the past and learn how people lived and struggled and succeeded in years past.

Justice Markman writes a foreword to the book and makes the point well: "There are no more engaging and evocative towns that those of Michigan – New England not excepted. To spend time in these communities is to experience a not-yet-disappeared America of traditional values and pleasures." This is the book to take the reader to those towns and times.

MDTC Offers Audio Recordings of Events

The following events are available as audio recordings. Please contact MDTC to obtain your copy.

Commercial Litigation Section Update Fraud Prevention And Investigation Issues: Responding to Workplace Embezzlement and Asset Misappropriation — A Legal and Forensic Accounting Guide

Thursday, September 16, 2010

12:00 p.m. – 1:00 p.m.

Presenters: Robert J. Wagman, Dickinson Wright, PLLC, Washington, D.C.; Jeffrey Johnston, AlixPartners, Forensic Accountant, Southfield; Edward Perdue, Dickinson Wright, PLLC, Grand Rapids

Moderator: Christina K. McDonald, Dickinson Wright, PLLC, Grand Rapids

General Liability Section Update Teleconference

Thursday, August 5, 2010 @ 12:00 noon

McCormick v Carrier: Has the course and trajectory of Kreiner and the serious impairment of body function threshold been altered?

Sponsored by: Jacobs & Diemer, PC & Garan Lucow Miller, P.C.

Presenters: Daniel S. Saylor, Garan Lucow Miller, P.C., Detroit (argued for the defense in Kreiner and filed an amicus brief in McCormick); Michael P. McDonald, Grzanka Grit McDonald, Grand Rapids (argued for the defense in McCormick); and Barry R. Conybeare, Conybeare Law Office, St. Joseph (offering the perspective of the plaintiff's bar).

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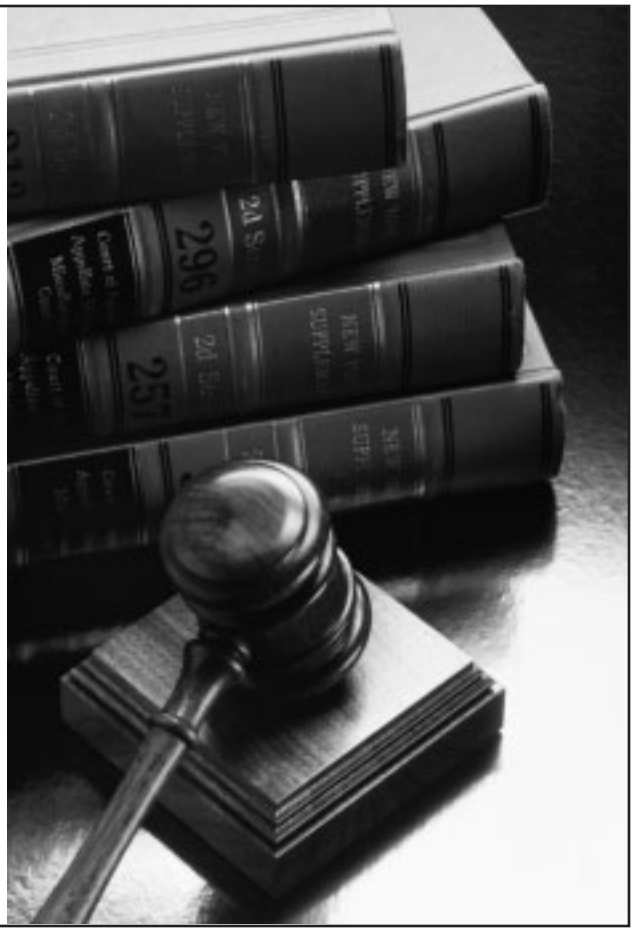
Jeff Collision



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Schedule of Events

2010

October 14	Meet The Judges - Baronette Renaissance
October 20–24	DRI Annual Meeting
November 4	Board Meeting, Troy Marriott
November 4	Past Presidents' Dinner, Troy Marriott
November 5	Winter Meeting, Troy Marriott

2011

January 11	Excellence in Defense Nomination Deadline
January 11	Young Lawyers Golden Gavel Award Nomination Deadline
January 21	Future Planning, City Flats Hotel, Holland MI
January 22	Board Meeting, City Flats Hotel, Holland, MI
February TBA	Bi-annual Movie Night (date/location TBA)
March 16	Board Meeting, Okemos Holiday Inn Express
May 18–20	Annual Meeting, Soaring Eagle Casino & Resort

MDTC is an association of the leading lawyers in the State of Michigan dedicated to representing individuals and corporations in civil litigation. As the State's premier organization of civil litigators, the impact of MDTC Members is felt through its Amicus Briefs, often filed by express invitation of the Supreme Court, through its far reaching and well respected Quarterly publication and through its timely and well received seminars. Membership in MDTC also provides exceptional opportunities for networking with fellow lawyers, but also with potential clients and members of the judiciary.