MICHIGAN DEFENSE
QUARTERLY

Volume 30, No. 2 November 2013

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MDTC
PROMOTING EXCELLENCE IN CIVIL LITIGATION

MDTC
Promoting Excellence in Civil Litigation
P.O. Box 66
Grand Ledge, Michigan 48837
Phone: 517-627-3745 • Fax: 517-627-3950
www.mdtc.org • info@mdtc.org

Publication Schedule:

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

For information on article requirements, please contact MDTC at info@mdtc.org

Editor's Notes

Editor:
D. Lee Khachaturian
dkhachaturian@dickinsonwright.com

Associate Editor: Jenny Zavadil
jenny.zavadil@bowmanandbrooke.com

Associate Editor: Kimberlee A. Hillock
khillock@willinghamcote.com

Associate Editor: Beth A. Wittmann
beth.wittmann@kitch.com

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

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QUARTERLY

Vol. 30 No. 2 • November 2013

Cite this publication as 30-2 Mich Defense Quarterly.

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

President's Corner

By: Raymond W. Morganti, *Siemion Huckabay, P.C.*

Joining the Call for Open Disclosure of Judicial Campaign Spending

Raymond W. Morganti
President
Siemion Huckabay, P.C.
One Towne Square, Suite 1400
Southfield, MI 48076
(248) 213-2013
RMorganti@Siemion-Huckabay.com

We have all seen so-called "issue ads" that proliferate on radio and television during election campaigns. These ads, sponsored by political parties or independent groups, do not expressly ask voters to "vote for," "vote against," "support" or "defeat" a candidate. Rather, the ads typically present more generalized statements regarding a candidate's record (either in public office or in the private sector), character, qualifications and views. Frequently, these ads encourage voters to contact a specified individual (who is running for elected office, but whose candidacy is not mentioned in the ad) and express approval or disapproval for that person. Under the prevailing interpretation of the Michigan Campaign Finance Act (MCFA),[1] expenditures for such ads are not subject to disclosure under the Act, because the ads do not expressly advocate the election or defeat of a candidate.[2] This is often referred to as the express advocacy or "magic words" standard. Communications which do not satisfy this standard are considered to be "issue advocacy," and expenditures for such communications do not have to be reported to the Department of State's campaign finance reporting system.

Application of the express advocacy standard to judicial elections has come under increasing scrutiny and criticism over the last five years, culminating in the call for full and open disclosure of all judicial campaign spending as one of the recommendations of the Michigan Judicial Selection Task Force.[3] In the course of its report, the Task Force noted that "[o]ver the last decade, more than half of all spending on supreme court races in Michigan went unreported (and therefore the sources went undisclosed)."[4] The Task Force also described the harmful consequences of concealing judicial campaign expenditures from public view:

> Secret spending on campaigns is harmful in two ways: it can confuse voters about the messages they rely upon to assess the candidates, and it obscures financial contributions that might cause apparent conflicts of interest and require justices' recusal from cases involving those donors. Both problems undermine the public's respect for the courts and diminish democratic accountability.[5]

The Task Force was unanimous in calling for an amendment to the MCFA to require the disclosure of the sources of all judicial campaign spending.

On September 11, 2013, the State Bar of Michigan made a formal request that the Michigan Secretary of State issue a declaratory ruling that "all payments for communications referring to judicial candidates be considered 'expenditures' for purposes of the MCFA [Michigan Campaign Finance Act, MCL 169.201, et seq.], and thus reportable to the Secretary of State, regardless of whether such payments entail express advocacy or its functional equivalent."[6] Pursuant to MCL 169.215(2), the Secretary of State must respond within 60 business days after the request.

The Executive Committee of MDTC has reviewed and discussed the State Bar's request, and has decided to support this request. There are three main reasons why all payments for communications referring to judicial candidates should be considered "expenditures" for purposes of the MCFA, and thus reportable to the Secretary of State.

First, the "magic words" test is outmoded. Although the test was initially adopted by the United States Supreme Court as a means of avoiding potential conflict with

the First Amendment,[7] the Court subsequently rejected the magic-words requirement as a constitutional standard and also found it to be "functionally meaningless."[8] As the Court observed:

> Not only can advertisers easily evade the line by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election.[9]

Second, the attempted distinction between express and issue advocacy never had any relevance as applied to judicial elections. Typically, issue ads are distinguished from express candidacy ads on the basis that they promote the discussion of public policy issues, and seek to mobilize constituents, policy makers, or regulators in support of or in opposition to current or proposed public policies.[10] Judges, however, unlike other elected officers, are not supposed to be influenced by so-called "issue advocacy" outside the courtroom. As stated in the State Bar letter, "A judge's decisions must be driven solely by the facts of the case before the court and by the law as it applies to those facts." In other words, issue advocacy is often nothing more than thinly veiled candidate advocacy, but the veil is utterly transparent in the context of judicial elections.

Finally, and more fundamentally, whatever validity the distinction between express and issue advocacy might have in other aspects of election reform, it has little (if any) bearing upon the constitutionality of election finance disclosure requirements. As Justice Kennedy wrote in *Citizens United v. FEC*,[11] "disclosure is a less restrictive alternative to more comprehensive regulations of speech."[12] On this basis, Justice Kennedy rejected the contention that disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.[13] As Justice Kennedy also recognized, the transparency engendered by such disclosure "enables the electorate to make informed decisions and give proper weight to different speakers and messages."

MDTC joins in the Recommendations of the Michigan Judicial Selection Task Force, as well as the September 11, 2013 request by the State Bar for a declaratory ruling by the Secretary of State. MDTC has prepared a formal position statement, joining in the State Bar's request to the Secretary of State, and a copy of that statement is available on the MDTC website. We look forward to the Secretary's recognition that the time has finally arrived for full disclosure of judicial campaign spending.

Endnotes

1. MCL 169.201, et seq.
2. On April 20, 2004, the Michigan Department of State issued an interpretive statement, declaring that payments for issue advocacy advertisements fall outside of the MCFA's definition of "expenditure." Basically, the Secretary of State ruled that the MCFA's definition of "expenditure" only covered express candidate advocacy.
3. The full report of the Task Force is available from the State Bar website. http://www.michbar.org/generalinfo/pdfs/4-27-13JSTF.pdf
4. Report and Recommendations of the Michigan Judicial Selection Task Force (April 2012), p. 4.
5. Id.
6. The State Bar request is available at http://www.michbar.org/public_mediaresources/pdfs/Letter%20on%20Campaign%20Finance.pdf.
7. Buckley v Valeo, 424 US 1 (1976).
8. McConnell v FEC, 540 US 93, 193 (2003).
9. Id.
10. See, e.g., FEC v Wis Right to Life, Inc, 551 US 449, 470 (2007).
11. 558 U.S. 310 (2010).
12. Id. at 369.
13. Id.

Premises Liability vs. General Negligence in Michigan:

Was Injury Caused by a Condition of the Premises or the Conduct of the Defendant?

By: Ronald C. Wernette, Jr., *The Wernette Law Firm*, and Eric A. Rogers, *Bowman and Brooke LLP*

Executive Summary

In Michigan, premises liability arises from conditions *of the premises under the defendant's control, while general negligence stems from* conduct *of the defendant. In practice this distinction is not always obvious, and there is little recent published authority offering guidance. Many recent unpublished court of appeals decisions have held that the gravamen of the plaintiff's complaint involves a condition of the land subject to the open and obvious defense. However, it has permitted general negligence causes of action when a defendant's actions were the central focus and the defendant's status as a premises owner was incidental, or when the defendant actively participated in the injury-causing event.*

Ronald C. Wernette, Jr is principal of The Wernette Law Firm PLLC in Sylvan Lake, MI. A Michigan and Ohio trial and appellate lawyer, he is focused on the defense of personal injury claims. He can be reached at ron.wernette@wernettelawfirm.com, 248.953.5803.

Eric A. Rogers is a summer associate in Bowman and Brooke LLP's Bloomfield Hills, Michigan office. He has a Bachelor of Science degree from Kettering University and is completing his 3L year at MSU College of Law. Prior to law school, he worked as an engineer for a major automotive supplier.

"[T]he assertion of a premises liability claim does not preclude a plaintiff from also asserting another theory of liability based on a defendant's conduct."[1]

When drafting a complaint for damages arising out of alleged negligent conduct occurring on a defendant's property, an important consideration for plaintiffs' lawyers is whether to plead premises liability, general negligence, or both. This distinction often is claim-dispositive because of the "open and obvious" doctrine that applies to bar many premises liability claims but has no application to general negligence claims.[2]

In Michigan, premises liability arises from *conditions* of the premises under the defendant's control, while general negligence stems from *conduct* of the defendant.[3] It sounds simple. But in practice the distinction is not always obvious, and good lawyers attempt to describe, and then artfully plead, the same injury-producing event in terms more favorable to their legal position.

For example, think of the garden-variety grocery shopper slip-and-fall in a puddle of clear fruit juice spilled in a grocery aisle. Was the injury caused by the unsafe *condition* of the premises? Or was the injury caused by the *conduct* of the grocery store employees in failing to clean up the spill despite having notice? Does it make a difference if the spill itself was caused by a store employee or by another shopper? How about if it is shown that a store employee had done an incomplete job of cleaning up the spill before the fall occurred? What sounds like a bright-line legal rule in theory is less clear in application.

This article identifies and briefly discusses the Michigan case-law in this specific area over the past few years in order to help Michigan practitioners better plead or defend these types of personal injury cases.

The Gravamen of Plaintiff's Claim

A review of the cases reveals two general approaches used by plaintiffs in an effort to avoid the defense-friendly "open and obvious" doctrine of premises liability law. One approach has been for plaintiffs to plead multiple counts, with a premises liability claim focusing on the allegedly dangerous condition on the land and a general negligence claim focusing on allegedly wrongful conduct, with an effort to distinguish between the two theories of liability. The other approach is to avoid any premises liability claim at all and allege only general negligence, emphasizing the alleged wrongful conduct of defendants rather than focusing on the premises per se.

Regardless of the pleading made by a plaintiff, "[i]t is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim."[4] For example, in a related context, the Michigan Supreme Court held that "[a] complaint

cannot avoid the application of the procedural requirements of a malpractice action by couching its cause of action in terms of ordinary negligence."[5] An example of this principle applied in the context of the premises liability/general negligence distinction is provided by *Anbari v Union Square Dev, Inc*,[6] where the court stated as follows:

> Plaintiff's injury resulted from a condition of the land and plaintiff is suing the landowner. That this condition arose out of Woudenberg's actions is not dispositive; indeed, many conditions of land arise out of a person's actions. Plaintiff may not avoid the law of premises liability by characterizing this case as one involving ordinary negligence, when he was injured by a condition of the land and is alleging a breach of reasonable care on the part of the landowner.[7]

In the discussion that follows, this article looks at how the Michigan Court of Appeals has applied these legal rules in practice under a variety of case-specific circumstances.

Published Cases

There is little published case law, but an important starting point is the 2005 Michigan Court of Appeals case *Laier v Kitchen*.[8] There, plaintiff's decedent was helping the defendant repair a farm tractor on the defendant's property. During the repair, the bucket on the tractor moved as a result of the repair work, pinning the plaintiff's decedent between the bucket and tractor body. The plaintiff's wrongful death complaint alleged a single, generalized count of negligence without specifying the underlying theory of liability.[9] The trial court granted summary judgment in favor of the defendant under the open and obvious doctrine, holding that the claim sounded in premises liability, and the defendant had no duty to warn the decedent of the obvious danger.[10] The court of appeals reversed the dismissal, but with separate opinions written by each of the three panel judges. *Laier* is an important case for the proposition that a claim for premises liability "does not preclude a separate claim grounded on an independent theory of liability based on the defendant's conduct."[11]

Another point of agreement by at least two *Laier* judges was that, to the extent there was a viable claim of general negligence, dismissal on the basis of the open and obvious danger was improper.[12] But only one judge opined that there was a factual record sufficient to assess whether a general negligence claim may actually be viable in the case,[13] making it harder to discern *Laier*'s precedential effect on the premises liability/general negligence question itself. *Laier* does not provide any controlling guidance for application of that legal rule. Post-*Laier*, there is little published case law applying the rule.

In Michigan, premises liability arises from *conditions* of the premises under the defendant's *control*, while general negligence stems from *conduct* of the defendant. It sounds simple. But in practice the distinction is not always obvious, and good lawyers attempt to describe, and then artfully plead, the same injury-producing event in terms more favorable to their legal position.

In *Wheeler v Central Michigan Inns*,[14] plaintiff's decedent child drowned in a pool owned by the defendant. Plaintiff's complaint was unclear about its wrongful death theory of liability. The trial court dismissed plaintiff's claims, whether characterized as premises liability (open and obvious danger) or general negligence (no duty). The court of appeals suggested that a premises liability cause of action likely would fail on several grounds, but noted that "plaintiff herself stated that her cause of action sounded in ordinary negligence, rather than premises liability."[15] As a result, the *Wheeler* Court analyzed the general negligence claim in a substantive way and affirmed the dismissal after finding the defendant owed no legal duty on which to base a general negligence claim.[16]

The Michigan Supreme Court's only recent guidance was provided in 2008, in *Kwiatowski v Coachlight Estates*.[17] Unfortunately, the guidance is less than clear and does not offer much help to practitioners or the bench. The court, in lieu of granting leave to appeal, issued a one paragraph split decision order reversing the 2-1 court of appeals unpublished majority opinion and adopting the dissenting opinion.[18] The facts of the case are straightforward. The plaintiff lived at a mobile home park owned and managed by the defendants. The individual defendant opened a door at the management office, which hit the plaintiff, causing the plaintiff to fall from a porch and sustain injury. The plaintiff initially filed suit against the defendants on a premises liability theory. The trial court granted defendants' motion for summary disposition but allowed plaintiff to file an amended complaint to allege general negligence against both defendants. The defendants again sought summary disposition, but the trial court denied defendants' motion. The court of appeals majority reversed, finding that

> [P]laintiff's classification of his claim as negligence rather than premises liability is questionable. Where an injury arises out of a condition on the land, rather than out of the activity or conduct that created that condition, the action lies in

premises liability. See *James v Alberts,* 464 Mich 12, 18-19; 626 NW2d 158 (2001). In this matter plaintiff was not injured by the door hitting his face and chest. Rather, plaintiff was injured by his fall once he lost his balance on the small porch and when his foot caught under the door. The small porch and the slight gap between the porch and the door are conditions of the land. Thus, plaintiff's claim arguably sounds in premises liability, not general negligence.[19]

The dissenting judge disagreed with this conclusion, stating as follows:

> Finally, despite the majority's suggestion to the contrary, I conclude that plaintiff's claim sounded in ordinary negligence rather than premises liability. . . . Plaintiff's claim is based on defendant's alleged negligence in opening the door—not defendant's failure to protect him from dangerous conditions on the land. *Hiner v Mojica,* 271 Mich App 604, 615; 722 NW2d 914 (2006). . . . Plaintiff's claim sounded in ordinary negligence only. *Hiner, supra* at 615-616.[20]

Kwiatowski stemmed from a simple set of undisputed facts. Yet, the judges of the split court of appeals panel and the justices of the split supreme court reached different conclusions about whether the gravamen of the plaintiff's claim involved a condition of the land or the conduct of the defendants. The lesson from the split decisions in *Kwiatowski* and *Laier* is that the gravamen of the plaintiff's complaint lies in the eye of the beholder. That means, in practice, that persuasive lawyering, as well as the identity of the judicial figure making the decision, could make all the difference in a particular case.

In sum, the published cases provide little clarity for those wanting to answer the question of premises liability versus general negligence. But, since *Laier*, the Michigan Court of Appeals has issued over a dozen unpublished opinions dealing with the issue. Some guidance can be found in those cases.

Unpublished Cases[21]

Negligence Claim Rejected – Premises Claim in Disguise

The most frequent cases are those in which the Michigan Court of Appeals has found that the complaint sounded solely in premises liability and has rejected an attempt to assert a general negligence claim.

In *Thorne v Great Atlantic & Pacific Tea Co*,[22] the plaintiff slipped and fell on grapes allegedly dropped by a store worker at a grocery store. The court of appeals held that the claim sounded in premises liability, noting that the plaintiff's complaint alleged that the slip and fall was caused by the grapes, an "unsafe *condition*" in the store.[23] *Koontz v Sybra Inc.*[24] involved a slip and fall caused by debris outside an Arby's restaurant. The trial court found that the claim was for premises liability, the danger was open and obvious, and it thus dismissed the case. On appeal, the plaintiff did not dispute that the debris was open and obvious but argued that the open and obvious doctrine did not apply because he had stated claim for general negligence. The court of appeals affirmed, holding that the complaint sounded in premises liability only because a *condition* of the land caused the injury.[25]

The lesson from the split decisions in *Kwiatowski* and *Laier* is that the gravamen of the plaintiff's complaint lies in the eye of the beholder. That means, in practice, that persuasive lawyering, as well as the identity of the judicial figure making the decision, could make all the difference in a particular case.

In cases where an arguably clumsy plaintiff fell and was injured, the court of appeals has consistently found only a premises liability claim. The court has applied premises liability principles to cases where a plaintiff was injured after opening an unlocked but barricaded door and falling through,[26] where the plaintiff was walking down unlit stairs and fell after missing two steps,[27] where a plaintiff was injured after falling off a school stage,[28] and where the plaintiff was injured while trying to pick up a store item while standing atop a defective pallet that gave way.[29] In these various scenarios, the court rejected the plaintiffs' arguments that the gravamen of their complaint was defendant's conduct.

The court of appeals has likewise been hesitant to apply general negligence where the defendant's complained-of conduct involved some form of assurance of safety, rather than active involvement in the injury-producing activity itself. In *Dupras v Lloyd-Lee*,[30] for example, the plaintiff was helping the defendant to shingle the roof of defendant's garage. The roof was wet, and the plaintiff sought and obtained defendant's assurance that the roof was safe to walk on. However, when the plaintiff began to walk on the roof, he slipped, fell off, and was hurt. The court held that the action sounded in premises liability only, as "[i]t was the roof itself . . . not defendant's conduct that caused plaintiff to fall."[31] Similarly, in *Demchik v Comaty*[32] the defendant incorrectly assured the plaintiff that a window in defendant's house was unlocked. However, when the plaintiff attempted to open the locked window by pushing on it, the glass shattered and injured the plaintiff. Using familiar language to exclude a general negligence cause of action, the court held "it was the window itself, and not defendant's conduct that caused the laceration."[33]

Negligence Claim Accepted

As noted, the Michigan Court of Appeals has been reluctant to expansively hold that a claim concerns conduct as opposed to a condition of land. The

court has, however, permitted general negligence causes of action when a defendant's actions are the central focus, and defendant's status as a premises owner/possessor is incidental. For example, in *Floyd v Insulspan*[34] the plaintiff truck driver was injured after slipping on snow covered lumber loaded onto his trailer by defendant's employees. The plaintiff alleged that the defendant's employees were negligent in allowing snow to accumulate on the lumber. The court held that this was a properly asserted general negligence claim, with no valid premises liability component, as it was based on "the conduct of defendant's employees, and [did] not bear any relation to the defendant's ownership of the premises."[35] The previously discussed *Kwiatowski* case is another example of where the plaintiff's injury was characterized by 6 of the 10 jurists reviewing the case as having been caused by the defendant's conduct in opening a door — and thus a general negligence claim was allowed.[36]

The court of appeals has also accepted the assertion of general negligence when a premises liability claim would be invalid for other reasons. In *Schoch v Michigan Paving*,[37] the plaintiff broke her foot while walking across an uneven parking lot paved by defendant. A premises liability claim could not lie because the defendant did not have possession or control of the parking lot, and the court without extensive discussion remanded the case to the trial court for a trial on general negligence.[38] The published *Wheeler*[39] case discussed previously also falls into this category; the court implied that a premises liability cause of action would fail because the defendant complied with all applicable safety requirements.[40]

In sum, if there is a focus on a defendant's actions in the absence of a cognizable premises liability claim (e.g., defendant is not owner/possessor or defendant's status as owner/possessor is unrelated to the liability asserted), or if a physical act by the defendant directly caused the plaintiff's injury, a viable claim of general negligence might be allowed.

Both Premises and Negligence Claims Accepted

A few cases have expressly sanctioned both general negligence and premises liability claims on a set of operative facts. In *Fayad v Darwich*,[41] the plaintiff and defendant were holding ropes to guide a tree on defendant's property safely to the ground, while a third party operated a chainsaw to cut the tree down. When the tree began to fall, the defendant let go of her rope and fled, causing the tree to fall onto the plaintiff. The plaintiff pled a generalized count of "regular negligence" without detail, and the court of appeals held that both general negligence and premises liability were viable causes of action.[42] While the premises claim failed under the open and obvious doctrine, the court held that a general negligence claim was valid because the defendant's active participation in the tree cutting was separate from the premises liability claim stemming from her status as the landowner.[43]

As noted, the Michigan Court of Appeals has been reluctant to expansively hold that a claim concerns conduct as opposed to a condition of land. The court has, however, permitted general negligence causes of action when a defendant's actions are the central focus, and defendant's status as a premises owner/possessor is incidental.

The court of appeals also recognized a viable separate general negligence cause of action in *Pernell v Suburban Motors Co*,[44] where the plaintiff slipped and fell on a puddle of unidentified liquid in an auto dealership while being escorted to the customer service waiting area by a dealership employee. Plaintiff there asserted both premises liability and general negligence claims. The trial court dismissed both claims, agreeing with defendant that the premises claim should be dismissed because the puddle was open and obvious. The trial court further found that the general negligence claim was not a viable separate theory because the injury arose from a condition of the premises rather than the conduct of the defendant and, thus, was only a premises liability action. The court of appeals reversed; the 2-1 majority held that plaintiff had stated a viable general negligence claim because "defendant's liability, if any, arises not because of defendant's status as an invitor, but because defendant engaged in escorting plaintiff to the customer service lounge. . . . This is a claim based on negligent conduct independent of defendant's status as the premises owner."[45] The *Pernell* dissenting judge disagreed, instead affirming the trial court's view and stating: "The employee's actions did not cause plaintiff's fall. He and plaintiff both walked in the same direction and the employee did nothing to cause plaintiff's injury, which is premised on the condition of the premises, not the employee's conduct."[46] Again, the gravamen of the claim seems to be in the eye of the beholder, some see "condition" where others see "conduct," making it difficult to predict how a particular set of facts will be viewed by a court. Thus, a space for advocacy.

The common thread in the aforementioned cases is the presence of a defendant who both owns the property and is actively participating in the injury-causing activity itself. Another example is provided by *Cohen v Great Lakes Live Steamers,*[47] where the plaintiff was riding on a miniature train operated by the defendant. She sustained injury when the train car she was riding in derailed.

The plaintiff alleged that the defendant negligently placed her in the back of the train car, violating safe weight distribution standards. The court, in addition to discussing a possible premises liability cause of action, allowed a general negligence claim because it believed the evidence established a "logical sequence of cause and effect" between the defendant's actions and the train's derailment.[48] However, the *Cohen* court also expressed doubt about the viability of a premises liability cause of action on account of unresolved factual issues whether the defendant controlled the premises.[49] Thus, the court may have been more inclined to allow a general negligence cause of action in light of its doubts about the viability of a premises liability cause of action against the specific defendant.

Conclusion

Courts will look beyond the face of the complaint to determine a true cause of action, regardless of the labels chosen by a plaintiff. The legal line dividing premises liability and general negligence — which turns on the characterization whether the gravamen of a claim is *condition* or *conduct* — is not always clear under Michigan common law. That leaves room for advocacy by counsel on both sides of the bar. If an injury occurred due to a plaintiff's likely clumsiness or a defendant's assurance of safety, and an aspect or condition of the premises are an operative issue, then a general negligence claim is unlikely to be recognized. But if a defendant was physically involved in the injury-producing event, or a defendant's status as premises owner is coincidental to the operative events, or a premises liability claim would not lie against a particular defendant, a general negligence claim might be facially viable.

Endnotes

1. *Pernell v Suburban Motors Co*, unpublished opinion per curiam of the Court of Appeals, issued April 23, 2013 (Docket No. 308731) at p. 4, citing *Laier v Kitchen*, 266 Mich App 482; 702 NW2d 199 (2005).
2. See, e.g., *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001).
3. *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001).
4. *Adams v Adams*, 276 Mich App 701, 710-711; 742 NW2d 399 (2007).
5. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 43; 594 NW2d 455 (1999), quoting *McLeod v Plymouth Court Nursing Home*, 957 F Supp 113, 115 (ED Mich, 1997).
6. *Anbari v Union Square Dev, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2012 (Docket No. 302833).
7. *Id.* at *3.
8. *Laier v Kitchen*, 266 Mich App 482; 702 NW2d 199 (2005).
9. *Id.* at 490.
10. *Id.* at 486.
11. *Id.* at 493. *See also id.* at 502 (Hoekstra, J.) ("the trial court and the parties failed to recognize ordinary negligence as a theory of recovery separate from premises liability and thus failed to develop a record sufficient to permit any meaningful review by this Court").
12. *Id.* at 490 (Neff, J.) and 502 (Hoekstra, J.); *but see id.* at 501-502 (Schuette, J., finding the record "about as factually underdeveloped as a fourth-world economy" and for that reason concurring in the result only and declining to join in the analysis of other panel members).
13. Although Judge Neff's opinion suggested there was sufficient evidence to support a viable claim for general negligence, the separate opinions of Judges Hoekstra and Schuette each expressly declined to opine on the viability of such a claim if made in this case.
14. *Wheeler v Central Michigan Inns, Inc*, 292 Mich App 300; 807 NW2d 909 (2011).
15. *Id.* at 304-305.
16. *Id.* at 307.
17. *Kwiatowski v Coachlight Estates of Blissfield, Inc*, 480 Mich 1062; 743 NW2d 917 (2008).
18. *Kwiatowski v Coachlight Estates of Blissfield, Inc*, unpublished opinion of the Court of Appeals, issued July 3, 2007 (Docket No. 272106), rev'd, 480 Mich 1062.
19. *Id.* at 2.
20. *Id.* (Jansen, J., dissenting) at 2.
21. Federal courts, particularly those in the Sixth Circuit, have become increasingly deferential to unpublished Michigan Court of Appeals decisions when there is no traditionally controlling precedent. *See* Nelson & Jordan, *Unpublished but Binding? Federal Courts give Near-Binding Effect to Even Unpublished Michigan Court of Appeals Decisions*, 29 Mich Def Quarterly 13 (2013).
22. *Thorne v Great Atlantic & Pacific Tea Co*, unpublished opinion per curiam of the Court of Appeals, issued March 4, 2010 (Docket No. 281906).
23. *Id.* at 2 (emphasis added).
24. *Koontz v Sybra Inc*, unpublished opinion per curiam of the Court of Appeals, issued July 17, 2008 (Docket No. 278658).
25. *Id.* at 1-2.
26. *Anbari v Union Square Dev, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2012 (Docket No. 302833).
27. *Ahola v Genessee Christian School*, unpublished opinion per curiam of the Court of Appeals, issued December 15, 2009 (Docket No. 283576).
28. *Berry v Dearborn Heights Montessori, Inc*, unpublished opinion per curiam of the Court of Appeals, issued January 1, 2012 (Docket No. 300737).
29. *Weeks v Menard, Inc*, unpublished opinion per curiam of the Court of Appeals, issued January 6, 2011 (Docket No. 294208).
30. *Dupras v Lloyd-Lee*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2011 (Docket No. 295130).
31. *Id.* at 2.
32. *Demchik v Comaty*, unpublished opinion per curiam of the Court of Appeals, issued October 21, 2010 (Docket No. 292370).
33. *Id.*at 2.
34. *Floyd v Insulspan, Inc*, unpublished opinion per curiam of the Court of Appeals, issued September 29, 2009 (Docket No. 286442).
35. *Id.* at 3.
36. *Kwiatowski v Coachlight Estates of Blissfield, Inc*, unpublished opinion of the Court of Appeals, issued July 3, 2007 (Docket No. 272106) (Jansen, J., dissenting), rev'd, 480 Mich 1062.
37. *Schoch v Michigan Paving & Materials Co*, unpublished opinion per curiam of the Court of Appeals, issued September 30, 2010 (Docket No. 291435).
38. *Id.* at 2-3.
39. *Wheeler v Central Michigan Inns, Inc*, 292 Mich App 300; 807 NW2d 909 (2011).
40. *Id.* at 303.
41. *Fayad v Darwich*, unpublished opinion per curiam of the Court of Appeals, issued May 5, 2009 (Docket No. 284181).
42. *Id.* at 2-3.
43. *Id.* at 3.
44. *Pernell v Suburban Motors Co*, unpublished opinion per curiam of the Court of Appeals, issued April 23, 2013 (Docket No. 308731).
45. *Id.* at 5.
46. *Id.* (Saad, J., dissenting) at 1.
47. *Cohen v Great Lakes Live Steamers, Inc*, unpublished opinion per curiam of the Court of Appeals, issued March 6, 2008 (Docket No. 275190).
48. *Id.* at 6.
49. *Id.* at 3-4.

The Electronic On-Board Recorder Mandate for Tractor-Trailers and Its Potential Impact on Safety, Claims Handling and Underwriting[1]

By: Timothy S. Groustra, Kaitlin A. Brown, & Jim Rodi

Executive Summary

Rules are being proposed in compliance with the Moving Ahead for Progress in the 21st Century Act, which would mandate electric on-board recorders (EOBRs) in commercial motor vehicles involved in interstate commerce. EOBRs will have to be certified and meet certain specifications. They will simplify monitoring and compliance with hours-of-service (HOS) regulations as well as trucker performance reviews. They could also aid in claims handling and underwriting procedures as well as trucking accident litigation. With the advantages of EOBRs, the units are expected to quickly pay for themselves, prompting many to become compliant before they are mandated to do so.

Timothy S. Groustra is a Principal at Kitch Drutchas Wagner Valitutti & Sherbrook (Mt. Clemens, Michigan). Mr. Groustra specializes in trucking litigation and no-fault claims, as well as other complex matters. Mr. Groustra is also the Chief Operating Officer of Report Anyplace, LLC, a company formed to reduce risk and improve underwriting in the trucking space. He can be reached at t.groustra@kitch.com

Kaitlin A. Brown is an Associate with Kitch Drutchas Wagner Valitutti & Sherbrook (Mt. Clemens, Michigan). Ms. Brown can be reached at kaitlan.brown@kitch.com.

Jim Rodi is the Senior Vice President, Mobile Communications Group, Rand McNally (Skokie, Illinois). Rand McNally has been delivering award-winning solutions to the commercial transportation industry for over 75 years. Mr. Rodi can be reached at jrodi@randmcnally.com.

Electronic on-board recorders (EOBRs), also known as Electronic Logging Devices (ELDs), are being mandated by the federal government as a way to ensure compliance by truck drivers with hours-of-service (HOS) rules. Federal HOS rules, in place in some form since 1938, limit the amount of time a long-haul driver can be on the road. Instead of paper logs manually filled out by the driver, ELDs automatically tally driver activities and tabulate a driver's maximum allowed driving time. EOBRs currently on the market already provide several benefits to the industry, even without the looming mandate to install them. The following is a brief overview of the status of the mandate, a description of EOBR capabilities (drawing from Rand McNally's commercial transportation products as an example), and how the technology can be used to mitigate risk and insurance costs.

Summary of MAP–21: Status of the EOBR Mandate

The Federal Motor Carrier Safety Administration (FMCSA) plans to issue a supplemental notice of proposed rulemaking in November that will mandate EOBRs on commercial motor vehicles involved in interstate commerce and operated by a driver subject to the hours of service and record of duty status requirements.[2] This comes after President Obama signed into law the Moving Ahead for Progress in the 21st Century Act, commonly known as MAP–21, on July 6, 2012.[3] The law's stated purpose is to improve the United States transportation system[4] through achieving goals such as improvement of the national freight network, and significant reduction of traffic fatalities and serious injuries on all public roads.[5]

MAP–21 seeks to achieve these goals by mandating that the FMCSA make 29 new rules within 27 months, although that timeframe has now been extended due to recent delays.[6] In particular, MAP–21 included enactment of the Commercial Motor Vehicle Safety Enhancement Act of 2012 (Safety Enhancement Act), which requires the Secretary of Transportation to prescribe regulations requiring electronic logging devices in commercial motor vehicles (the EOBR mandate).[7]

The purpose of the new EOBR mandate is to "improve compliance . . . with hours of service regulations," but the regulations must also ensure that drivers will not be harassed with the information collected.[8] The latter concern comes from the Seventh Circuit Court of Appeals' decision striking down the FMCSA's previous 2010 rule requiring EOBRs.[9]

The FMCSA plans to compose the rule after a three-step process of information gathering.[10] First, the Motor Carrier Safety Advisory Committee (MCSAC) will "develop materials that include technical specifications for EOBRs, and . . . address the potential of [using] these devices to harass drivers."[11] Second, the FMCSA will

hold two "public listening sessions" to receive opinions from drivers, carriers, enforcement officers, and stakeholders, about the issue of harassment.[12] Third, the FMCSA will survey drivers, carriers, and vendors on the harassment issues in an attempt to "draw the line between what encourages productivity and what amounts to harassment."[13]

On January 8, 2013, the FMCSA noted in its semiannual regulatory agenda that its regulation regarding "Electronic Logging Devices and Hours of Service Supporting Documents" was in the "proposed rule stage,"[14] which would establish the following:

> (1) Minimum performance standards for electronic logging devices (ELDs); (2) requirements for the mandatory use of the devices by drivers required to prepare handwritten records of duty status (RODS); (3) requirements concerning HOS supporting documents; and (4) measures to ensure that the mandatory use of ELDs will not result in harassment of drivers by motor carriers and enforcement officials.[15]

Anne S. Ferro, Administrator of the FMCSA, expects the mandate to be finalized in the September 2014 timeframe, making the ultimate goal for implementation of the rule in 2016, despite the requirement of MAP-21 to finalize the regulation by October 1, 2013, and to take effect two years thereafter.[16] Thus, commercial motor vehicles will have two years from the publication of the final rule to ensure their trucks are in compliance.[17]

The Safety Enhancement Act requires that EOBRs:

- accurately and automatically record commercial driver HOS;[18]
- record the location of a commercial motor vehicle;
- be tamper resistant; and
- be synchronized to the operation of the vehicle engine or be capable of recognizing when the vehicle is being operated.[19]

Further, the EOBR mandate will require a secure process for standardized and unique vehicle operator identification,[20] and define a standardized user interface to aid vehicle operator compliance and law enforcement review.[21] EOBRs will also be required to be certified, and the regulations must establish the criteria and process for such certification.[22] Electronic logging devices that are not certified will not be acceptable evidence of the hours of service and record of duty status requirements under federal regulations.[23]

Finally, it seems certain that any new rule promulgated in accordance with MAP–21 will require the EOBR to have a direct connection with the truck's engine, as it affords the most accurate and secure manner to capture and preserve data. Most EOBRs presently available plug into the engine diagnostics.

EOBR Capability/Functionality

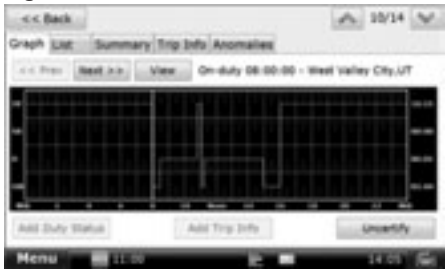
EOBRs were in the market, and in use in fleets, long before there was a law requiring a federal mandate. Depending on the make and model of the EOBR unit, the following are the current types of data and functions that are available to the driver, safety director, or other company representatives:

- HOS logs and pre-trip/post-trip vehicle inspections.
- Truck specific navigation and routing, including low clearances, haz mat restricted areas, overweight prohibited areas, etc.
- Fleet safety monitoring, including the ability to monitor the location, speed, and movement of every truck in the fleet in real-time.
- Electronic control module (ECM) caliber data direct on the EOBR, without the need for expert download of the engine. Thus, EOBRs can capture detailed information, such as the 90 seconds leading up to a hard brake event, the truck's speed, throttle, brake position, rpm data, and direction.
- Driver performance modules, which monitor and report more than 200 metrics, including idling time, fuel efficiency performance, number of hard brake events, cruise control usage and gear shifting patterns.
- Mobile communication between the cab and back office, allowing the driver to interact with dispatch and/or the safety department.

With respect to HOS data, EOBRs make it far simpler for drivers to be compliant and allow a much easier, quicker, inspection by a department of transportation officer. As demonstrated in *Figures 1 & 2*, a Rand McNally unit, for example, has a screen dedicated to the driver's HOS compliance status – listing the number of hours remaining within the 70 hour rule, along with the driver's remaining driving time for the day. Anyone looking at that one screen will immediately know if the driver is within his or her HOS limits, without having to tally any numbers or review several pages of logs.

Figure 1

Figure 2



In all, the goal for many EOBR manufacturers is to eliminate paper in the cab, making the driver's job much easier, and allowing the driver to focus on safely delivering loads.

As for fleet compliance monitoring, company safety directors are able to log into a secure web portal and pull up a map to instantly know exactly where the entire fleet is, what route each truck took to get to its present location, and any location along the route where a particular truck traveled (displayed on some systems with arrows). *See Figures 3 & 4*.

Figure 3

Figure 4

In the event of a loss, the company safety director can, from his or her office, immediately pull up ECM caliber data to help assess what may have occurred. For example, with a hard brake event and impact, it is possible to review second-by-second details leading up to and immediately following the event. The safety director would immediately know if his or her driver was traveling in excess of the speed limit or how much braking, if any, there was pre-impact. Readily available ECM caliber data may ultimately prove critical to a liability defense team in compiling a complete picture of the likely cause of the impact, where fault may primarily lie, and the extent of the company's exposure, if any.

EOBRs are also rapidly adapting to mobile technology. There are systems in which the route tracker connects wirelessly with a driver's smart phone or tablet through Bluetooth technology. From the smart phone's cellular network, data can be sent to computers at the dispatch center. Fleet managers can then view the data in real time or retrieve past logs. A product that will be commercially available later this year will connect with the Wi-Fi® enabled truck navigation GPS device to create a fully functional electronic logging and mobile fleet management device.

Potential Advantages of EOBRs for Safety, Claims, and Underwriting

Bill Graves, President and CEO of American Trucking Associations, has observed that EOBRs are "potentially game-changing technology."[24] He is convinced that "[e]lectronic logs improve safety by making compliance with the rules easier . . . [and] less time spent filling out, checking, rechecking, verifying, storing and retrieving paper logbooks."[25]

Modify Behavior and Improve CSA Scores

By being able to monitor speed, hard braking, engine idling, hours of service, and other data, more than one company director has reported "fewer accidents and safety violations, which in turn has saved the company money on insurance and has, in many ways, made life easier for drivers."[26] Further, the American Transportation Research Institute produced survey results indicating that "76% of fleets saw an improvement in driver morale after transitioning to electronic logging, and 19% found it easier to recruit and retain drivers after making the switch."[27] One company has even reported that posting driver performance results within the company has created competition among the drivers to be the most compliant.[28] Others are reportedly tying driver bonuses to their performance data.

Specifically, fleet managers can, with the EOBR data, seek to modify driver behavior by noting "red flags." For example, for drivers with persistent hard brake events, repeated instances of traveling in excess of the speed limit (having nothing to do with whether a driver was caught speeding by local law enforcement), or prolonged idling time, a safety director can speak with the driver about the issue and provide the appropriate coaching. If the issue persists, management might decide that a driver retraining course is appropriate. In extreme cases, where the safety director observes from the data that the driver has been unable, or unwilling, to modify his or her behavior, the company can determine if it wants that type of risk on the payroll. Several companies have a system in place whereby a certain number of discussions with a driver will automatically result in retraining, and a subsequent number of offenses after retraining warrant termination. Some companies may even implement efficiency ratings of its safety director, based on the number of days it takes to speak to a driver about flagged issues and whether there was a recurrence of the issue thereafter.

In all, by monitoring driver behavior, a safety director can improve driver habits and realize a positive impact on CSA scores.

Assist in Claims Handling

EOBR data can produce a significant benefit in the area of claims handling. With a wealth of data stored in an electronic file, company safety managers can easily hold onto the EOBR data for the length of the applicable statute of limitations. Thus, EOBR data may be especially helpful for those instances where, for example, a plaintiff's counsel, knowing that liability and/or the forces involved in the collision make a serious injury claim dubious, sits quietly for a few years before filing a closed head injury claim mere months before the statute runs. The company safety director, in that

instance, instead of scrambling to gather any scarce information still available to defend the company, readily has all of the engine data at his or her fingertips, just as if the company had borne the expense, even with a minor impact, to dispatch an accident reconstruction expert to the scene immediately after the occurrence to download the engine ECM. The company would also have proof that its driver was HOS compliant. With EOBR devices, litigation-pertinent data is standardized, automatic, accurate, and more easily preserved.

In the final analysis, claims handling is about obtaining the best data possible as quickly as possible to assess exposure. With EOBR data easily stored and saved for any loss event, claims representatives and company safety directors will be able to more precisely determine the risk.

Potential Underwriting Benefits

The data collected by EOBRs is also useful for underwriters to more accurately rate the policy by determining exactly where a fleet operates and how frequently it operates in certain areas. Thus, underwriters will be able to readily determine such things as whether the fleet activities are as reported; whether company trucks are required to be in high crime areas and, if so, how frequently; and how often the fleet travels in congested areas where the collision incident rate is higher. The precision and detail of the data available through some EOBRs will provide underwriters the information that will allow for a policy premium that is more reflective of a fleet's risk exposure. While that might result in higher premiums for some, it may result in lower premiums for others depending on the activities reflected in the data.

Potential Evidentiary/Spoliation Issues

According to the Safety Enhancement Act, the EOBR Mandate must establish a secure process for standardized: data transfer for vehicle operators between motor vehicles,[29] data storage for a motor carrier,[30] and data transfer and transportability for law enforcement officials.[31] The technical specifications will likely place the onus on the EOBR manufacturer to ensure compliance with FMCSA's performance criteria regarding tampering.[32]

Potential evidentiary issues regarding preservation and use of the data include the following:

- Will FMSCA's electronic log preservation requirement remain at six months? Plaintiff's counsel might press for an adverse inference and/or spoliation if EOBR collision data is not preserved on the basis that it is easy and inexpensive to retain the data for all accident events for the duration of the applicable statute of limitations period, and failure to do so must mean that the data contained evidence damaging to the truck company's defenses. The strict federal e-discovery guidelines may also govern the data.

- Much like with ECM data, there will be the question of "whose data is it"? Most EOBR manufacturers would seemingly consider the trucking company as the owner of the data, but that should be something addressed within the servicing agreement with the manufacturer.

- EOBR data could conceivably be used by plaintiff's counsel to bolster negligent hiring/training/supervision claims. A pre-impact history of multiple hard brake instances or of exceeding the speed limit, for example, could hand claimants otherwise non-existent evidence to bolster the argument that the driver was an "accident waiting to happen." On the other hand, if the data is used by trucking companies to identify potential problem drivers and have them retrained, the prior adverse EOBR data, and the fact it prompted driver retraining, might be used against the company in a subsequent event, regardless of the accident facts.[33] That is, the company may be second guessed as to why it attempted retraining when termination was allegedly warranted.

- With the FMCSA apparently intent on placing the onus of ensuring the accuracy of the data on EOBR manufacturers, and ensuring that drivers or their companies have not tampered with the data, one might expect plaintiff's counsel to subpoena the EOBR manufacturer in cases involving particularly large losses, seeking evidence on what the manufacturers do to ensure accuracy, what the success/failure rate is, whether tampering can be ruled out for the specific incident at issue, and what changes or upgrades have been made to the units to impede tampering since the loss at issue regardless whether the change/upgrade had anything to do with that particular incident. Plaintiff's counsel may even retain their own EOBR experts to attempt to pry open the door for a tampering argument.

- As most manufacturers are developing, or have already available, smart-phone based applications to interface with the EOBR (or are developing EOBRs run entirely by smart phones and tablets), will plaintiffs' attorneys start demanding inspections of a driver's cell phone and/or demand the download of the data (i.e., they might do more than just obtain call historical records)?

Answers to these questions are beyond the scope of this article (and would be worthy of an entire article of their own), but these are issues that should be considered when instituting an EOBR compliance plan.

Conclusion

The FMCSA's EOBR FAQs estimate a trucking company's cost to be in the neighborhood of $1,500 to $2,000 for each vehicle to become compliant with the eventual mandate (not including service fees).[34] In anticipation of this mandate,

some companies are already offering lower cost units (i.e., at a cost less than half that estimated by the agency) that will make the mandate requirement financially easier to meet. The bottom line, however, is that an EOBR mandate appears certain. With the advantages that EOBRs afford in improving safety, CSA scores, claims handling, and underwriting, the units may quickly pay for themselves, prompting many to become compliant long before there is a mandate to do so.

Endnotes

1. As published in *The Transportation Lawyer*, July 2013, Vol 15, No.1 (with permission).
2. Semiannual Regulatory Agenda, 78 Fed Reg 1,607 (Jan. 8, 2013). *See also* 49 USC § 31137(a); MAP–12, 126 Stat. at 405 (enacted July 6, 2012). Timothy Cama, *FMCSA Will Miss Deadline for ELD Rule, Ferro Says,* Transport Topics, April 8, 2013.
3. Moving Ahead for Progress in the 21st Century Act, Pub L No 112-141, 126 Stat 405 (codified as amended in 23 USC § 150, 49 USC 31137, *et al.*, generally effective October 1, 2012) (MAP–12).
4. MAP–12, 126 Stat. at 405–406, 524.
5. 23 USC § 150 (2012).
6. FMCSA, *Implementation of Moving Ahead for Progress in the 21st Century (MAP–21)*, (Sept. 28, 2012) available at http://www.fmcsa.dot.gov/about/what-we-do/MAP-21/Map21.aspx.
7. 49 USC § 31137(a). *See also* MAP–12, 126 Stat at 405 (enacted July 6, 2012).
8. 49 USC § 31137(a)(1). *See also* MAP–12, 126 Stat at 405 (enacted July 6, 2012).
9. *OOIDA v FMCSA*, 656 F3d 580, 588-589 (CA 7, 2011).
10. Bill Bronrott, *An Overview of FMCSA Safety Initiatives*, Chicago, IL at 7 (June 29, 2012).
11. *Id.*
12. *Id.* at 8.
13. *Id.*
14. Semiannual Regulatory Agenda, 78 Fed Reg 1,607 (Jan. 8, 2013).
15. *Id.* at 1,611.
16. Timothy Cama, *FMCSA Will Miss Deadline for ELD Rule, Ferro Says,* Transport Topics, April 8, 2013.
17. 49 USC § 31137(b)(1)(C).
18. 49 USC § 31137(b)(1)(A). "Electronic logging device," as used in the Safety Enhancement Act, means "an electronic device that is capable of recording a driver's hours of service and duty status accurately and automatically; and meets the requirements established by the secretary through regulation." 49 USC § 31137(f)(1).
19. 49 USC § 31137(b)(1)(A).
20. 49 USC § 31137(b)(2)(B)(i).
21. 49 USC § 31137(b)(2)(A).
22. 49 USC § 31137(c)(1).
23. 49 USC § 31137(c)(2).
24. Bill Graves, *FMCSA Must Move Forward on E-Logging Rule*, Transport Topics, Dec. 3, 2012, at 5.
25. *Id.* at 5.
26. Daniel P. Bearth, *Carriers Use Data to Tackle Big Issues*, Transport Topics 2012 Top 100 Private Carriers, 2012, at A3.
27. Bill Graves, *FMCSA Must Move Forward on E-Logging Rule*, Transport Topics, Dec. 3, 2012, at 5. See also Kenneth P. Abbarno and David A. Valent, *The Future of On-Board Recorders*, For the Defense, Dec. 2012, at 72.
28. Daniel P. Bearth, *Carriers Use Data to Tackle Big Issues*, Transport Topics 2012 Top 100 Private Carriers, 2012, at A3.
29. 49 USC § 31137(b)(2)(B)(iii).
30. 49 USC § 31137(b)(2)(B)(iv).
31. 49 USC § 31137(b)(2)(B)(v).

32. FMCSA EOBR FAQs (http://www.fmcsa.dot.gov/about/other/faq/faqs.aspx?faqtype=24#question1).

33. Shimon B. Kahan, Haynes, Studnicka, Kahan, O'Neill & Poulakidas, LLC.

34. FMCSA EOBR FAQs (http://www.fmcsa.dot.gov/about/other/faq/faqs.aspx?faqtype=24#question1).

MDTC Welcomes New Members!

Michele Arene, *Hom Killeen Siefer Arene & Hoehn*, AAA Michigan, 150 W. Jefferson, Suite 1500, Detroit, MI 48226, 313-237-5636, mmarene@aaamichigan.com

Amy A. Baranski, *Law Offices of Williams & Baranski*, 340 E. Big Beaver Road, Suite 250, Troy, MI 48083, 248-764-1220, amy_a_baranski@progressive.com

Howard H. Brauckmuller, *Law Offices of Williams & Baranski*, 340 E. Big Beaver Road, Suite 250, Troy, MI 48083, 248-764-1210, howard_h_brauckmuller@progressive.com

Kevin S. Carden, *Hom Killeen Siefer Arene & Hoehn*, AAA Michigan, 1685 North Opdyke Road, Auburn Hills, MI 48326, 248-258-2205, kscarden@aaamichigan.com

John A. Cothorn, *Cothorn & Stanczyk, P.C.*, 535 Griswold, Suite 530, Detroit, MI 48226, 313-964-7600, jcothorn@cothornmackley.com

Arminia Duenas, *Hom Killeen Siefer Arene & Hoehn*, AAA Michigan, 150 W. Jefferson, Suite 1500, Detroit, MI 48226, 313-237-5449, aqduenas@aaamichigan.com

Carol Eliel, *Hom Killeen Siefer Arene & Hoehn*, AAA Michigan, 1685 North Opdyke Road, Auburn Hills, MI 48326, caeliel@aaamichigan.com

Keith R. Ellis, *Hom Killen Siefer Arene & Hoehn*, AAA Michigan, 150 W. Jefferson, Suite 1500, Detroit, MI 48226, 313-237-5656, krellis@aaamichigan.com

Justin T. Evans, *Hutchinson Cannatella PC*, 1001 Woodward Ave, Suite 900, Detroit, MI 48226, 313-963-1860, jevans@mhutchlaw.com

Jeremiah Lee Fanslau, *Magdich & Associates*, 17177 N. Laurel Park Drive, Suite 401, Livonia, MI 48152, 248-344-0013, jfanslau@magdichlaw.com

Javena Finley, *Hom, Killeen, Siefer, Arene & Hoehn*, AAA Michigan, 150 West Jefferson , Suite 1300, Detroit, MI 48226, 313-237-5529, jmfinley@aaamichigan.com

Robert L. Gariepy, *Hom Killeen Siefer Arene & Hoehn*, AAA Michigan, 1685 North Opdyke Road, Auburn Hills, MI 48326, 248-258-2205, rlgariepy@aaamichigan.com

Micah R. German, *Magdich & Associates*, 17177 North Laurel Park Drive, Suite 401, Livonia, MI 48152, 248-344-0013, mgerman@magdichlaw.com

Elaine I. Harding, *Hom, Killeen, Siefer, Arene & Hoehn*, AAA Michigan, 150 West Jefferson, Suite 1500, Detroit, MI 48226, 313-237-5626, eiharding@aaamichigan.com

Scott M. Haskins, *Horn Killeen Siefer Arene & Hoehn*, AAA Michigan, 75 North Main Street, Suite 300, Mt. Clemens, MI 48043, 586-465-8205, smhaskins@aaamichigan.com

James E. Hoehner, *Hom, Killeen, Siefer, Arene & Hoehn*, AAA Michigan, 150 West Jefferson, Suite 1500, Detroit, MI 48226, 313-237-0610, jehoehner@aaamichigan.com

Jessica A. Jackson, *Collins Einhorn Farrell PC*, 4000 Town Ctr, Suite 909, Southfield, MI 48075, 248-355-4141, jessica.jackson@ceflawyers.com

Elizabeth A. King, *Hom Killeen Siefer Arene & Hoehn*, AAA Michigan, 150 W. Jefferson, Suite 1500, Detroit, MI 48226, 313-237-5733, eaking@aaamichigan.com

Gregory W. Mair, *O'Neill Wallace & Doyle, PC*, 300 St. Andrews Rd, Suite 302, PO Box 1966, Saginaw, MI 48605, 989-790-0960, gregmair@owdpc.com

Jamie Lynn McCutcheon, *Horn Killeen Siefer Arene & Hoehn*, 150 W. Jefferson, Suite 1500, Detroit, MI 48226, 313-237-5540, jlmccutcheon@aaamichigan.com

Jonathan P. Mona, *Magdich & Associates*, 17177 North Laurel Park Drive, Suite 401, Livonia, MI 48152, 248-344-0013, jmona@magdichlaw.com

Donna J. Neibauer, *Law Offices of Williams & Baranski*, 340 E. Big Beaver Road, Suite 250, Troy, MI 48083, 248-764-1210, Donna_J_Neibauer@Progressive.com

Ashley Nyeholt, *Hom Killeen Siefer Arene & Hoehn*, AAA Michigan, 1685 North Opdyke Road, Auburn Hills, MI 48326, aanyeholt@aaamichigan.com

Samantha J. Orvis, *Law Office of Storck & Dinverno*, 700 Tower Drive, Suite 550, Troy, MI 48098, 248-631-2101, orviss1@nationwide.com

Daniel S. Palmer, *Law Offices of Williams & Baranski*, 340 E. Big Beaver Road, Suite 250, Troy, MI 48083, 248-764-1210, Daniel_S_Palmer@Progressive.com

Max R. Prokop, *Hom Killeen Siefer Arene & Hoehn*, AAA Michigan, 150 W. Jefferson Ave, Suite 1500, Detroit, MI 48226, 313-237-5648, mrprokop@aaamichigan.com

Sandra Ann Prokopp, *Hom Killeen Siefer Arene & Hoehn*, AAA Michigan, 1685 North Opdyke Road, Auburn Hills, MI 48326, 248-648-6999, saprokopp@aaamichigan.com

Doreen Rayba, *Hom Killeen Siefer Arene & Hoehn*, AAA Michigan, 150 W. Jefferson, Suite 1500, Detroit, MI 48226, derayba@aaamichigan.com

Heather A. Ridderhoff, *Law Offices of Storck & Dinverno*, 700 Tower Drive, Suite 550, Troy, MI 48098, 248-631-2121, riddeh1@nationwide.com

Fareed Sam Saba, *Law Offices of Williams & Baranski*, 340 E. Big Beaver Road, Suite 250, Troy, MI 48083, 248-764-1127, fareed_saba@progressive.com

Michael J. Schaefer, *Hom Killeen Siefer Arene & Hoehn*, AAA Michigan, 75 N. Main St., Suite 300, Mount Clemens, MI 48043, 586-465-8204, mjschaefer@aaamichigan.com

A. Katie Simon, *Hom Killeen Siefer Arene & Hoehn*, AAA Michigan, 150 W. Jefferson, Suite 1500, Detroit, MI 48226, 313-237-5632, aksimon@aaamichigan.com

Gina L. Smith-Gallant, *Hom Killeen Siefer Arene & Hoehn*, AAA Michigan, 1685 North Opdyke Road, Auburn Hills, MI 48326, 248-648-6904, glsmith-gallant@aaamichigan.com

Richard M. Soranno, *Hom Killeen Siefer Arene & Hoehn*, AAA Michigan, 150 W. Jefferson Ave., Suite 1500, Detroit, MI 48226, 313-237-5622, rmsoranno@aaamichigan.com

Charles Trickey, III, *Hom, Killeen, Siefer, Arene & Hoehn*, AAA Michigan, 75 N. Main St., Suite 300, Mount Clemens, MI 48043, 586-465-8203, ctrickey@aaamichigan.com

Karen Trickey Pappas, *Hom Killeen Siefer Arene & Hoehn*, AAA Michigan, 75 North Main Street, Suite 300, Mt. Clemens, MI 48043, 586-465-8227, ktpappas@aaamichigan.com

Jeffrey Dale Trimble, *Law Offices of Williams & Baranski*, 340 E. Big Beaver Road, Suite 250, Troy, MI 48083, 248-764-1210, jeffrey_d_trimble@progressive.com

David R. Tuffley, *Hom Killeen Siefer Arene & Hoehn*, AAA Michigan, 75 N. Main St., Suite 300, Mt. Clemens, MI 48043, 586-465-8238, drtuffley@aaamichigan.com

Jessica Weber, *Hom Killee Siefer Arene & Hoehn*, AAA Michigan, 150 W. Jefferson, Suite 1500, Detroit, MI 48226, jpweber@aaamichigan.com

Mark E. Williams, *Law Offices of Williams & Baranski*, 340 E. Big Beaver Road, Suite 250, Troy, MI 48083, 248-764-1210, mark_e_williams@progressive.com

Shirley Wrase, *Hom Killeen Siefer Arene & Hoehn*, AAA Michigan, 150 W. Jefferson, Suite 1500, Detroit, MI 48226, slwrase@aaamichigan.com

Doron Yitzchaki, *Dickinson Wright PLLC*, 350 S. Main St., Suite 300, Ann Arbor, MI 48104, 734-623-1947, dyitzchaki@dickinsonwright.com

Vapor Intrusion — A New and Challenging Issue

By: Jeffrey Bolin, *The Dragun Corporation*, and Arthur Siegal, *Jaffe, Raitt, Heuer & Weiss, P.C.*

Executive Summary

Vapor intrusion (VI) occurs when chemical contaminants in soil or groundwater contaminate a gas and migrate into an overlying building, whether that is a place of business or a home. VI has become an increasingly important issue in environmental assessments, as is evidenced by new governmental guidance with respect to evaluating VI, and increasing lawsuits against businesses and property owners alleging exposure to contaminated vapors. This article provides an overview of what VI is, governmental criteria and guidance relating to VI, sampling methods used to determine if there is a VI problem, and methods of responding to VI.

Jeff Bolin is the Vice President of Technical Operations at The Dragun Corporation. He manages and oversees the consulting, litigation support, engineering, environmental compliance, remedial investigation, and remediation operations of the corporation in the United States and Canada. Jeff has over 30 years of experience in environmental project management; consulting and litigation support with attorneys; financial institutions; and industrial, municipal, and commercial clients.

Arthur Siegal is a partner at Jaffe, Raitt, Heuer & Weiss, P.C. and heads the firm's Environmental and Energy practice group. He has over 25 years of environmental law experience, representing clients in dealings with, and litigation regarding, State and Federal environmental laws, regulations and regulators. Arthur is a 1986 cum laude graduate of the University of Michigan Law School. The Jaffe firm has offices in Southfield, Detroit, Ann Arbor, Philadelphia and Florida.

Introduction

For years, the focus of environmental cleanups and liability has been on protection of groundwater. That focus is shifting to include vapor intrusion (VI), particularly of solvent and gasoline vapors, and there will be a whole host of new factors and issues to address in real property acquisition, financing and remediation. Dry cleaners, gas stations and any manufacturer using volatile solvents is a likely suspect for a VI issue.

The principles behind VI are complicated, involving chemical vapor pressures, Henry's Law, diffusion, concentration differentials and gradients, advection, geology, hydrogeology, crack densities, stack effect and many other relatively boring scientific factors.

Regardless of whether you paid attention in science class, vapor intrusion for owners, tenants and lawyers is real and has far reaching business implications. From property transactions to site remediation and closures (or more importantly site "reopeners"), VI is very likely to play a key due care role in business deals and property management. Further, the real and potential impact to property use, building use, and adjoining property could result in increased litigation with third parties and regulatory agencies.

What is Vapor Intrusion and Why is it Important

Vapor intrusion occurs when a chemical contaminant in soil or groundwater enters the soil gas above the water table and migrates into an overlying building. While this may sound simple, it is quite complex, both technically and legally.

Other environmental issues such as soil contamination may have been "safely" at a site "next door." A plume of contaminated groundwater may have migrated below a property, out of sight. People tended to have a sense of security because they weren't digging the dirt or drinking groundwater. Vapor intrusion, on the other hand, has become increasingly important to environmental assessments because it is quite literally at the front door and inside homes and places of business. Vapor intrusion raises questions such as

Is the air in my house or workspace safe?
Will this harm me or my children, my tenants or employees?
Will I be able to sell my building and for what price?

These questions are packed with emotion and not easily answered.

The Science of Vapor Intrusion

Many factors drive the migration of a chemical into soil gas and ultimately to "intrude" into a building. Understanding the main driving forces is paramount in determining cause and effect, appropriate mitigation, and cleanup levels.

The two main scientific forces at work are *diffusion* and *advection*. Diffusion is often the initial factor governing chemicals moving in soil gas through unsaturated soil via concentration gradients (higher to lower). Typically, the closer the "contaminated" soil gas gets to a building, advection tends to dominate often via pressure differentials and more permeable materials (the building zone of influence).

Additionally, the VI process is affected by factors such as barometric pressure, seasonality, soil type, soil moisture, the depth to the water table, the concentration and properties of the chemical of concern. In some cases, the nature of the contaminants and the soils and thickness of the groundwater itself may lead to vapor intrusion into a structure being either more or less likely.

A building influences the intrusion of contaminated vapors by "trapping" the soil gas under the building. Once trapped, contaminated vapors are "pulled" into the building through cracks and other entry points (e.g., sumps, utilities, etc.) via pressure differentials created inside the building due to heating and cooling, warm air rising in the building, and the effect of wind around the building (the "stack effect").

Understanding the VI process, the influencing factors, and the nuances of each will be critical to properly counsel clients (technically and legally) with respect to investigation, risk, and mitigation.

Litigation Risks

While the appellate track record on the issue of VI is developing, there have been many lawsuits indicating the future of litigation on this issue. They largely result from suits by neighbors against former users of hazardous chemicals seeking recovery of either remedial expenses,[1] or property damages.[2] Personal injury claims are also surfacing.

In Mississippi, in 2010, a jury reportedly awarded $17 million to five women who claimed that their children were harmed in utero by leaded gasoline fumes. In 2011, a federal district court approved an $8.1 million settlement of a class action by 124 families against Kraft Foods alleging pollution from a nearby factory contaminated groundwater and caused vapor intrusion in their homes.[3]

Perhaps the most chilling case is a 2010 decision from the U.S. District Court for Nevada, *Voggenthaler v Maryland Square, LLC*.[4] In *Voggenthaler,* plaintiffs, (residential homeowners) sued a dry cleaner and the past and present owners of the shopping center from which the dry cleaner tenant had released contamination. The contamination had migrated under the neighboring homes raising concerns regarding soil vapor infiltration. The shopping center owners sought summary judgment excusing them from liability.

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The district court denied the motion, holding that because the shopping center had owned and operated the below-ground drain pipes and lines beneath the dry cleaners, that meant the shopping center owners had "contributed" to the disposal and handling of PCE (dry cleaning solvent) at the shopping center. Amazingly, the court focused on the fact that the lease was structured such that the landlord received "a financial advantage . . . [by] receiv[ing] a percentage of the dry cleaning operation's over the counter sales."

The case was reversed and remanded in part on appeal on other grounds,[5] including a failure to allow the final owner in the chain to correct deficiencies in an affidavit regarding its pre-acquisition due diligence and relating to that owner's argument that it should not be held liable under the federal Resource Conservation and Recovery Act[6] as it did not buy the shopping center until after the dry cleaners had ceased operations. The appellate court did not address the surprisingly broad liability pronouncement based solely on ownership of a shopping center.

Governmental Criteria and Regulatory Guidance

As understanding of the VI mechanism is still developing, regulators are taking diverse and varied approaches. The USEPA, Interstate Technology and Regulatory Council (ITRC), and ASTM have all studied the process and have generated guidance documents. It will be critical to understand in which arena you and your client are "playing" as the rules may be different.

The U.S. Department of Housing and Urban Development's Multifamily Accelerated Processing (MAP) (which establishes national standards for approved lenders to submit loan applications for Federal Housing Administration (FHA) multifamily mortgage insurance) has included since 2009, a requirement that a Phase I environmental site assessment (ESA) must include an initial vapor

encroachment screen to determine if vapors potentially occur in the subsurface below existing and/or proposed structures.[7]

The USEPA released new guidance for the evaluation of vapor intrusion in November of 2012,[8] and the Michigan Department of Environmental Quality (MDEQ) provided its guidance document in May of this year.[9] Other states are also generating guidance documents, while some are deferring to the USEPA. The MDEQ's guidance applies when some previously adopted generic standards are exceeded and when there are pathways which might be outside the MDEQ generic baseline assumptions (e.g., when impacted groundwater is shallow and near foundations and basements). The MDEQ guidance includes the following steps:

1. Evaluating existing information to determine if the vapor pathway is of concern;
2. If it is, and there are buildings nearby, assess the risk and whether response actions are needed;
3. In some cases, conduct a building-specific investigation to evaluate the risks posed by the contaminants;
4. Conduct response actions, if necessary, which may include remedial actions or other mitigation measures.

In some cases, the MDEQ guidance has action standards far more stringent than it had previously adopted in its generic cleanup standards.

ASTM's guidance documents are also of note. In June of 2010, ASTM, an international standards organization, published its *Standard Guide for Vapor Encroachment Screening on Property Involved in Real Estate Transactions*, ASTM E2600-10. This guide includes two tiers; the first tier is directing an evaluation of known or suspected sources of contamination near a subject property. The second tier uses readily available information regarding the contaminated media (soil and/or groundwater) to predict if vapors may migrate to the property in question. ASTM is also preparing to release a new guidance document relating to the preparation of Phase I ESA, ASTM E1527-13 and, reportedly, this new standard also directs vapor migration be considered during environmental due diligence.

The EPA's draft guidance is more complex and requires more than MDEQ's guidance — including more vapor intrusion assessment; building mitigation and subsurface remediation; preemptive mitigation (Early Action); and community outreach and involvement.

Sampling Methods/Issues — How Do You Know You Have a Problem?

The vapor intrusion pathway is complex and is influenced by many factors. Identifying sources and their relationship to buildings is often first looked at by developing a conceptual site model (CSM). The CSM provides an integrated interpretation of the: (1) site geology and hydrogeology; (2) contaminant source type and concentration; (3) relative distances (vertical and horizontal) of the source and the building; (4) the building type and characteristics (e.g., basement, slab-on-grade, multi-level, integrity of slab, sumps, etc.); and (5) the building use.

Once a potential source and potential receptor have been identified, determining whether the vapor intrusion pathway is complete is often an iterative sampling process. Although Michigan still has default cleanup criteria for soil and groundwater and the potential for vapor intrusion,[10] these have become less reliable as an "off ramp" for the need to further evaluate the vapor intrusion pathway. Michigan, as noted above, as well as many other states, is opting toward a more conservative "multiple lines of evidence" approach. These multiple lines of evidence rely more on actual sample data and less on fate and transport modeling. Sampling can include one or all of the following depending on the level of certainty deemed appropriate: soil gas; sub-slab soil gas; and indoor air.

Soil Gas Sampling. Gasses in the soil are evaluated in the vadose (unsaturated) zone in and around the source and the building(s) in question. Depths to be sampled vary by site conditions. For example, if the building in question has a basement, the soil gas monitoring point(s) should be installed at or near the floor depth of the basement. Regardless, soil gas monitoring points are always installed above the water table.

Sub-Slab Sampling. Due to the nature of the "trapping" of soil gas by a building's slab, sub-slab soil gas samples are thought to indicate whether the VI pathway is truly relevant on a case-by-case basis. There are no hard and fast rules as to how many sample points are appropriate. Locations and frequency of sample points should take into account the purpose of the data, the building size and characteristics, the source and its size and proximity to the building, and the subsurface conditions.

Indoor Air Sampling. Indoor air samples are often collected following the collection of soil gas or sub-slab samples when the results indicate an indoor air quality risk. Collection of representative indoor air samples can be complicated by many factors including background interferences (e.g., building materials, common household cleaners and products, paints and paint related solvents, etc.), duplicating "typical" building conditions (e.g., HVAC operation), and seasonality. Often, ambient air samples are collected from outside the building as a "blank" or "background" sample for comparison to the indoor air results. It may also be necessary to conduct multiple

rounds of sampling to reflect seasonal effects on the vapor intrusion process. Such sampling needs to be carefully evaluated and compared to various standards to ensure its usefulness.

Ultimately, the level of effort and the steps taken to evaluate the vapor intrusion potential and risk will be site specific. Whether looking at a property transaction, site closure, potential long-term obligations (e.g., due care), or potential off-site exposure, each will likely require a different level of investigation.

Mitigation and Closure — Methods and Monitoring

As previously discussed, the potential for vapor intrusion and a completed VI pathway exists when there are (1) volatile contaminants in the soil gas, (2) routes of entry for the contaminated soil gas to enter the building, (3) advective conditions to pull the contaminated soil gas into the building, and (4) human occupancy in the building.

Intervening or removing any of these conditions to prevent human exposure would mitigate the concern. Remediation of the source eliminates the need for mitigation. When mitigation is required, a remedy or combination of remedies must be selected, implemented, operated and maintained until the vapor source is eliminated. Whether a VI situation requires mitigation or remediation is site-specific and depends on numerous factors. Similarly, the selection of a mitigation method or remedial activity or some combination is also site-specific and depends on site goals. Remedial approaches generally include source remediation, institutional controls and building controls.

Source Remediation. Source remedies address the source of vapors (soil and groundwater contamination), rather than controlling the entry of vapors into buildings. This includes removing and/or treating the source. Source remediation is a more permanent solution to vapor intrusion, while institutional or building control remedies are considered to be short-term or interim measures. These short-term measures are often implemented until the long-term remedy is complete.

Institutional Controls. Institutional controls are legal mechanisms such as restrictive covenants, zoning restrictions, prohibition of groundwater extraction or subsurface activity (e.g., excavation), and requirements for new construction (e.g., vapor barriers, sub-slab systems).

Building Controls. These are generally broken into passive or active methods.[11]

Passive barriers (vapor barriers) are materials or structures (often layers of plastic) installed below a building to physically block the entry of vapors. These systems are often selected when they can be installed during new construction.

Passive venting involves the design and implementation of a preferential venting layer below the floor slab to allow and direct soil gas to move laterally beyond the building footprint under natural diffusion gradients (resulting from the buildup of soil gas below the building) or pressure (thermal or wind-created) gradients. This allows the system to effectively function automatically. As with passive barriers, these systems are often installed during new construction.

Active methods of controlling VI fall mainly into four categories: Sub-slab depressurization (SSD); Submembrane depressurization (SMD), Sub-slab pressurization (SSP); and positive building pressure.

- SSD is widely used because it can be relatively easily implemented at existing buildings. SSD is a form of soil vapor extraction (SVE) but instead of being focused on mass reduction of a source, it is engineered to pull vapors from below the slab via a vacuum (greater than the stack effect into the building) such that the vapors do not enter the building. Instead vapors are typically vented above the building roof line.
- SMD is similar to SSD, however, it is used where there is no slab (i.e., a building with a crawl space). A membrane is used as a surrogate for a slab and a vacuum (depressurization) draws gasses from the soil below the membrane.
- SSP systems are the opposite of SSD systems. SSP uses blowers to push air into the soil or venting layer below the slab instead of drawing it out under a vacuum. The force of the air beneath the slab pushes the contaminated vapors to the outer edges of the building where it vents to the ambient air. Precautions should be taken so that contaminated vapors are not inadvertently reintroduced into the building through other pathways (HVAC systems, open windows, etc.).
- Another method of preventing vapors from entering the building is to create a positive pressure in the building interior (relative to the sub-slab). This is typically accomplished by modifying the HVAC system of the building. This creates a "bubble effect" that prevents vapor intrusion.

Note that these methods will require monitoring and operations and maintenance to ensure proper system operation and that the desired goals are being met. Many regulating agencies require alarms and other safety mechanisms in case of system failure.

Potential Reopener of Closed Sites/BEA Sites

After contaminated property has been cleaned, property owners typically and understandably want governmental

assurance that there will be no further pursuit of remedial action. In short, one wants certainty that the work is completed. This documentation usually takes the form of a No Further Action letter, a Certificate of Completion or a Covenant Not to Sue. However, it is rare to receive an unconditional release of liability or closure. Nearly all governmental environmental authority makes use of "reopeners," contract qualifiers that allow the government to demand additional cleanup of a site under circumstances such as:

- Imminent and substantial endangerment to the public health and environment;
- Certificate obtained through fraud or misrepresentation;
- A discovery that the cleanup criteria were not, in fact, met;
- Previously undiscovered contamination, 42 USC § 9622(f)(6)(A); and
- New contamination or a change in condition that exacerbates contamination.

Additionally, it is common for states to reserve the right to reopen remediation projects if there are changes in laws that require cleanup to different levels than prior laws, although some states will relieve developers of brownfields properties from liability for changes in the law to encourage redevelopment.[12] The concept is that if the previously approved remedy is no longer believed to be protective of human health and/or the environment, a reopener is appropriate.

A 2003 study by The Environmental Law Institute and Cleveland State University found that less than one percent of completed brownfields cleanups are reopened.[13]

Michigan's Baseline Environmental Assessment (BEA) program, as adopted in 1995, requires a non-liable owner or operator of a contaminated property to exercise due care including mitigating unacceptable exposure to hazardous substances allowing the facility to be used "in a manner that protects the public health and safety."[14] MDEQ and some lenders have reportedly begun reading the new MDEQ closure guidance to possibly mandate expensive remedial-type investigations *and* cleanups[15] — something, until now, a BEA largely allowed owners and operators to avoid. The recent change in focus on VI is such a large paradigm shift relating to protection of public health that any site with volatile contamination already closed or acquired under Michigan law could be subject to an expensive reopener. Residential sites or the potential for residential exposure likely would be the focus of any reopener evaluation.

Conclusion

For the last 15+ years, lawyers have largely believed that if contamination met the state standards for protection of groundwater, financing, sales and/or occupancy of the site was not an issue. While those standards remain in effect, the recent focus on vapor intrusion raises a whole host of new technical and legal issues for counsel to contend with and on which to advise their clients. Vapor intrusion has far reaching implications in the business world and counsel will need excellent technical support to minimize their client's risk and expense and/or in responding to this new concern.

Endnotes

1. *See, e.g., CAEUSA, Inc v Triple Cities Metal Finishing Corp*, No 3:11-CV-0711-LEK/DEP (ND NY); *United States v Apex Oil Co, Inc*, 579 F3d 734 (CA 7, 2009).
2. *Aiken v General Electric Co*, 2008 NY Slip Op 09527 (App Div 3rd Dept, Dec 4, 2008) (holding a question of fact as to when a three-year statute of limitations began to run when residents had no knowledge of vapor intrusion); *Baker v Chevron*, Nos 11-4369, 12-3995 (SD Ohio, Aug 2, 2013); *Forest Park Nat Bank & Trust v Ditchfield*, 881 F Supp2d 949 (ND Ill, 2012).
3. *Stoll v Kraft Foods Global Inc*, No 1:09-cv-00364 (SD Ind, May 20, 2011); *Ball v Bayard Pump & Tank Co, Inc*, 67 A3d 759 (Penn, 2013); *Ivory v International Business Machines*, 37 Misc3d 1221(A) (2012); *First Property Group, Ltd v Behr Dayton Thermal Products LLC*, No 3:08-CV-329 (SD Ohio, 2011).
4. 2010 WL 2947296.
5. 2013 WL 3839330 (CA 9, July 2013).
6. 42 USC 6901, *et seq*.
7. http://archives.hud.gov/offices/hsg/mfh/map/chapt9.pdf.
8. *OSWER Final Guidance for Assessing and Mitigating the Vapor Intrusion Pathway from Subsurface Sources to Indoor Air (External Review Draft),* U.S. Environmental Protection Agency Office of Solid Waste and Emergency Response, April 2013.
9. *Guidance Document for the Vapor Intrusion Pathway, May 2013, MDEQ Remediation and Redevelopment Division*.
10. https://www.michigan.gov/deq/0,1607,7-135-3311_4109_9846_30022-101581--,00.html. Of particular note, these cleanup standards and the rules authorizing them will be repealed as of December 31, 2013. 2012 PA 446. Reports are that MDEQ is working feverishly on a replacement set of rules and cleanup standards.
11. While the focus of this article is VI of volatile organic compounds, these methods can also be used with the mitigation of radon gas.
12. See, e.g., 52 FR 28038 (July 27, 1987).
13. See Robert A. Simons et al., "Quantifying Long-Term Environmental Regulatory Risk for Brownfields: Are Reopeners Really an Issue?" quoted in David A. Dana, "State Brownfields Programs as a Laboratory of Democracy?," NYU Law Journal, February 1, 2006, p. 96.
14. MCL 324.20107a(1)(b).
15. These unexpected potential obligations may be subject to challenge under the Michigan Administrative Procedures Act, MCL 24.201, et seq. as not legally enforceable. However, the outcome of such a challenge is uncertain.

Potential Pitfalls for the Michigan Attorney:

Attorney Liability for Fraudulent Transfers under Michigan's UFTA and Section 550(a)(1) of the United States Bankruptcy Code

By: Frederick R. Dewey and Grace K. Trueman, *Dickinson Wright PLLC*

Executive Summary

Although an attorney is ethically bound to zealously represent his client, an attorney must take care when transferring his client's funds in the face of the client's creditors lest he be subject to liability under Michigan's Uniform Fraudulent Transfer Act ("UFTA") or the United States Bankruptcy Code. This article explores potential attorney liability for the transfer of property or funds in the face of outstanding judgments against a client under the UFTA and Section 550(a)(1) of the Bankruptcy Code.

Fred Dewey is a litigation associate in Dickinson Wright, PLLC's Detroit office. His practice generally revolves around commercial and business litigation. His email address is fdewey@dickinsonwright.com.

Grace Trueman is an associate with Dickinson Wright, PLLC in the Detroit office. Grace's practice focuses on general commercial litigation, as well as labor and employment matters. Grace can be reached at gtrueman@dickinsonwright.com.

Introduction

In 1601 the English Star Chamber observed that "because fraud and deceit abound in these days more than in former times . . . all statutes made against fraud should be liberally and beneficially expounded to suppress fraud."[1] Still relevant today, this ancient case laid the foundation for a concept that would develop into what is now the Uniform Fraudulent Transfer Act and Section 548 of the United States Bankruptcy Code (the fraudulent transfer provision).[2] This article explores the potential for attorney liability for the transfer of property or funds in the face of outstanding judgments against a client under the Uniform Fraudulent Transfer Act ("UFTA") and Section 550(a)(1) of the United States Bankruptcy Code for attorneys practicing in Michigan and the United States Court of Appeals for the Sixth Circuit.

First, it discusses Michigan's expected stance on attorney liability by analyzing cases from other jurisdictions involving the UFTA and two potential pitfalls that arise when attorneys assist clients in protecting assets from the reach of creditors.

Second, it turns to the Bankruptcy Code and discusses the Sixth Circuit's position on attorney liability in light of a recent Eleventh Circuit Court of Appeals case finding attorney liability as an "initial transferee." These cases serve as a reminder that there is a line between zealous advocacy and fraud that Michigan attorneys must be sensitive to, or risk finding themselves liable to third parties.

Michigan Attorneys' Potential Liability under the Uniform Fraudulent Transfer Act

An Overview of the UFTA

With origins in the English Statute of 13 Elizabeth, the Uniform Fraudulent Conveyance Act,[3] the predecessor to the current UFTA, provided creditors with a remedy for fraudulent transfers.[4] In 1984, the National Conference of Commissioners on Uniform State Laws revised and renamed the act to become the UFTA.[5] To date, almost every state has enacted a version of the UFTA, including Michigan.[6] In 1998, Michigan adopted the UFTA without substantive changes from the National Conference of Commissioner's model UFTA.[7]

In keeping with its origins, the UFTA generally "creates a right of action for any creditor against any debtor and any other person who has received property from the debtor in a fraudulent transfer."[8] A fraudulent transfer is one in which the debtor's assets are parted with or disposed of with "actual intent to hinder, delay, or defraud any creditor or debtor."[9] However, because the UFTA drafters recognized that producing

evidence of actual intent is a significant evidentiary hurdle, the UFTA also allows a creditor to present circumstantial evidence of actual intent. Known as "badges of fraud,"[10] these objective factors include: a creditor's claim against a debtor arose before the fraudulent transfer and the debtor was insolvent or did not receive a reasonably equivalent value; or a transfer to an insider when the debtor was insolvent and the transferee knew the debtor was insolvent.[11] This is a nonexclusive list of factors. However, a "'concurrence of several [of these factors] will always make out a strong case'" in support of fraudulent intent.[12]

The consequences of finding "badges of fraud" surrounding a transaction may not only result in liability for the creative debtor, but also his attorney. Depending on the jurisdiction, attorneys have been found liable for their involvement in fraudulent conveyances based on various theories under the UFTA. While Michigan has yet to squarely address the issue of attorney liability for fraudulent transfers, there are indicators that Michigan courts would find liability in appropriate circumstances. Yet, without the benefit of substantive case law on the matter, Michigan attorneys must look to other jurisdictions for guidance on this issue.

Michigan Attorneys' Potential Liability under the UFTA

Generally, Michigan courts are reluctant to permit an attorney's actions affecting a non-client to be grounds for finding liability because of the risk of conflicts of interest that could undermine counsel's duty of loyalty to the client.[13] As the Michigan Supreme Court noted, "Allowing third-party liability generally would detract from the attorney's duty to represent the client diligently and without reservation."[14] Michigan courts reason that attorneys should not be forced to balance potential liability exposure against their client's best interest, as it is the attorney's obligation to loyally represent the interests of his or her client.[15] However, this immunity to third parties is not absolute.

As noted above, Michigan courts have not squarely addressed attorney liability under the UFTA. Nevertheless, one unpublished Michigan case mentions, albeit in dicta, that attorneys could be liable for advising and assisting clients in transferring property.[16]

In *Warner Norcross & Judd v Police & Fire Retirement System of Detroit*, the plaintiff law firm sued former clients, arguing that they entered into a prohibited transfer of property to defeat the law firm's fee claims.[17] The Michigan Court of Appeals entered into the fray after the trial court denied the law firm's motion to compel defendants to demonstrate that the documents they withheld where in fact privileged. Upon review, the court noted that the documents could be highly relevant to the plaintiff's cause of action.[18] Specifically:

> The documents may contain information indicative of whether defendants fraudulently approved the transfer of assets to [a third-party] and whether attorneys . . . advised and assisted defendants in transferring all of the real and personal property related to the project to [a third party] for nominal value in violation of the Uniform Fraudulent Transfer Act ("UFTA"), MCL 566.31.[19]

Generally, Michigan courts are reluctant to permit an attorney's actions affecting a non-client to be grounds for finding liability because of the risk of conflicts of interest that could undermine counsel's duty of loyalty to the client.

Finding that the trial court erred in denying the plaintiff law firm's motion to compel, the court of appeals explained that the trial court's ruling precluded the plaintiff from arguing that the crime-fraud exception to the attorney-client privilege applied to the documents in question.[20] Defendants tried to argue that because the UFTA does not require proof of the defendant's intent, the documents are not relevant to establish a crime-fraud exception to the attorney-client privilege.[21]

But the court of appeals disagreed and explained that "[t]he attorney-client privilege 'does not protect communications made for the purpose of perpetrating a fraud.'"[22] Accordingly, communications made in furtherance of a fraudulent transfer, within the meaning of the UFTA, are not protected. Moreover, just as communications may not be protected, this unpublished decision gives a clear warning that Michigan courts may find attorneys liable for helping clients engage in fraudulent transfers.

The caveat to this is that *Warner Norcross* is an unpublished decision and does not substantively address the merits of attorney liability under Michigan's UFTA. Consequently, without substantive direction from Michigan courts, attorneys practicing in the state can and should look to other jurisdictions for guidance, where courts have found attorneys liable for, among other things, direct involvement in a fraudulent transfer — such as being an initial transferee — or secondarily liable for conspiracy to defraud by knowingly assisting clients in hiding assets.[23] The following two cases discuss these two scenarios.

Scenario #1: Attorney as the Transferee

"We begin with the moral of this story: lawyers who help to separate insolvent

debtors from their assets by acquiring those assets for inadequate consideration soon become debtors themselves."[24]

In *Nisenzon v Sadowski*, 689 A2d 1037 (RI 1997), the plaintiffs brought an action for fraudulent conveyance and common law fraud against a defendant attorney and the attorney's business partnership for fraudulently transferring certain real property on behalf of a client, Sadowski.[25] Originally, Sadowski (who was a named defendant but not a party on appeal because he filed for bankruptcy) entered into an agreement to invest in real property with the plaintiffs.[26] Sadowski solicited $20,000 from the plaintiffs to become co-owners of a waterfront lot.[27] Sadowski and the plaintiffs signed a document that recognized plaintiffs' capital contribution and that any and all profits would be split 50% between plaintiffs and Sadowski.[28]

Unbeknownst to plaintiffs, however, Sadowski already had purchased the property in his own name the month before. Sadowski's real estate attorney, Levitt, notarized Sadowski's original quitclaim deed apparently without any knowledge of the plaintiffs; neither Sadowski nor Levitt ever amended the deed to reflect the plaintiffs' co-ownership. Subsequently, Sadowski approached the plaintiffs for an additional $10,000, which the plaintiffs agreed to at 20% interest with repayment in one year.[29]

Despite Sadowski's assurances that the property value had increased, the plaintiffs became concerned about their investment.[30] Sadowski, however, convinced them to delay any threatened legal action. In the fall of 1988, Sadowski proceeded to convey the property to his attorney, Levitt, for an unknown sum.[31] As for the purpose of the transfer, during trial, Levitt testified that the conveyance was made to secure a $17,000 loan that he previously made to Sadowski.[32] In his answers to interrogatories, however, Levitt had claimed the property was conveyed as "a sale" for which he paid $39,500.[33]

Eventually, in early 1989, the plaintiffs took action and engaged counsel who contacted Levitt, described the plaintiffs' interest in the property and inquired into security for the loan apart from the property.[34] On May 1, 1989, Levitt's firm responded by providing assurances that its client, Sadowski, acknowledged the debts owed, and that while Sadowski could not immediately pay, he would do so in the near future if the plaintiffs agreed to delay receiving payments, as Sadowski expected to be financially able to structure a realistic payment plan in the near future due to his new career as a real estate broker.[35]

> Finding that the trial court erred in denying the plaintiff law firm's motion to compel, the court of appeals explained that the trial court's ruling precluded the plaintiff from arguing that the crime-fraud exception to the attorney-client privilege applied to the documents in question

Meanwhile, after learning of the plaintiffs' interest in the property from plaintiffs' counsel, Levitt conveyed the property to his partnership, Park City Capital ("Park City"), which was separate and distinct from Levitt's law firm.[36] In Levitt's answers to interrogatories, he explained that he "held the Deeds only as collateral for funds advanced by [him] to [Sadowski]. Park City actually acquired the property from [Sadowski]; [he] just effectuated the conveyance."[37] Park City then granted a mortgage on the property to a financial institution to secure the repayment of a $150,000 loan.[38]

On appeal, the Supreme Court of Rhode Island affirmed the trial court's determination that both the transfer from Sadowski to Levitt and the transfer from Levitt to his partnership were fraudulent conveyances.[39] Common in many state enactments of the UFTA, transfers made without a debtor receiving a reasonably equivalent value in exchange, or transfers executed when the debtor was insolvent, constitute "badges of fraud."[40]

Here, the first conveyance reflected "badges of fraud" because Sadowski did not receive reasonably equivalent value from Levitt in exchange for the property.[41] Moreover, there was evidence—primarily the letter from Levitt's law firm acknowledging Sadowski's inability to pay his debts—suggesting that Sadowski was insolvent when he transferred the property to Levitt.[42]

The transfer from Levitt to his general partnership also was deemed fraudulent because by that time, Levitt knew of the plaintiffs' interest in the property and thus, acted with "actual intent to hinder, delay, or defraud" the plaintiffs.[43] In sum, the Supreme Court of Rhode Island determined that the trial court did not err in finding both transfers fraudulent.[44] The court affirmed the judgment against Levitt and Park City for the total amount of money plaintiffs gave Sadowski: $30,000.[45]

While Levitt's conduct was troublesome, *Nisenzon* is still instructive for more nuanced situations involving asset protection. Setting aside the obvious ethical considerations that arise in a situation like *Nisenzon*, an attorney participating in a transfer of client assets must take every precaution so he does not find himself standing in Levitt's shoes, liable to a third party.[46] The failure to understand or appreciate the surrounding circum-

stances can manifest as "badges of fraud," sufficient to establish a fraudulent transfer.

Scenario #2: Sophisticated Strategies

As the United States Supreme Court wryly noted: "we suspect there is absolutely nothing new about debtors trying to avoid paying their debts, or seeking to favor some creditors over others—or even about their seeking to achieve these ends through 'sophisticated strategies.'"[47] Yet, under the UFTA, attorneys may be secondarily liable for helping their clients conceal assets by means of such "sophisticated strategies," if the conduct correlates with "badges of fraud."[48]

In *Essex Crane Rental Corp v Carter*, 371 SW3d 366 (Tex 1st Dist Ct App, 2012), two attorneys were sued for drafting and filing fraudulent legal documents to assist their clients in protecting assets from creditors in violation of Texas' version of the UFTA.[49] The conduct stemmed from litigation between Coastal Terminal Operations, Inc. ("Coastal"), an entity owned by the McPherson family, and Essex Crane Rental Corp. ("Essex") for unpaid crane rental fees.[50] McPherson Sr. had personally guaranteed the payment of all rentals to Essex. Essex eventually was awarded judgment against Coastal for the principal amount of rental fees due and owing, as well as attorney's fees and statutory interest.

After its collection efforts failed, Essex brought suit against Coastal and McPherson, Sr., among others, alleging that the named defendants "conspired with each other to fraudulently transfer, hide, secrete or otherwise conceal assets with the intent to avoid payment of the debt."[51] Essex later amended its petition to raise similar claims against two attorneys, Carter and Farley. Essex argued that Carter and Farley helped conceal Coastal and McPherson family assets by means of sophisticated strategies.

Prior to the Essex litigation, McPherson and his entities had entered into a settlement agreement with the Texas Worker's Compensation Insurance Fund (the "Fund") and the Texas Worker's Compensation Facility (the "Facility") to compromise a dispute with respect to millions of dollars of unpaid worker's compensation dues. The agreement between McPherson, multiple McPherson entities, and the Fund and the Facility provided for McPherson and the McPherson entities to make payments over several years, totaling $900,000, collateralized in part by equipment owned by McPherson entities.[52]

Essex illustrates the point, reflected in other jurisdictions, that attorneys who create and execute calculated strategies as a means of protecting client assets may open the door to their own liability for fraudulent transfer.

After the Essex judgment was entered, however, attorneys Carter and Farley began negotiating with the Fund and the Facility for an assignment of their rights under the settlement agreement to Houston Industrial Investments ("HII"), "in exchange for payment to them [the Fund and the Facility] of the remaining balance" due under the settlement agreement.[53] HII was an entity incorporated by Farley; McPherson, Sr.'s son, McPherson, Jr., was the sole owner and managing member of HII; Carter was its registered agent; and both Farley and Carter drafted the assignment.[54] In negotiating this assignment, Carter and Farley were negotiating for an assignment "of a previously satisfied debt as to which the assignor [HII] retained no right of payment," "to an insider controlled by a relative of the debtor."[55]

Adding another layer to the scheme, after entering into the assignment of the settlement funds with the Fund and Facility, HII entered into two agreed judgments, whereby HII, as the successor in interest to the settlement funds, took a final judgment against various McPherson entities for $3.5 million in damages, representing the amounts that the Fund and the Facility had compromised in the settlement.[56] McPherson, Sr. testified at trial "that the plan was discussed with Carter."[57] Attorneys Carter and Farley then "promptly proceeded to execute the judgments against the McPherson [e]ntities, removing from Essex's reach assets otherwise available to satisfy the judgment lien it had placed on the transferred assets."[58]

Not surprisingly, Essex argued that the assignment and agreed judgments were "fraudulently procured" and a "sham."[59] Essex's suit alleged that Carter and Farley engaged in a civil conspiracy with various original defendants (i.e., the McPhersons), to fraudulently transfer McPherson assets out of Essex's reach in violation of the Texas Uniform Fraudulent Transfer Act.[60] Both attorneys subsequently brought motions for summary judgment arguing there was no genuine issue of material fact as to fraudulent conveyance and attorney immunity.[61]

The trial court granted the attorneys' motion for summary judgment, finding that: (1) there was no evidence that the attorneys committed a fraudulent transfer or conspired to commit a fraudulent transfer, and (2) the attorneys were immune as their actions were undertaken in the course of representing their clients.[62] On appeal, Essex argued that the trial court erred because it had produced more than enough evidence to show that

the attorneys "knowingly participated in a conspiracy to fraudulently transfer assets" out of Essex's reach, and the attorneys were not immune from suit for their conspired activities.[63]

As to conspiracy, the court explained that "[c]onspiracy is a derivative tort requiring an unlawful means or purpose, which may include an underlying tort."[64] An "attorney may be liable for conspiracy to defraud by knowingly assisting a client in evading a judgment through a fraudulent transfer."[65] Yet, there must be proof that the attorney agreed to the injury, not merely the conduct.[66]

Essex, the court reasoned, had presented enough evidence showing that both Carter and Farley were "intertwined" with the fraudulent conveyance and that there were issues of fact concerning the parties' agreement to assist in the transfer and shelter of assets from McPhersons' creditors.[67]

Specifically, the court looked to the attorneys' involvement in creating HII to acquire an assignment of the Fund's and Facility's rights; the close insider relationship between McPherson, Jr. as the owner and sole member of HII, while Carter served as the registered agent; the fact that both attorneys drafted the assignment of creditors' rights; the fact that the newly incorporated HII took a final judgment against McPherson and various McPherson entities on a previously settled and satisfied debt; and the fact that Carter testified that these collaborative actions were taken as a form of "estate planning."[68] This evidence, the court concluded, constituted badges of fraud sufficient to support Essex's claim for conspiracy to fraudulently transfer client assets.[69]

As to attorney immunity, the court cautioned: "Attorneys have no immunity from knowingly drafting fraudulent documents to evade the lawful seizure of property by a judgment creditor, and they may not deny their liability . . . for the loss sustained by reason of their own wrongful acts on the ground that they are agents of their clients."[70] The court determined that Essex presented a material fact issue as to whether the attorneys were immune from liability.

Thus, on both conspiracy to fraudulently transfer and attorney immunity the court held the trial court erred in granting summary judgment in favor of the attorneys. The trial court decision was reversed and remanded.[71]

> Actual intent is statutorily defined as a transfer made "with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, [or] indebted."

Essex illustrates the point, reflected in other jurisdictions, that attorneys who create and execute calculated strategies as a means of protecting client assets may open the door to their own liability for fraudulent transfer.[72] Cases like *Essex* create a quagmire of hypothetical problems for attorneys who advise on asset protection. For example, if an attorney helps transfer assets in the face of future or present creditor claims and the goal is effectively the same as the client's, protecting assets, does the attorney thereby create a conspiracy to fraudulently transfer? If there are "badges of fraud," the answer can be a resounding yes. Engaging in sophisticated strategies with the purpose of protecting a client's assets is a dangerous shell game that may lead to attorney liability under the applicable state's UFTA.

For Michigan attorneys, these cases highlight the potential scenarios that may arise when helping clients transfer or hide assets. As noted, Michigan courts have not squarely addressed the issue, but it is more than possible that Michigan courts will be willing to find attorney liability in the appropriate circumstances.

The Bankruptcy Code: Attorney Liability as an Initial Transferee under § 550(a)

In addition to liability under the UFTA, and in light of a recent decision in the United States Court of Appeals for the Eleventh Circuit, *In re Harwell*,[73] an attorney practicing in Michigan may also be liable to a trustee in bankruptcy if their client is, or becomes a bankruptcy debtor and the attorney has made disbursements from the client's trust account that qualify as fraudulent transfers under Bankruptcy Code § 548.[74] A thorough understanding of the facts and law in *In re Harwell* will help advise attorneys of the pitfall of potential liability to a trustee in bankruptcy.

Overview of Relevant Sections of the Bankruptcy Code

To fully understand the implication of the Eleventh Circuit's holding in *In re Harwell*, any attorney who handles a client trust account should have a basic understanding of initial transferee liability under the Bankruptcy Code.[75] The Bankruptcy Code grants the trustee the power to recover property from an initial transferee where the transfer from the debtor to the initial transferee is avoidable under the Bankruptcy Code.[76] Section § 550(a) provides that:

> [T]o the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553 (b), or 724 (a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from (1) the initial transferee of such transfer

or the entity for whose benefit such transfer was made; or (2) any immediate or mediate transferee of such initial transferee.[77]

Of the avoidable transfers delineated in § 550(a), most relevant to this discussion are "fraudulent transfers" under § 548. A fraudulent transfer, as defined by § 548 of the Bankruptcy Code, is a transfer made within 2 years of the date of filing the bankruptcy petition, when the transfer was made with actual or constructive intent to defraud.[78]

Actual intent is statutorily defined as a transfer made "with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, [or] indebted."[79]

Constructive intent occurs when the debtor "received less than a reasonably equivalent value in exchange for such transfer or obligation;" and the debtor qualifies as one of the following:

a. "insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;"[80]

b. "had engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;"[81]

c. "intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured;"[82] or

d. "made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business."[83]

Simply put, a trustee can avoid a fraudulent transfer (or one of the other types of avoidable transfers) made by debtor. Once the transfer is avoided, the trustee can recover the property from the initial transferee or any subsequent transferee. If the trustee seeks to recover from the initial transferee, he becomes strictly liable to the trustee for the amount of the transfer.

In a major decision by the Eleventh Circuit Court of Appeals, *In re Harwell,* the court held that an attorney who distributed settlement proceeds pursuant to his client's directive was liable to the trustee in bankruptcy because the attorney did not act in good faith even though the attorney did not have control of the funds and would have otherwise qualified as a "mere conduit."

Who Qualifies as an Initial Transferee under § 550?

Although the Bankruptcy Code does not define "initial transferee," the circuit courts of appeal have developed similar tests that provide that in order for someone to be an "initial transferee," that person must exercise a degree of control or dominion over the funds. For instance, in *Bonded Financial Serv, Inc v European Amer Bank*, 838 F2d 890 (CA 7, 1988), the court held that "the minimum requirement of status as a 'transferee' is dominion over the money or other asset, the right to put the money to one's own purposes."[84] Similarly, in *Coutee v Brunson*, 984 F2d 138 (CA 5, 1993), the court held that "a party that receives a transfer directly from the debtor will not be considered the initial transferee unless that party gains actual dominion or control over the fund."[85]

Generally, under the tests articulated above, an attorney disbursing funds from a client trust account would not be liable to the trustee in bankruptcy as an initial transferee. The attorney never gains actual control or dominion over funds in a client trust account. In other words, the attorney cannot put those funds to his own use. As such, in most cases, the attorney is a "mere conduit" and not liable to the trustee under § 550(a). But what if the attorney transferred money at the client's behest, all the while suspecting the possibility that his client's instructions were actually an attempt to defraud his creditors? Recently, the Eleventh Circuit has addressed such a case and found that the attorney was an initial transferee and, thus, liable to the trustee.

In re Harwell: Can an Attorney Be Liable as an Initial Transferee?

In a major decision by the Eleventh Circuit Court of Appeals, *In re Harwell,*[86] the court held that an attorney who distributed settlement proceeds pursuant to his client's directive was liable to the trustee in bankruptcy because the attorney did not act in good faith even though the attorney did not have control of the funds and would have otherwise qualified as a "mere conduit."

Factual Background

In 2005, Thomas Hill ("Hill") obtained a judgment in Colorado against Billy Jason Harwell ("Harwell") for nearly $1.3 million.[87] Shortly thereafter, Hill initiated proceedings to domesticate the Colorado judgment in Florida. Harwell hired an attorney named Steven Hutton ("Attorney Hutton") to represent him in the domestication proceedings. At the time the Colorado judgment was entered, Harwell owned shares of two businesses: (1) the Center for Endoscopy,

Inc. ("CFE") and (2) the Sarasota Endo Investors, LLC ("SEI").[88]

In addition to the domestication proceedings, Harwell also retained Attorney Hutton to represent him in unrelated litigation arising out of disputes with other shareholders of CFE and SEI. In August 2005, Harwell entered into a settlement agreement with CFE and SEI.[89] The settlement agreement provided that CFE and SEI would pay Harwell $100,000 and $400,000, respectively, in exchange for his ownership interest.[90] The agreement also provided that SEI would execute a promissory note to Harwell in the amount of $46,837.00 to satisfy other obligations.[91]

Later that month, Harwell answered post-judgment interrogatories from Hill. In answering the interrogatories, Harwell did not disclose the CFE and SEI settlements.[92] Attorney Hutton was not involved in answering these interrogatories.[93]

On September 1, 2005, CFE paid $100,000 directly to Attorney Hutton's client trust account.[94] Hours later, acting at the direction of Harwell and with knowledge of Hill's judgment, Attorney Hutton distributed the entire $100,000 to Harwell, Harwell's wife, one of Harwell's creditors, and himself (for legal fees).[95]

Next, Attorney Hutton wrote a letter to SEI requesting that they make payment on the promissory note directly to Harwell's wife. Several days later, SEI deposited the $400,000 settlement amount into Attorney Hutton's client trust account. The same day, and at Harwell's direction, Attorney Hutton distributed the entire $400,000 to various creditors of Harwell, family members of Harwell, and Harwell himself.[96]

On September 19, 2005, Hill served Attorney Hutton with a writ of garnishment for any funds that Attorney Hutton held in trust for Harwell. In response, Attorney Hutton stopped payment on only two of the checks amounting to $125,000 (these two checks were issued to Harwell himself). Harwell successfully moved to quash the writ of garnishment based on a defective domestication.[97] After the court quashed the writ of garnishment, Attorney Hutton personally went to the bank and delivered a check for the remaining $125,000 in exchange for seven cashier's checks payable to Harwell's wife, his father, and creditor Montana Tractor.[98]

In re Harwell does not stand for the position that an attorney is subject to initial transferee liability for every transfer made on behalf of a client. Indeed, as the Eleventh Circuit notes, "[i]n the vast majority of cases, a client's settlement funds transferred in and out of a lawyer's trust account will be just like bank transfers" and would not subject an attorney to liability.

Bankruptcy and District Court Decisions: The Attorney Is Not an Initial Transferee

Harwell filed for Chapter 11 bankruptcy protection on October 10, 2005.[99] Shortly after Harwell filed the bankruptcy petition, Attorney Hutton assisted him in converting the $30,000 cashier's check payable to Montana Tractor, into a check payable personally to Harwell.[100] Shortly after the filing, the bankruptcy trustee filed a complaint against Attorney Hutton seeking to recover the $500,000 SEI and CFE settlement proceeds from Attorney Hutton under 11 USC § 550(a)(1).[101]

Attorney Hutton moved for summary judgment which the bankruptcy court granted. In deciding the motion for summary judgment, the bankruptcy court framed the issue as, "are there theories in which a Chapter 7 Trustee can go after the lawyer for personal liability where the lawyer is the mastermind and facilitator of the fraudulent conveyance."[102]

The bankruptcy court assumed the following facts: (1) Attorney Hutton was "the mastermind and the marionette that was driving all the pieces of what was a huge fraudulent conveyance of hundreds of thousands of dollars that would have been available for creditors;" and (2) that he "managed to coordinate things in a fashion that the settlement was concluded and the money funneled through [his] trust account to various preferred creditors and insiders in either preferential or fraudulent conveyances."[103]

Nevertheless, the bankruptcy court concluded that Attorney Hutton was ***not*** an initial transferee under § 550(a) of the Bankruptcy Code because he never had dominion and control over the funds. Consequently, the trustee could not recover the $500,000 that Harwell fraudulently transferred to Attorney Hutton.[104] The district court affirmed the decision of the bankruptcy court.[105]

The Eleventh Circuit's Decision: The Attorney Must Act in Good Faith

The Eleventh Circuit reversed and remanded the decision of the lower courts.[106] It held that a literal interpretation of § 550(a) means that "the first recipient of the debtor's fraudulently transferred funds is an 'initial transferee.'"[107] As such, Attorney Harwell was the initial transferee.[108] Next, the court recognized that the "control" or "mere conduit" tests were an equitable exception to this strict interpretation of an "initial transferee."[109] Finally, the court held that:

"[g]ood faith is a requirement under

this Circuit's mere conduit or control test. Accordingly, initial recipients of the debtor's fraudulently-transferred funds who seek to take advantage of equitable exceptions to § 550(a)(1)'s statutory language must establish (1) that they did not have control over the assets received, i.e., that they merely served as a conduit for the assets that were under the actual control of the debtor-transferor and (2) that they acted in good faith and as an innocent participant in the fraudulent transfer.[110]

Consequently, the court added an additional element of good faith to the already well-developed "control" or "mere conduit" test.

The court then remanded the case to the bankruptcy court to determine "whether [Attorney Hutton] has or lacked control of the funds and as to whether Hutton acted in good or bad faith."[111] The court noted that "[i]n the vast majority of cases, a client's settlement funds transferred in and out of a lawyer's trust account will be just like bank transfers."[112] As such, "lawyers as intermediaries will be entitled to mere conduit status because they lack control over the funds. . . . Mere conduits such as lawyers and banks do not have an affirmative duty to investigate the underlying actions or intentions of the transferor."[113] The court made the distinction that, in this instance, because of Attorney Hutton's major role in the fraudulent transfers, he was not entitled to summary judgment.

The Bankruptcy Court's Decision on Remand

On remand, the bankruptcy court held an evidentiary hearing and found that Attorney Hutton had not acted in good faith.[114] First, the bankruptcy court reasoned that "good faith should be decided based on an objective test. The focus is on what the transferee knew or should have known."[115] The court further reasoned that "if the transferee has sufficient knowledge to put him on inquiry notice that the transfer may be fraudulent, the transferor lacks good faith."[116] The court defined inquiry notice as "instances, knowledge or suspicious events" that would induce a reasonable person to investigate whether the "purposes of the transfer would hinder or delay a creditor rather than being ordinary course of business transactions."[117]

Although the United States Court of Appeals for the Sixth Circuit has expressly adopted the "dominion and control test" as a mere conduit defense to initial transferee liability, it has not yet issued an opinion that follows *Harwell* in expressly requiring "good faith."

The court found that Attorney Hutton was unable to make a "credible argument that he was an unwitting or innocent participant in the transfers made by Mr. Harwell."[118] As such, Attorney Hutton was found liable as an "initial transferee" to the debtor in bankruptcy.

This ruling raises the question of what Attorney Hutton should have done to avoid liability when he suspected that his client may have been attempting to defraud creditors. The bankruptcy court suggested that Hutton could have "simply refused to be the recipient of the settlement proceeds and could have insisted that the settlement agreement not make him the initial transferee of those funds."[119] Additionally, the bankruptcy court noted that Attorney Hutton could have refused to facilitate Harwell's fraudulent requests and paid all of the money directly to Harwell.[120] It reasoned that this would not be a violation of the attorney's ethical duties.[121]

In re Harwell does not stand for the position that an attorney is subject to initial transferee liability for every transfer made on behalf of a client. Indeed, as the Eleventh Circuit notes, "[i]n the vast majority of cases, a client's settlement funds transferred in and out of a lawyer's trust account will be just like bank transfers" and would not subject an attorney to liability.[122] Nevertheless, this case serves as a cautionary tale warning attorneys not to ignore any suspicions they may have regarding their clients' fraudulent intent. By taking the time to understand this case and the context in which it arose, an attorney can avoid the potential pitfall of initial transferee liability to a trustee in bankruptcy.

Has the Good Faith Requirement in *In re Harwell* Been Adopted in the Sixth Circuit?

Although the United States Court of Appeals for the Sixth Circuit has expressly adopted the "dominion and control test" as a mere conduit defense to initial transferee liability, it has not yet issued an opinion that follows *Harwell* in expressly requiring "good faith."[123] In applying the "dominion and control test," the Sixth Circuit has simply held that "a party is not to be considered an initial transferee if it is merely an agent who has no legal authority to stop the principal from doing what he or she likes with the funds at issue."[124]

The United States District Court for the Eastern District of Michigan has, on at least one occasion, directly addressed attorney liability as an initial transferee.[125] In *Stevenson v Siciliano*, 436 BR 29 (ED Mich, 2010), the court held that a trustee was not permitted to recover judgment proceeds that a law firm retained from a client's trust account in

satisfaction of legal fees owed to it because the client at all times had "dominion and control" over the funds.[126] Stated differently, the law firm was not liable because "[it] could not lawfully spend the money however it wanted."[127]

Note, however, that unlike *Harwell*, good faith was not at issue in *Stevenson*. Also, unlike *Harwell*, in *Stevenson*, the trustee was attempting to recover legal fees paid to the law firm, not transfers to third parties. Because courts in the Sixth Circuit have not addressed a scenario that is factually analogous to *Harwell*, it is currently unclear how these courts would decide the issue. Nonetheless, from a practical standpoint, it is best to view *Harwell* as a cautionary tale and not to test the waters by effectuating transfers to third parties on a client's behalf when fraudulent intent is suspected.

Conclusion

For attorneys practicing in Michigan or the Sixth Circuit, the moral of these stories regarding attorney liability for fraudulent transfers is twofold. First, and most obvious, although an attorney is ethically bound to zealously represent his client, an attorney should not work with his client to defraud creditors lest he be subject to liability under Michigan's UFTA or the Bankruptcy Code. Second, even if the attorney is not intentionally assisting the client in a fraudulent scheme, the attorney could still face liability if he suspected fraudulent intent on the part of his client.

Everything considered, an attorney should make every effort to understand his clients' goals and the underlying factual circumstances of a matter before assisting a client with asset protection or effectuating transfers on a client's behalf. This vigilance will help an attorney avoid the pitfalls that may subject him to liability for fraudulent transfers.

Endnotes

1. *Twyne's Case*, (1601) 76 Eng Rep 809, 815 (Star Chambers, 1601); *BFP v Resolution Trust Corp*., 511 US 531, 541 (1994).
2. *Id.*
3. Prior to 1998, Michigan followed the Uniform Fraudulent Conveyance Act, which was "similar" to the current UFTA. *Nationsbanc Mortgage Corp v Luptak*, 243 Mich App 560, 567; 625 NW2d 385 (2000).
4. Uniform Law Commission, Fraudulent Transfer Act Summary, available at http://uniformlaws.org/ActSummary.aspx?title=Fraudulent%20Transfer%20Act (last visited on April 29, 2013).
5. *Id.*
6. Uniform Law Commission, Legislative Fact Sheet-Fraudulent Transfer Act, available at http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Fraudulent Transfer Act (last visited April 29, 2013).
7. See MCL 566.31; *Estes v Titus*, 273 Mich App 356, 372; 731 NW2d 119 (2006).
8. Fraudulent Transfer Act Summary, *supra* note 4; MCL 566.31, *et seq*.
9. MCL 566.34(a); UFTA, § 4(a)(1); see also *Szkrybalo v Szkrybalo*, 477 Mich 1086, 1086; 729 NW2d 233 (2007).
10. Historically, courts would focus on specific objective factors to establish intent: "circumstances, so frequently attending sales conveyances and transfers, intended to hinder, delay or defraud creditors, that they [were] known and denominated *badges of fraud*." Peter A. Alces & Luther M. Dorr, Jr., A Critical Analysis of the New Uniform Fraudulent Transfer Act, 1985 U Ill L Rev 529, 530 (1985), quoting *Thames & Co v Rembert's Adm'r*, 63 Ala 561, 567 (1879) (emphasis in original) (invalidating conveyance by insolvent debtor to relative, when debtor was pressed by a large suit and retained possession of some property supposedly conveyed).
11. MCL 566.35; UFTA § 4(b).
12. *Bentley v Caille*, 289 Mich 74, 78; 286 NW 163 (1939) (quoting *Timmer v Pietrzyk*, 272 Mich 238, 242; 261 NW 313 (1935)).
13. See *Atlanta Int'l Ins Co v Bell*, 438 Mich 512, 518-519; 475 NW2d 294 (1991) ("Traditional legal doctrine thus mandates that only a person in the special privity of the attorney-client relationship may sue an attorney for malpractice"); see also *Friedman v Dozorc*, 412 Mich 1, 24-25; 312 NW2d 585 (1981).
14. *Atlanta Int'l Ins Co*, 438 Mich at 518-519.
15. *Friedman,* 412 Mich at 24-25.
16. *Warner Norcross & Judd v Police & Fire Ret Sys of Detroit*, No 300866, 2012 Mich App LEXIS 314, *10 (Feb 23, 2012).
17. *Id*. at *1-2.
18. *Id*. at *10.
19. *Id*.
20. *Id*.
21. *Id*.
22. *Id*. (quoting *Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC*, 107 Mich App 509, 519; 309 NW2d 645 (1981)).
23. See *Easton v Phelan*, No. 01-10-01067-CV, 2012 Tex App LEXIS 3710, *22 (May 10, 2012), quoting *Alpert v Crain, Caton & James, PC*, 178 SW3d 398 (Tex App 1st Dist, 2005) ("If an attorney participates in independently fraudulent activities, his actions are 'foreign to the duties of an attorney.'").
24. *Nisenzon v Sadowski*, 689 A2d 1037, 1039 (RI, 1997).
25. *Id*. at 1040.
26. *Id.*
27. *Id.* at 1039.
28. *Id.* at 1040.
29. *Id.*
30. *Id.*
31. *Id.* The quitclaim deed merely stated, "the consideration is such that no revenue stamp need be affixed."
32. The court noted that there was no written evidence or other documentation of the $17,000 loan from Levitt to Sadowski. *Id.*
33. *Id.* at 1040, at n 3.
34. *Id.*
35. *Id.* at 1040-41. The letter also stated that (1) Sadowski acknowledged the total debt of $30,000, (2) he agreed to pay back the $30,000, but (3) he was not financially able to pay interest on the loan, and (4) he could not provide any security for the promise to pay back the plaintiffs.
36. *Id.* at 1041.
37. *Id.* at 1040, n 5.
38. *Id.*
39. *Id.* at 1043.
40. *Id.*
41. *Id.* at 1044.
42. *Id.*
43. *Id.* at 1045.
44. *Id.*
45. *Id.* at 1044.
46. See, e.g., *Stochastic Decisions, Inc v DiDomenico*, 995 F2d 1158, 1163 (CA 2, 1993) (affirming final judgment against defendants, including an attorney and his law firm, for state law fraudulent conveyance and common law fraud claims, as well as a RICO claim, for developing a plan to conceal the real property proceeds from creditors) (applying New York law); *Amusement Indus, Inc v Midland Ave Assocs, LLC*, 820 F Supp 2d 510 (SDNY, 2011) (denying in part attorneys' motion to dismiss state fraudulent conveyance claims alleging fraudulent transfer of escrow funds to friends, family, and close associates); *Paloian v Greenfield (In re Rest Dev Group, Inc)*, 397 BR 891 (Bankr ND Ill, 2008) (denying attorneys' motion to dismiss trustee's claims alleging the attorneys conspired with the debtors to commit fraud and aided and abetted the commission of fraud).
47. *Grupo Mexicano de Desarrollo v Alliance Bond Fund, Inc*., 527 US 308 (1999) (holding

a district court had no authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of the respondents' contract claim for money damages).

48. *Nisenzon v Sadowski*, 689 A2d 1037 (RI, 1997); *Essex Crane Rental Corp v Carter*, 371 SW3d 366 (Tex 1st Dist Ct App, 2012).
49. *Essex Crane Rental Corp,* 371 SW3d at 376-77.
50. *Id.* at 371.
51. *Id.*
52. *Id.* at 370.
53. *Id.* at 371.
54. *Id.* at 371.
55. *Id.* at 380.
56. *Id.* at 372.
57. *Id.* at 380.
58. *Id.*
59. *Id.* at 372
60. *Id.* at 376.
61. *Id.* at 377.
62. *Id.* at 378.
63. *Id.* at 377.
64. *Id.* at 378 (citations omitted).
65. *Id.* at 379.
66. *Id.*
67. *Id.*
68. *Id.* at 379-780.
69. *Id*. at 380.
70. *Id.* at 382.
71. *Id.* at 388.
72. See, e.g., *Banco Popular N Am v Gandi*, 876 A2d 253, 263, 268 (NJ, 2005) (holding an attorney could be liable for conspiracy to violate the UFTA for participation in a fraudulent transfer, which requires the creditor to prove that the conspirator agreed to perform the fraudulent transfer); *McElhanon v Hing*, 728 P2d 256, 264 (Ariz Ct App, 1985), *vacated in part on other grounds*, 728 P2d 273 (Ariz, 1986) (finding sufficient evidence to determine that an attorney participated in a conspiracy to fraudulently hinder and delay the plaintiff as a judgment creditor in collecting against the attorney's client).
73. *In re Harwell*, 628 F3d 1312 (CA 11, 2010).
74. Although the transfer at issue in *In re Harwell* was a fraudulent transfer under 11 USC § 548, other avoidable transfers, including preferential transfers under 11 USC § 547 and other avoidable transfers listed in 11 USC § 550(a) may also trigger attorney liability.
75. *See* 11 USC § 550(a)(1).
76. *Id.*
77. *Id.*
78. 11 USC § 548(a).
79. *Id.* at § 548(a)(1)(A).
80. *Id*.at 548(a)(1)(B)(ii)(I).
81. *Id*. at 548(a)(1)(B)(ii)(II).
82. *Id*. at 548(a)(1)(B)(ii)(III).
83. *Id*. at 548(a)(1)(B)(ii)(IV).
84. *Bonded Financial Serv, Inc v European Amer Bank*, 838 F2d 890, 893 (CA 7, 1988) (finding that a bank, which served solely as an intermediary and had no dominion over fraudulently transferred funds, was not an "initial transferee" for purposes of recovery under § 550(a)).
85. *Coutee v Brunson*, 984 F2d 138, 141 (CA 5, 1993) (finding that a law firm that made a preferential payment to a bank on behalf of a client/debtor from that client's trust account was acting as a "mere conduit" and was not an "initial transferee" for purposes of recovery); *see also In re Baker & Getty Fin Servs*, 974 F2d 712 (CA 6, 1992) (holding that "an initial transferee is one who receives money from a person or entity later in bankruptcy, and has dominion over the funds."); *In re Pony Exp. Delivery Serv, Inc,* 440 F3d 1296, 1300 (CA 11, 2006) (holding that "a recipient of an avoidable transfer is an initial transferee only if they exercise legal control over the assets received, such that they have the right to use the assets for their own purposes, and not if they merely served as a conduit for assets that were under the actual control of the debtor-transferor or the real initial transferee.").
86. *In re Harwell*, 628 F3d 1312, 1322 (CA 11, 2010).
87. *Id.* at 1314.
88. *Id.*
89. *Id.*
90. *In re Harwell*, 414 BR 770, 773 (MD Fl, 2009).
91. *Id.*
92. *Id.*
93. *In re* Harwell, 414 BR at 773.
94. *Id.*
95. *Id.* at 770.
96. *Id.*
97. *Id.*
98. *In re Harwell*, 628 F3d at 1315.
99. *Id.*
100. *Id.*
101. *Id.* at 1316.
102. *Id.*
103. *Id.*
104. *Id.*
105. *In re Harwell*, 628 F3d at 1316.
106. *Id.* at 1324.
107. *Id.* at 1322.
108. *Id.*
109. *Id.*
110. *Id.* at 1312.
111. *Id.*
112. *Id.*
113. *Id.*
114. *In re Harwell*, No 8:12-CV-482-JSM , 2012 US Dist LEXIS 117665, *3 (MD Fl, August 21, 2012).
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id*. at *4.
119. *Id.*
120. *Id.* at *9.
121. *Id*. (noting that, "Certainly no one has argued here, that the rules regulating the Florida Bar mandate that an attorney follow the instructions of a client in disbursing funds to accomplish fraudulent or criminal purposes.").
122. *In re Harwell*, 628 F3d at 1324; *see e.g. Coutee v Brunson*, 984 F2d 138 (CA 5, 1993) (law firm not held liable as initial transferee but rather a "mere conduit").
123. *In re Hurtado*, 342 F3d 528 (CA 6, 2003).
124. *Id.* at 534.
125. Other district courts in the Sixth Circuit have also addressed attorney liability as "initial transferees." *See, e.g., In re Spinnaker Indus Inc,* 328 BR 755 (SD Ohio, 2005).
126. *Id.* at 32.
127. *Id.*

Agriculture Fires, A New Threat

By: Jack Fetrow, *Donan*

Executive Summary

Fires in livestock buildings can be costly for the insurance industry, especially when they involve newer, state-of-the-art facilities. Methane gas has been determined to be the origin of several of these fires. When the livestock is in residence, ventilation fans disperse the gas that escapes the foam layer that forms on top of the waste. When the ventilation fans are turned down, or the foam layer is disturbed, the concentration of methane gas can rise above the explosive limit.

Jack Fetrow joined Donan Engineering in 2002 as a Fire and Explosion Investigator with the South Bend, Indiana, office. Jack was promoted to Office Manager of the South Bend office in 2004 and then Regional Manager that same year. In 2009 Jack was promoted to the Northern Territory Manager for Donan Engineering overseeing operations in 24 states. In October of 2012 Jack assumed the responsibilities of Fire Investigation Division General Manager for the entire company. Throughout his 26 year career in public service, Jack has served nine years with the Henry Township Fire Department where he obtained the rank of Captain. He also served with the North Manchester Fire department for 13 years and was appointed fire chief in 1994. In 1998 Jack was hired as director of public safety for the Town of North Manchester IN where he was the Chief Executive Officer over the Fire, Police and Dispatch Departments. With over 30 years of experience in fire and police investigations, Jack has acquired extensive background and knowledge in his field of expertise. Jack has been qualified as an expert witness in court numerous times, testifying for both subrogation and subrogation defense.

For many years, the fire investigation industry has seen numerous fires involving livestock buildings. These fires are often high profile, especially when masses of animals are lost or injured. Many times these losses are in older structures with neglected electrical and/or heating systems. Given the interior environment of these facilities, corrosion and degradation to electrical and heating components are common.

Today, fires are being seen in new state-of-the-art buildings less than five years old. Needless to say, these incidents are extremely costly for the insurance carrier, as many of the new state-of-the-art buildings are priced within the seven-figure range. The most prevalent and well known losses are in the swine production arena. As of March 1, 2013, USDA records showed that the United States has 65.9 million hogs.[1] The majority of these animals are raised throughout the corn belt in states such as Iowa, Illinois, Indiana, Ohio, North Carolina, and Minnesota, just to name a few. The method of raising these animals is in climate-controlled confinement structures.

Figure 1

In recent years, the industry trend is to erect a structure over a concrete pit 8 to 10 feet deep with slatted floors above for the collection of waste. The waste is then pumped out of the pit once or twice a year and applied to crop ground. During the time the waste is in the pit, certain chemical changes take place as it decomposes. Gases released during this process include but are not limited to hydrogen sulfide, carbon dioxide, ammonia, and methane. Each of these can be of significant consequence, but one is a major issue when confined: methane. Methane, CH_4 , or natural gas, as it is more widely known, is the most prevalent of the gases.

The typical waste pit configuration allows for several high-volume fans to be placed along the perimeter of the building to ventilate the pit. The fans disperse the gases generated during the decomposition process into the atmosphere. These fans also keep the noxious and combustible gases out of the occupied space of the building.

In recent years (since about 2008), formulation of swine feed has changed to include recycled corn products such as dried distillers grain with soluble (DDGS) and the addition of other processed food items. Since about 2010, sporadic reports of a foam layer forming atop numerous confinement swine manure pits have circulated. This foam layer has been blamed or linked to over a dozen significant explosions or fires in the upper Midwest.

People often ask, "How does the trapping of methane gas in a foam layer in a con-

finement swine building manure pit cause an explosion?" The foam layer that forms atop the liquid in the waste pit is comprised of bubbles containing methane gas. Studies at some major Midwest universities indicate that these bubbles are from 40 to 60 percent methane gas by volume. When this foam layer is stagnant or un-agitated, the methane is released very slowly and does not accumulate in a confined space or enclosed area. The pit ventilation fans are able to disperse the gas.

Two of the losses that Donan has investigated resulted after a time when the structure was idle or unoccupied. When some type of action takes place such as repopulating the pens, cleaning of the pens, or similar activities, the foam layer is disrupted, and large amounts of methane are released. If the methane can be evacuated to the atmosphere without reaching a concentration in air of greater than 4 percent, no potential for explosion or fire exists. However, if the methane release is greater or the ventilation system for the pit is inactive or reduced (as is intentionally done during idle times), the concentration of methane to air can be above the 4 percent explosive limit. Also, methane gas has a vapor density of 0.5, which indicates it is lighter than air and will rise.

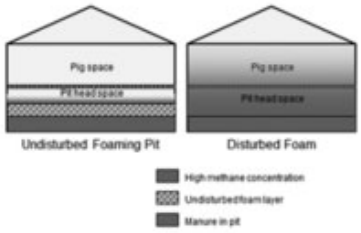

Figure 2

In the first illustration of Figure 2 above, the high methane concentration in the undisturbed foam is contained within the waste pit and away from potential ignition sources. In the second illustration showing the foam being agitated or disturbed, the methane release is throughout the occupied portion of the structure, where many potential ignition sources are present.

In one such instance that Donan investigated, the damage was limited to a localized flash fire that injured the building owner and destroyed a number of pigs. The building had been empty for at least two weeks while some ventilation upgrades and cleaning were being performed. Minimal pit fans were in operation, and the weather was in the mid to upper 20s. During the filling of the structure with grower pigs, the explosion and flash fire occurred. Two standing pilot, liquefied petroleum gas- (LPG) fueled heaters were operating. As the pens were being populated, the discharge from the animals entered the pit and began to agitate the foam layer. The escaping methane gas rose to the level of the standing pilot light heater in a concentration to air of greater than 4 percent, causing a flash fire.

Figure 3: Melted plastic components with minimal flame impingement damage. Notice the LPG heater in proximity to the greatest fire damage to plastic components.

In another such loss that Donan investigated, the structure had been without livestock for nearly a week while routine repairs and cleaning were being accomplished. During the day, the temperature was warmer than the set point on the thermostats for the gas heaters. Crews worked in the facility most of the day, power-washing and cleaning, undoubtedly agitating the foam layer. The heaters in this building were not of the standing pilot type. Sometime the next morning, the ambient temperature had fallen below the set point on the heaters, one of the heaters called for heat, and the explosion ensued.

This explosion ripped the metal ceiling and the metal roof open, sending a fireball through the attic space. The blast also dislodged all of the pit fans from their mountings. Firefighters reported the pit "burning with a blue flame" throughout much of the incident. In the days following the explosion and fire, crews were removing debris from the site. It was noted that the foam layer on the pit had rapidly increased. During removal of the metal roofing, a fireball about 15 feet in diameter was witnessed as a worker lit a cigarette. No one was injured, but it attests to the danger of the methane gas being produced.

Figure 4: 80-foot by 412-foot building destroyed.

The investigation into commercial agriculture buildings has taken on a whole new twist in the last two to three years. The reason for the foaming of the waste pit is still being sought out, and remedies are being tested. It is known that the foam layer on the pits contains high concentrations of methane gas, and multiple ignition sources are present within the structure. Updates to this article will be presented as more information becomes available.

Endnotes

1. United States Department of Agriculture

Judicial Profile: Judge James S. Jamo

By: Kimberlee A. Hillock, *Willingham & Coté, PC*

Executive Summary

Recently, long-time attorney and newly elected Judge of the Ingham Circuit Court James S. Jamo graciously agreed to be interviewed by the staff of the Michigan Defense Quarterly. *He shared his past experiences both as an attorney and before becoming an attorney, as well as his experiences and preferences on the bench.*

A Personal Perspective:

Judge Jamo said that no single person was most influential in his life. One should learn from a wide variety of people. Everyone a person interacts with offers a different perspective, and this diversity enriches one's own perspective.

The judge has a cottage on a lake in northern Michigan. For relaxation, he enjoys fly fishing. He watches college sports, primarily football and basketball. He comes from a divided household: his own undergraduate degree was from the University of Michigan, as were his son's undergraduate and dental degrees, while his daughter went to Michigan State. To remedy the divide, Judge Jamo has season tickets to both schools. He did not say who he roots for when the two teams play each other. When watching hockey and baseball, he follows the professional teams in Detroit. His taste in music is eclectic. He is just as likely to listen to rock, as he is to country or classical. He has in his collection Billy Holiday, Kid Rock, and anything in between.

Judge Jamo's Past Law Practice:

Before being elected to the bench in 2012, Judge Jamo spent 28 years in private practice as a litigation attorney. He first joined the law firm of Denfield, Timmer & Taylor in 1984. In 1990, when one of the partners went on to the Court of Appeals and another partner retired, Judge Jamo became a partner, and the firm renamed itself Timmer, Jamo & O'Leary. In 2000, Judge Jamo became a partner in the firm Grua, Jamo & Young, where he remained until 2012.

He credits much of his success to the mentorship he received as a young attorney. George Denfield and James Timmer were very accessible as mentors. They would sit down and talk through cases, and advise on how they would handle them. As a new attorney, Judge Jamo was able to learn from their experiences.

Judge Jamo's practice involved a wide variety of law, and he enjoyed the variety. He did not find any area of law more difficult than others, and he enjoyed the challenge of learning new subjects. He found different cases memorable for different reasons. There were cases that presented the opportunity to learn a specialized area of science or medicine; cases that contained interesting legal issues; and cases that gave him the personal satisfaction of accomplishing a favorable result for a client who needed his help.

Two cases, however, stood out as particularly memorable. The first case, tried in Jackson County, involved a woman claiming brain injury from chemical exposure. Although the witnesses were reluctant, he was eventually able to show that the plaintiff's law suit was fraudulent.

The second case was being tried in Ingham County on September 11, 2001. In the middle of trial, Judge Brown interrupted testimony and announced that a plane had hit one of the World Trade Center towers. Minutes later, it was announced that the other tower had been hit. The parties and the trial court conferred and agreed

with the court's decision to excuse jurors because some might have relatives in New York. Judge Jamo himself had a brother who frequently worked at the World Trade Center, and he recalls the worry and wait until he received word that his brother was safe.

Judge Jamo, the Early Years:

Prior to private practice, Judge Jamo worked as an intern at the Prosecuting Attorney's Association of Michigan while attending law school at Thomas M. Cooley Law School. As part of his internship, he assisted in preparing and maintaining a notebook for prosecutors that summarized cases by topic. He would also research special topics upon request by telephone calls from all over the state and would respond to each request with a memorandum of his findings.

Judge Jamo enjoyed attending law school. His most memorable moment pertained to a civil procedure professor who was particularly difficult in terms of grading and who would actually give negative grades on tests. He recalls getting an A on the final exam from this professor . . . with a score of 12 points on a 100-point test.

Even before law school, Judge Jamo demonstrated initiative, a strong work ethic, and a desire to take care of people. In high school, he started his own landscaping business, and in college, he drove a truck for Coca Cola and worked for Ford Motor Company.

Judge Jamo's Judicial Experience:

Since taking office in January of this year, Judge Jamo has enjoyed his new position. He states that being a judge is very different from being an attorney. When he is in chambers now, it is very quiet, and this is a large contrast from a busy law practice with deadlines, depositions, hearings, and constant phone calls and emails. The quiet is nice because it allows him to focus. When asked if he has any pet peeves, he stated that he has not been on the bench long enough to develop one. He says he is pretty easy going and flexible, and states that a party would have to go a long way to rile him. He cannot recall a specific decision that has been difficult to make. One of his fellow judges advised that the most important ability to develop was the ability to say "no." Although he recognizes that it is necessary, he has found it difficult to say no in close calls.

Judge Jamo says he has trained as a mediator and is not opposed to taking an active role in settlement negotiation if the parties want him to. However, he does not receive many requests because there are so many great mediators out there. It is a far different situation now than it was 23 or 24 years ago when, in his first mediation as a litigator, the parties had to bring in mediators from San Francisco, California. This is no longer necessary, as mediation is widely available and is a terrific tool. In fact, Judge Jamo stated that the General Trial Division of the Ingham County Circuit Court recently changed its final pre-trial conference notice form to no longer require parties be present. So many parties mediate or participate in case evaluation, that parties are no longer required at the pre-trial unless a particular judge indicates otherwise. Instead, pre-trial focuses on getting ready for trial.

Judge Jamo emphatically believes in attorneys conducting their own voir dire. He will ask basic questions to give the attorneys a chance to listen to jurors on basic issues. According to Judge Jamo, allowing attorneys to conduct voir dire is the best practice because they know the nuances of their cases. Furthermore, it allows the attorneys to establish a rapport with the jurors.

Judge Jamo does not require attorneys to remain at the lectern during trial as long as they speak loudly and clearly so that a good record can be made. However, he prefers that attorneys remain at the lectern during motions because it is easier to be heard.

Advice to New Attorneys:

When asked what advice he would give new attorneys, Judge Jamo recommended that they find a mentor. He tells them to not be discouraged by the negative comments about the profession; a career in law is very fulfilling. If a particular area of law is not interesting, find another one. If an attorney ends up in an area of law that is not his or her forte, it is not the end of the road. He recalls a fellow law student who ended up not practicing law at all but instead made a very successful career in insurance and legal training. Most importantly, Judge Jamo advises new attorneys to be candid with themselves, their clients, and the court regarding the strengths and weaknesses of their cases.

Future Plans When He Eventually Leaves the Bench:

At the present time, Judge Jamo does not think he would return to private practice if he left the bench. However, he would still remain professionally engaged, perhaps by teaching law. And he states he might fish more . . .

MDTC E-Newsletter
Publication Schedule

Publication Date	Copy Deadline
December	November 1
March	February 1
June	May 1
September	August 1

For information on article requirements, please contact:

Alan Couture
ajc@runningwise.com, or

Scott Holmes
sholmes@foleymansfield.com

By: Graham K. Crabtree, *Fraser, Trebilcock, Davis & Dunlap, PC*
gcrabtree@fraserlawfirm.com

MDTC Legislative Report

In the summer days since my last report, the Legislature convened for a handful of sessions and discussions continued on a number of important topics, including, most notably, the proposed expansion of the state Medicaid program passed by the House in June, and the various options for raising additional revenues for badly-needed road repairs.

When the Senate convened on August 27th, it passed the Medicaid expansion Bill – House Bill 4714 (Lori – R) – with amendments added to address concerns of Republican members uncomfortable with the attendant expansion of government and fearful of the Tea Party's wrath. The bill passed with the minimum number of affirmative votes, but its proponents fell 2 votes short of the 26 votes needed for immediate effect. The Senate amendments were approved by the House on September 3rd, but the vote on immediate effect was not reconsidered. Thus, if approved by Governor Snyder as expected, the Medicaid expansion will take effect 90 days after this year's sine die adjournment — a date which will probably fall sometime in the last week of March.

As I complete this report, the road funding issues remain unresolved with no clear resolution in sight. The no-fault insurance reform legislation – House Bill 4612 (Lund – R) – reported by the House Insurance Committee in May remains in limbo on the House second reading calendar with no sign that it has come any closer to final passage in its house of origin.

We have heard political rumblings in Lansing which will surely grow louder in the coming months. There has been considerable discussion among Tea Party activists of a plan to replace Lieutenant Governor Brian Calley with a more conservative candidate of their choosing. And, displeasure with the Medicaid expansion has prompted reports that the Tea Party may put forth a candidate to challenge Governor Snyder in next year's August primary. It may be expected that this would be a disappointment for the Governor and more moderate Republicans, since a primary challenge would be a divisive distraction at the very least, and could substantially deplete the funds available for the Governor's re-election campaign. The Democrats have not said much about this so far, but I picture them grinning.

2013 Public Acts

There are now 106 Public Acts of 2013 – 56 more than when I last reported in June. Most of the new acts involve appropriations and a variety of tax and economic development issues. The few which may be of interest to litigators include:

2013 PA 65 – House Bill 4793 (Haugh – D) This act has **amended the Fireworks Safety Act** to allow local governments greater freedom to regulate the use of consumer fireworks during specified hours on the day before, the day of, and the day after a national holiday.

2013 PA 93 – House Bill 4529 (McMillin – R) has created a new "Michigan Indigent Defense Commission Act." This new act creates a **new Michigan Indigent Defense Commission as an autonomous entity in the judicial branch**, charged with responsibility for development of minimum standards for local delivery of indigent criminal defense services to be proposed for adoption and enforcement by the Supreme Court.

2013 PA Nos. 103, 104, 105 and 106 – Senate Bill 380 (Richardville – R); Senate Bill 383 (Booher – R); House Bill 4765 (Farrington – R); and House Bill 4766 (Callton – R) This package amends provisions of Chapter 32 of the Revised Judicature Act, governing foreclosure of mortgages by advertisement. Public Acts 103 and 106 have amended MCL 600.3204 and added a new section MCL 600.3206 to **establish new requirements for foreclosure of mortgages on residential properties** in certain cases where the first notice of foreclosure is published after January 9, 2014. In those cases, the mortgagee will not be permitted to foreclose until the mortgagor has been offered an opportunity to have a meeting for the purpose of attempting to negotiate a loan modification.

The purpose of Act 105 was to extend the sunset for the existing loan modification procedures provided under MCL 600.3205a through 600.3205d from June 30, 2013 to June 30, 2014. This purpose has failed, however, because Act 105 was not signed and filed until July 3rd, and thus, MCL 600.3205a through 600.3205d were repealed by operation of law on June 30th. Public Act 104 has amended MCL 600.3204 to add new provisions allowing

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

And, displeasure with the Medicaid expansion has prompted reports that the Tea Party may put forth a candidate to challenge Governor Snyder in next year's August primary.

purchasers of foreclosed properties to enter and inspect the foreclosed property during the redemption period, and to **seek possession of the property before the end of that period if they are denied access or discover damage** to the property.

New Initiatives and Old Business

A few other matters of interest include:

House Bill 4959 (Farrington - R) This bill would **amend the Insurance Code to provide that an owner or registrant of a motor vehicle who is 65 years of age or older would no longer be required to maintain security for payment of Personal Protection Insurance benefits.** Presumably, the purpose of this proposal is to allow senior citizens to avoid paying for medical benefits that Medicare can pay for. This bill was introduced on September 4, 2013, and referred to the House Committee on Insurance.

House Bill 4913 (McMillin – R) would amend the Revised Judicature Act to add a new Section MCL 600.2978, which would **provide individuals with new protection against lawsuits** (sometimes referred to as "SLAPP" suits) **brought for the purpose of hindering free speech and participation in the process of government.** Subject to exceptions provided to allow pursuit of legitimate lawsuits, dismissal would be required if the court determines that: 1) the action is based upon an exercise of the individual's constitutional right to petition government to procure a governmental or electoral action, result or outcome; or 2) the action is based on the defendant's exercise of his or her constitutionally protected right of free speech. If dismissal is found to be warranted for either of those reasons, the court would be required to award court costs, reasonable attorney fees, and treble damages. The court would also be given discretionary authority to impose punitive sanctions upon the plaintiff and the plaintiff's counsel to deter the future filing of similar lawsuits. This bill was introduced on July 18, 2013, and referred to the House Judiciary Committee.

House Bill 4917 (Heise – R) This bill would amend the Revised Judicature Act to create a new Chapter 30a, **providing procedures for required disclosure and consideration of claims for compensation from asbestos trust funds in tort actions presenting asbestos claims.** This bill was introduced on July 18, 2013, and referred to the House Judiciary Committee.

House Bill 4202 (Kowall – R) and House Bill 4203 (VerHeulen – R) These bills, often referred to as the "**Mainstreet Fairness Package**," propose amendments to the General Sales Tax Act and the Use Tax Act which would adopt statutory presumptions to facilitate collection of sales and use tax on internet purchases and other remote sales. These bills would not create any new taxes; they would merely **provide improved means for collecting the sales and use taxes previously established, in order to prevent online sellers from having an unfair advantage over merchants selling goods from brick and mortar retail establishments in Michigan.** Nonetheless, there are some Tea Party activists and other like-minded parties who have criticized this legislation as an effort to impose new taxes, and this has made legislators on both sides of the aisle nervous. The bills have been scheduled for hearing before the House Tax Policy Committee, but their future is uncertain as of this writing.

House Joint Resolution U (Haveman – R) This House Joint Resolution **proposes an amendment of the existing term limits for state legislators** provided in Const 1963, art 4, § 54. If approved by the Legislature and the voters, the proposed changes would allow a person first serving as a State Representative in 2015, or as a State Senator in 2019, to serve a combined total of 16 years as a State Representative and/or a State Senator. This joint resolution, which would require a 2/3 vote of both houses, was introduced on June 12th and referred to the House Committee on Elections and Ethics.

Senate Joint Resolution X (Young – D) This Senate Joint Resolution **proposes an amendment of Const 1963, art 2, § 9, which establishes and governs the rights of initiative and referendum.** The proposed amendment would provide that, when a law has been rejected by the voters in a referendum, the Legislature may not pass "a same or similar law" without the approval of two-thirds of the members elected to, and serving in each house. This joint resolution, probably inspired by the most recent legislation governing the appointment and powers of emergency managers, was introduced and referred to the Senate Government Operations Committee on June 11th.

What Do You Think?

Members are again reminded that the MDTC Board regularly discusses pending legislation and positions to be taken on bills and resolutions of interest. Your comments and suggestions are appreciated, and may be submitted to the Board through any Officer, Board Member, Regional Chairperson or Committee Chair.

By: Susan Leigh Brown, *Schwartz Law Firm P.C.*
sbrown@schwartzlawfirmpc.com

No Fault Report

Children Are "Domiciled" Exclusively with Parent to whom Court Has Given Primary Physical Custody, Says Supreme Court

Grange Insurance v Lawrence, 494 Mich 475 (2013).

Settling a long-lived dispute as to the domicile of minors for purposes of no fault coverage, the Michigan Supreme Court has reconciled prior case law, the No Fault Act (MCL 500.3114) and the Child Custody Act in holding that children, indeed all persons, have only one "domicile" though they may have multiple "residences." At issue in this case, which involved two different suits, was whether minor children who are victims of auto accidents are resident relatives of both parents or only one parent. The language of MCL 500.3114 provides that those entitled to PIP benefits include the named insured, his/her spouse and "a relative of either [spouse] domiciled in the same household." After lengthy historical discussion, and in contrast to some interpretations of the factors identified in *Workman v DAIIE*, 404 Mich 477 (1979), the court ruled that no person may have more than one domicile. Though the concept of "domicile" under Michigan common law is dependent, in part, on the question of intent to permanently reside in a location together with physical presence in that location, the court ruled that children have no legal choice as to their domicile until they are emancipated or reach the age of majority. Therefore, the "intent" of a child to remain with one parent rather than another is not determinative of "domicile." Likewise, divorced or separated parents surrender the right to change the legal domicile of a minor child absent an order of the court. In other words, the family court determines the legal domicile of minors and that court's order establishes domicile as a matter of law regardless of where the child actually resides.

While the three concurring Justices (Zahra, joined by Markman and McCormack) agreed with the outcome in these cases, they would not give custody orders irrebuttable weight. Rather, the concurring Justices would hold that custody orders carry with them only a rebuttable presumption of domicile which could be overcome by evidence of intent of the minor and his/her parents to establish the child's domicile contrary to the custody order.

In the companion case of *ACIA v State Farm*, decided along with *Grange*, physical custody of the minor had been granted to the father who had later obtained a court order allowing him to move the child to Tennessee. Thereafter, the parents and child decided that she would live with her mother in Michigan for some time to get to know her mother. The child spent the summer in Michigan and eventually enrolled in school here. She was tragically killed in an auto accident during the school year. Although the parents and child had agreed that she could remain in Michigan with her mother for the time being, the court order awarding primary physical custody to the father had not been modified. Accordingly, the majority ruled that, as a matter of law, the child was "domiciled" with the father at the time of accident although she had been actually residing with her mother for months before the accident. The concurring Justices agreed that, under the facts of this case, although the child had changed her address to her mother's Michigan address, moved many of her belongings to Michigan, obtained a part-time job in Michigan and continued in school in Michigan (she was 16 and in high school), there was no evidence that she had intended to permanently reside in Michigan after having lived with her father in Tennessee for 11 years.

The opinion is likely to affect cases other than those related to minors in that it declares once and for all that, under the No Fault Act, a person cannot have but a single domicile. All seven Justices agreed on that point. Therefore, those who, for example, live part of each year in one state and part in another will be deemed, for No Fault purposes in any event, to have only one "domicile," that domicile being the place in which a person resides with the intent to remain there permanently, no matter how short the residence is. The court also put to rest the question of whether, for purposes of the No Fault Act, the terms "domicile" and "residence" are always synonymous. The answer is a definite "NO."

Susan Leigh Brown is an attorney with Schwartz Law Firm in Farmington Hills. She specializes in insurance defense, employment law, tort defense, credit union law and commercial litigation. Ms. Brown has over 20 years of experience in No Fault and Insurance law, including counseling, coverage disputes, litigation, and appeals, and is a regular contributor to the *Michigan Defense Quarterly*. She has lectured to trade groups on insurance law, employment law and credit union law.

Ms. Brown is a member of MDTC as well as the Labor and Employment and Insurance and Indemnity Law Sections of the State Bar and the Oakland County and Detroit Bar Associations. Her email address is sbrown@schwartzlawfirmpc.com

In other words, the family court determines the legal domicile of minors and that court's order establishes domicile as a matter of law regardless of where the child actually resides.

No Double-Dip for Motorcyclist with Health Insurance, According to Supreme Court

Harris v Auto Club, 494 Mich 462 (2013).

Harris was injured when the motorcycle he was operating was struck by a car. The owner of the vehicle that struck Harris was insured under a no fault insurance policy issued by ACIA. Harris had health insurance with Blue Cross. The Blue Cross policy excluded coverage for care and services "for which [the insured] legally do(es) not have to pay." The Michigan Supreme Court held that Blue Cross did not owe any benefits because, pursuant to MCL 500.3114, ACIA was obligated as a matter of law to pay for all medical expenses related to the accident. The court differentiated between those situations in which the injured person is an insured under both a health and a no fault insurance policy. If the injured person is entitled to insurance benefits as a result of a ***contract obligation***, that is, the person bought a policy of no fault insurance, he/she may be entitled to the double-dip which occurs when both the auto and health policies are not coordinated. In those situations, the person has paid an increased premium specifically to purchase uncoordinated coverage. Therefore, the insured is entitled to be paid directly by his/her no fault carrier the same amounts which his/her health insurer has paid to providers.

However, said the court, where a person is entitled to no fault benefits by operation of law, such as a motorcyclist entitled to PIP benefits from the insurer of the other vehicle involved in the accident, the injured person is not entitled to the benefits of an uncoordinated policy including the potential double-dip.

Moreover, the court ruled that the injured person was never legally obligated to pay his own medical bills because MCL 500.3114 obligated ACIA to pay those bills as a matter of law. Therefore, Blue Cross did not have to pay any of the medical bills and there was no opportunity for a double-dip regardless of the provisions of any no fault insurance policy. In this regard, the court reversed the majority decision of the court of appeals which had held that, regardless of the statutory mandate that ACIA pay the medical bills, the motorcyclist had, nonetheless, "incurred" the expenses as that phrase is used in MCL 500.3107. Because the expenses had been "incurred," the court of appeals said, Blue Cross could not rely on its exclusionary language and the trial court had erred in granting summary disposition in favor of Blue Cross.

By: Phillip J. DeRosier, *Dickinson Wright*, and Trent B. Collier, *Collins Einhorn Farrell & Ulanoff*
pderosier@dickinsonwright.com; trent.collier@ceflawyers.com

Appellate Practice Report

Filing Postjudgment Motions Following a Bench Trial

Most practitioners are familiar with the process of filing postjudgment motions challenging a jury's verdict. These motions are, of course, required to preserve certain issues for appeal (such as a challenge to the sufficiency of the evidence supporting the verdict), and will toll the time for filing an appeal. Most often, parties will file either a motion for judgment notwithstanding the verdict (or, in federal parlance, a renewed motion for judgment as a matter of law) or new trial, or both. But what about the bench trial setting? How should a party go about seeking what essentially amounts to "reconsideration" of a court's findings of fact and conclusions of law?

In state court, it is important to file a postjudgment motion following a bench trial under either MCR 2.517(B) or MCR 2.611, and not MCR 2.119(F), which is limited to seeking reconsideration of a decision on a motion. See *Gearhart v Greslin*, unpublished opinion per curiam of the Court of Appeals, issued July 7, 2000 (Docket No. 219091); 2000 Mich App LEXIS 1371, *10 ("We note that defendants' motion for reconsideration was an improper postjudgment motion. MCR 2.119(F) is used to correct any obvious mistakes made by a court when ruling on a motion. Defendants did not move for reconsideration of a ruling on a motion. Rather, they sought to contest the judgment entered by the trial court [following a bench trial].") (citation omitted).

Pursuant to MCR 2.517(B), "[o]n motion of a party made within 21 days after entry of judgment, the court may amend its findings or make additional findings, and may amend the judgment accordingly." A motion under MCR 2.517(B) may be combined with a motion under MCR 2.611, which provides that "[o]n a motion for a new trial in an action tried without a jury, the court may" take one of the following actions:

(a) set aside the judgment if one has been entered,

(b) take additional testimony,

(c) amend findings of fact and conclusions of law, or

(d) make new findings and conclusions and direct the entry of a new judgment.

See MCR 2.611(A)(2).

The process for filing a postjudgment challenge to a court's decision following a bench trial is similar in federal court. FR App 52(b) provides that "[o]n a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly." Like MCR 2.517(B), Rule 52(b) further provides that "[t]he motion may accompany a motion for a new trial under Rule 59." Pursuant to FR App 59(a)(2), "[a]fter a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment."

Phillip J. DeRosier is a member in the Detroit office of Dickinson Wright PLLC, and specializes in the area of appellate litigation. Prior to joining Dickinson Wright, he served as a law clerk for Michigan Supreme Court Justice Robert P. Young, Jr. He serves as Secretary for the State Bar of Michigan's Appellate Practice Section Council, and is the chair of the Appellate Practice Section of the Detroit Metropolitan Bar Association. He can be reached at pderosier@dickinsonwright.com or (313) 223-3866.

Trent Collier is a member of the appellate department at Collins, Einhorn, Farrell & Ulanoff, P.C., in Southfield. His practice focuses on the defense of legal malpractice, insurance, and general liability claims at the appellate level. His email address is Trent.Collier@CEFLawyers.com.

In state court, it is important to file a postjudgment motion following a bench trial under either MCR 2.517(B) or MCR 2.611, and not MCR 2.119(F), which is limited to seeking reconsideration of a decision on a motion.

Voluntarily Dismissing an Appeal

Every so often, the parties to a pending appeal will reach a settlement, requiring that the appeal be dismissed. The process for voluntarily dismissing an appeal is similar in the Michigan Court of Appeals and Sixth Circuit Court of Appeals.

In the Michigan Court of Appeals, there are two options. *First*, the appellant may file an "unopposed motion to withdraw the appeal." MCR 7.218(A). *Second*, the parties "may file with the clerk a signed stipulation agreeing to dismissal of an appeal." MCR 7.218(B). In either case, if the appeal has not yet been placed on a session calendar, the court clerk will enter an order of dismissal. Otherwise, the order must be entered by the court. Once a case has been scheduled for oral argument, parties should submit a voluntary dismissal as soon as possible. In practice, the court will honor a stipulation to dismiss an appeal at any time up to and including the day of oral argument.

The procedure for voluntarily dismissing an appeal in the Sixth Circuit is nearly identical. Pursuant to FR App P 42(b), "[t]he circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due." An appeal may also be dismissed "on the appellant's motion on terms agreed to by the parties or fixed by the court." *Id.*

Attaching Unpublished Opinions

A question recently came up on the State Bar of Michigan Appellate Practice Section's listserv about when unpublished opinions must be provided to the court. The answer depends on whether the brief is being filed in the Michigan Court of Appeals or the Sixth Circuit Court of Appeals.

Pursuant to MCR 7.215(C)(2), "[a] party who cites an unpublished opinion must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citation appears." Typically that means attaching the opinion as an exhibit to the brief.

In the Sixth Circuit, however, there is no need to attach an unpublished opinion so long as it is "available in a publicly accessible electronic database." 6th Cir R 32.1. Otherwise, "the party must file and serve a copy as an addendum to the brief or other paper in which it is cited." *Id.*

In 2010, the Appellate Practice Section proposed amending MCR 7.212 and MCR 7.215 to eliminate the requirement to provide a copy of an unpublished Michigan Court of Appeals opinion if it was issued after July 1, 1996, as those opinions are all available on the court of appeals' website. The proposal eventually received the support of the State Bar, but the supreme court declined to adopt the proposed amendments.

Attorneys Have Standing to Appeal Decisions Regarding Fees, Even if They are Not Parties to the Litigation.

In *Matthew R Abel, PC v Grossman Investment Company,* __ Mich App __; ___ NW2d ___ (August 15, 2013), the Michigan Court of Appeals resolved a matter of importance to all Michigan attorneys.

The question presented in *Matthew R Abel* was whether a receiver's attorney had standing to appeal a fee award granting fees well below those claimed in his application. The circuit court held that the receiver's attorney did not have standing to appeal the district court's fee award, but the court of appeals reversed.

The circuit court's ruling was based on a version of Michigan's Court Rules that predated adoption of the "aggrieved party" concept in 2011 for appeals from the district court to the circuit court. The court of appeals held, however, that the "aggrieved party" concept was nevertheless applicable, given the Michigan Supreme Court's opinion in *Federated Ins Co v Oakland Co Rd Comm,* 475 Mich 286; 715 NW2d 846 (2006). A party is aggrieved if it "suffered a concrete and particularized injury." If an aggrieved party can demonstrate that a controversy is justiciable, the party has standing to appeal.

The *Matthew R Abel* panel concluded that "an order granting, denying, or setting fees" gives an attorney "a pecuniary interest in a court ruling." This interest is a "concrete and particularized injury" sufficient to satisfy the "aggrieved party" requirement. The fee order was justiciable because it was within the court of appeals' jurisdiction and involved a "genuine, live controversy between interested persons asserting adverse claims, the decision of which can definitively affect existing legal relations." Thus, an attorney may appeal a fee award without formally intervening in the underlying action.

By: Michael J. Sullivan and David C. Anderson, *Collins Einhorn Farrell & Ulanoff P.C.*
michael.sullivan@ceflawyers.com; david.anderson@ceflawyers.com

Legal Malpractice Update

A Significant Passage of Time without Communication from an Attorney Does Not Necessarily Give Rise to an Argument that the Plaintiff Lacked Diligence in Discovering a Potential Claim for Legal Malpractice

Wright v Attorney Defendant, unpublished opinion per curiam of the Court of Appeals, issued June 18, 2013 (Docket No. 303491)

Michael J. Sullivan and **David C. Anderson** are partners at Collins, Einhorn, Farrell & Ulanoff, P.C. in Southfield. They specialize in the defense of professional liability claims against lawyers, insurance brokers, real estate professionals, accountants, architects and other professionals. They also have substantial experience in product and premises liability litigation. Their email addresses are Michael.Sullivan@ceflawyers.com and David.Anderson@ceflawyers.com.

The Facts: Plaintiffs, husband and wife, met with the attorney defendant for representation in their medical malpractice case. After this first meeting, plaintiffs "signed on" with the defendant, and he represented himself as their attorney although a retainer agreement was not proffered. Internal documents from the defendant's office stated that he was both the "case manager" and the "attorney in charge" for the wife's case. Written correspondence from the defendant to plaintiffs, to an attorney in Michigan for "assistance with local representation," and to a doctor regarding plaintiffs' medical malpractice claim, as well as the inclusion of the defendant's name on some of the initial pleadings, demonstrate that he engaged in actions indicating his provision of legal services in the medical malpractice action.

Another attorney handled the majority of the case, and in February 2009, the defendant told plaintiffs that the other attorney was "at fault" for the dismissal of their medical malpractice case. Plaintiffs contacted other counsel to seek assistance after receiving this information. Plaintiffs first filed an action for legal malpractice in the federal district court on July 21, 2009, alleging subject-matter jurisdiction premised on diversity of citizenship. Plaintiffs filed an action against the same named defendants in circuit court on September 4, 2009. The federal court action was still pending in the federal district court when plaintiffs filed their complaint with the state circuit court. The federal court dismissed the action without prejudice on September 21, 2009 for lack of subject-matter jurisdiction.

The defendant attorney moved for summary disposition, arguing that the statute of limitations barred plaintiffs' legal malpractice claim. The trial court agreed, granting his motion and dismissing the claim as barred by the statute of limitations. The plaintiffs appealed.

The Ruling: The court of appeals reversed the trial court's holding, concluding that plaintiffs' legal malpractice claim was timely filed under the six-month discovery rule. Plaintiffs had sufficient information as of February 25, 2009 to discover the existence of a possible cause of action for legal malpractice when the defendant attorney told them that the other attorney handling the case was at fault for the dismissal. Indeed, plaintiffs then sought assistance from other counsel after receiving this information. The federal district court case was filed within six months of the February 25, 2009 discovery date. This action tolled the accrual of the limitations period, and the circuit court filing was done while that case was still pending, making it timely.

The attorney defendant argued that the plaintiffs failed to act diligently to discover their potential claim, and should have discovered it sooner when they had difficulty communicating with the other attorney and received no information regarding the status of their medical malpractice case. The court disagreed and noted that while a plaintiff must act diligently to discover a possible cause of action, plaintiffs had been reassured by the other attorney that the proceedings were under control. Plaintiffs were not knowledgeable regarding legal proceedings or the time frame for the proceeding's conclusion, and had retained and

Plaintiffs had sufficient information as of February 25, 2009 to discover the existence of a possible cause of action for legal malpractice when the defendant attorney told them that the other attorney handling the case was at fault for the dismissal.

depended on counsel to guide them through the case. Although suspicious of the extensive delay in the underlying matter, plaintiffs had no reason to suspect the existence of a possible cause of action for legal malpractice at that point. Additionally, the plaintiff wife had documentation of her attempts to contact the attorney defendant's office to inquire about the status of the case. The court ruled that, given the factual circumstances, plaintiffs' lack of action for a longer period of time could not be equated with a lack of reasonable diligence.

The defendant attorney also challenged the existence of an attorney-client relationship. The court concluded that the record evidence regarding the origination of the relationship and the defendant's actions was sufficient for plaintiffs to allege the existence of an attorney-client relationship.

Practice Note: If a plaintiff makes efforts to be informed as to the status of a case, it will be difficult for an attorney to later argue that the lack of communication from the attorney should have put a plaintiff on notice of a malpractice claim for purposes of the statute of limitations under the six-month discovery rule.

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tmeagher@fosterswift.com

By: M. Sean Fosmire, *Garan Lucow Miller, P.C.*
sfosmire@garanlucow.com

Michigan Court Rules (and the RJA) Adopted and Proposed Amendments

For additional information on these and other amendments, visit the Court's official site at http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Pages/default.aspx

ADOPTED

MCR 2.112 – Pleading Special Matters

Admin no.: 2012-36
Rule affected: 2.112
Issued: June 5, 2013
Effective: September 1, 2013

Any party shall file with its first pleading a written notice that a case meets the statutory criteria for assignment to the business court. This applies only in the 17 or so circuits which have established a business court.

PROPOSED

MCR 2.107 – Service and Filing of Pleadings and Other Papers
MCR 2.117 – Appearances

Admin no.: 2013-10
Rule affected: Rules 2.107 and 2.117
Issued: June 19, 2013
Comments close: October 1, 2013
Public Hearing: To be scheduled

This would insert the term "final order" and would provide that the duration of an appearance by an attorney filing or defending a post-judgment motion is the same as the duration of an attorney's appearance filing or defending original pleadings.

MCR 2.107 governs how service is to be made. Once an attorney enters an appearance, service is made on the attorney. Subrule 1-c provides that, after entry of judgment and expiration of the appeal period, notice of any further proceedings is to be served on the party, rather than the attorney, on the presumption that the attorney's period of service is now at an end. This amendment would add the phrase "or final order" to this subrule.

MCR 2.117 governs the duration of an attorney's appearance. The same change is made in two locations.

Federal Rules – The Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure has released a series of proposed amendments to Rules 1, 4, 6, 16, 26, 30, 31, 33, 34, 36, 37, and 55. It further proposes to delete Rule 84 and the Appendix of Forms. The proposals were released on August 25, 2013, and comments may be submitted until February 25, 2014. The proposals and the extended commentaries may be viewed at http://www.uscourts.gov/RulesAndPolicies/rules/proposed-amendments.aspx

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

MDTC/MAJ Respected Advocate Award:

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

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By: Carson J. Tucker, *Lacey & Jones, LLP*
ctucker@laceyjones.com

MDTC Amicus Activity in the Michigan Supreme Court

The Michigan Supreme Court's activity during the period between January 2013 and September 2013 has been interesting for the defense bar. Issues to be addressed by the court will be subject to further debate and litigation. Some of the more significant cases of import to the defense bar, including those in which MDTC has been invited to participate, are discussed below.

MDTC will be filing a brief in *Huddleston v Trinity Health, Michigan*, *et al*, Case No. 146041 (April 3, 2013 grant order). The Michigan Supreme Court granted oral argument on an application in this medical malpractice case to consider the court of appeals' majority ruling that speculative injuries can be the basis for damages in a medical malpractice case. The court specifically requested the litigants brief and address whether the court of appeals' majority ruling is contrary to the rule enunciated by the court in *Henry v Dow Chemical*, 473 Mich 63 (2005), which held that residents could not recover for damages associated with environmental contamination, where future injuries from such contamination were, at best, speculative. The court also requested the parties consider whether the court of appeals' majority properly applied *Sutter v Biggs*, 377 Mich 80 (1966), which addressed the foreseeability of damages in a medical malpractice action. The court of appeals' majority here dismissed the view that in cases where there are dual functioning organs, a doctor's removal of one does not give rise to a cause of action because of the potential for greater future harm due to the additional risk associated with having only one functional organ. The court of appeals majority and dissent agreed that insufficient expert testimony was provided to establish the standard of care against the defendant hospital concerning the standard applicable to delivery of radiology results.

The Michigan Supreme Court appears to be only concerned with the issues concerning speculative damages and causation. The court invited *amicus* briefing from the Michigan Association of Justice and MDTC. **Carson J. Tucker** of Lacey & Jones, LLP will be filing a brief on behalf of MDTC.

Other cases of import to the defense bar are being considered this term.

In *John Ter Bek v City of Wyoming*, Case No. 145816 (April 3, 2013 grant order), the Michigan Supreme Court granted the City of Wyoming's application for leave to appeal the court of appeals' ruling that its local zoning ordinance, enacted to prohibit use of marijuana, conflicted with the Michigan Medical Marihuana Act ("MMMA") and the federal Controlled Substances Act. The supreme court has requested the parties address whether the local ordinance is preempted by either state or federal law. This case will likely garner much attention as the MMMA has been under fire for some time and has been addressed at many levels of the judicial system since its enactment.

Motions to file *amicus curiae* briefs have been filed by the Public Corporation Law Section of the State Bar of Michigan, the Michigan Municipal League, the Cato Institute, Drug Policy Alliance, and Law Enforcement Officers Against Prohibition.

In *Estate of Sholberg v Robert Truman, et al*, Case No. 146725 (June 21, 2013 oral argument on application grant order), the Michigan Supreme Court has granted oral argument on an application to consider the issue of whether a property owner who is

Carson J. Tucker is the Chair of the Appeals and Legal Research Group at Lacey and Jones, LLP, a law firm that has been providing legal services in Michigan for 100 years. Mr. Tucker handles all types of appellate matters and assists other lawyers with complex litigation and insurance coverage issues. Mr. Tucker represents local and state governmental entities, national and international businesses and insurance companies, and global corporations.

The Michigan Supreme Court granted oral argument on an application in this medical malpractice case to consider the court of appeals' majority ruling that speculative injuries can be the basis for damages in a medical malpractice case.

not in possession of property and does not participate in conduct creating an alleged nuisance (in this case, a loose horse that escaped from the property, wandered into a road and was hit by the decedent's automobile, causing the decedent's death) may be liable for the alleged nuisance.

This case has garnered quite a bit of attention. Motions for leave to file *amicus curiae* briefs have been granted to the Property Management Association of Michigan, Detroit Metropolitan Apartment Association, Property Management Association of West Michigan, Property Management Association of Mid-Michigan, and Washtenaw Area Apartment Association.

In *Bonner v City of Brighton*, Case No. 146520 (July 1, 2013 grant order), the Michigan Supreme Court granted leave to consider the constitutionality of a local ordinance allowing destruction of a property considered a nuisance or abandoned where the cost of repair or renovation exceeded the cost of demolishing the structure. The court invited the Public Corporation Law and Real Property Law sections of the State Bar of Michigan to file briefs *amicus curiae*. The Michigan Municipal League also filed a motion to submit an *amicus* brief during the application process.

In *Ramblin v Allstate Ins Co*, Case No. 146256 (May 1, 2013, oral argument on the application grant order), the court is addressing a significant and recurring issue under Michigan's No Fault Act.

The court of appeals reversed a trial court decision denying the plaintiff insurance benefits after he was injured in a collision with an automobile and the motorcycle the plaintiff was driving. Unbeknownst to the plaintiff, the motorcycle was stolen. It was loaned to him by a friend who told him he could use it for a motorcycle riding event.

The plaintiff pursued insurance benefits from the legal owner's insurance company. The insurance company denied benefits on the basis of MCL 500.3113(a), the "unlawful taking" exception to the statutory requirement for personal insurance protection benefits under the No Fault Act.

Basing its reasoning on the Michigan Supreme Court's 2012 decision in *Progressive Marathon Ins Co v DeYoung* and *Spectrum Health Hospitals v Farm Bureau Mutual Ins Co*, consolidated cases reported at 492 Mich 503 (July 31, 2012), the court of appeals held that because the plaintiff did not know the motorcycle had been stolen, PIP benefits should have been extended to him from the true owner's insurance company.

MCL 500.3113(a) provides: "A person is not entitled to be paid [PIP] benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed: (a) The person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle. . . ."

Although the court of appeals based its decision on the "unlawful taking" language of the statute, there is extensive discussion about the second provision of the exclusion, the "savings clause" as the court put it, regarding whether the plaintiff reasonably believed he had permission to use the vehicle. The fact that this case is published is significant.

There was also a partial concurrence by Judge Ronayne Krause in which she stated there was no need for the latter discussion, the court having concluded – rightly, in her opinion – that the trial court's decision should be reversed for the first reason, i.e., that there had been no unlawful taking within the meaning of the statute and the Michigan Supreme Court's recent decisions in *Spectrum* and *Progressive*.

Even though the Michigan Supreme Court has just written significant opinions addressing MCL 500.3113(a), the facts of this case and the opinion on the heels of those decisions indicate that further analysis is necessary.

The court's order granting leave to appeal will require further exploration of the underlying issues regarding the meaning of an "unlawful taking" and the unauthorized use of a motorcycle or motor vehicle under Michigan's No Fault Act. No invitation to file *amicus curiae* briefs was issued.

In *Wurtz v Beecher, et al*, Case No. 146157 (June 5, 2013 grant order), an employment discrimination/whistleblower's case, the Michigan Supreme Court has granted leave to consider (1) whether the plaintiff suffered an adverse employment action under the Whistleblower Protection Act ("WPA"), MCL 15.361 *et seq*., when the defendants declined to renew or extend the plaintiff's employment contract, which did not contain a renewal clause beyond the expiration of its ten-year term; and (2) whether there was a fair likelihood that additional discovery would have produced evidence creating a genuine issue of material fact, MCR 2.116(C)(10), if the defendants' motion for summary disposition had not been granted prior to the completion of discovery. The

The court's order granting leave to appeal will require further exploration of the underlying issues regarding the meaning of an "unlawful taking" and the unauthorized use of a motorcycle or motor vehicle under Michigan's No Fault Act.

court invited all persons or groups interested in the determination of the issues presented in this case to file motions to file briefs *amicus curiae*.

The Michigan Supreme Court is once again considering *Miller-Davis Co v Ahrens Constr, Inc et al*, Case No. 145052 (June 5, 2013 grant order), after hearing oral argument in March of 2011 and issuing an opinion remanding the case to the court of appeals.

The court's most recent order granting leave to appeal is limited to the issues: (1) whether the indemnification clause in the plaintiff's contract with defendant Ahrens applies to this case; (2) if so, whether the plaintiff's action for breach of that provision was barred by the statute of limitations, MCL 600.5807(8); and (3) whether the plaintiff adequately proved that any breach of the indemnification clause caused its damages, including the issue of whether the trial court clearly erred in concluding that defendant Ahrens' performance of nonconforming work caused the natatorium moisture problem.

No invitations have been issued to file briefs *amicus curiae*, but the issues presented have significant implications for business contracts, indemnity provisions and breach of commercial contract actions.

One case was "resubmitted" by the court during the 2012-2013 term, *Woodbury et al v Res-Care Premier, Inc et al*, Case No. 144721 (resubmitted by order dated July 26, 2013).

Resubmission is the somewhat rare occurrence in which the parties are allowed to resubmit briefing and present oral argument during the following term because the court has not rendered a decision in the case submitted on the calendar during the prior term. The parties may request re-argument pursuant to MCR 7.312(E). Very generally, this case involves the legal competency of a dissolved corporation to be bound to a contract apparently entered into during or after the date of dissolution.

In its resubmission order the court laid out the extensive issues to be addressed in supplemental briefing. Because this is a somewhat rare occurrence, it is helpful to look at the court's full order.

On order of the Court, this case having been argued and submitted, we direct the Clerk to set this case for resubmission in the October 2013 session. Further, the Court having concluded that it would be assisted by supplemental briefing, we DIRECT the parties to file supplemental briefs addressing the following issues: (1) whether § 925(2) of the Nonprofit Corporation Act (NCA), MCL 450.2101 *et seq*., applies retroactively or prospectively to validate "all contracts entered into and other rights acquired" during dissolution; (2) whether renewal pursuant to § 925 permits an administratively dissolved corporation to enforce contracts and rights not related to winding-up in light of MCL 450.2833 and MCL 450.2834; (3) whether *Bergy Bros, Inc v Zeelend Feeder Pig, Inc*, 415 Mich 286 (1980), correctly interpreted MCL 450.1925, the analogous provision in the Business Corporation Act, MCL 450.1101 *et seq*.; and (4) whether the common-law doctrine of corporation by estoppel is applicable here. Additionally, assuming arguendo that § 925(2) applies retroactively to validate "all contracts entered into and other rights acquired" during the interval of dissolution, we further direct the parties to address: (5) whether Center Woods' rights to a thirty-day notice of the sale of the property at issue and the right of first refusal were "acquired" during the interval of Center Woods' dissolution; and, if not, (6) whether those rights were nevertheless enforceable after Center Woods renewed its corporate good standing pursuant to § 925. Finally, assuming arguendo that the rights to notice and first refusal are enforceable, we direct the parties to address: (7) what remedy is available to Center Woods against the seller and purchaser of the property at issue, given that the sale was finalized during the interval of Center Woods' dissolution; and (8) whether Res-Care preserved any objection to the trial court's choice of remedy in this case.

The Business Law Section of the State Bar of Michigan, the Michigan Chamber of Commerce, and the Department of Licensing and Regulatory Affairs were invited to file briefs *amicus curiae*. The court issued a general invitation to file motions for participation as *amicus curiae* to other persons or groups interested in the determination of the issues presented in the case.

The MDTC's ability to weigh in on these important legal issues is made possible through the tireless efforts of our volunteer brief writers. As 2014 approaches, please consider whether you would like to be added to our list of available amicus authors.

Also, please let us know if you are interested in any more specifics on any of the cases above in which MDTC's participation has not been requested. Even if there are no specific or general invites, the court welcomes *amicus curiae* participation as it is an essential and crucial part of the judicial process.

By: Joshua K. Richardson, *Foster, Swift, Collins & Smith, P.C.*
jrichardson@fosterswift.com

Supreme Court Update

Landlords Have a Duty to Reasonably Expedite Police Involvement When put on Notice of a Risk of Imminent Harm to an Identifiable Tenant or Invitee in the Common Areas of the Landlord's Premises

On July 30, 2013, the Michigan Supreme Court held that landlords owe the same limited duty of care as merchants to reasonably expedite the involvement of police when put on notice of criminal acts that pose a risk of imminent harm to a tenant or invitee occurring in an area under their control. *Bailey v Schaaf*, ___ Mich ___; ___ NW2d ___ (2013).

Facts: In 2006, the plaintiff attended an outdoor gathering held in the common area of an apartment complex. The gathering was being monitored by security guards, which the apartment complex hired to provide security on its premises. During the gathering, a resident of the complex informed the security guards that an individual at the gathering was brandishing a handgun and threatening to kill someone. The security guards did not respond, and sometime later, the individual shot the plaintiff twice in the back, rendering him a paraplegic.

The plaintiff filed suit against the apartment complex, its management company, the security company and the two security guards, alleging various claims, including premises liability, negligent hiring and supervising, vicarious liability, breach of third-party beneficiary contract, and ordinary negligence. The defendants filed a motion for summary disposition, arguing that they owed no duty to protect the plaintiff from the criminal acts of a third-party. The trial court agreed and dismissed the plaintiff's claims in their entirety.

The court of appeals affirmed in part and reversed in part, holding that, although the plaintiff could not rely on the defendants' security contract, which was executed only after the incident, to state a breach of third-party beneficiary contract, the plaintiff properly alleged a premises liability claim because the defendants owed the plaintiff a duty to call the police in response to the ongoing criminal situation on the premises. The court of appeals extended the duty of care imposed on merchants in similar situations under *MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001).

Holding: In granting the defendants' application for leave to appeal, the Michigan Supreme Court asked the parties to address the singular issue of whether the court of appeals erred in extending the limited duty of merchants – to involve police when a situation on the premises poses an imminent risk of harm to an identifiable invitee – to landlords and other premises proprietors. On that issue, the court affirmed the court of appeals.

The court began by highlighting the duties traditionally imposed on landlords and merchants to remedy physical defects in the premises under their control. The court noted that these general duties – ensuring the reasonable safety of physical premises under their control, including common areas – arise from the special relationships landlords and merchants hold with their tenants and invitees and the level of control they maintain over their premises.

The court further explained that, although these traditionally imposed duties related only to physical defects in the premises controlled by landlords and tenants,

Joshua K. Richardson is an associate in the Lansing office of Foster, Swift, Collins & Smith, PC. He specializes in employment litigation, municipal law, premises liability and commercial litigation. He can be reached at jrichardson@fosterswift.com or (517) 371-8303.

Like a merchant, a landlord has a duty to respond "by reasonably expediting police involvement where it is given notice of a specific situation occurring on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee."

a series of cases dating back to the 1970's began expanding the duties to the protection of tenants and invitees from the criminal acts of others in the controlled areas. The court previously articulated the scope of a merchant's duty in *MacDonald*, where it held that a merchant's duty to respond to foreseeable criminal acts of third parties is "limited to reasonably expediting the involvement of the police" and is triggered only when there are "specific acts occurring on the premises that pose a risk of imminent and foreseeable harm to an identifiable invitee." The duty does not require the merchant to otherwise anticipate or prevent the criminal acts of third parties.

Recognizing its consistent approach of imposing the same duties of care to merchants and landlords with respect to the protection of tenants and invitees in common areas, the court concluded that a landlord's duty regarding the criminal acts of third parties should similarly follow the duties imposed on merchants under *MacDonald*. Like a merchant, a landlord has a duty to respond "by reasonably expediting police involvement where it is given notice of a specific situation occurring on the premises that would cause a reasonable person to recognize a risk of imminent harm to an identifiable invitee." This duty applies only to situations occurring in common areas, over which the landlord maintains control.

Given the facts alleged by the plaintiffs – namely, that the presence of an individual with a handgun making threats to kill someone was made known to the defendants' security guards – the court determined that the defendants were on notice that their tenants and invitees faced a specific and imminent harm and had a duty to reasonably expedite the involvement of the police. Thus, summary disposition in the defendants' favor was improper.

Significance: By expanding the duties of merchants under *MacDonald* to landlords regarding the criminal acts of third parties, the court has provided uniformity to future decisions regarding the reasonableness of a landlord's response to known criminal acts of third parties in common areas.

Police Chiefs are Entitled to Absolute Governmental Immunity From Tort Claims Arising From Their Engagement in Tasks That Might Also be Performed by Lower-Level Employees

On June 20, 2013, the Michigan Supreme Court held that a police chief is entitled to absolute immunity from tort claims under MCL 691.1407(5) even when engaging in tasks that could be performed by lower-level employees, so long as the tasks fall within his or her general authority as an executive official. *Petipren v Jaskowski*, 494 Mich 190; 833 NW2d 247 (2013).

Facts: In the summer of 2008, the Village of Port Sanilac held an annual outdoor festival, involving a beer tent and live music. Many patrons of the festival began complaining about the offensive nature of the music being played by certain bands at the festival. In response to these complaints and additional concerns regarding the festival's atmosphere, including that the offensive music caused many patrons to leave the festival and others to heckle the bands and their supporters, the village chief of police agreed with the festival organizers to stop the bands' performances.

The plaintiff, a drummer for one of the bands, was approached by the police chief when he continued to play the drums onstage. The plaintiff claimed he did not know that the festival organizers had decided to cancel the remaining performances and that the police chief forcefully assaulted and arrested him without warning or justification. The police chief, however, claimed that the plaintiff refused to stop playing, began swearing, then punched him in the jaw and otherwise resisted the police chief's attempts to arrest him.

The plaintiff eventually sued the Village of Port Sanilac and the chief of police, alleging claims for assault and battery, as well as false arrest. The police chief filed a separate suit against the plaintiff, asserting among other things a competing claim for assault and battery. The plaintiff filed a counterclaim in that action, alleging additional claims for intentional infliction of emotional distress, negligence, and negligent infliction of emotional distress.

The police chief filed motions for summary disposition on the plaintiff's tort claims, arguing that he was absolutely immune under MCL 691.1407(5) because, while conducting the arrest, he was acting within his executive authority as the highest appointive executive official of a level of government. MCL 691.1407(5) states that "[a] judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability . . . if he or she is acting within the scope of his or her judicial, legislative, or executive authority."

In support of his motions, the police chief submitted evidence that the village's job description for the chief of police position included not only executive level activities, but also many of the

The Michigan Supreme Court reversed, holding that the chief of police, as the highest appointive executive official of a level of government, was entitled to absolute immunity from tort claims even if those claims arose out of his performance of lower-level tasks.

regular functions typically undertaken by ordinary police officers. The plaintiff argued in response that, among other things, the police chief was not acting within his executive authority, but instead arrested the plaintiff because he was prejudiced against the band and its fans.

The trial court denied the police chief's motions for summary disposition, finding that the police chief acted with personal animus in arresting the plaintiff and, consequently, was not acting within his executive authority as the chief of police, as necessary for absolute immunity to apply.

The court of appeals affirmed and held that "when a police chief acts as an ordinary police officer – that is, when the nature of the act is outside the scope of his or her executive duties – the chief is not entitled to absolute immunity simply because he or she is also the police chief." The court of appeals construed the term "executive authority" in MCL 691.1407(5) as including only those tasks particular to the individual's position as the highest appointive executive official. Because the police chief's arrest of the plaintiff did not relate to a policy, procedure, administration or personnel matter, the court of appeals determined that he was not acting within the scope of his executive authority and, therefore, not entitled to absolute immunity.

Holding: The Michigan Supreme Court reversed, holding that the chief of police, as the highest appointive executive official of a level of government, was entitled to absolute immunity from tort claims even if those claims arose out of his performance of lower-level tasks.

The court explained that, contrary to the court of appeals' conclusion, the term "executive authority" under MCL 691.1407(5) encompasses "all" authority vested to the official by virtue of his or her role in the executive branch. Thus, because the village granted to the chief of police authority to conduct an arrest in his official capacity, the chief of police remained absolutely immune from tort claims arising from his arrest of the plaintiff.

The court also held that the trial court erred by concluding that the police chief's alleged personal animus toward the plaintiff had any bearing on the scope of his executive authority. Because an official's executive authority encompasses all acts that the official is authorized to perform by way of his or her position – even those that are ministerial in nature – absolute immunity will apply even if the official performs the authorized act for improper purposes.

Significance: This decision provides a unique framework for determining actionable conduct based not necessarily on the conduct itself, but rather on who carries it out. Applying the court's decision to its logical end, acts that might otherwise be unlawful if performed by an ordinary governmental employee may be accomplished with impunity by the highest appointive executive official.

Civil Contempt Petition for Indemnification Damages Against a Governmental Agency Seeks to Impose Tort Liability and is Barred by Governmental Immunity

On July 26, 2013, the Michigan Supreme Court held that a county sheriff's department was governmentally immune from a plaintiff's civil contempt claim, through which the plaintiff sought compensatory damages, because the elements necessary to establish entitlement to relief are essentially those needed to establish a tort claim. *In re Bradley Estate*, ___ Mich ___; ___ NW2d ___ (2013).

Facts: In 2004, the petitioner sought from the Kent County Probate Court an order for the involuntary hospitalization of her brother, who the petitioner feared had become increasingly violent and suicidal. The probate court granted the petition and issued an order requiring the petitioner's brother to submit to psychiatric examination, imposing involuntary hospitalization, and requiring that a "peace officer" take the petitioner's brother into protective custody and transport him to a community health facility.

Shortly after the order was entered, the petitioner provided it to the Kent County Sheriff's Department for execution. The sheriff's department, however, did not execute the order, and nine days after the order was entered, the petitioner's brother committed suicide. The sheriff's department conducted an internal investigation and determined that its failure to execute the order resulted from simple neglect.

The petitioner sued the sheriff's department and the Kent County Sheriff, alleging they were grossly negligent in failing to timely execute the order and that their negligence was the proximate cause of her brother's death. The case was dismissed on governmental immunity grounds. Rather than appeal, the petitioner filed a petition for civil contempt in the probate court against the sheriff's department. The petitioner claimed that the department's failure to execute the order constituted contempt and entitled her to indemnification damages under MCL 600.1721. The petitioner also sought damages under the wrongful death statute, MCL 600.2922.

The sheriff's department moved for summary disposition, arguing that governmental immunity barred the petition-

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er's claim, which essentially sought tort damages under the guise of a civil contempt petition. The probate court denied the motion, holding that governmental immunity did not apply to its inherent authority to punish contempt. On appeal, the circuit court reversed and held that the petitioner's claim sounded in tort because it sought damages under the wrongful death statute. The circuit court also noted that the probate court's inherent authority to punish contempt related only to the imposition of fines and imprisonment, not to awarding tort damages, such as those sought by the petitioner.

The court of appeals reversed the circuit court and held that the determination of whether a claim is based on tort does not turn on the damages sought, but the nature of the claim itself and whether the claim is separate and distinct from one sounding in tort. The court concluded that a petition for civil contempt is not a tort action that may be barred by governmental immunity simply because tort-like damages are recoverable.

Holding: The Michigan Supreme Court reversed and remanded. The court explained that whether the civil contempt petition was barred by governmental immunity required it to determine first what "tort liability" is for purposes of governmental immunity under MCL 691.1407(1), which – absent a statutory exception – grants immunity to governmental entities for tort liability, and, second, whether the petition at issue sought to impose tort liability, so as to invoke governmental immunity.

Looking to the historical classification of legal torts in common law, the court concluded that "tort liability" means "all legal responsibility arising from a non-contractual civil wrong for which a remedy may be obtained in the form of compensatory damages."

The court then noted that the civil contempt statutes at issue allow for the imposition of fines, imprisonment, and indemnification damages for a contemnor's misconduct that arises from the

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neglect or violation of a duty. The court determined that the statutory language contains all the elements of a tort claim and imposes compensatory damages for noncontractual civil wrongs. Under this framework, the civil contempt statutes contemplate "what is, in essence, a tort suit for money damages."

Because the civil contempt statutes specifically provide for the imposition of tort liability, the court then turned to whether the particular petition sought to impose tort liability. The petition alleged that the sheriff's department negligently failed to execute the order and sought indemnification damages as a result. The court concluded that, as stated, the petition specifically sought to impose tort liability against the sheriff's department and, consequently, was barred by governmental immunity. The court was clear that, had the petition only sought the imposition of a fine or imprisonment, as opposed to tort damages, it may have avoided governmental immunity and survived summary disposition.

Significance: This decision establishes that "tort liability" for governmental immunity purposes casts a wide net and includes all claims that seek to impose "legal responsibility arising from noncontractual civil wrongs."

Michigan Defense Quarterly Publication Schedule

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

For information on article requirements, please contact:

Lee Khachaturian
dkhachaturian@dickinsonwright.com, or
Jenny Zavadil
jenny.zavadil@bowmanandbrooke.com

MDTC Golf Outing 2013

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Linda Green, Donan Engineering & Wonda Swenson, ProAssurance Casualty Company

Jackie Brazen & Daniel Klimak, Sherlock Investigations, Inc.

Winning Foursome: Josh Bauer, Keith Sterley, Mark Hypnar and Jim Gross

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By: Edward Perdue, *Dickinson Wright PLLC*
eperdue@dickinson-wright.com

DRI Report

Ed Perdue is a member of Dickinson Wright PLLC and practices out of its Grand Rapids office. He specializes in complex commercial litigation and assumed the position of DRI representative in October, 2011. He can be reached at (616) 336-1038 or at eperdue@dickinsonwright.com.

I am writing as MDTC's state representative to the Defense Research Institute (DRI), the MDTC's sister national defense counsel organization. DRI puts on quite a few seminars and annual meetings each year in exciting and fun venues that offer its members an opportunity to meet other practitioners in their field on a face to face basis. The following is a short synopsis of some of the many upcoming DRI events:

November 7, 2013: Boot Camp for New Health, Life and Disability Lawyers (Chicago)

The DRI Life, Health and Disability Committee is once again sponsoring a program for lawyers who are new to the practice. The program will be taught by highly experienced attorneys and will be aimed at providing a basic understanding of the concepts applicable to life, health and disability litigation. Rave reviews followed the inaugural program in 2011. Young lawyers and older lawyers who are new to the practice or who wish to brush up on their skills are encouraged to attend. To encourage the classroom atmosphere, registration will be limited to 50 persons.

December 12, 2013: Professional Liability (New York, NY)

DRI's Professional Liability Seminar will give you the know-how to provide best practices representation to your clients in 2014 and beyond. This seminar is dedicated to addressing the educational needs of attorneys and insurers who represent the interests of all professionals, including accountants, attorneys, officers, building professionals, and insurance producers. Learn about the emerging issues shaping the professional liability landscape, along with the particular issues facing various professional liability practice lines. DRI invites you to come, network, and develop relationships with professional liability claims personnel, experts, and defense counsel from across the country.

December 12, 2013: Insurance Coverage and Practice Symposium (New York, NY)

DRI's Insurance Coverage and Practice Symposium is the premier professional educational event on the subject of insurance coverage and claims. This year's faculty is comprised of insurance industry leaders and nationally known attorneys, who will provide insightful education and practice tips on some of the most important insurance coverage and claims issues facing coverage attorneys and the insurance industry today. The symposium also provides an excellent opportunity for networking in New York City during the holidays with some of the best practitioners and professionals in the insurance coverage and claims arena.

For more details on these and other upcoming DRI events, please go to http://www.dri.org/Events. As always, feel free to contact me if you have any questions about DRI, or if I can be of any assistance: eperdue@dickinsonwright.com, 616-336-1038.

MDTC Schedule of Events 2014

2014

January 24	Future Planning – Grand Rapids
January 25	Board Meeting – Grand Rapids
March 27	Board Meeting – Okemos
May 8 & 9	DRI Central Regional Meeting – Ohio
May 15 & 16	Annual Meeting – The Atheneum Hotel, Greektown
October 2	Meet the Judges – Hotel Baronette, Novi
November 6	Past Presidents Dinner – Marriott, Troy
November 7	Winter Meeting – Marriott, Troy

MDTC LEADER CONTACT INFORMATION

Officers

Raymond Morganti
President
Siemion Huckabay, P.C
One Towne Square Ste 1400
P.O. Box 5068
Southfield, MI 48076
248-357-1400 • 248-357-3343
rmorganti@siemion-huckabay.com

Mark A. Gilchrist
Vice President
Smith Haughey Rice & Roegge
100 Monroe Center NW
Grand Rapids, MI 49503
616-774-8000 • 616-774-2461
mgilchrist@shrr.com

D. Lee Khachaturian
Treasurer
Dickinson Wright, PLLC
500 Woodward Ave Ste 4000
Detroit, MI 48226
313-223-3128 • 313-223-3598
dkhachaturian@dickinsonwright.com

Hilary A. Ballentine
Secretary
Plunkett Cooney
38505 Woodward Ave
Bloomfield Hills, MI 48304
313-983-4419 • 313-983-4350
hballentine@plunkettcooney.com

Timothy A. Diemer
Immediate Past President
Jacobs & Diemer, P.C.
500 Griswold St., Ste 2825
Detroit, MI 48226
313-965-1900 • 313-965-1919
Tim.Diemer@jacobsdiemer.com

Board

Angela Emmerling Boufford boufford@butzel.com 248-258-2504 • 248-258-1439	Butzel Long PC 41000 Woodward Ave. Bloomfield, MI 48304
Barbara Eckert Buchanan beb@kellerthoma.com 313-965-7610 • 313-965-4480	Keller Thoma, P.C. 440 East Congress, Fifth Floor Detroit, MI 48226
Lawrence G. Campbell lcampbell@dickinsonwright.com 313-223-3703 • 313-223-3598	Dickinson Wright P.L.L.C. 500 Woodward Ave., Ste 4000 Detroit, MI 48226
Jeffrey C. Collison jcc@saginaw-law.com 989-799-3033 • 989-799-2969	Collison & Collison PC 5811 Colony Dr North Saginaw, MI 48638
Michael I Conlon MIC@runningwise.com 231-946-2700 • 231-946-0857	Running, Wise & Ford, PLC 326 E State St, PO Box 686 Traverse City, MI 49684
Terence P. Durkin terence.durkin@kitch.com 313-965-6971 •313-965-7403	Kitch, Drutchas, Wagner, Valitutti & Sherbrook 1 Woodward Ave., Ste. 2400 Detroit, MI 48226
Scott S. Holmes sholmes@foleymansfield.com 248-721-8155 • 248-721-4201	Foley & Mansfield PLLP 130 East Nine Mile Road Ferndale, MI 48220
Richard J. Joppich richard.joppich@kitch.com 517-381-7182 • 517-381-4427	The Kitch Firm 2379 Woodlake Dr., Suite 400 Okemos, MI 48864-6032
John Mucha III, Chair jmucha@dmms.com 248-642-3700 • 248-642-7791	Dawda, Mann, Mulcahy & Sadler, PLC 39533 Woodward Ave., Suite 200 Bloomfield Hills, MI 48304
Matthew T. Nelson mnelson@wnj.com 616-752-2539 • 616-222-2539	Warner Norcross & Judd LLP 900 Fifth Third Center, 111 Lyon Street NW Grand Rapids, MI 49503
Joshua Richardson jrichardson@fosterswift.com 517-371-8303 • 517-371-8200	Foster Swift Collins & Smith PC 313 South Washington Square Lansing, MI 48933
Robert Paul Vance pvance@ccglawyers.com 810-232-3141 • 810-232-1079	Cline, Cline & Griffin, PC 503 S. Saginaw St., Ste. 1000 Flint, MI 48503

MDTC LEADER CONTACT INFORMATION

Section Chairs

Appellate Practice:
Beth A. Wittmann, Co-Chair
beth.wittmann@kitch.com
313-965-7405 • 313-965-7403
Kitch Drutchas Wagner Valitutti & Sherbrook, PC
One Woodward Ave, Ste. 2400
Detroit, MI 48226

Commercial Litigation: Matthew Allen
allen@millercanfield.com
248-267-3290 • 248-879-2001
Miller Canfield
840 W. Long Lake Rd Ste 200
Troy, MI 48098

General Liability: Tom Aycock
taycock@shrr.com
616-458-8391 • 616-774-2461
Smith, Haughey, Rice & Roegge
100 Monroe Center NW
Grand Rapids, MI 49503

Insurance: Darwin L. Burke, Jr.
dburke@rvnvlaw.com
586-469-8660 • 586-463-6997
Ruggirello Velardo Novara & Ver Beek, PC
65 Southbound Gratiot Avenue
Mount Clemens, MI 48043

Labor & Employment:
Gouri G. Sashital
gsr@kellerthoma.com
313-965-8924 • 313-965-1531
Keller Thoma PC
440 East Congress, 5th Floor
Detroit, MI 48226

Law Practice Management:
Thaddeus E. Morgan
tmorgan@fraserlawfirm.com
517-482-5800 • 517-482-0887
Fraser, Trebilcock, Davis & Dunlap PC
124 W. Allegan, Ste 1000
Lansing, MI 48933

Municipal & Governmental Liability:
Ridley S. Nimmo
rnimmo@plunkettcooney.com
810-342-7010 • 810-232-3159
Plunkett Cooney
111 E. Court St. Ste 1B
Flint, MI 48502

Professional Liability & Health Care:
Michael R. Janes
mrj@martinbacon.com
586-979-6500 • 586-468-7016
Martin, Bacon & Martin, P.C.
44 First Street
Mount Clemens, MI 48043

Trial Practice: David M. Ottenwess
dottenwess@ottenwesslaw.com
313-965-2121 x 211 • 313-965-7680
Ottenwess Allman & Taweel PLC
535 Griswold St., Ste 850
Detroit, MI 48226

Young Lawyers: Robert E. Murkowski
murkowski@millercanfield.com
313-496-8423 • 313-496-8451
Miller Canfield
150 West Jefferson, Suite 2500
Detroit, MI 48226

Regional Chairs

Flint: Bennet Bush
Garan Lucow Miller PC
8332 Office Park Drive
Grand Blanc, MI 48439
810-695-3700 • 810-695-6488
bbush@garanlucow.com

Grand Rapids: Connor Dugan
Varnum LLP
333 Bridge St NW, P.O. Box 352
Grand Rapids, MI 49501
616-336-6892 • Fax: 616-336-7000
cbdugan@varnumlaw.com

Kalamazoo: Tyren R. Cudney
Lennon, Miller, O'Connor & Bartosiewicz PLC
900 Comerica Bldg.
Kalamazoo, MI 49007
269-381-8844 • 269-381-8822
cudney@lennonmiller.com

Lansing: Paul Tower
Garan Lucow Miller PC
504 S. Creyts Rd., Ste. A
Lansing, MI 48917
517-327-0300
ptower@garanlucow.com

Marquette: Open

Saginaw / Bay City: David Carbajal
O'Neill Wallace & Doyle PC
300 Saint Andrews Rd Ste 302, PO Box 1966
Saginaw, MI 48605
989-790-0960 • 989-790-6902
dcarbajal@owdpc.com

Southeast Michigan: Nicole DiNardo Lough
Faurecia North American
900 N. Squirrel Road Suite 175
Auburn Hills, MI 48326
248-484-3351
nicole.lough@faurecia.com

Traverse City / Petoskey: John Patrick Deegan
Plunkett Cooney
303 Howard Street, Petosky, MI 49770
231-348-6435 • 231-347-2949
jdeegan@plunkettcooney.com

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