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QUARTERLY

Volume 30, No. 3 February 2014

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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

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MICHIGAN DEFENSE
QUARTERLY

Vol. 30 No. 3 • February 2014

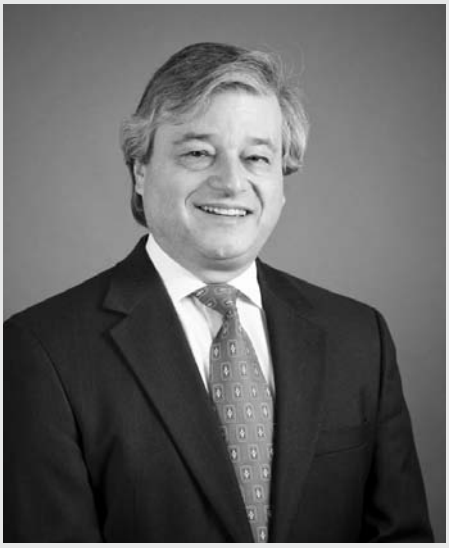
Cite this publication as 30-3 Mich Defense Quarterly.

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.*

A Busy Period for the Legislature



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From mid-November through early December we have witnessed a flurry of Michigan legislative activity in areas of significance to the members of MDTC. The leadership of MDTC has devoted a considerable amount of effort evaluating the legislative proposals, as well as expressing concerns and comments to legislators.

SB 652

SB 652, which vests Court of Claims jurisdiction exclusively in the Court of Appeals, was passed by the Legislature and was enacted into law as PA 164 on November 12, 2013, when it was signed by the Governor. The law also: (1) transfers all currently pending Court of Claims cases to the new Court of Claims, and (2) expands Court of Claims jurisdiction to demands for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers.

Under the new statute, the Court of Claims consists of 4 Court of Appeals judges from at least 2 Court of Appeals districts. The judges are assigned by the Supreme Court. On November 13, the Supreme Court announced that Court of Appeals Judges Pat Donofrio, Amy Ronayne Krause, Deborah Servitto and Michael Talbot would serve on the new Court of Claims. Judge Talbot has been appointed chief judge.

HB 5156

The enactment of SB 652 prompted concerns that the statutory language might not have sufficiently protected the jury trial as it existed prior to November 12, 2013. This concern led to HB 5156, in an effort to make it clear that the right of jury trial, as it previously existed, was preserved.

Representatives of MDTC, Michigan Association for Justice (MAJ) and the Negligence Section of the State Bar met with House Republican staff in order to express concerns regarding language in HB 5156, which failed to address an ambiguity created by PA 164. In particular, PA 164 defined an action against the state as including actions against state employees. Concerns were therefore expressed regarding the right to jury trial in cases filed against individual state employees. Although HB 5156 contained language preserving the right to jury trial as it existed prior to November 12, 2013, it did not specifically address the right to jury trial in cases filed against individual state employees.

On December 3, 2013, the House Government Operations committee held a public hearing regarding HB 5156. I was present at the hearing, along with Jim Bradley from the Negligence Section of the State Bar, Steve Goethel and Chad Engelhardt from the MAJ, Peter Cunningham from the State Bar, Bruce Timmons, and Graham Crabtree for the Appellate Practice Section of the State Bar. Just prior to the hearing, a substitute bill was proposed which did not contain language specifically preserving the right to jury trial regarding individual state employees. The committee heard testimony from the MAJ representatives, and the representatives of the Negligence Section, regarding the danger that the bill could be misconstrued contrary to the legislative intent. House members agreed to consider an amendment on the House floor clarifying that the right to jury trial was preserved in actions against state employees.

The leadership of MDTC has devoted a considerable amount of effort evaluating the legislative proposals, as well as expressing concerns and comments to legislators.

On December 4, an agreement was reached with the House regarding an amended bill, satisfactory to the Negligence Section, the MAJ and MDTC. In a very welcome demonstration of bipartisan cooperation, the amended bill was passed by the House unanimously on December 4. On December 11, the bill was passed by the Senate unanimously, without further amendment.

SB 661

A portion of this bill has triggered strong opposition by various individuals and organizations, to the extent that it codifies a loophole in the Michigan Campaign Finance Act (MCFA), permitting secret spending on election campaigns. MDTC is particularly concerned about this loophole as applied to judicial election campaigns.

In April of 2012, the Michigan Judicial Selection Task Force was unanimous in calling for an amendment to the MCFA, MCL 169.201, et seq., to require the disclosure of the sources of all judicial campaign spending.[1] 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)."[2] 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.[3]

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."[4] In particular, the State Bar sought to overturn the prevailing interpretation of the MCFA, under which expenditures for so-called "issue" ads (i.e., ads which do not expressly ask voters to "vote for," "vote against," "support" or "defeat" a candidate) are not subject to disclosure under the Act, because they do not expressly advocate the election or defeat of a candidate.[5] 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.

The Executive Committee of MDTC reviewed and discussed the State Bar's request, and decided to support this request. As I stated in my last President's Corner, 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 the potential unconstitutionality of a law that limited campaign expenditures,[6] the Court subsequently rejected the magic words requirement as a constitutional standard. The Court "rejected the notion that the First Amendment requires Congress to treat so-called issue advocacy differently from express advocacy."[7] The Court also found the magic words test 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. Judicial decisions must be based solely upon the facts of the case before the court and the applicable law. In other words, issue advocacy is often nothing more than thinly veiled

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.

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 no bearing upon the First Amendment implications 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." Proponents of this legislation argue that this legislation is necessary to prevent the chilling of First Amendment rights, but Justice Scalia effectively rebutted this claim when he stated:

> There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously . . . and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.[14]

On September 26, 2013, MDTC submitted a formal position statement, joining in the State Bar's request to the Secretary of State.

On November 14, 2013, the Secretary of State declined to issue the interpretive ruling requested by the State Bar, but proposed a new rule that would require reporting on issue ads in the 30 days leading up to a primary election or 60 days before a general election. Unfortunately, on that same day, the Senate Committee on Local Government and Elections responded to the Secretary of State's proposal by adding subsection 6(2)(j) to a bill (SB 661) that would amend the MCFA. This subsection of the bill provides that the term "expenditure" does not include "expenditure for a communication if the communication does not in express terms advocate the election or defeat of a clearly identified candidate so as to restrict the application of this act to communications containing express words of advocacy of election or defeat, such as 'vote for', 'elect', 'support', 'cast your ballot for', 'smith for governor', 'vote against', 'defeat', or 'reject'." In other words, the bill would codify the outmoded magic words test. SB 661 was passed by the Senate on November 14, 2013, the same day it was reported favorably by the committee.

In the House of Representatives, the bill was referred to the Committee on Elections and Ethics.

On December 6, 2013, MDTC submitted a formal position statement opposing subsection 6(2)(j) of SB 661, as it applies to judicial campaign expenditures. It is the position of MDTC that all payments for communications referring to judicial candidates should be considered "expenditures" for purposes of the MCFA, and thus reportable. MDTC's position statement joins similar written objections submitted by the Negligence Section of the State Bar, MAJ, the Michigan Campaign Finance Network and others. A copy of MDTC's statement is available on the MDTC website.

Steve Galbraith (on behalf of the Negligence Section and the Oakland County Bar Association), Rich Robinson of the Michigan Campaign Finance Network, and others testified in opposition to the bill at a House Committee hearing held on December 3. I appeared on behalf of MDTC at a further hearing conducted on December 10, and joined in the opposition to subsection 6(2)(j) of SB 661 for the reasons discussed above. After an amendment which had no bearing upon subsection 6(2)(j), the committee voted 5-4 to report the bill favorably.

SB 661 was passed by the full House on December 11. On December 12, the amended bill was passed by the Senate. Unfortunately, contrary to his past pledges for full disclosure and openness, Governor Snyder signed the bill on December 27.

MDTC continues to support the Recommendations of the Michigan Judicial Selection Task Force, as well as the principles underlying the State Bar's earlier request for a declaratory ruling by the Secretary of State. It continues to be the position of MDTC that all payments for communications referring to judicial candidates should be considered "expenditures" for purposes of the MCFA, and thus reportable.

It continues to be the position of MDTC that all payments for communications referring to judicial candidates should be considered "expenditures" for purposes of the MCFA, and thus reportable.

Endnotes

1. The full report of the Task Force is available from the State Bar website. http://www.michbar.org/generalinfo/pdfs/4-27-13JSTF.pdf.
2. Report and Recommendations of the Michigan Judicial Selection Task Force (April 2012), p. 4.
3. *Id*.
4. The State Bar request is available at http://www.michbar.org/public_mediaresources/pdfs/Letter%20on%20Campaign%20Finance.pdf.
5. 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.
6. *Buckley v Valeo*, 424 US 1, 96 S Ct 612, 46 L Ed 2d 659 (1976).
7. *McConnell v FEC*, 540 US 93, 194, 124 S Ct 619, 157 L Ed 2d 491 (2003).
8. *Id*. at 193.
9. *Id*.
10. See, e.g., *FEC v Wis Right to Life, Inc*, 551 US 449, 470, 127 S Ct 2652, 168 L Ed 2d 329 (2007).
11. 558 US 310, 130 S Ct 876, 175 L Ed 2d 753 (2010).
12. *Citizens United v FEC*, 558 US at 369.
13. *Id*.
14. *Doe v Reed*, 130 S Ct 2811, 2836-2837, 177 L Ed 2d 493 (2010) (Scalia, J., concurring).

The Use of Social Media in Litigation:
Helping Your Case with Effective Monitoring and Capturing Techniques

By: Lyn Mettler, *Step Ahead Social Research*

Executive Summary

Monitoring social media can be a very effective means of tracking an individual's activity. Social media posts that refute a plaintiff's claims and alleged damages can potentially save defendants from significant judgments. This article explores relevant rulings related to social media, the benefits of social media monitoring, and the social media monitoring process utilized by firms that specialize in efficient and cost-effective online investigations.

This article originally appeared in a similar form in Volume 10 of the Indiana Civil Litigation Review, a publication of the Defense Trial Counsel of Indiana.

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With more than 1 billion active users on Facebook,[1] Twitter users sending 400 million tweets each day,[2] 100 hours of video uploaded to YouTube every minute,[3] and 55 million pictures uploaded to Instagram daily,[4] the public's use of social media tools has become a part of day-to-day life.

Often without a second thought, individuals upload pictures of their activities, record and share videos of life events, "check in" on Facebook or Foursquare, outlining their geographic location over time, and post blogs, comments, product reviews, tweets and Facebook posts about their health, well-being, and innermost thoughts and opinions.

Judges are increasingly ruling that such activity, even when shared privately, is admissible because social media outlets are by nature designed for "social" sharing and are similar to private diaries or letters.

This is good news for defense attorneys, who, with the right tools, can mine such data for information about an individual that may be relevant to a case without having to physically track their whereabouts and activities. The challenge, however, is understanding what data is accessible, where to find it, how to collect it in an efficient manner and the best way to report it that is both verifiable and easy for a judge to review.

Relevant Rulings in Cases Involving Social Media

Over the last few years, judges have begun to set a precedent for the admissibility of social media data in court proceedings. However, many are setting limits on the scope of the data to be collected and requiring there be a "good faith belief" that private accounts contain something relevant.

McMillen v Hummingbird Speedway[5]

In a case in Pennsylvania state court, in which the plaintiff had filed suit attempting to recover damages after he was rear-ended at a stock car race, the court granted a motion to compel plaintiff's provisions of his Facebook and MySpace username and password. The defense met the "good faith belief" test by finding relevant posts and photos on the public portion of his Facebook page that potentially refuted his claim and requested access to the private portion for further review.

The court held as follows: "The Court cannot say, therefore, that the community [Facebook] seeks to sedulously foster friendships by recognizing friend-to-friend communications as confidential or privileged. No such privilege currently exists." Additionally, Judge Foradora noted, "whatever relational harm may be realized by social network computer site users is undoubtedly outweighed by the benefit of correctly disposing of litigation. As a general matter, a user knows that even if he attempts to communicate privately, his posts may be shared with strangers as a result

of his friends' selected privacy settings. The Court thus sees little or no detriment to allowing that other strangers, i.e., litigants, may become privy to those communications through discovery."

Winchell v Lopiccolo, 2012[6]

By contrast, in a case in state court in New York, the court found the defense did not meet the "good faith belief" test and denied a request for access to the plaintiff's private Facebook profile. The plaintiff claimed "impaired cognitive functioning" after a motor accident. The defense requested access to her private Facebook profile, contending "the layout of her Facebook page would demonstrate cognitive function inasmuch as the layout of a Facebook page calls for creativity of some sort as well as thought in providing captions for photographs, narrative posts written by the plaintiff as well as her ability to write and comment. Writings on the page would be direct and circumstantial evidence of her claims. Moreover, lucid and logical writing or a lack thereof would be useful in the defense and/or assessment of this case."

The plaintiff argued that it was "unreasonable to use the contents of her Facebook page as an indicator of her cognitive functioning," and that there was no precedent for the "unfettered access" the defense was requesting.

The court agreed, stating "[t]he party demanding access to social networking accounts must show that the method of discovery will lead to 'the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information that bears on the claims'" (citations omitted). "Defendants cannot point to anything concrete. Instead, they hope to divine the extent of Plaintiff's cognitive injuries from reading every bit of information on her Facebook page."

Romano v Steelcase, 2010[7]

In another case out of New York state court, the court granted a motion to compel the plaintiff to provide usernames and passwords for her profiles on Facebook and MySpace. The plaintiff had sued a furniture company, claiming a defective chair caused her to fall and injure herself.

The court held:

> Users would logically lack a legitimate expectation of privacy in materials intended for publication or public posting. They would lose a legitimate expectation of privacy in an e-mail that had already reached its recipient; at this moment, the e-mailer would be analogous to a letter-writer whose expectation of privacy ordinarily terminates upon delivery of the letter.
>
> Indeed, as neither Facebook nor MySpace guarantee complete privacy, Plaintiff has no legitimate reasonable expectation of privacy… Since Plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy.

Judges are increasingly ruling that such activity, even when shared privately, is admissible because social media outlets are by nature designed for "social" sharing and are similar to private diaries or letters.

Largent v Reed v Pena[8]

In this case, which involved personal injury claims stemming from an accident between a car and motorcycle, the defense moved to compel the release of the plaintiff's Facebook username and password, claiming that at a time after the accident the profile was set to public. When viewed publicly, they found relevant photos and posts that could refute her claims of serious and severe injury.

The court held that the plaintiff's Facebook account was not "privileged" and noted:

> There is no reasonable expectation of privacy in material posted on Facebook. Almost all information on Facebook is shared with third parties, and there is no reasonable privacy expectation in such information. When a user communicates on Facebook, her posts may be shared with strangers. And making a Facebook page "private" does not shield it from discovery . . . . By definition, there can be little privacy on a social networking website . . . . Only the uninitiated or foolish could believe that Facebook is an online lockbox of secrets.

The Benefits of Social Media Monitoring

While it is clear that social media is increasingly admissible, attorneys must do their due diligence in demonstrating the reasons they believe it is relevant to provide access to a private profile. However, techniques such as attempting to friend the person on a given social network to glean privately-posted information are not permitted, so other methods must be found. As discussed below, this includes completing an exhaustive search of the person's past activities online, and utilizing tools that may find public postings by the individual, even if they were later deleted.

As demonstrated in the case summaries above, monitoring social media activity helps litigators find relevant information to their case. There are a variety of ways that such data may prove beneficial, including relevancy to liability, damages, credibility and more. Moreover, critical information may be available without

having to physically track an individual, saving the time and costs of hiring a personal investigator and risking discovery by plaintiffs that they are being monitored.

Online social media monitoring can be accomplished without the plaintiff being aware, so there is less likelihood of a change in their normal behaviors, and can provide information that is not just relevant in court proceedings, but that can be used in depositions, settlement negotiations, etc.

Social data may speak to liability when it indicates a plaintiff is blaming other causes for his injuries, demonstrates a plaintiff had a pre-existing injury or documents ongoing health problems outside of the alleged incident. As an example, in a case involving claims of personal injury due to a specific product, a woman was featured in a blog post that discussed her injuries as caused by a pre-existing disease and not by the product at issue.

Social media data may also uncover information related to damages. Accounts and sites such as Twitter, Instagram and Facebook that document a consistent written and photographic history of an active lifestyle can contradict claims of the extent and effects of the injury. If a plaintiff is alleging personal injury and a photo on their account — or a relative's or friend's — demonstrates physical activity or frequent travel, it can provide fodder for refuting such claims. Those active on social media commonly post pictures and comments about vacations and exercise; if the individual is being untruthful about liability or damages issues and maintains social media accounts, the chances of discovering helpful, relevant information are good.

Research may also undermine a plaintiff's credibility by uncovering he or she is a participant in serial suits or has a criminal history. There are even documented incidents where a plaintiff clearly states on social media that he or she is simply going after money. In some cases, especially in class action suits involving a large number of plaintiffs, an individual may have died during the case unbeknownst to the defense.

Even if postings are not judged admissible in court, they can prove useful fodder for depositions, allowing attorneys to question plaintiffs about travel, health, activities and other statements they have made on social media. Information may also prove useful in negotiating favorable settlements on behalf of clients.

Even if postings are not judged admissible in court, they can prove useful fodder for depositions, allowing attorneys to question plaintiffs about travel, health, activities and other statements they have made on social media. Information may also prove useful in negotiating favorable settlements on behalf of clients.

How to Efficiently and Effectively Monitor Social Media

While the need for monitoring social media is clear, how to effectively find and document the information is the challenge. With such information gathering an emerging need as social media data becomes increasingly admissible, it is critical that litigators find ways to uncover the most relevant information but in an efficient manner that does not drain hours of their staff's time and deplete their client's budget.

Many firms are engaging their paralegals in this work as a first attempt at the process; however, paralegals' time is likely better spent on activities where their skill set is more appropriate rather than attempting to become social media sleuths.

Paralegals, for example, may spend hours trying to individually search profiles on Facebook or Twitter, only to return day after day or week after week for updated information. Such a process is very time consuming, inefficient and distracting from their other work. Additionally, copying and pasting posts and photos into a separate document or taking screen captures does not allow attorneys to prove when, where and on whose account items were posted.

A new litigation support service is emerging to help attorneys both research and document such information, using tools that can collect surprising information in an automated and time-saving manner. Just as firms turn to medical records collection agencies for support or private investigators to monitor a person's behavior, it is more cost effective for clients and provides better information to outsource social media collection work.

Tools used by a handful of new social media monitoring services for attorneys provide past and present public social media information, blog postings, forum postings, customer reviews (on sites like Amazon, TripAdvisor and more) and other online data even if it may have been deleted. By inputting a person's name and personal information into software tools designed for such research, all related information is collected as it is posted without requiring constant searches. Additionally, once the information is posted publicly, it is forever captured by these tools for later reference, thereby ensuring later deleted posts are not lost.

Finding posts that a plaintiff believes has been removed can be a surprising, compelling and helpful component of the discovery process. Though many plaintiffs may be advised to stop using their social media accounts, in a surpris-

ing number of cases that simply does not happen. People are becoming increasingly reliant upon social media and individuals often continue to post items that are relevant to the case. If, however, they do stop using their accounts, finding past data before they were advised to stop posting is often the most helpful.

Social media monitoring firms can also track accounts, such as LinkedIn, Twitter and Facebook, that are private to the extent the court has required plaintiff to provide a username and password. All data is then collected and can be sorted into reports in whatever frequency is needed.

The Social Media Monitoring Process

Before beginning the social media monitoring process, it is imperative to discover as much information about a given plaintiff as possible. Background checks to establish the individual's current and past cities of residence, full name and aliases, and family members should be the first step. This can be completed by the law firm or by the outsourced monitoring company.

Secondly, an exhaustive search of the plaintiff's past activity should follow along with a thorough review of all items found. It is during this process that social media accounts for this individual, if they exist, will be discovered and can be noted for future monitoring and for a full review of historic data.

In reviewing the information, keep in mind that inevitably, information about individuals with the same or similar names who are not the plaintiff will arise and need to be ruled out based on the background information above.

If an individual has a common name, it may be difficult to discover their exact accounts without outside help and may require a judge to compel them to provide at least the links to their accounts, if not their private access. While this will alert them to the monitoring, with tools available from some monitoring firms, finding past data that was publicly posted is a possibility and may still yield helpful results.

Also, during this stage, accounts for family members or close associates may be discovered and can also be noted for continued monitoring. While an individual may have been advised to halt social media activity by their attorney, their friends and family likely may not consider such a pause for themselves. It is often through relatives' pages that pictures of the plaintiff engaging in activity may emerge that may be relevant to the claims.

A new litigation support service is emerging to help attorneys both research and document such information, using tools that can collect surprising information in an automated and time-saving manner.

This historic check of the plaintiff may also uncover arrest records, news articles, property records, marriage records, criminal charges, previous lawsuits, blog posts, forum posts, geographic tracking via tools like Facebook and Foursquare, and some public social media activity — all of which could potentially be relevant to the case.

Once this information has been reviewed and sorted for data pertaining to the correct individual and his or her family members, a comprehensive report of all current and past activity on targeted social media accounts — with or without usernames or passwords — can be gathered. With many plaintiffs, this can be an overwhelming amount of data, especially those who post multiple times daily, and this is where the paralegals or attorneys are advised to become engaged in the process. As the legal experts, they can review the information that has been captured for relevancy.

Outsourced monitoring firms generally provide a first report on the individual with all data from that point in time and historically as far back as possible. Reports can then be provided on a regular basis for review, such as weekly, monthly, bimonthly or before trial or deposition. The shorter the amount of time between reports allows for a smaller subset of information and less time required for the attorneys to review the data.

If data or photos need to be presented in court or at a deposition, social media monitoring firms can compile the information for the attorney into an easy-to-read report with key dates, posts and photos.

Monitoring firms can quickly and efficiently complete such projects. Keeping this work in-house, without the benefit of monitoring software, would require hours tracking the individual and the appropriate accounts and then copying and pasting the relevant data. Posts that were posted publicly and later removed will be missed; moreover, counsel will have to return day after day to check for updated information, making it a manual, rather than automated, process. Additionally, failure to consistently check sites could result in lost data where an individual posts something and later removes it before the site is re-visited.

Engaging a quality social media monitoring firm ensures the capture of all possible information that is publicly available as soon as it is posted. Additionally, reports from such systems are much easier to review than the messy formatting resulting from copying and pasting from Twitter, Facebook or other social media accounts.

Validation of Captured Data

A key benefit of utilizing companies and software systems designed to monitor and capture social media data is their ability to validate information captured. Many software systems used by social media monitoring companies provide valuable metadata, which, if needed, can be used to provide a timestamp, as well as unique tracking to verify that it was posted by a particular account.

Summary

In today's world of increasing online "sharing," with the right tools, social media monitoring can be a more effective means of tracking an individual's activity, both online and in the real world.

Social media posts that refute a plaintiff's claims (e.g., those that depict a person exercising when claiming they cannot perform everyday functions or demonstrate long-distance travel when alleging they are bed-ridden) can potentially save defendants from significant judgments.

By engaging firms that specialize in online investigations, litigators can discover such information in a way that efficiently uncovers the most relevant data and is cost-conscious for the client, rather than expending time and money on in-house staff who may not have access to the proper tools or be trained in the best techniques and practices.

Endnotes

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The SEC Whistleblower Program — What Employers Need to Know

By: Matthew P. Allen, *Miller, Canfield, Paddock and Stone*

Executive Summary

After Lehman Brothers, Bernie Madoff, and the mortgage-backed securities meltdown of 2008, Dodd-Frank and the public have charged the U.S. Securities & Exchange Commission ("SEC" or "Commission") with doing its part to help prevent another financial and economic catastrophe by regulating with more authority various securities products and industries. From money market funds, to private equity funds, to foreign private issuers, the SEC has stepped up its efforts to effectively examine, investigate, and charge securities violations that it views as endangering investors. However, it appears the Commission's budget has not kept up with the increased scope of its duties.[1] So the Commission must be effective and judicious with its resources, which has resulted in a reorganization of the SEC's divisions and reporting structure, enactment and implementation of new examination and investigation procedures and protocols, and increased cooperation with settling defendants and other state, federal, and international regulators and authorities.[2]

One of the primary tools developed for the SEC to carry out the increased scope of its duties, with the relatively modest budget provided to do so, is the creation by Congress of the "Securities Whistleblower Incentives and Protection" Section in the Dodd Frank Act ("Section 21F" or "the Whistleblower Act").[3] Section 21F directs the SEC to provide monetary awards to individuals who provide "voluntary," "original" information that leads to a successful enforcement action which results in a sanction over $1 million. Congress established the Investor Protection Fund to ensure enough money to pay whistleblowers without diminishing the amount of recovery for victims of securities fraud. The Commission established the Office of the Whistleblower to administer the whistleblower program. "It is [the Office of the Whistleblower's] mission to administer a vigorous whistleblower program that will help the Commission identify and halt frauds early and quickly to minimize investor losses."[4]

Equally important to Congress and the SEC is protecting whistleblowers from retaliation by their employers. Section 21F provides whistleblowers with a statutory cause of action and significant remedies for retaliation, which can include reinstatement, two times the back pay owed, and payment of their attorney fees. Moreover, Section 21F and its implementing regulations do not permit companies to use confidentiality or severance provisions in employment agreements to prevent whistleblowers from providing tips or information to the SEC, and permits whistleblower employees to secretly communicate with the SEC even if the employee is represented by corporate counsel. These laws and rules create new challenges for corporate counsel managing an internal or other investigation involving a whistleblower.

This Article provides an overview of the SEC's whistleblower rule, provides some whistleblower compliance tips for employers, and an overview of how courts are interpreting and enforcing the whistleblower provisions.

The SEC Whistleblower Program

The Whistleblower provisions of the 2010 Dodd-Frank legislation were enacted to empower the SEC to financially reward, and protect from retaliation, securities fraud whistleblowers. Congress legislated the parameters for the SEC whistleblower program, created an Office of the Whistleblower, and directed the SEC to issue final regulations implementing the whistleblower legislation no later than mid-2011.[5] In May 2011, the SEC issued its final whistleblower program and rules, which became effective on August 12, 2011 and are embodied in SEC Rule 21F.[6]

Former SEC Chairman Mary Shapiro remarked that the SEC's whistleblower program has already "proven to be a valuable tool in helping us ferret out financial

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fraud. . . . When insiders provide us with high-quality road maps of fraudulent wrongdoing, it reduces the length of time we spend investigating and saves the agency substantial resources."[7]

The SEC interim Commissioner after Chairman Shapiro left, Elisse Walter, commented in December 2012 that she was "bothered" by two issues with the whistleblower rules: (1) the impact of the program on internal corporate compliance processes; and (2) that culpable whistleblowers may receive an award as long as they are not criminally convicted.[8]

In 2013, President Obama nominated as SEC Chairman the former U.S. Attorney for the Southern District of New York, Mary Jo White, who has implemented an aggressive SEC enforcement agenda.[9] Unlike her predecessor, Chairman White sees the whistleblower rules augmenting, not inhibiting, corporate internal compliance programs:

> When our whistleblower program was being set up, many in the securities bar . . . worried that the program would undermine internal compliance efforts. It seems, however, that the program may be having the opposite effect. Today, we hear that companies are beefing up their internal compliance function and making it clear to their own employees that internal reporting will be treated seriously and fairly. And most in-house whistleblowers that come to us went the internal route first.[10]

Chairman White's comments indicate that more whistleblower awards will be made, and that the whistleblower program will be used to "dramatically broaden [the Commission's] presence."[11]

This Section provides the following information about the SEC's whistleblower program: (A) summary of some of the more relevant provisions of Rule 21F; (B) statistics from the SEC's whistleblower reports for 2012 and 2013, the first two full operational years of the whistleblower program; (C) whistleblower compliance suggestions and issues for companies and counsel to consider; and (D) an analysis of important court decisions interpreting the Whistleblower Act provisions and SEC implementing rules.

A. Summary of Salient Provisions of Rule 21F[12]

Rule 21F-3: SEC will pay an award to one or more whistleblowers who:

1. "Voluntarily provide" the SEC
2. "original information"

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3. "that leads to the successful enforcement" by the SEC in court or in an administrative action
4. where SEC "obtains monetary sanctions totaling more than" $1million ("1M")

Whistleblowers can also receive an award in a "related action" (such as DOJ, CFTC, FINRA, IRS parallel proceedings) if the whistleblower satisfies Rule 21F.

Rule 21F-4: Definitions of Key Terms

- **Voluntary submission of information:** provide information "before a request, inquiry, or demand that relates to the subject matter of your submission is directed to you or anyone representing you" by the SEC, PCAOB or any other SRO, or any federal government branch or agency. It will not be voluntary even if your response is not compelled by a subpoena; any inquiry counts. But it will be voluntary if you provide original information to another agency prior to the SEC request or inquiry. It will not be voluntary if your submission is required as part of a pre-existing duty.
- **Original information:** information that is "derived from your independent knowledge or independent analysis," not already known to the SEC from another source (unless you are the original source of that information), not derived from a public allegation, reports, news story, etc., and provided after the 7/21/10 date of the Dodd Frank enactment.
- **"Independent analysis"** can mean your evaluation of public information which reveals information not generally known or available to the public. Company officers, directors, compliance, accountants, auditors, and lawyers cannot be whistleblowers UNLESS 120 days elapses after they report a violation to the responsible person or committee and nothing happens or no action is taken.
- **When internal reporting still counts as original information:** If you provide original information through your company's internal compliance reporting procedures, you can submit the same information to the SEC within 120 days of your internal report and still receive credit as the source of the original information, with the date you internally reported counting as the date you reported to the SEC, even if the Company voluntary discloses your information to the SEC before you within that 120 day period.

- **"Leads to successful enforcement:"** when you provide "sufficiently specific, credible, and timely" original information that "significantly contributes" to a "successful judicial or administrative action"
- **Monetary sanctions of more than $1M:** SEC will count two or more administrative or judicial proceedings together towards the $1M number, even if their individual penalties are less than $1M, if the proceedings "arise out of the same nucleus of operative facts"

Rule 21F-5: Amount of Award

- SEC has discretion to award an amount "at least 10% and no more than 30% of the monetary sanctions" the SEC "and other authorities **are able to collect**"
- Amounts paid to multiple whistleblowers in the same action will not in the aggregate be less than 10% or more than 30% of the amount the SEC or other authorities "**collect**"

Rule 21F-6: Criteria for Determining Amount of Award

Factors that increase the amount of the award

- Significance of the information
- Assistance provided by the whistleblower
- Law enforcement interest in case

Participation in internal compliance systems

- Factors that decrease the amount of the award
- Culpability of whistleblower in infraction
- Unreasonable reporting delays
- **Interference with internal compliance and reporting systems**

Rule 21F-8: Eligibility

You are ineligible if "you are **convicted of a criminal violation** that is related to the Commission action for which you otherwise could receive an award."

Rule 21F-14: Procedures Applicable to Payment of Awards

- You are only entitled to an award amount "to the extent that a monetary sanction is collected in the Commission action or in a related action upon which the award is based."

Company officers, directors, compliance, accountants, auditors, and lawyers cannot be whistleblowers UNLESS 120 days elapses after they report a violation to the responsible person or committee and nothing happens or no action is taken.

Rule 21F-15: No Amnesty

- Your status as a whistleblower does not preclude enforcement action against you by the SEC for your own conduct in connection with the securities violations.
- But if the SEC brings such an action against you, it will "take your cooperation into consideration" in accordance with its Statement Concerning Cooperation by Individuals.
- Only a criminal conviction will make the whistleblower ineligible for an award.

Rule 21F-16: Awards to Whistleblowers Who Engage in Culpable Conduct

- SEC will not count towards the $1M penalty threshold amount any sanctions for violations that are "based substantially on conduct that the whistleblower directed, planned, or initiated."
- If the whistleblower is entitled to an award, the amount of the sanction upon which the award is calculated will be reduced by any amount the whistleblower is required to pay for his or its own culpable conduct.

Rule 21F-17: Staff Communications with Individuals Employed by Companies

- "No person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, **including enforcing, or threatening to enforce, a confidentiality agreement with respect to such communications.**"
- The SEC staff is authorized to communicate directly with an entity's director, officer, member, agent or employee that has initiated communication with the SEC, even if that entity has counsel, without the SEC seeking the consent of the entity's counsel.

Section 78u-6(h):[13] Protections and Remedies for Whistleblowers and Their Lawyers

- "No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by whistleblower."
- Retaliation plaintiffs are entitled to nationwide service of process in prosecuting whistleblower retaliation claims.
- Remedies available to whistleblowers include:

> "reinstatement with the same seniority status that the individual would have had, but for the discrimination";
>
> "2 times the amount of back pay otherwise owed to the individual; and"
>
> "compensation for litigation costs, expert witness fees, and reasonable attorneys' fees."

B. 2012 and 2013 Statistics From the SEC Office of the Whistleblower

2012 was the first full year for which data was available to begin to assess the SEC's whistleblower program. On November 15, 2012, the SEC released its Annual Report on the Dodd-Frank Whistleblower Program ("2012 Annual Report"), a requirement of the Dodd-Frank legislation. Some of the data revealed in the 2012 Annual Report include:

- 3,050 hotline calls from members of the public;
- The SEC Office of the Whistleblower received 3,001 formal whistleblower tips via submission of Form-TCR (tips, complaints, and referrals);
- The most frequent tips concerned corporate disclosures (547 tips, 18.2%), offering fraud (465 tips, 15.5%), and manipulation (457 tips, 15.2%);
- 115 complaints, or 3.8%, related to the Foreign Corrupt Practices Act;
- The state from which the largest number of tips emanated was California (435 tips, 17.4%), followed by New York (246 tips, 9.8%) and Florida (202 tips, 8.1%); and
- The Office of the Whistleblower received tips from whistleblowers from 49 countries outside the US, including 74 tips from the United Kingdom, 46 tips from Canada, 33 tips from India, and 27 tips from China.

The SEC posted notices of 143 "covered actions" in 2012 — SEC enforcement actions in which a final judgment or order resulted in monetary sanctions exceeding $1 million. In 2012, the SEC issued only one award under the Whistleblower program — a $50,000 award to an anonymous tipster who revealed a multi-million dollar fraud.[14]

The 2013 Annual Report indicates that the Whistleblower Program is gaining momentum in its second full year of operation. In 2013, the SEC:

- Paid over $14 million to whistleblowers as a result of tips;
- Has over $439 million available in the Investor Protection Fund for whistleblower awards;
- Has received 3,238 formal tips (8% increase from 2012);
- Received the most common tip relating to "Corporate Disclosures and Financials";
- Received the most tips from outside the U.S. from the United Kingdom, followed closely by China and Canada;
- Received 18% more international tips in 2013 compared to last year and a 12% increase in countries that submitted tips;
- Returned over 2,810 phone calls from members of the public to its whistleblower hotline; and
- Created an on-line portal for submission of formal tips to the SEC at www.sec.gov/whistleblower.[15]

The Chief of the SEC Office of the Whistleblower, Sean McKessy, noted in the 2013 Annual Report that the Commission will focus on protecting whistleblowers from retaliation by employers, noting that the "protection of whistleblowers from retaliation by their employers is important to the success of the whistleblower program," and that retaliating employers will face SEC enforcement for such conduct:

> [The Office of the Whistleblower] is coordinating actively with Enforcement Division staff to identify matters where employers may have taken retaliatory measures against individuals who reported potential securities law violations or have utilized confidentiality, severance, or other agreements in an effort to prohibit their employees from voicing concerns about potential wrongdoing.[16]

McKessy and his Office have said "'[w]e're keeping our eyes open for the right fact pattern' with which to bring an action" under the anti-retaliation provisions.[17] In light of this focus by the Commission, employers may want to develop whistleblower compliance guidelines. Part C below provides tips for companies to get started.

C. Whistleblower Compliance Tips for Companies

The following are general tips and considerations for companies and compliance personnel considering Rule 21F, the SEC Annual Reports, and relevant case law and regulatory reports and notices:

- Craft a compliance investigation plan that can be immediately customized as needed;
- Publicize remediation and resultant disciplinary action when appropriate to demonstrate that the company is serious about compliance and expects no less from its employees;
- Construct a formal whistleblower hotline that is well-known within the company;

- Publicize in compliance program that internal compliance reporting first can still qualify the whistleblower for an award under the whistleblower law, and that internal reporting first is an element that may increase the award paid by the SEC;
- Incentivize internal whistleblowing by making it the easiest course, with flexible reporting mechanisms, prompt investigations, regular briefings to whistleblowers, and internal recognition for bringing compliance issues to management;
- To incentivize internal reporting consider setting up an internal award scheme but perhaps with less hurdles than Rule 21F (to support perhaps less generous company awards);
- Consider making valid whistleblower reports part of the company's compensation or bonus scheme;
- Multi-national companies with potential non-US whistleblowers must be mindful that any whistleblower compliance program should account for potential civil or criminal liability under privacy and secrecy laws of some non-US countries for sharing certain information with the SEC. It is relevant to note that the SEC may share the information from a whistleblower with foreign law enforcement or regulators;
- Multi-national compliance programs should also account for the cultural stigmas or biases that may attach to whistleblowers in certain cultures, countries, or regions;
- Be mindful of Rule 21F-17 and the right it provides the SEC to speak directly with company employee whistleblowers, even if the company has counsel, without the SEC seeking the consent of the company's counsel; and
- Be mindful of the harsh whistleblower retaliation laws and procedures and that sub-par or non-performing employees may use this law to try and protect themselves from termination.

D. What the Courts Are Saying about the Whistleblower Act

1. Handling Conflicts Between Congressional Statutory Provisions of the Whistleblower Act and The SEC's Implementing Rules

In *Asadi v GE Energy (USA), LLC*,[18] the U.S. Court of Appeals for the Fifth Circuit held that an employee must report potential securities law violations to the SEC, not just to his employer, in order to have standing to bring a lawsuit under the anti-retaliation provisions of the Whistleblower Act. In so ruling, the court invalidated an SEC administration definition of "whistleblower" that impermissibly broadened the definition by Congress to include employees who do not report securities law violations to the SEC.

Asadi was employed by GE Energy and sent to Ammon, Jordan to serve as the Iraq Country Executive. Asadi informed his supervisor about concerns raised by an Iraqi official about the Company's potential violations of the Foreign Corrupt Practices Act. Asadi did not report this tip to the SEC. Asadi was terminated one year later and sued his employer under the anti-retaliation provisions of the Whistleblower Act, arguing he was fired in retaliation for reporting his concerns about the FCPA.

In Section 78u-6(a) of the Whistleblower Act, Congress defines "whistleblower" as someone who "provides . . . information relating to a violation of the securities laws *to the Commission*."[19] However, the anti-retaliation provision, Section 78u-6(h), contains a subsection — 78u-6(h)(1)(A)(iii) — that prohibits retaliation for an employee making disclosures required by the Sarbanes Oxley Act ("SOX") which do not require disclosure of information to the SEC.[20]

Asadi argued that persons who take action that fall within this category of the anti-retaliation Section 78u-6(h)(1)(A)(iii) — which does not require reporting to the SEC — are protected even if they do not fall within the Section 78u-6(a) definition of "whistleblower" — which requires reporting to the SEC as part of the definition. Asadi interpreted a conflict between 78u-6(a) and 78u-6(h), which he said created an ambiguity that should be cured in his favor. The court cited several U.S. district court opinions that accepted Asadi's analysis and permitted retaliation claims by employees who did not report alleged securities violations to the SEC.[21]

The Fifth Circuit in *Asadi* found no conflict or ambiguity with Sections 78u-6(a) and 78u-6(h). To the court, Section 78u-6(a) unambiguously defines "whistleblower" as an individual who provides "information relating to a securities law violation to the SEC."[22] Section 78u-6(h)(1)(A) represents protected activity in a whistleblower retaliation claim, but it does "not define which individuals qualify as whistleblowers."[23] Indeed, the anti-retaliation Section 78u-6(h) unambiguously provides protection to "whistleblowers," which is unambiguously defined in Section 78u-6(a) as someone who reports a securities law violation to the SEC. Congress did not provide anti-retaliation protection to any "employee" or "individual," it provided protection for a "whistleblower" previously defined as someone who reports violations to the SEC.[24] Merely because someone may take protected activity under 78u-6(h)(1)(A)(iii) yet not qualify as a "whistleblower" "does not render [Section] 78u-6(h)(1)(A)(iii) conflicting or superfluous."[25]

The court provided an example of an employee who reports a securities law

violation to his CEO and the SEC, and is fired by the CEO when the CEO was not aware the employee also reported to the SEC. Because the employee was not fired for reporting a violation to the SEC, the employee could not pursue a retaliation claim under 78u-6(h)(1)(A)(i) or (ii). But the disclosure to the CEO is protected under SOX, which is protected under 78u-6(h)(1)(A)(iii). And because the employee also reported the violation to the SEC, he qualifies as a whistleblower under Section 78u-6(a) and is eligible for the more generous remedies and limitations period provided in the Whistleblower Act as compared to the SOX whistleblower provisions.[26] Asadi's interpretation of Section 78u-6(h)(1)(A)(iii) would render the SOX whistleblower provisions moot because both could be used without reporting violations to the SEC.[27]

The court rejected Asadi's reliance on Rule 21F-2(b)(1),[28] wherein the SEC redefined "whistleblower" to include individuals who engage in protected activity under Section 78u-6(h) but do not report the securities law violation to the SEC. Because the court found Congress' definition of "whistleblower" in Section 78u-6(a) unambiguous, the court rejected "the SEC's expansive interpretation of the term 'whistleblower' [in Rule 21-F(b)(1)] for purposes of the whistleblower protection provision" under the *Chevron* doctrine.[29]

U.S. district courts in other circuits since *Asadi* was decided have declined to follow *Asadi*, have found a conflict between Section 78u-6(a) and 78u-6(h)(1)(A)(iii), and resolved the stated ambiguity by deferring to the SEC's broadened definition of "whistleblower" in Rule 21-F(b)(1).[30] Stay tuned.

2. Extraterritorial Application of The Whistleblower Act Provisions

In *Liu v Siemens AG*,[31] the U.S. District Court for the Southern District of New York held that the Whistleblower Act's anti-retaliation provisions did not apply to acts of retaliation occurring outside of the United States. Liu was a resident of Taiwan, working for a Chinese subsidiary (Siemens China) of a German company (Siemens). Liu made an internal report that Siemens China was involved in a kickback scheme in violation of the FCPA in its sales of equipment to public hospitals in North Korea and China. Liu was terminated after his persistent internal reports and presentations about the issue. Citing the Supreme Court's decision in *Morrison v National Austl Bank Ltd*,[32] the court held that the anti-retaliation provisions did not apply extraterritorially because Congress gave no clear indication that they had extraterritorial application: "'When a statute gives no clear indication of an extraterritorial application, it has none.'"[33] The court found this was so even though Siemens AG securities traded on the New York Stock Exchange, noting that this was no replacement for the required express congressional intent for extraterritorial application, and that the Supreme Court did not require total disconnect with the U.S. for the ban on extraterritorial application of U.S. laws to apply:

> The [Supreme] Court acknowledged that "it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States. But the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case." This is a case brought by a Taiwanese resident against a German corporation for acts concerning its Chinese subsidiary relating to alleged corruption in China and North Korea. The only connection to the United States is the fact that Siemens has [securities] that are traded on an American exchange, just as in *Morrison*. There is simply no indication that Congress intended the Anti–Retaliation Provision to apply extraterritorially.[34]

Liu appealed this ruling to the Second Circuit Court of Appeals.[35] Stay tuned.

Conclusion

The SEC's whistleblower program is gaining steam, and the SEC Chairman Mary Jo White views it as an indispensable part of enforcing the nation's securities laws. Companies may want to become familiar with the SEC whistleblower rules and incentives, and how courts are interpreting them, to understand their effect on various issues that arise in any internal or other investigation of securities fraud: parallel criminal proceedings, the witness's Fifth Amendment privilege (a company does not have one), and how the program affects attorney-client privileges of the company, the employee, and other witnesses. Hopefully this Article helps identify some of the issues you or your client may need to consider in these circumstances.

Endnotes

1. *See, e.g.,* Sarah N. Lynch, *SEC Chairman to Request Budget Boost As Sequestration Looms*, Reuters, Feb 13, 2013.
2. *See* Matthew P. Allen, *The SEC Cooperation Initiative and Its Criminal Roots*, ABA Section of Litigation Annual Meeting (2013) (www.millercanfield.com/assets/attachments/The%20New%20SEC%20Cooperation%20Program%20And%20Its%20Criminal%20Roots.pdf).
3. 15 USC 78u-6 ("Section 21F").
4. SEC 2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program (Nov 2013), at 2.
5. *See* 15 USC 78u-6, 78u-7.
6. *See* SEC Release No 34-64545 (May 25, 2011). The whistleblower rules are published in 17 CFR 240.21F-1 – 21F-17.
7. *SEC's Whistleblower Office Received 3,001 Tips in Fiscal Year 2012, Report Says*, Secs Reg & Law Rpt, (BNA) Vol 44, No 46 at 2109 (Nov 19, 2012).
8. *See* Yin Wilczek, *SEC Seeing Poor Controls Over Fees During Exams of Private Fund Advisers*, Secs Reg & Law Rpt (BNA) at 2227-

2228 (Dec 10, 2012).

9. *See SEC Nominee Signals Shift: Obama Taps Ex Prosecutor Mary Jo White, Portending Increased Policing of Wall Street*, WALL ST J, Jan 25, 2013 at A1.
10. SEC Chair Mary Jo White Remarks at the Securities Enforcement Forum, Washington DC (Oct 9, 2013).
11. *Id*.
12. 17 CFR 240.21F-1 – 21F-17.
13. 15 USC 78u-6(h).
14. *See generally* SEC Annual Report on the Dodd Frank Whistleblower Program, Fiscal Year 2012 (Nov 2012); *SEC's Whistleblower Office Received 3,001 Tips in Fiscal Year 2012, Report Says*, SECS REG & LAW RPT (BNA) Vol 44, No 46 at 2109; *Lessons From the Whistleblower Report*, Law360 (Nov 12, 2012); *$104M Whistleblower Award — A Sign of Things to Come*, Law360 (Dec 6, 2012); *Cross-Border Implications of the SEC Whistleblower Report*, Law360 (Nov 15, 2012).
15. *See generally*, SEC Annual Report on the Dodd Frank Whistleblower Program, Fiscal Year 2013 (Nov 2013) ("2013 Annual Report"); Walter Pavlo, *What the SEC Whistleblower Report Means for Companies*, FORBES (Nov 18, 2013).
16. 2013 Annual Report at 2.
17. *See* Yin Wilczek, *SEC Received More Than 3,200 Tips in FY2013, Whistle-Blower Official Says*, SECS REG & LAW RPT (BNA) (Nov 18, 2013).
18. 720 F3d 620 (CA 5, 2013).
19. 15 USC 78u-6(a)(6) (emphasis added).
20. 15 USC 78u-6(h)(1)(A)(iii).
21. *See Asadi*, 720 F3d at 625 n6.
22. *Id*. at 625.
23. *Id*.
24. *See id*. at 626.
25. *Id*.
26. *Id*. at 627-628 & n11, 629.
27. *See id*. at 628.
28. 27 CFR 240.21F-2(b)(1).
29. *See Asadi*, 720 F3d at 629-630 (citing *Chevron USA, Inc v Natural Res Def Council, Inc*, 467 US 837, 842-44 (1984) (finding that an administrative agency like the SEC must give effect to the unambiguous intent of Congress and not make rules that contradict that intent)). *See also* Rachel Louise Ensign, *The Whistleblower Debate: Companies Say Protections Apply Only When Tipsters Raise Concerns With the SEC*, WALL ST J, Aug 12, 2013 at B4.
30. *See, e.g., Rosenblum v Thomson Reuters, LLC*, _____ F Supp 2d ___, 2013 WL 5780775 (SDNY, Oct 25, 2013).
31. ____ F Supp 2d ___, 2013 WL 5692504 (SDNY, Oct 21, 2013).
32. 561 US 247, 130 S Ct 2869 (2010).
33. *Liu*, *supra* at *2 (quoting *Morrison*, 130 S Ct at 2878).
34. *Id*. at *3-4 (quoting *Morrison*, 130 S Ct at 2884) (internal citation omitted).
35. *See Whistle-Blower Appeals Dismissal of Retaliation Suit*, SECS REG & LAW REPORT (BNA) (Nov 18, 2013).

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Auditor Malpractice:

Five Things Litigators Should Know About Generally Accepted Auditing Standards

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Executive Summary

Fraud in company financial statements is a problem that some in this country believe is only getting worse. While independent auditors render opinions that give investors confidence in the accuracy of a company's reported financial performance, when fraud is uncovered, resulting litigation often focuses on the independent auditors' conduct — in particular, on what the independent auditors examined and how they reached their conclusions. This article lays out five important "bright line" principles about generally accepted auditing standards (GAAS) that will assist lawyers who either defend or pursue claims against accounting professionals.

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Independent auditors play a vital role in our capital markets system. A third party opinion on the representations made in a company's financial statements serves as assurance of accuracy and transparency, and builds investor confidence. However, when investors learn of securities fraud or other financial statement misrepresentations, ensuing litigation often focuses highly critical attention on the quality and sufficiency of the information auditors obtained, and how they processed that information in reaching audit conclusions.

Demonstrating audit failure often depends heavily upon the documentation of the planning and conduct of the examination. On the other hand, in both civil malpractice and white collar criminal defense cases, the accused's legal team may find in the audit working papers the basis for a defense, founded on the auditors having "done the right things," even if fraud or misconduct occurred and was not uncovered.

Before advocating for either plaintiffs or defendants regarding allegations of audit malpractice, securities fraud or other misconduct, attorneys should clearly understand five important facts about generally accepted auditing standards (GAAS).[1]

1. It is not the auditors' responsibility to identify all fraudulent activity in the organization.

Fraud, sadly enough, is a commonplace occurrence. In fact, Andrew Fastow, former CFO of bankrupt energy-trading firm Enron, recently told *Accounting Today* that the problem of fraud is ten times worse now than it was when his company collapsed.[2] Auditing standards, however, have never and do not now place primary obligations for detection of fraud on the independent accountants.

Professional standards do require auditors to opine on their client's compliance with generally accepted accounting principles (GAAP). In order to do so, auditors are required to plan and perform their audits to obtain reasonable assurance that financial statements are free from material misstatements, whether due to error or fraud. Thus, fraud that is material to the financial statements *should* be uncovered during the performance of typical audit procedures, but an audit does not and cannot provide absolute assurance that this will happen.

2. Management is responsible for the financial statements.

Auditors are engaged to give their opinion on financial statements.[3] They are not the authors of the financial statements, nor can they be. In fact, auditors are strictly prohibited from performing specific tasks, such as certain bookkeeping services. They are also barred from making management decisions that would impair their independence and preclude their ability to give unbiased opinions on the financial statements.

Oftentimes, auditors accused of professional malpractice stemming from fraudulent financial reporting by a client will cite, as their first line of defense, the observation that management is fully responsible for the financial statements. Although no respected auditing expert would disagree with this statement, *per se*, it remains the auditors' duty to conduct effective audits that bring fraud and misconduct to light.

On the other hand, it is also true that management often relies heavily on the knowledge and experience of their auditors to help resolve technical accounting issues, and this can create at least the appearance of excessive involvement by auditors in managerial decision-making. When this occurs, good auditors will carefully document the fact that the ultimate decisions on the financial statements were made by management, and they may incorporate this assertion into the management representations that must be memorialized before the audit report is delivered, documenting that the auditors' role was limited to technical research done to provide management with the information needed to select from among multiple available reporting options.

Management alone must make the financial reporting policy decisions, and qualified auditors will carefully document this in their working papers.

3. Uncorroborated management assertions are not audit evidence.

Management is required to submit an afore-noted "management representation letter" to the auditors, which generally contains assertions regarding the company's accurate, complete disclosure of information to the auditors, as well as various declarations regarding contingent obligations, related party transactions, and other matters affecting the company's financial statements. While these representations are made during, and are material to, the conduct of the audit, they cannot substitute for the appropriate application of audit procedures. Indeed, the mandatory application of "professional skepticism" is quite akin to President Reagan's admonition to "trust but verify" - but, in contravention of this mandate, some accountants do rely too heavily on management's assertions.[4]

In the planning and performance of an audit, the auditor must maintain an attitude that includes a questioning mind and a critical assessment of audit evidence.

For example, in its report on the 2007 inspection of a Big Four firm, the Public Company Accounting Oversight Board (PCAOB, which oversees auditors of publicly held companies) decried "a firm culture that allows, or tolerates, audit approaches that do not consistently emphasize the need for an appropriate level of critical analysis and collection of objective evidence, and that rely largely on management representations."[5]

Commonly, in the event of litigation against accountants, defense attorneys will attempt to cite the management representation letter as evidence that the auditors were in fact the victims of management deception, as demonstrated by untruths in the representation letters, and thus are not guilty of malfeasance. However, the correct application of the audit standards would have precluded reliance solely on these representations, and therefore the assertions made in the client representation letter will be of limited value as part of a defense strategy.

4. While a formal audit program and appropriate planning are required by professional standards, rigid adherence to a standard audit program and failure to consider needed modifications to it do not meet professional expectations.

The auditors' task is not limited to execution of the audit plan, which often begins with an "off the shelf" set of procedures dictated by firm policy. Auditors are also required to assess various elements of risk, including inherent risk, control risk, and detection risk. The audit team must furthermore engage in meaningful brainstorming of fraud risk factors before they can begin their examination, which then must be tailored in clear response to these assessments. Perhaps most importantly, auditors are required to be "appropriately skeptical," according to Margaret McGuire, a member of the SEC Financial Reporting and Audit Task Force, "…particularly in areas that involve management judgment in the preparation of financial statements and disclosures."[6]

In the planning and performance of an audit, the auditor must maintain an attitude that includes a questioning mind and a critical assessment of audit evidence. This transcends mere reliance on pre-conceived audit checklists, no matter how well

designed, and demands a mind-set that surpasses, but is informed by, mere technical accounting competence.

5. The timing and sequence of audit procedures may reveal whether the work was properly planned and executed.

According to professional standards, the auditors' working papers should provide a complete narrative of how they reached their opinion,[7] such that an accountant with similar experience but no previous connection to the engagement can understand the auditors' procedures, judgments, and conclusions. Individual audit working papers should be signed and dated by both preparer and reviewer, as the implied time line of the audit engagement may prove crucial in auditor litigation.

If, for example, substantive procedures were performed after the audit report date, or in such proximity as to have precluded careful evaluation and audit procedure modifications before finalizing an opinion, it may be argued that this work was only performed to "paper the files" and was not timely performed in support of the audit opinion.

While erroneous or even fraudulent financial reporting can occur and escape detection even with a well-conducted audit, a failure to comply with professional standards will typically make auditors vulnerable to assertions of malpractice. Since auditing standards are largely *behavioral* in nature — in contrast with, say, accounting standards, which essentially consist of technical instructions — there will be more room for interpretation regarding the compliance by the auditors with the relevant standard of care in conducting audits. The matters enumerated above are among the few "bright line" principles in the realm of audit conduct, and should accordingly be given serious consideration.

In any litigation dealing with allegations of auditors' malpractice, ultimately it will be the preponderance of the evidence regarding the auditors' good faith, informed and competent execution of audit planning procedures and the conduct of testing and evaluation of evidence that will drive the final verdict. An understanding of auditing standards is thus needed both by those seeking to defend or to pursue claims against accounting professionals.

Endnotes

1. AICPA Professional Standards, AU Section 150: *Generally Accepted Auditing Standards* http://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-00150.pdf.
2. Cohn, Michael. "Former Enron CFO Andrew Fastow Confronts the Fraud Examiners," *Accounting Today*. June 27, 2013. Web.
3. AICPA Professional Standards, AU Section 110: *Responsibilities and Functions of the Independent Auditor* http://pcaobus.org/Standards/Auditing/Pages/AU110.aspx.
4. AICPA Professional Standards, AU Section 333, *Management Representations*, AU §333.03 http://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-00333.pdf.
5. Public Accounting Oversight Board, *Report on 2007 Inspection of Deloitte & Touche LLP*, May 19, 2008, at p. 17 http://pcaobus.org/Inspections/Reports/Documents/2008_Deloitte.pdf.
6. Gaetano, Chris. "David Woodcock and Margaret McGuire, SEC Financial Reporting and Audit Task Force," *Trusted Professional*. August 8, 2013. Web.
7. AICPA Professional Standards, AU Section 339, *Audit Documentation*, AU §339.05 http://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-00339.pdf.

Michigan Defense Quarterly Publication Schedule

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

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Retailer Beware:
A Retailer's Guide to The Michigan Shopping Reform and Modernization Act

By: Scott Petz, Salina Hamilton and Grace Trueman,[1] *Dickinson Wright PLLC*

Executive Summary

Effective September 2011, Michigan's legislature enacted the Shopping Reform and Modernization Act, which eliminates retailers' obligations to individually price merchandise while still maintaining statutory protections for consumers that purchase mismarked or mispriced consumer items. This act was meant to attract new business to Michigan and to reduce costs to retailers. Despite this effort, the act left the door open for purported consumers, referred to as "bounty hunters," to misuse the act. This article provides an overview of the act, identifies some of the key issues facing retailers, and suggests preventive measures available to retailers to limit and defend against claims brought under the act.

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Until recently, Michigan retailers were required to individually price most merchandise. Though some items were exempt from then applicable individual labeling requirements, individual price labels were required on the vast majority of consumer goods. Not surprisingly, individually pricing each item was burdensome on retailers as it forced merchants to incur significant costs related to marking, monitoring, and policing the individual price labels. Improperly priced items opened retailers up to statutory penalties, even if the pricing error was unintentional or inadvertent.[2]

In an effort to provide relief to these retailers, Michigan's legislature enacted the Shopping Reform and Modernization Act (the "Act"), effective September 1, 2011.[3] The Act eliminates retailers' obligations to individually price merchandise while still maintaining statutory protections for consumers that purchase mismarked or mispriced consumer items. State lawmakers and retailers supported the Act as a means of attracting new business to Michigan and as a way to reduce costs associated with individual pricing.[4]

Despite the legislature's admirable efforts to strike a balance between consumer protection and reasonable burdens on retailers, the Act could be clearer on key issues, which has forced retailers into an unanticipated shell game of statutory obligations. Accordingly, while the Act was touted as a major advancement for retailers, the door was left open for purported consumers — referred to in the industry as "bounty hunters"[5] — to misuse the Act in an effort to take advantage of retailers through improper bounty-demands and suits for trumped-up damages for alleged violations of the Act. As a result, store employees may—in fear of violating the Act—give in to the demands of these bounty hunters, even when the claimed bounties are believed to be illegitimate or have not been investigated by the retailer.

Processing bounties under the Act and dealing with bounty hunters is time-consuming, costly, and disruptive to retailers. Costs include not only the payment of bounties, but also paying employees to process, investigate, and respond to bounty claims instead of focusing on selling merchandise. When you add in the additional cost of legal fees to defend against bounty hunter claims, the Act can cause Michigan merchants to expend significant resources. The problems faced by retailers are exacerbated by the lack of published legal authority addressing the Act's application on key issues, and the absence of substantive legislative history discussing the intent of the Act.[6]

In light of the above issues, this article provides an overview of the Act, identifies some of the key issues facing retailers under the Act, and suggests preventive measures available to retailers to limit and defend against claims brought under the Act.

The Basics

The Act is a consumer protection statute that regulates pricing and advertising of certain consumer items, provides for rain-check guarantees, and also allows consumers to collect a price difference for mispriced consumer items along with a "plus amount," often referred to as a bounty.[7] The Act also sets forth relief available as a result of a retailer violating the Act's statutory requirements.

The Attorney General and Director of the Department of Agriculture and Rural Development share responsibilities and obligations for promulgating rules and administering the Act.[8] The Attorney General, however, has the power to seek an injunction against retailers accused of violating provisions of the Act.[9] A consumer may choose to bring an action for declaratory or injunctive relief against a retailer if the Attorney General fails to initiate suit within 60 days after receiving notice of the consumer's complaint.[10] Additionally, a person may elect to bring suit for monetary relief.[11]

Collecting "Bounty" Under the Act

Before a consumer can bring an action for monetary relief under the Act, the consumer must fulfill the notification requirements under the Act.[12] Stated simply, this section allows a purchaser of a consumer item[13] to recover money when the price displayed[14] is lower than the price charged. In order for this section to apply, a consumer must engage in a "sale at retail," which "means a transfer of an interest in a *consumer item* by a person that is regularly and principally engaged in the business of selling consumer items to a buyer for use or consumption and not for resale."[15] Moreover, there must be a price displayed for the consumer item, the purchase must be made on an automatic checkout system, and the buyer must have a receipt describing the item showing the price charged.[16]

Within 30 days of making such a purchase, the consumer must notify the retailer in person or in writing of the loss suffered as a result of incorrect pricing.[17] Notice must include evidence of such loss.[18] Under the Act, a person can request both the difference between the amount advertised and amount actually charged and a "plus" amount which is equal to 10 times the difference amount (at least $1.00 but not more than $5.00). Recovery is limited to one item if identical items are purchased.[19]

Once a retailer receives notice, it has two options: (1) pay the appropriate difference and bounty within 48 hours after receiving notification, or (2) refuse to do so.[20] Once paid, a consumer is barred from further recovery with respect to the purchase.[21] If a retailer refuses to make a payment, however, the consumer may then bring a lawsuit against the retailer for statutory damages or actual damages, whichever is greater.[22]

> The Act eliminates retailers' obligations to individually price merchandise while still maintaining statutory protections for consumers that purchase mismarked or mispriced consumer items.

Key Issues Facing Retailers Under the Act

When it was introduced in 2011, the Act was passed by the Michigan legislature with extreme favor and without much discussion.[23] Thus, there is almost no legislative discussion of the Act. Additionally, the only case law concerning the Act is at the trial court level. Consequently, there is no binding case law providing any clarification or interpretation of the Act's provisions.[24] Accordingly, retailers, consumers, and the courts are without the benefit of either substantive legislative discussions or binding judicial interpretations of the Act for guidance and clarification on how to interpret and apply the Act.

Among the issues facing retailers under the Act, the most problematic are:

1. Burden for Recovery: The Act is silent as to the burden for the payment of bounties. Under the Act, a buyer is required to notify the retailer in writing or in person within 30 days of any alleged loss from being overcharged on a consumer item. The retailer, however, is given 48 hours to investigate the buyer's claim and, if legitimate, to issue payment. If a retailer's allotted two-day investigatory period runs out, and the buyer is nowhere to be found, what then? Must the retailer be subjected to a lawsuit simply because it decided to review the evidence to ascertain the legitimacy of the buyer's claim, but then couldn't locate the consumer?

Confounding the issue is the fact that the Act does not expressly require the consumer to return to the store or to leave reliable contact information with the retailer. Ultimately, the Act provides no clear answer to such questions, and even the Michigan Attorney General's office has acknowledged the lack of specificity in the Act, noting only that a buyer may be required to make arrangements with the retailer for payment under the Act.[25]

2. Consumer Status: Importantly, as a consumer protection statute, the Act is designed to protect consumers from pricing errors. The Act, however, does not define the term "consumer."[26] Arguably, the Act does not apply to bounty hunters because they purchase items for a "business" purpose in an attempt to abuse retailers by using the

Act to earn a profit. This purpose is the same whether bounty hunters actually find pricing errors or manufacture them. In fact, some bounty hunters may readily admit that at no point did they plan to retain any of the items they purchased. Rather, they essentially "keep" each item from the store for just long enough to claim the bounty and then return each item, often within hours of the initial purchase.

Notably, at the store level, the Act provides for recovery of the "difference" between the price displayed and the price charged and a plus amount.[27] However, the Act does not state that a buyer is entitled to return all items for a full refund and to collect the "plus amount." Also, importantly, the Act is meant to protect purchasers of consumer items, which are items purchased for personal, family, or household purposes.[28] Items purchased for the purpose of profiting under the Act are not included in the Act's definition of consumer item.[29]

In short, the Act could be clearer on the issue of who is entitled to protection under the Act and could provide better safeguards to prevent abuses by bounty hunters under the Act. Even with clearer statutory language or judicial interpretation, however, retailers' generous return policies, which seek to keep legitimate buyers satisfied, may make it difficult to ascertain a buyer's intentions.

3. Statutory Damages: Perhaps the most vexing problem posed by the Act is enforcing the limitations on recovery provided under the Act.[30] Under MCL 445.322(2), a consumer may bring suit for loss suffered from a retailer's violation of the Act.[31] The Act provides that a consumer can recover "actual damages or $250.00, whichever is greater, *for each day on which a violation of this act is found*, together with reasonable attorneys' fees that do not exceed $300.00 in an individual action."[32] Some plaintiffs have interpreted this statutory language to require that a retailer pay $250.00 for each mispriced item and have sought thousands of dollars for one day's worth of purchases.

If faced with such an interpretation, some retailers may simply pay, either because the retailer (1) does not understand its obligations under the Act, or (2) wants to avoid additional cost and delay that will inevitably result by challenging the bounty hunter. That need not be the result. When this statutory damage issue has been decided in litigated matters handled by these authors, courts have uniformly agreed that recovery is indeed limited to $250 for *each day* on which a violation is found, regardless of the number of violations that occurred on a given day.

Preventative Measures

Reasonable interpretations and legislative intent can only go so far in addressing the Act's shortcomings, and the simple fact remains that there is a dearth of binding legal authority on how to effectively deal with bounty hunters under the Act. So what can be done? As the old adage goes, an ounce of prevention is worth a pound of cure. In defending against bounty claims, the same holds true. Retailers are required to comply with the Act, but when it comes to bounty claims, preventive measures are available.

A concerted effort on the part of retail staff to eliminate pricing errors is a threshold preventative matter. Moreover, retailers can consider investing in new digital price displays and other displays that are not easily susceptible to tampering by savvy and unscrupulous bounty hunters. In addition, retailers can also diligently investigate bounty claims and document those investigations in detail. Some retail establishments may not have a clear policy on bounties and may pay out claims without recording the transaction. However, taking the time to determine whether claims are legitimate can help ensure that a retailer is not an easy-mark, thereby discouraging bounty hunters from frequenting the establishment.

Maintaining accurate and thorough records of claimed and paid bounties is a preventative measure that also provides retailers with a means to readily identify bounty hunters that frequent their stores. Inadequate bookkeeping may help bounty hunters "re-use" receipts and receive bounties for purchases that would otherwise be barred under the Act as previously recovered. Accurate record-keeping can also help prevent payouts on otherwise manufactured and illegitimate claims.

To address the issue of who has the burden under the Act of making sure payment of the bounty is made, a record of the demand and arrangements for follow-up at the end of the 48-hour period should be clearly documented. Although the Act does not provide for retailers to demand contact information from the consumer, maintaining records that demonstrate that the retailer was ready, willing, and able to tender payment within the 48-hour period can provide a potential defense should a non-responsive consumer try to bring suit.

Finally, experienced counsel can help retailers develop defensive plans and legal strategies in dealing with bounty hunters in every day retail operations as well as in the courtroom, including issuing no-trespass orders and defending against harassing claims.

Endnotes

1. The authors wish to thank W. Anthony Jenkins for his substantial contributions throughout the drafting and editing process.
2. Michigan's Pricing and Advertising of Consumer Items Act, MCL 445.351-364, which required many items to be individually marked was repealed effective September 1, 2011.
3. Michigan's Shopping Reform and Modernization Act, MCL 445.311 *et seq.*; *see also* Michigan Attorney General Consumer

Alert, *available at* http://www.michigan.gov/ag/0,4534,7-164-17337_20942-134114--,00.html.

4. Jim Hallan, President and CEO of Michigan Retailers Assoc., Memorandum to Members of the Michigan House of Rep. Commerce Comm., Feb. 8, 2011.
5. This term, which has gained widespread use in the industry, refers to individuals who engage in calculated efforts to collect statutory payments referred to as "bounties" when they locate—or manufacture—pricing errors in retail establishments.
6. *See* Legislative History of House Bill 4158 (2011), *available at* www.legislature.mi.gov.
7. MCL 445.311, *et seq*.
8. *See* Attorney General's rights and duties, MCL 445.320, and the Director of the Department of Agriculture and Rural Development's rights and duties, MCL 445.313.
9. MCL 445.320(1); *see also* MCL 445.323 (allowing a prosecuting attorney to conduct an investigation and prosecute in the same manner as Attorney General).
10. MCL 445.322(1).
11. MCL 445.322(2).
12. MCL 445.319(2). Notably, an exception to this rule exists when a retailer is accused of *intentionally* charging more than the price displayed for a consumer item. *See* MCL 445.319(4).
13. MCL 445.312(d) (defining "consumer item").
14. MCL 445.312(e) (defining "displayed").
15. MCL 445.312(g) (defining "sale at retail") (emphasis added).
16. MCL 445.319(1).
17. MCL 445.319(2).
18. *Id*.
19. *Id*.
20. MCL 445.319(2)(a)-(b).
21. MCL 445.319(2).
22. MCL 445.319(3) & MCL 445.322(2).
23. *See* Legislative History of House Bill 4158 (2011), *available at* www.legislature.mi.gov.
24. *See People v Metamora Water Serv*, 276 Mich App 376, 382; 741 NW2d 61 (2007) (*citing People v Hunt*, 171 Mich App 174, 180; 429 NW2d 824 (1988)).
25. *See* Michigan Attorney General's Consumer Alert, *supra*, note 3.
26. *See* 445.312.
27. MCL 445.319.
28. MCL 445.319; *see also* MCL 445.312(d).
29. In one litigated matter handled by Mr. Petz and Ms. Hamilton, a Michigan judge, after a five witness bench trial, was persuaded that, among other things, the purchaser/plaintiff was not entitled to protection under the Act because the items at issue were purchased with the purpose of attempting to profit under the Act.
30. MCL 445.322(2).
31. *Id*.
32. *Id*. (emphasis added).

The Sixth Circuit Holds That an Insurance Broker Who Mistakenly Failed to Obtain Specific Insurance Could Be Liable in Tort

By: Greg Wix, *Bowman and Brooke LLP*

Executive Summary

This article discusses a recent case from the United States Court of Appeals for the Sixth Circuit addressing the issue of an insurance broker's duty to an additional insured. Because there was no Michigan case law directly on point, the Sixth Circuit was required to analyze Michigan case law and predict the Michigan Supreme Court's holding under the circumstances of the case before it.

ubi jus, ibi remedium (where there is a wrong, there is a remedy) - Majority
restitutio ad integrum (restoration to original condition) - Dissent

In *Cleveland Indians Baseball Co, LP v New Hampshire Ins Co*,[1] the United States Court of Appeals for the Sixth Circuit was called upon to address an issue not previously decided by Michigan courts: an insurance broker's duty to an additional insured.

This case arose from an accident that occurred at a "Kids Fun Day" event before a Cleveland Indians baseball game on June 12, 2010. Douglas Johnson and David Brown were attending the game as spectators when a large inflatable slide collapsed on them. Mr. Johnson died nine days later.

National Pastime Sports (NPS) had entered into a contract with the Cleveland Indians Baseball Company to produce "Kids Fun Day" events before several Cleveland Indians games during the summer of 2010. As part of the entertainment, NPS agreed to provide the inflatable slide. Under the agreement, NPS was required to purchase a comprehensive general liability insurance policy naming the Cleveland Indians as an additional named insured. NPS hired CSI Insurance Group, to procure the required policy. On the first page of the application sent to the insurance broker, under the heading "Qualification Questions," the box was checked to indicate that the events will have "bounce houses or inflatables." CSI subsequently obtained a policy from New Hampshire Insurance Company (NHIC) and provided NPS and the Cleveland Indians with a "Certificate of Liability Insurance."[2]

NPS contacted CSI to notify it of the accident and learned that, despite its specific request, "CSI had mistakenly failed to procure a comprehensive liability policy that expressly covered inflatables."[3] When NPS reiterated this point, an employee of CSI emailed back, "Oh, ok. Sorry, I guess I missed it. I'm so used to quoting up your events I think I hardly look a[t] anything but the dates and the details of the event."[4]

There was a flurry of litigation and several coverage claims made by NPS and the Cleveland Indians were dismissed.[5] However, the Cleveland Indians also filed a complaint against CSI sounding in tort pertaining to CSI's failure to procure the proper insurance. The district court dismissed this claim as well, but this was overturned on appeal.

The Duty of Insurance Brokers to Additional Insureds

The Sixth Circuit recognized that there is no Michigan case law directly on the issue of an insurance broker's duty to an additional insured. However, a recent clarification

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of *Fultz v Union–Commerce Assoc*, 470 Mich 460 (2004), indicated Fultz's "'separate and distinct' mode of analysis should be interpreted to hold that a contracting party's assumption of contractual obligations does not extinguish or limit separately existing common-law or statutory tort duties owed to noncontracting third parties in the performance of the contract."[6] Specifically, "Fultz did not extinguish the simple idea that is embedded deep within the American law of torts . . .; if one having assumed to act, does so negligently, then liability exists as to a third party for failure of the defendant to exercise care and skill in the performance itself."[7]

The court found that it was reasonably foreseeable that an additional insured such as the Indians will be harmed if an insurance agency or other intermediary fails to procure the intended coverage, just as the primary insured would be. In this case the court noted that, "CSI knew that it was procuring insurance for the Indians as well as for National Pastime, it knew exactly what dates and events the insurance was for, it knew that the Indians had paid the premium and that CSI had issued a Certificate of Insurance to the Indians indicating that the policy was in effect. CSI was well aware that the Indians could be harmed if the proper insurance was not procured."[8]

Economic Loss Doctrine Is Not Defense

Below CSI also argued that the Indians' only damages were economic in nature — the loss of insurance proceeds — and the "economic loss doctrine" precluded recovery in tort for this type of loss. However, the court did not believe the cases cited by CSI for the proposition that the "economic loss doctrine" barred recovery were factually analogous, and it was convinced that the Michigan Supreme Court would not hold that the doctrine barred the Indians' negligence claim in this case.[9] The court also emphasized the importance of the underlying personal injuries in this case, noting "the underlying wrongful-death suit in this case most certainly does concern physical injury. The fact that the case presents itself as an insurance dispute veils the fact that the underlying injuries complained of are physical."[10]

The court found that it was reasonably foreseeable that an additional insured such as the Indians will be harmed if an insurance agency or other intermediary fails to procure the intended coverage, just as the primary insured would be.

Negligent Misrepresentation Claim Stands Against Insurance Broker

The Cleveland Indians also claimed damages as a result of CSI providing them with a Certificate of Insurance that implied that the requested insurance was in force. The Indians claimed their reliance induced them to move forward with the "Kids Fun Day" under the belief that they were covered. The district court dismissed this claim as well.

On appeal the court noted that CSI conceded the element of foreseeability in this claim and the only remaining question was whether the reliance element was established. It was "undisputed that neither the Indians nor" NPS had received "a copy of the full policy from New Hampshire Insurance Company or CSI."[11] As a result, the court held that, "reliance by the Indians on the Certificate as a representation by CSI that CSI had procured the requested insurance, including coverage for inflatables, was reasonable."[12]

However, the court did not believe the cases cited by CSI for the proposition that the "economic loss doctrine" barred recovery were factually analogous, and it was convinced that the Michigan Supreme Court would not hold that the doctrine barred the Indians' negligence claim in this case.

Conclusion

The Court remanded the case back to the district court with instructions to let the negligent misrepresentation claim proceed along with the general negligence claim. The dissent claims that this case will allow for double recovery in some situations:

> The issue at the heart of this case is not the ultimate question of liability; on the facts as established at this stage, there is little question that CSI is liable to NPS, who in turn may be liable to the Indians. The rule proposed by the majority would permit double recovery, because under the majority's approach CSI could be liable to NPS for breach of its contract to obtain insurance, and to the Indians for negligence, even though the damages due to each would be the same.[13]

It is not known whether the dissent's fears regarding double recovery will be realized. However, what is known is that under this case there is certainly a possibility that an insurance broker will be subject to two bodies of law — contract and tort.

Endnotes

1. *Cleveland Indians Baseball Co, LP v New Hampshire Ins Co*, 727 F3d 633 (CA 6, 2013).
2. Neither NPS nor the Indians had received a copy of the full policy at the time of the accident that killed Mr. Johnson.
3. *Cleveland Indians Baseball Co*, 727 F3d at 636.
4. *Id.*
5. NHIC denied any responsibility to defend or indemnify NPS or the Cleveland Indians based on the "amusement device" exclusion in the policy. NPS filed for declaratory judgment regarding NHIC's duty to defend and indemnify NPS. This suit was dismissed based on a "finding that the insurance policy was unambiguous in its exclusion of coverage for injuries arising out of the inflatable slide." *Id.* at 637.
6. *Loweke v Ann Arbor Ceiling & Partition Co*, 489 Mich 157, 159-160 (2011). The Court also held that Michigan law does not require that "plaintiff have a link such as privity, a bond approaching privity, or a fiduciary relationship with the defendant in order for a duty of reasonable care to exist." *Cleveland Indians Baseball Co*, 727 F3d at 638 (quotations omitted).
7. *Id.* at 170-171. Citing *Loweke*, the dissent noted that there was no separate duty outside of the contract that could have been a basis for tort liability:

   [A]n action would lie in contract if it was based solely on a defendant's failure or refusal to perform a contractual promise. In contrast, an action could lie in either contract or in tort if a "defendant negligently performs a contractual duty or breaches a duty arising by implication from the relation of the parties created by the contract . . . ." *Fultz*, 470 Mich. at 469, 683 N.W.2d 587. In the latter category of cases, however, no tort liability would arise "for failing to fulfill a promise in the absence of a duty to act that is separate and distinct from the promise made." *Id.* at 470. *Cleveland Indians Baseball Co*, 727 F3d at 643-644.
8. *Cleveland Indians Baseball Co*, 727 F3d at 639. The court did not specifically hold that Michigan law required a "special relationship" to find a duty, but did note that "[i]f indeed Michigan would require some additional 'special relationship' to impose tort liability on CSI, such a relationship surely can be demonstrated here." *Id.* at 640.
9. The court specifically stated that, "[t]his case does not involve products liability, implied warranties, or economic recovery for some other sort of defective good where the damage is confined to the product itself — the type of case where the doctrine is most often invoked." *Id.*
10. *Id.* at 640.
11. *Id.* at 642.
12. *Id.*
13. *Id.* at 644.

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MDTC Schedule of Events 2014

2014

March 27	Board Meeting — Okemos
May 8 & 9	DRI Central Regional Meeting — Ohio
May 14 & 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

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

Since my last report, discussions have continued on a number of important topics, including the ever-popular questions of road repair funding and no-fault auto insurance reform, without any publicly-disclosed resolutions.

2013 Public Acts

As of this writing (December 6, 2013), there are 180 Public Acts of 2013. Of those enacted since my last report, the most significant by far is 2013 PA 164 – Senate Bill 652 (Jones – R), which has effected a **dramatic restructuring of the Court of Claims and a substantial expansion of its exclusive jurisdiction**. This legislation, passed by party-line votes without any support from the minority party, has generated considerable controversy and contributed to the unfortunate erosion of trust and civility seen during this session. It is an important piece of legislation – arguably one of the most significant of the year.

Since 1978, the Court of Claims has been a function of the Ingham County Circuit Court. PA 164 has now transferred all Court of Claims cases from that court to a newly reconfigured Court of Claims consisting of four Court of Appeals judges, selected and appointed by the Supreme Court from at least two of the four Court of Appeals election districts. The Court of Appeals judges selected to serve in this capacity will be appointed for two-year terms ending on May 1st of each odd-numbered year, and may be reassigned to serve additional terms. The Clerk of the Court of Appeals will serve as the Clerk of the new Court of Claims, and the court will sit in unspecified locations within the election districts from which the appointed judges were elected, unless otherwise determined by the Chief Judge of the Court of Claims. The sponsor and supporters of SB 652 have contended that these changes were needed as an appropriate way to promote more widespread representation of the electorate in the selection of Court of Claims judges. Its critics have suggested that the real purpose was to "stack the judicial deck" in favor of the Republican administration.

Previously, the Court of Claims had exclusive jurisdiction of all claims *ex contractu* and *ex delicto* (contract and tort claims) against the state and any of its departments, commissions, boards, institutions, arms or agencies, and concurrent jurisdiction with the circuit courts over claims for declaratory and/or injunctive relief. Thus, under the prior law, actions against the state and its various political subdivisions which sought only declaratory and/or equitable relief could be filed and adjudicated in the circuit courts. PA 164 has eliminated the prior system of concurrent jurisdiction and expanded the exclusive jurisdiction of the new Court of Claims to include, in addition to its original jurisdiction, all claims or demands "statutory or constitutional," and any demands for equitable or declaratory relief or issuance of an extraordinary writ against the state and its various political subdivisions "notwithstanding another law that confers jurisdiction of the case in the circuit court."

The exclusive jurisdiction of the Court of Claims has also been expanded to include all such claims brought against any individual officers, employees or volunteers of the state or its enumerated bodies and agencies. Thus, the circuit courts will no longer be empowered to hear actions against the state or its political subdivisions seeking only a declaratory judgment, equitable relief or issuance of an extraordinary writ such as *mandamus* or *quo warranto*, nor will they continue to have jurisdiction over actions against individual officers, employees or volunteers of the state or its political subdivisions.

These jurisdictional changes will not be limited to new filings; they will apply retroactively to existing cases as well. Thus, cases pending in the Court of Claims before the effective date of this legislation were immediately transferred to the new Court of Claims for assignment to a newly-selected Court of Appeals judge. Pending circuit court actions falling within the newly-expanded jurisdiction of the Court of Claims will also have to be transferred to a Court of Appeals judge appointed to the Court of Claims if a transfer is requested by the state or a state officer or department. And because PA 164 was given immediate effect, the provisions requiring transfer of pending cases became effective immediately on November 12, 2013, the date of its filing with the Secretary of State.

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Chief Justice Young has acted promptly to appoint Judges Michael Talbot, Pat Donofrio, Deborah Servitto and Amy Ronayne Krause to serve as the first new judges of the Court of Claims until May 1, 2015, and has diffused some of the political opposition to this legislation by these politically-balanced appointments.

Chief Justice Young has acted promptly to appoint Judges Michael Talbot, Pat Donofrio, Deborah Servitto and Amy Ronayne Krause to serve as the first new judges of the Court of Claims until May 1, 2015, and has diffused some of the political opposition to this legislation by these politically-balanced appointments. Judge Talbot will serve as Chief Judge.

The passage of this legislation is perhaps the best example in recent memory of how legislation can be hastily approved when speedy voting is found to be politically expedient. In a period of only two weeks from introduction to enrollment, this legislation sailed through the Senate and the House without meaningful review, debate or consideration of numerous criticisms, suggestions and proposed amendments offered by a variety of knowledgeable experts. Testimony and written statements in opposition were presented by MDTC, MAJ, the State Bar Negligence and Appellate Practice Sections, and judges and administrators of the Ingham County Circuit Court. Testimony and written comments in opposition were also presented by Bruce Timmons, who served with legendary distinction as Republican counsel to the House Judiciary Committee from 1968 until his retirement earlier this year. No publicly-disclosed input was received from the Supreme Court, the Court of Appeals or the State Court Administrative Office, and thus, it appears that the impact of this legislation upon the processing of Court of Claims matters and the appellate caseload of the Court of Appeals has not yet been determined with any degree of certainty.

The criticisms of this legislation have included several expressions of concern that the new provisions might be construed to eliminate the right to jury trial with respect to claims falling within the newly-expanded scope of Court of Claims jurisdiction. The statements in opposition also expressed concerns that this legislation may have an adverse impact upon the fair and efficient administration of appellate justice in Michigan for a number of reasons. There has been a general concern that Court of Appeals Judges are best equipped and trained to handle disposition of appellate matters, and that it will be inefficient to require four of them to serve in a dual role as both appellate and trial court judges — a role which may lead to unnecessary reliance upon special masters, with resulting increases in costs to the litigants in Court of Claims litigation.

There were also expressions of concern that this legislation may cause additional delays in the adjudication of appeals by the Court of Appeals. The number of Court of Appeals judges will be reduced by attrition from 28 to 24 judges over the next few years pursuant to 2012 PA 40, and thus, it may be expected that diverting the attention of four additional Court of Appeals judges from the business of the Court of Appeals may adversely affect that court's ability to decide its cases in a timely manner. This impact may be considerable in light of the expanded scope of jurisdiction which will inevitably cause a substantial increase in the Court of Claims case load.

There are also unanswered questions about how appeals from decisions of the new Court of Claims will be handled. These include, most notably, questions as to how decisions of Court of Appeals judges sitting as judges of the Court of Claims can be reviewed by other Court of Appeals judges consistent with the constitutional requirements of procedural due process, how hearing panels will be selected to hear and decide these appeals from decisions of fellow Court of Appeals judges, and how the Court of Appeals might address the necessity for disqualification of Court of Appeals judges from hearing appeals from decisions of fellow Court of Appeals judges which may frequently arise under the new system.

There does not appear to be any precedent, in recent memory, for giving immediate effect to legislation requiring such a dramatic restructuring of our court system. Nonetheless, PA 164 was given immediate effect, requiring immediate implementation of the substantial changes previously discussed. This, also, was highly controversial. In the Senate, the separate two-thirds vote required for immediate effect by Const 1963, art 4, § 27 was properly established by a record roll call vote, but in the House, the required support was simply declared by quick action of the presiding officer's gavel in spite of amply expressed protests clearly suggesting that the motion for immediate effect had not, in fact, been supported by the constitutionally-required supermajority vote.

All of this has prompted many critics of this legislation to ask: What was the great rush? No one has provided an answer to that legitimate question, although the speculation has been that members of the majority party perceived

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a compelling need to immediately remove one or more pending or soon-to-be-filed actions from one or more circuit courts in Ingham County or elsewhere. It is unnecessary to dwell upon the specifics, but in the absence of any explanation to the contrary, there are many who feel that the speculation has a ring of truth. And there are many who have been left with the troubled thought that the people of Michigan deserved better.

The concerns about the potential impact upon the right to jury trial did not slow the rush to final passage, but Governor Snyder agreed to sign with the understanding that those concerns would be promptly addressed by way of a "trailer Bill." House Bill 5156, which would **provide the desired assurance that PA 164 did not create or diminish any right to jury trial**, was passed by the House on December 3, 2013, and placed on the Senate's General Orders Calendar, clearing the way for its immediate passage before the final adjournment. That Bill does not address any of the other criticisms of PA 164; as Mr. Timmons aptly noted in his recent testimony before the House Government Operations Committee, HB 5156 "does not make a silk purse out of the sow's ear known as PA 164." Additional fine-tuning will perhaps be accomplished by future legislation if the necessary support can be found.

The other new Public Acts of 2013 pale by comparison to PA 164. Those which may be of interest to our members include:

2013 PA 172 – House Bill 4704 (Pettalia – R), which will also contribute, in a smaller way, to the non-appellate functions of the Court of Appeals. PA 172 has amended the Uniform Budgeting and Accounting Act to **establish new procedures for lawsuits by elected county officials and county-funded courts against legislative bodies and chief administrative officers of county governments**, regarding the sufficiency, administration, execution and enforcement of general appropriations acts, and to specify that such lawsuits must be brought as original actions in the Court of Appeals.

2013 PA 171 – House Bill 4156 (Potvin – R), which has amended the Public Health Code, MCL 333.16184 and 333.16185, to **allow retired health professionals** (all of the types subject to licensure under Article 15 of the Public Health Code) **to provide uncompensated services to medically indigent persons under a special volunteer license, with the same immunity from liability that is currently provided under section 16185** to physicians, dentists and optometrists providing such uncompensated care.

New Initiatives and Old Business

Other matters of interest include:

House Bill 4064 (Heise – R) and House Bill 4532 (Price – R) would **require the State Court Administrative Office to establish and maintain record management policies for the courts**, including a records retention and disposal schedule, in accordance with Supreme Court Rules and specified statutes, and eliminate a number of inconsistent statutory provisions. As originally introduced and passed by the House, these tie-barred bills included provisions which would have provided specific authorization for the Supreme Court to establish reasonable fees for electronic access to court records, but the Senate has eliminated those provisions in response to criticism that this would improperly confer a power of taxation upon the Court. These bills were passed by the Senate on December 5, 2013, and have now been returned to the House for consideration of the Senate substitutes.

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**. On September 11, 2013, the House Tax Policy Committee reported substitutes for these bills, which now await consideration by the full House on the Second Reading Calendar.

Senate Bill 498 (Robertson – R) would amend the Revised Judicature Act to **establish procedures for lawsuits brought by taxpayers and local units of government to enforce provisions of the Headlee amendment, and to require that all such lawsuits be filed as original actions in the Court of Appeals**. This bill was introduced on September 17, 2013, and referred to the Senate Committee on Local Government and Elections.

What Do You Think?

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

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No Fault Report

"Normal Operation" of a Vehicle in a Roadway Does Not Render It "Involved in an Accident" When a Motorcyclist Reacts to the Vehicle

Smutzki v Auto Owners, Michigan Court of Appeals, unpublished opinion per curiam of the Court of Appeals, issued August 20, 2013 (Docket No. 306492).

Plaintiff was seriously injured when she "laid down" her motorcycle reacting to a slow moving semi truck in front of her. Neither she nor her motorcycle made contact with the truck. There was no evidence that the truck was negligently operated. Rather, the evidence showed that plaintiff misjudged the speed of the truck, came up too quickly behind it and could not stop her motorcycle to avoid hitting the truck. Because a motorcycle is not a "motor vehicle" under the No-Fault Act, PIP benefits are not available to motorcyclists unless the accident "involves" a motor vehicle.

The trial court found that a question of fact existed as to whether the truck was "involved in the accident," applying a "but for" analysis by finding that the tractor-trailer was involved because plaintiff was reacting to its presence in the road. The trial court "reluctantly" found that, because plaintiff was reacting to the mere presence of the truck, the truck was "involved," albeit not at fault. The Court of Appeals reversed the entry of summary disposition in favor of plaintiff, relying on *Turner v Auto Club*, 448 Mich 22 (1995). The Court of Appeals reiterated that a vehicle must ***actively***, as opposed to passively, contribute to the accident. The Court held that "more than just the normal operation of a motor vehicle is required" to find that that vehicle was "involved in the accident."

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Plaintiff's PIP Claim Barred by One Year Notice Requirement Because Oral Notice of Claim Does Not Satisfy Requirement of MCL 550.3145

Schildgen v Allstate Insurance Company, unpublished opinion per curiam of the Court of Appeals, issued November 19, 2013 (Docket No. 311339).

Plaintiff was injured in an accident. One day after the accident, she called the insurance company and verbally stated that she had been injured in the accident and was making a claim for PIP benefits. Defendant insurer opened a claim and provided written acknowledgment of the claim to plaintiff a few weeks later. No further communication was received from plaintiff until more than one year after the accident, other than a phone call in which she told defendant that she was filing a claim with a different insurance company. Suit was filed more than a year after the accident.

Defendant filed a motion for summary disposition based on the one year notice requirement in MCL 500.3145. The statute expressly requires claimants to provide ***written*** notice to insurers that identifies the name and address of the injured person as well as the time, place and nature of the injury. Plaintiff argued that her phone call to the insurer constituted "substantial compliance" with the statute and that defendant clearly acknowledged having received notice of the claim and injury. The Court of Appeals affirmed the trial court's order granting summary disposition to defendant, holding that the express and unambiguous terms of the statute require ***written*** notice leaving no room for doubt that oral notice is, as a matter law, insufficient.

Whether a Misrepresentation in an Application for Insurance Supports Rescission of the Policy After an Accident is a Question of Fact.

Meyers v Transportation Services, Inc, Zurich American Insurance, and Titan Insurance Co, unpublished opinion per curiam of the Court of Appeals, issued September 24, 2013 (Docket No. 300043).

Plaintiff applied for insurance through Titan Insurance Company several days before his accident. In the application, he falsely answered a question denying that anyone in his household either had no drivers license or had a suspended or revoked drivers license when, in fact, his own license had been suspended for years before the application. Plaintiff was

The Court of Appeals held that summary disposition was inappropriate because numerous questions of fact existed as to whether Titan could properly rescind the policy.

a pedestrian when he was hit by a semi truck on the freeway. There was a question of fact as to whether plaintiff intentionally walked into the path of the truck with the intent to injure or kill himself. Titan denied the claim arguing that plaintiff's misrepresentation on the application for insurance justified rescission of the policy from the inception date.

The trial court disagreed and granted summary disposition in favor of plaintiff, requiring Titan to pay PIP benefits. Arguments were made by Zurich (the insurer of the truck that would have been responsible for PIP payments assuming that the Titan policy had been properly rescinded and the injury was "accidental") that any misrepresentation in plaintiff's application for insurance was not material, that Titan would have issued the policy even if plaintiff had admitted to the suspension of his license on the application, and that Titan had accepted a premium payment after having sent the rescission letter. Titan countered those arguments.

The Court of Appeals held that summary disposition was inappropriate because numerous questions of fact existed as to whether Titan could properly rescind the policy. Specifically, the Court noted that there were questions of fact as to (a) whether plaintiff knew his license was suspended at the time he applied for insurance (a misrepresentation must be intentional in order to support rescission), (b) whether it was the agent, rather than the plaintiff, who made the representation because the agent physically completed the application, and (c) whether Titan would have issued the policy even if it had known of the suspension of plaintiff's license, thereby rendering the misrepresentation "non-material."

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Medical Malpractice Report

Notices of Intent and the 182-Day Waiting Period

Tyra v Organ Procurement Agency of Michigan, 302 Mich App 208; ___ NW2d ___ (2013). Application for leave to appeal pending in the Supreme Court; Conflict declared *Furr v McLeod*, ___ Mich App ___; ___ NW2d ___ (2013) vacated, conflict panel convened ___ Mich App ___ (November 20, 2013) (Docket No. 310652).

The Facts: In *Tyra*, the plaintiff sent defendants a notice of intent (NOI), and then filed a complaint 112 days later, despite the mandatory 182-day waiting period set forth in MCL 600.2912b. One of the defendants filed affirmative defenses that included a statement that "Plaintiff failed to comply with the notice provisions of MCL 600.2912b . . . and that Plaintiff's action is thus barred; Defendant gives notice that it will move for summary disposition." The other defendants did not mention the statute at all. The defendants moved for summary disposition, which the trial court granted, relying on *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005) (a complaint filed before the expiration of the mandated waiting period under MCL 600.2912b neither commences a medical-malpractice action nor tolls the statute of limitations).

In *Furr*, the plaintiffs filed their complaint 181 days after serving a notice of intent. The trial court denied defendants' motion for summary disposition, relying on *Zwiers v Growney*, 286 Mich App 38; 778 NW2d 81 (2009) (invoking MCL 600.2301 to excuse a complaint filed 1 day too soon). The defendants filed an application for leave to appeal to the Court of Appeals. In the interim, the Supreme Court decided *Driver v Naini*, 490 Mich 239; 802 NW2d 311 (2011), which reaffirmed that *Burton* still applied despite the Supreme Court's decision in *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009) (permitting a court to either ignore or allow a plaintiff to remedy defects in the substance of NOIs). In lieu of granting leave, the Court of Appeals remanded to the trial court for reconsideration of the summary disposition motion under *Driver* and *Burton*. After the trial court again denied summary disposition, the Court of Appeals granted leave to appeal.

The Ruling: In *Tyra*, the Court of Appeals, in an opinion authored by Judge Amy Ronayne Krause, and joined by Judge Cynthia Stephens, first found fault with the affirmative defenses of all defendants, including the one who specifically asserted failure to comply with MCL 600.2912b as a ground for relief, and held that the defendants had not properly preserved any statute of limitations defense. As to the grant of summary disposition itself, the Court of Appeals held that the trial court properly granted summary disposition, but should have permitted plaintiff to move for, and argue in favor of, somehow "amending the filing date of her complaint and affidavit of merit" under MCL 600.2301 and *Zwiers*. The panel reversed the grant of summary disposition and remanded for further proceedings. Judge Kurtis Wilder filed a dissenting opinion, asserting that *Zwiers* was no longer good law in light of *Driver*. He also concluded that the defendants had not waived (and could not waive) their defense that the complaint was prematurely filed.

In *Furr*, the Court of Appeals, in an opinion authored by Judge William Whitbeck and joined by Judge Michael J. Kelly, concluded, similarly to Judge Wilder

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Motions in limine to exclude expert testimony should be considered whenever an expert admits not having any literature or studies to support his or her opinions, and especially where he or she cannot even point to his or her own professional experience as a basis for the theory.

in *Tyra*, that *Driver* and *Burton* compelled the dismissal of the plaintiff's complaint, and essentially invalidated *Zwiers* and the proposition that MCL 600.2301 could somehow be used to change the date of service of an NOI or the filing of a complaint. The panel noted, however, that *Tyra* was binding under the "first-out" rule of MCR 7.215(J). Accordingly, the court held that though it would have reversed the denial of summary disposition, it was constrained by *Tyra* to affirm instead. The majority[1] asserted that it believed *Tyra* to be wrongly decided, and called for a conflict panel under MCR 7.215.

The Court of Appeals entered an order vacating *Furr* under MCR 7.215(J)(5), and ordered a special panel convened under MCR 7.215(J) to resolve the conflict between the *Tyra* and *Furr* decisions. As of the date of this writing, the panel has yet to hear arguments or issue an opinion. Also, there is a pending application for leave to appeal to the Supreme Court in the *Tyra* matter.

Practice Tip: *Tyra* and *Furr* show that the fallout from *Bush* has not quite settled yet. Though it is largely understood that most defects to the content of NOIs are now, essentially, not worth challenging,[2] the cases dealing with non-content-based defects—such as premature filing — are all over the map in terms of how courts deal with them. Despite the fact that the court in *Bush* emphasized that a plaintiff must continue to comply with the applicable notice period, and despite the court in *Driver* reaffirming the rule in *Burton*, case law has continued to excuse premature filings of complaints despite the rule that a prematurely filed complaint does not either commence an action or toll the limitations period. Defendants facing a prematurely filed complaint have a strong argument for summary disposition, but whether it will "stick" is an issue that will likely remain in flux unless and until the conflict panel in *Furr* and eventually the Supreme Court clearly set forth that *Zwiers* is no longer good law.

While *Tyra* may not ultimately win the day, it does set forth a troubling proposition for defense counsel seeking to assert statute of limitations defenses based on failure to comply with the notice period of MCL 600.2912b (or, for that matter, for failures to file complaints with affidavits of merit under MCL 600.2912d): the majority in *Tyra* rejected a fairly specific objection based on the premature filing of the complaint because it didn't specify enough facts supporting that defense. Defense counsel should consider making any premature-filing defense asserted in responsive pleadings as specific as possible until the issue of whether *Tyra* correctly held that such a defense can be waived is resolved.

Evidentiary Basis for Expert Testimony

Tondreau v Hans, ___ Mich ___; 836 NW2d 691 (2013), reversing *Tondreau v Hans*, unpublished opinion per curiam of the Court of Appeals, issued March 14, 2013 (Docket No. 300026).

The Facts: The Court of Appeals affirmed a trial court order permitting the plaintiff's expert witnesses to testify that an ultimately fatal hematoma occurring after a carotid endarterectomy was caused by inadequate perfusion of the brain, causing the brain to rapidly shrink to such an extent that it tore the blood vessels bridging the brain, the covering of the brain, and the skull. The experts admitted, however, that there was no scientific evidence, case study, or literature that would support that such a thing could even happen, and the experts admitted that they had neither witnessed nor even heard of something like that ever happening. The closest one expert could come was to attempt to analogize the brain to the liver because both were "soft organs," and livers had been known to shrink quickly based on being underperfused. The Court of Appeals held that there was enough testimony from the experts to create a question of fact for the jury about whether their theories were correct.

The Ruling: In lieu of granting leave to appeal, the Supreme Court issued a unanimous order peremptorily reversing the Court of Appeals, holding that "the lack of supporting literature, combined with the lack of any other form of support for these opinions[,] render the opinions unreliable and inadmissible under MRE 702."

Practice Tip: Motions in limine to exclude expert testimony should be considered whenever an expert admits not having any literature or studies to support his or her opinions, and especially where he or she cannot even point to his or her own professional experience as a basis for the theory.

Endnotes

1. Judge Donald Owens concurred with the majority that *Tyra* was binding, but dissented from the part of the opinion characterizing *Tyra* as wrongly decided and calling for a conflict panel.
2. Although even *Bush* contemplates that a defective NOI that does not reflect a "good-faith effort" to comply with the statutory requirements might not be able to be saved by MCL 600.2301.

MDTC Appellate Practice Section

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Appellate Practice Report

Book Review: *Appellate Practice Compendium* (American Bar Association)

For anyone faced with handling an appeal, whether in Michigan, the Sixth Circuit, or another jurisdiction, the American Bar Association's *Appellate Practice Compendium* is truly a must-have. Jointly authored by a veritable who's who of state and federal appellate lawyers, the "Compendium" provides the ultimate insider's look into the appellate rules and procedures of every (yes, every) federal and state appellate court.

What makes the "Compendium" especially useful is that it is organized for quick reference. It has separate chapters devoted to each federal and state jurisdiction, beginning with the federal courts of appeals and followed by the state appellate courts, which are listed in alphabetical order (and include the state's highest court as well as intermediate appellate courts, if any). The "Compendium" even provides an explanation of the organization and structure of each state's appellate court system.

The chapters within the "Compendium" contain topic headings covering everything from "commencing the appeal" to "motions," "brief contents," "appendices," and "oral argument" (including advice that in Montana, the Supreme Court only grants oral argument in "approximately 20 cases each year"). In Florida, for example, a motion for an extension of time to file a brief must include "a certification that the opposing counsel has been consulted and an indication whether the parties consent or object." A brief filed in the Georgia Court of Appeals must contain three parts: a concise statement of the proceedings below; an "enumeration of errors" (with each enumeration addressing only a single error); and an argument section that follows the order of the enumeration of errors. In addition to bread-and-butter matters concerning the content and format of briefs, etc., the "Compendium" also addresses such discrete topics as "amicus curiae practice," "motions for rehearing," and "interlocutory review."

Even better, each chapter of the "Compendium" begins with a list of "Top Tips for Out-of-State Practitioners," which is especially helpful in avoiding the most common pitfalls. Filing a brief in the Alaska Supreme Court? You will need to have your brief and excerpts of records reviewed by the court clerk's office for compliance with format rules *before* they are printed, bound, and served. In the Eighth Circuit, always ask for oral argument, as "some members of the Eighth Circuit take the failure to do so as a signal that the appeal lacks merit." In Hawai'i, attorneys are cautioned that many appeals are "dismissed as premature or late based on arcane interpretations of what constitutes a 'final judgment or order.'" In South Dakota, briefs are commonly rejected for "failure to cite the three or four most relevant cases under each issue in the statement of issues (do not cite more than four)."

The "Compendium" is also a useful tool for practice right here in Michigan and the Sixth Circuit. The Michigan chapter is co-authored by Michigan's former Solicitor General, John Bursch (who recently returned to Warner Norcross & Judd), along with Warner Norcross & Judd's Gaëtan Gerville-Réache. The Sixth Circuit chapter is authored by Plunkett Cooney's Mary Massaron Ross and Hilary Ballentine. Even for those with experience practicing in the Sixth Circuit, Michigan

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Even for those with experience practicing in the Sixth Circuit, Michigan Supreme Court, and Michigan Court of Appeals, the "Compendium" is filled with important reminders.

Supreme Court, and Michigan Court of Appeals, the "Compendium" is filled with important reminders. In the Sixth Circuit, 14-day briefing extensions are routinely granted, but a motion for an extension must contain a "well-grounded explanation for why the time is needed." Have a question about a pending Sixth Circuit appeal? Your case manager is an invaluable resource. In the Michigan Court of Appeals, "[i]ssues not presented in the 'Statement of Questions Involved' are waived." And in the Michigan Supreme Court, attorneys are advised to "always file a brief in opposition to an application for leave to appeal," as the Supreme Court "enters a peremptory order on the application" in approximately 10 percent of cases.

In a nutshell, the "Compendium" contains a wealth of detailed information on local appellate rules and practices that will serve you well no matter where your appeal may take you.

Filing Reply Briefs in Support of Applications for Leave to Appeal in the Circuit Court and Court of Appeals, and in Appeals as of Right in Circuit Court

Until a recent court rule amendment, parties wishing to file a reply brief in support of an application for leave to appeal in the circuit court or the Court of Appeals had to seek leave, as the court rules did not provide for filing a reply brief as a matter of right. This was a change in practice from the Supreme Court, where reply briefs have long been permitted in support of applications for leave to appeal. Another unique aspect of appeals in circuit court was that the court rules did not provide for reply briefs even in appeals as of right.

Effective January 1, 2014, reply briefs are now available as a matter of right for applications for leave to appeal in both the circuit court and Court of Appeals, as well as in appeals as of right in circuit court. MCR 7.105, which governs applications for leave to appeal in the circuit court, has been amended to permit the filing of a reply brief "[w]ithin 7 days after service of the answer." For appeals as of right, a reply brief may be filed "[w]ithin 14 days after the appellee's brief is served." MCR 7.111(A)(3). In the Court of Appeals, a reply brief may be filed within 21 days after service of the answer to the application. See MCR 7.205(D); MCR 7.212(G).

Don't Call Your Opponent's Argument "Ridiculous" — a Recent Lesson in Civility

It can be tempting to use terms like "ridiculous" in addressing an opponent's position. But the Sixth Circuit has provided a recent reminder that such hyperbole is ineffective, and can sometimes backfire. In *Bennett v State Farm Mut Auto Ins Co*, 731 F3d 584 (CA 6, 2013), the issue was whether the plaintiff was an "occupant" of a vehicle that struck her. The plaintiff argued that she was an occupant for purposes of the driver's insurance policy because the impact threw the plaintiff onto the vehicle's hood. The district court disagreed and granted summary judgment to State Farm. *Id.* at 585.

In response to the plaintiff's appeal, State Farm called her principal argument "ridiculous." *Id.* The Sixth Circuit, however, concluded that the plaintiff's argument was in fact correct and reversed the district court, holding that the plaintiff *was* an occupant of the vehicle because State Farm's policy defined "occupant" as "in, on, entering or alighting from." *Id.*

But the Sixth Circuit did not stop there. In a firm rebuke of State Farm's brief on appeal, the court cautioned that there are "good reasons not to call an opponent's argument 'ridiculous'":

> The reasons include civility; the near-certainty that overstatement will only push the reader away (especially when, as here, the hyperbole begins on page one of the brief); and that, even where the record supports an extreme modifier, "the better practice is usually to lay out the facts and let the court reach its own conclusions." *Id.*

So the next time you consider using harsh terms in addressing your opponent's position, it might be wise to keep in mind what happened to State Farm.

Essential iPad Applications for Appellate Lawyers

Appellate lawyers tend to come in two varieties: those who embrace new technology enthusiastically and those for whom new technology is about as welcome as the first Horseman of the Apocalypse. But technology that begins as a luxury often has a way of becoming unofficially mandatory for attorneys. Cell phones worked that way. Early adopters were seen as having perhaps too much money to spend. But now it is rare indeed to find an attorney who expects he or she can maintain a practice without keeping a smart phone within arm's reach at almost every waking hour.

Although iPads have not yet become quite as essential as smart phones, there is among Michigan's appellate judges a

Judges who use iPads will be reviewing your briefs and exhibits with iAnnotate or a similar program – which means it's a good idea to review every brief in iAnnotate before you file it to ensure that it is properly bookmarked and easily accessible.

definite trend of integrating iPads into their daily work. And it seems that each week brings news of new applications that can streamline attorneys' practices. So if you have not yet integrated an iPad into your practice, there are two reasons to consider doing so. First, there is a good chance that your appellate briefs will be reviewed on an iPad. By understanding how documents work on tablets, you can maximize your chances for effective written advocacy. Second, a number of applications really can simplify your practice, creating more room for you to focus on legal matters rather than administrative ones.

iAnnotate (or one of its cousins, like Good Reader) is probably the most important app for lawyers, in terms of both understanding how briefs are presented to appellate judges and making your practice more efficient. This program allows you to read and modify PDF documents. Judges who use iPads will be reviewing your briefs and exhibits with iAnnotate or a similar program — which means it's a good idea to review every brief in iAnnotate before you file it to ensure that it is properly bookmarked and easily accessible. (For information on bookmarking briefs, see our article in the September 2013 *Michigan Defense Quarterly*).

iAnnotate also allows you to store PDFs, which means you can load a complete trial record onto your iPad, store documents in hierarchical folders, and quickly access any document with ease. You can then highlight, markup, and bookmark documents. This makes it easy to retrieve key portions of a trial record while drafting a brief or preparing for argument.

iAnnotate allows you to manage and markup documents prepared by others. You will also need a way to create documents on your iPad. There are many options on the market but we tend to think that **7notesHD Premium** is one of the best. 7notesHD Premium allows you to create documents in four basic ways:

1. Using a stylus, you can write by hand in a box at the bottom of the screen, and 7notesHD Premium will resize and replicate your handwriting. In other words, this method allows you to draft notes by hand and to preserve your work in your own handwriting.

2. You can also use 7notesHD Premium's handwriting-to-text converter. You write by hand in the same box used for recording your handwriting, but 7notesHD Premium converts your writing to printed text. The software works remarkably well, and is even able to decipher cursive.

3. Instead of writing with a stylus, you can use the iPad's built-in keyboard or a separate keyboard (such as a Bluetooth-ready keyboard).

4. You can forgo inputting text by hand entirely and use the dictation software that is built into every iPad. Simply press the microphone button next to the iPad's on-screen keyboard, and dictate your text. The iPad seems to recognize most punctuation commands. Its major drawback when compared to more sophisticated dictation software like DragonDictate is the need to press the microphone button again at the end of each sentence. But inputting text this way is often more efficient than handwriting or typing.

No iPad application is likely to take the place of standard word processing software for writing large appellate briefs. But applications like 7notesHD Premium are a sound substitute for writing on paper and even offer a distinct advantage. Your notes — even those written by hand — are automatically stored in electronic form. With the click of a button, you can email them, store them online, or store them with a client file located in iAnnotate.

An iPad is also a sleek tool for conducting legal research. Both Lexis and Westlaw have applications designed for the iPad; we happen to be familiar with **WestlawNext**'s app, which will be the focus here.

Westlaw's app seems to have all of the tools available through its Internet portal. But the app offers these in an especially user-friendly manner. One of its best features is that cases are opened in new windows, which allows you to quickly tab back through your research trail. For example, suppose you are researching the application of the open and obvious doctrine to accidents on black ice. Using the database for Michigan law, you search for "open and obvious" and "black ice." (Note: you can also use the dictation function in the iPad's built-in keyboard, stating "open quote" and "close quote" to insert the necessary punctuation). These search terms yield 120 cases. When you tap the name of the first case – *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474; 760 NW2d 287 (2008) – the text of the opinion opens in a new window. Pressing "close" in the bottom left-hand corner of the screen sends you quickly back to your search results. And if you click on a hyperlink to a case *within* an opinion, that case opens in a new tab,

No iPad application is likely to take the place of standard word processing software for writing large appellate briefs. But applications like 7notesHD Premium are a sound substitute for writing on paper and even offer a distinct advantage.

with a link to the originating case in a tab next to it. This design allows you to visualize your research trail and move backwards and forwards within it.

Like Westlaw's web-based portal, this application allows you to email and print copies of cases or save them in an online folder. It also works well with applications like 7notesHD Premium. While working in the Westlaw app, you can highlight text and then select "copy with reference." When you flip back to 7notesHD Premium and press a finger against the screen, you can paste the text you copied from Westlaw into your notes, along with the case citation. Using this method, you can compile detailed research notes, and supplement them with written (or dictated) text.

There are alternatives to each of these applications, some with different bells and whistles. The key point is that you can use an iPad for managing PDFs, creating text, and legal research – in other words, for much of the bread-and-butter work of appellate law. And there are a host of other applications for the iPad that assist with your daily practice, such as **Dropbox** (a user-friendly application for cloud storage), calendar programs (such as the iPad's built-in application or the slightly more elegant **Planner Plus**), and collaborative applications like **Quip** (an application for collaborative list-making).

It would be an exaggeration to say that the iPad has become essential for practicing law. But attorneys who really understand what it is like to review briefs and exhibits on an iPad are better equipped to ensure that *their* briefs are presented in a way that makes judges' lives easier. And when it comes to managing a trial record, an iPad is much more portable than briefcases full of binders the size of Manhattan phone books.

To be sure, integrating an iPad into your practice may require an initial hit to your wallet. But it is one for which your back — and your clients — may thank you.

Dismissing Claims Without Prejudice to Create Appellate Jurisdiction in Michigan's State and Federal Appellate Courts.

In Michigan's federal and state appellate courts, a party has a right to appeal only from a final judgment, usually defined as an order that disposes of all claims against all parties. MCR 7.202; 28 USC 1291. If one defendant obtains an order dismissing the claims against it but claims remain pending against co-defendants, a plaintiff must generally wait until a judgment is entered for or against the remaining defendants before it has a right to appeal this order.

At times, plaintiffs may respond to summary judgment against one defendant by attempting to manufacture appellate jurisdiction — that is, by dismissing the remaining claims or parties *without prejudice* in order to pursue an appeal of right against the dismissed defendant. Whether this strategy succeeds in Michigan may depend on whether the action is pending in federal or state court.

Michigan's Court of Appeals has rejected attempts to manipulate its jurisdiction. In *City of Detroit v State*, 262 Mich App 542; 686 NW2d 514 (2004), for example, a number of plaintiffs, including the City of Detroit, sued State Fair Development Group, LLC and the State of Michigan. The trial court denied the state's motion for summary disposition and, after the parties stipulated to dismiss the remaining claims without prejudice, the state appealed. In forceful terms, the Court of Appeals held that the state did not have a right to appeal. *Id.* at 545-546. Key to the panel's decision was its conclusion that an order dismissing claims without prejudice is not a "final order" because "it does not resolve the merits of the remaining claims." *Id.* at 545. Without a final order, the state had no right to appeal.

But the panel did not end there. It had strong objections to the parties' attempt to manipulate its jurisdiction: "The parties' stipulation to dismiss the remaining claims was clearly designed to circumvent trial procedures and court rules and obtain appellate review of one of the trial court's initial determinations without precluding further substantive proceedings on the remaining claims. This method of appealing trial court decisions piecemeal is exactly what our Supreme Court attempted to eliminate through the 'final judgment' rule . . . [W]e caution practitioners and trial courts to refrain from this type of improper practice, which we do not wish to reward." *Id.* at 545-546. Because of the case's legal importance, however, the Court granted leave to appeal in *City of Detroit*.

The Sixth Circuit Court of Appeals has taken a somewhat different view of this practice. As an initial matter, the Sixth Circuit allows parties to "cure" premature notices of appeal by dismissing outstanding claims. In *Gillis v US Dept of Health & Human Services*, 759 F2d 565 (CA 6, 1985), for instance, the plaintiffs filed a notice of appeal before entry of a final judgment or an appeal-

The Sixth Circuit joined other federal courts in holding that "an interlocutory appeal [that has not been certified for appeal by the district court] invokes appellate jurisdiction where judgment becomes final prior to disposition of the appeal."

able non-final judgment (for example, an order certified for appeal under Federal Rule of Appellate Procedure 54). At oral argument, plaintiffs' counsel informed the court "for the first time . . . that none of the [other] defendants remain[ed] in the case." *Id.* at 588. The court was therefore "presented with the question of whether a premature notice of appeal is effective to vest this Court with jurisdiction where the remaining elements of the case have been finally disposed of but no new notice of appeal has been filed." *Id.* at 589.

The Sixth Circuit joined other federal courts in holding that "an interlocutory appeal [that has not been certified for appeal by the district court] invokes appellate jurisdiction where judgment becomes final prior to disposition of the appeal." *Id.* Although it characterized the parties' approach as "sloppy," it allowed the appeal to proceed. The Sixth Circuit later justified this approach by reasoning that "[a] grant of partial summary judgment merges into a final judgment and can be reviewed upon appeal of the final judgment." *Bonner v Perry*, 564 F3d 424, 427 (CA 6, 2009), citing 15B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3914.28 (2d ed 1991 & 2008 Supp).

The Sixth Circuit recently clarified, however, that parties may not use conditional dismissal to obtain immediate appellate review of otherwise non-final orders. *Page Plus of Atlanta, Inc v Owl Wireless, LLC*, 733 F3d 658 (CA 6, 2013), addresses the following issue:

> Does a party's conditional dismissal of unresolved claims, in which the party reserves the right to reinstate those claims if the case returns to the district court, after an appeal of the resolved claims, create a final order under 28 U.S.C. §1291?

The Court answered this question bluntly: "No." *Id.* at 659.

The district court in *Page Plus* had granted summary judgment in the defendant's favor on both the plaintiff's claims and on the defendant's counterclaims. Consequently, as the Sixth Circuit put it, "[a]ll that remained was the damages trial on [defendant's] counterclaim." *Id.* When the defendant chose not to pursue damages on its counterclaim, the district court entered a stipulated order stating that, although the case was dismissed, the defendant could re-raise its damages claim if the order granting summary judgment was reversed.

When both parties appealed the district court's decision, the Sixth Circuit concluded that it lacked jurisdiction. The *Page Plus* court reasoned that the district court's order was a conditional dismissal and therefore was not a "final order" for purposes of 28 USC 1291. The court held that finality must be determined at the time the appeal is filed and the "finality inquiry should not present the court of appeals with a moving target." *Id.* at 660. In other words, an order must be absolutely, and not merely conditionally, final.

The *Page Plus* court also noted that policy considerations militated against treating the parties' conditional dismissal as a final order. The purpose of the final judgment rule is to ensure that all issues are brought before the appellate court at the same time. A contrary rule — one that allowed the parties to treat any order as final and to resurrect a case in the event of remand – would lead to inefficient and piecemeal appeals.

Notably, *Page Plus* did not overrule the court's prior opinion in *Hicks v NLO, Inc,* 825 F2d 118 (CA 6, 1987). The plaintiff in *Hicks* filed two claims. The district court dismissed one and, after voluntarily dismissing the remaining claim without prejudice, the plaintiff filed an appeal. The defendant argued that the appealable order was not final because the plaintiff could still pursue the claim that had been voluntarily dismissed. The *Hicks* court disagreed and treated the district court's order as final.

Rather than overruling *Hicks*, the *Page Plus* court distinguished it. It held that a dismissal without prejudice differed from a conditional dismissal for several reasons. A party who voluntarily dismisses a claim "assumes the risk that the statute of limitations, any applicable preclusion rules or any other defenses might bar recovery on the claim," and "loses any leverage that the claim provides in the initial action." In addition, the voluntarily-dismissed claim must be re-filed in a separate action, which eliminates the "risk that the same case will produce multiple appeals raising different issues." *Page Plus,* 733 F3d at 661.

These decisions from the Michigan Court of Appeals and Sixth Circuit suggest that, if a party dismisses outstanding claims without prejudice and reserves the right to re-file them in a new action, the question of appellate jurisdiction hinges on whether the case is proceeding in state or federal court. Michigan courts have little patience for this kind of manipulation of its jurisdiction. But the Sixth Circuit Court of Appeals, as suggested by *Hicks*, may find that it has jurisdiction over the appeal. Whether the Sixth Circuit's more lax approach is consistent with congressional limits on federal jurisdiction is, perhaps, another matter.

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DRI Report

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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 DRI Annual Meeting took place in Chicago in October and was well attended by MDTC members. Note in your calendars that next year's DRI annual meeting will be held at the San Francisco Sheraton in October 2014.

If you are not yet a DRI member, please contact me to discuss your membership options. You may be eligible for a free year of membership to DRI.

The following is a short synopsis of some of the other upcoming DRI events:

- **Toxic Torts and Environmental Law – February 20, 2014 New Orleans, LA**
  This year's Toxic Torts and Environmental Law Seminar will provide insider knowledge and critical information that you cannot get anywhere else—information you need to make sure you are in the forefront of emerging toxic tort and environmental issues. This year's program includes presentations by several in-house counsel, a former senior EPA lawyer and enforcement official, and the vice president of regulatory and technical affairs of the American Chemistry Counsel. In addition, one of the most famous plaintiffs' attorneys in the country will demonstrate and then discuss the tactics and strategies behind his winning trial techniques. From beginning to end, this program will provide concrete practice pointers and real-life "take-aways" that you can use in your law practice immediately. Please join us in New Orleans and learn from nationally recognized lawyers and scientists, as you network with colleagues and industry professionals from all across the country.

- **Medical Liability and Healthcare Law – March 20, 2014 Las Vegas, NV**
  DRI's Medical Liability and Health Care Law Seminar offers two days of targeted instruction on emerging topics in the medical malpractice and health care law field. Aimed at defense attorneys, in-house counsel, claims professionals, and risk management personnel, this seminar is focused on cutting-edge topics presented by an accomplished faculty of attorneys, physicians, and claims professionals — all leaders in their respective fields. There will be excellent networking opportunities, as well.

For more details on these and other seminars, podcasts 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.

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Legal Malpractice Update

Summary disposition Affirmed for Lawyers who Decide not to Pursue Default Judgment.

Caudill v Attorney Defendant, unpublished opinion per curiam of the Court of Appeals, issued November 19, 2013 (Docket No. 310714).

The Facts: Plaintiff's claims in the underlying case arose out of the distribution of proceeds from a real estate transaction in 2004. Plaintiff sued the closing agent, who in turn sued a third-party defendant ("the TPD"). Plaintiff alleged that he was entitled to certain proceeds, which the closing agent had distributed to the TPD. The closing agent eventually assigned its claims against the TPD to plaintiff and was dismissed from the underlying suit. Plaintiff proceeded with the suit against the TPD, and the attorney defendants began representing plaintiff in that suit when plaintiff's original attorney withdrew. After various proceedings, including a notice of default against the TPD and a subsequent stipulation setting aside the default, the attorney defendants withdrew as plaintiff's counsel. Plaintiff went to trial against the TPD, and the TPD prevailed.

Plaintiff then sued the attorney defendants and others, alleging various claims for legal malpractice as well as a myriad of other claims. The trial court granted summary disposition in favor of all defendants in separate orders. Plaintiff appealed.

The Ruling: The Court of Appeals affirmed the trial court's grant of summary disposition. In relevant part, the Court concluded that the attorney defendants' decision not to pursue a default judgment was reasonable given the filing of the TPD's answer soon after the notice of default was filed. Under the circumstances, it was reasonable for the attorney defendants to believe that the default would be set aside. The court also concluded that the attorney defendants did not commit malpractice by failing to sue additional parties involved in the underlying transaction or by failing to sue the TPD for fraud where they were not hired to do so (and where plaintiff failed to articulate a basis on which these persons could be held liable on these claims).

The court also rejected plaintiff's argument that the attorney defendants were negligent in withdrawing as plaintiff's attorneys just before trial, leaving plaintiff without time to seek an adjournment. The withdrawal was done with leave of the court, and without plaintiff's opposition. Because plaintiff did not oppose the withdrawal and did not assert what would have been done differently to obtain an adjournment (other than subpoena a witness), the attorney defendants were entitled to judgment as a matter of law.

Finally, the court concluded that the attorney defendants were entitled to judgment as a matter of law as to plaintiff's claims for failing to keep him informed and failing to investigate. Plaintiff did not articulate what investigation the attorney defendants should have done, or what it would have revealed. Plaintiff also did not establish that the failure to keep him informed was the proximate cause of any injury, and thus the claim was untenable.

Practice Note: Clearly setting forth the scope of your representation from the outset of the attorney-client relationship may go a long way toward avoiding liability if a client alleges negligence for failing to pursue claims or parties outside the scope of the representation.

The authors acknowledge the valuable assistance provided by Alissa Hurley, an associate of the firm.

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Court Rules Update

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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

PROPOSED

Admin no.: 2013-28
Rule affected: 2.510
Issued: 9-18-03
Comments to: 1-1-14

This proposed amendment would authorize courts to allow prospective jurors to complete and return questionnaires electronically, and would allow courts to maintain the questionnaires electronically.

ADOPTED

Admin no.: 2012-03
Rules affected: 1.111, 8.127
2.507-D (rescinded)
Issued: 9-11-13
Effective: Immediate

For parties and witnesses with "limited English proficiency," courts are required to appoint interpreters. At the conclusion of the case, the court will have discretion to impose the cost of the interpreter on a party if (1) the party has income over 125% of the Federal Poverty Level and (2) the court finds that imposing the cost does not unduly impede that party's ability to pursue or defend the claim. In a separate Administrative Order, each circuit is directed to adopt its own "language access plan."

Justice Markman authored a Federalism-based dissent. In August 2010, the U.S. Department of Justice sent a letter to the highest court in each state, asserting that courts were required to provide free interpretive services regardless of ability to pay, and that failure to comply could be regarded as discrimination based on national origin under the Civil Rights Act of 1964. Compliance was demanded as a condition of receiving federal assistance.

Rather than capitulating, Justice Markman said, the Supreme Court should respond and, if necessary, vigorously defend a legal action brought by the DOJ:

> Perhaps most troubling to me is that the demands of the Department are reflective of an increasingly familiar pattern by which this and other state supreme courts have routinely been "commandeered" or "dragooned" by federal agencies to enact new court rules, not as the product of any exercise of independent judgment by the courts themselves that such rules are warranted, but as the product of financial threats by these agencies. These demands typically occur in areas of policy that lie within the core constitutional responsibility of the states, such as child support regulations, foster care rules, and juvenile guardianship policies, and where there is little or no federal authority that can be discerned from the Constitution. A charade then proceeds in which the federal agency pretends to respect the authority of the state courts, and the state courts pretend to exercise that authority. A constitutional

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dynamic thus arises that caricatures the proper relationship between our national and state governments, in which publicly-unaccountable federal officials decree word-for-word to elected state justices what new court rules are required, and how exactly the justices must cast their votes at their next judicial "deliberations." It is hard to imagine a more distorted illustration of republican self-government, in which elected representatives of the people become little more than mechanical instrumentalities for obediently carrying out the demands of federal officials. And by this process, the federal government's spending authority is abused, both by imposing obligations upon the states allowing the federal government to accomplish policy ends it could accomplish in no other fashion, and by making state representatives appear feckless and ridiculous.

No other Justice joined this dissent.

The Department of Justice has responded that the proposal to require some parties to pay for interpreters is a violation of the Civil Rights Act.

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:

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Member News – Work, Life, and All that Matters

Member News is a member-to-member exchange of news of work (a good verdict, a promotion, or a move to a new firm), life (a new member of the family, an engagement, or a death) and all that matters (a ski trip to Colorado, a hole in one, or excellent food at a local restaurant). Send your member news item to Lee Khachaturian (dkhachaturian@dickinsonwright.com) or Jenny Zavadil (jenny.zavadil@bowmanandbrooke.com).

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MDTC Amicus Activity in the Michigan Supreme Court

In *Hannay v MDOT* (Supreme Court No. 146763), the Court granted leave to appeal and invited participation from MDTC. The Court has requested the parties to address whether the "motor vehicle" exception to governmental immunity (MCL 691.1405) allows parties to seek economic damages in the form of "wage loss" and lost earning/lost future earning potential for bodily injuries arising out of motor vehicle accidents in which a governmental entity is involved.

The Governmental Tort Liability Act (GTLA) allows suit for "bodily injury and property damage" arising out of negligent operation of a motor vehicle by a governmental party/governmental vehicle. MCL 691.1405. Michigan's No-Fault Act allows for the recovery of economic damages, including wage loss. MCL 500.3135(3)(c).

Plaintiff was injured in an accident with a salt truck operated by the state of Michigan, Michigan Department of Transportation (MDOT). Plaintiff sued the state claiming economic damages, including "wage loss," lost earnings, lost future earnings, and non-economic damages for serious impairment of a bodily function, both of which are ordinarily recoverable under the No-Fault Act.

MDOT argued the GTLA waives the government's suit immunity for "bodily injury" claims only, not any broader claims associated with such injury. MDOT cited *Weschler v Mecosta County Rd Comm'n*, 480 Mich 75, 85 (2008), which defined the term "bodily injury" under the GTLA's motor vehicle exception as "physical or corporeal injury to the body." *Weschler* held "loss of consortium" was not recoverable under the "motor vehicle exception." *Id.*

In a published opinion, the Court of Appeals held that work-loss benefits and benefits for ordinary and necessary services that exceed the statutory personal protection insurance benefit maximum pursuant to MCL 500.3135(3) are awardable against governmental entities. (Under the No-Fault Act there is a provision allowing for recovery of damages *in excess* of the daily, monthly, and three-year limitations contained in the No-Fault Act (MCL 500.3107 through MCL 500.3110)).

The Court of Appeals also affirmed the trial court's determination to award Plaintiff "lost earning potential" as a dental hygienist even though, before her injury, she had not yet completed her education in that field of study.

In its grant order, the Supreme Court requests briefing on the issues of whether economic damages in the form of "wage loss" are recoverable under the GTLA's motor vehicle exception (citing *Weschler*, *supra*), and, if so, referring to the Court of Appeals' ruling affirming the trial court's award of "projected earnings," whether loss of income from work, only, or lost earning capacity may be awarded.

This is a significant case likely to garner much attention. MDOT's argument is in line with the jurisdictional principle adhered to in Michigan concerning governmental immunity, and with the strict interpretation to be given to provisions waiving the government's suit immunity.

In my personal judgment, if one adheres strictly to these principles, then the No-Fault Act would likely *yield* to the narrow confines of liability that can be imposed against the government under the GTLA. MDTC has decided not to file an amicus brief in this case.

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There was another case on application that presented similar issues, but in that case, the Court of Appeals held that a plaintiff in a cause of action brought under the motor vehicle exception to governmental immunity is not entitled to any damages beyond those for "bodily injury" suffered.

In *Hunter v Sisco*, Supreme Court No. 147335, the Supreme Court denied leave to appeal. The Court of Appeals panel rejected plaintiff's argument that he was entitled to *any* other non-economic damages. The plaintiff filed an application for leave to appeal and the City of Flint cross-appealed. An application and a cross-application are currently pending in the Supreme Court.

Continuing in the vein of cases involving governmental entities and/or governmental immunity, the Court has also granted oral argument on an application for leave to appeal filed by MDOT in the case of *Yono v MDOT*, Supreme Court Case No. 146603, to address whether an alleged defect in the surface area of a parallel parking space running adjacent to and contiguous with a public highway (M22 in Sutton's Bay) is itself a defect within the meaning of the highway exception to governmental immunity. MCL 691.1402(1). Oral argument is scheduled for January.

The Court's order requested the parties to address whether the parallel parking area where the plaintiff fell is in the improved portion of the highway designed for vehicular travel within the meaning of MCL 691.1402(1).

On November 27, 2013, in *Farm Bureau Mutual Ins Co v Bowers*, Supreme Court Docket No. 147611, the Court issued a "peremptory reversal" in an insurance case in which the issue of "bailment" came into play. The plaintiff was using a boat under a common law bailment arrangement. Plaintiff and his wife had borrowed the boat from plaintiff's parents. Insureds were excluded from coverage for personal/bodily injury claims. Insureds were defined as one having control and custody of the boat at the time of the incident. Plaintiff was injured during an outing on the boat while his wife was piloting it. The circuit court ruled plaintiff was an "insured" and therefore excluded from his parent's policy. The Court of Appeals found a question of fact and reversed. The Supreme Court issued a peremptory reversal finding a bailment existed as a matter of law and that plaintiff and his wife had custody and control over the boat as a matter of law. Thus, plaintiff was an insured excluded from coverage.

On November 27, 2013 the Court granted oral argument on the application in the case of *Wayne county Employees Retirement System v Charter County of Wayne*, Supreme Court Docket No. 147296. The Court has asked the parties to address (1) whether the Court of Appeals erred in holding that provisions of Wayne County Enrolled Ordinance 2010-514 violate the Public Employee Retirement System Investment Act, MCL 38.1132 et seq.; and (2) whether the ordinance violates Const 1963, art 9, § 24.

This case concerns retirement system assets, formulas, allocations, and funding, and it involves a constitutional and statutory challenge by plaintiffs Wayne County Employees Retirement System (the Retirement System) and Wayne County Retirement Commission (the Retirement Commission) in regard to a county ordinance enacted in 2010 by defendant Charter County of Wayne (the County) through a vote of defendant Wayne County Board of Commissioners (the County Board). Plaintiffs argued that the ordinance violates Const 1963, art 9, § 24, and the Public Employee Retirement System Investment Act (PERSIA), MCL 38.1132 et seq. The trial court granted the defendants' motion for summary disposition, rejecting the plaintiffs' constitutional and statutory objections to the ordinance. The plaintiffs appealed this ruling as of right. The Court of Appeals held while some of the language is safe from challenge, multiple provisions of the ordinance violate PERSIA, most importantly a provision requiring an offset of certain inflation reserve assets against the County's annual contribution to the pension fund. Further, the Court held the offset provision improperly authorized the County to take excess Retirement System inflation reserve assets and use them for the County's benefit.

Although not yet in the Supreme Court, on October 24, 2013, the Michigan Court of Appeals issued an adversarial published opinion in a medical malpractice case on an issue of some significance. In *Furr v McLeod, MD*, Court of Appeals Docket No. 310652, the panel ruled as it did only because prior Court of Appeals precedent required it to do so under Michigan Court Rule (MCR) 7.215(J). However, the panel requested impaneling a conflict resolution panel by the Court of Appeals to address whether its own holding remains good law in light of Michigan Supreme Court precedent suggesting that a contrary result should now issue. I wrote extensively on this in my last report. On November 20, 2013, the Court of Appeals vacated the opinion and ordered convening of the special panel.

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 we begin 2014, 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.

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Supreme Court Update

Michigan Supreme Court Again Confirms that a Plaintiff May Not Generally Recover Non-Economic Damages for Breaches of Commercial Contracts and the Negligent Destruction of Property

On October 4, 2013, in lieu of granting leave to appeal, the Michigan Supreme Court issued an order reversing the judgment of the Court of Appeals and confirming that "[e]motional distress damages are generally not recoverable for breach of a commercial contract . . . [or] for the negligent destruction of property." *Benefield v Cincinnati Ins Co*, 837 NW 2d 283 (2013).

Facts: The plaintiff owned a condominium unit that sustained significant water damage after an individual in the condominium unit directly above hers fired a loaded gun into the floor, rupturing a water line located between the two units. The plaintiff filed suit, seeking to recover damages from the owner of the adjoining condominium unit, the individual who fired the gun, the condominium management company, the condominium association and the association's insurer.

The trial court granted summary disposition for the defendants on the plaintiff's breach of contract claims, relating to the defendants' alleged failure to properly and timely repair the water damage. The trial court concluded that the plaintiff failed to prove the contractual or third-party beneficiary relationships that would be necessary to establish liability on those claims. The plaintiff's negligence claims were tried before a jury, which found the owner of the adjacent unit and his guest liable to the plaintiff for just over $15,000 in economic damages. The trial court excluded evidence at trial regarding the plaintiff's claimed emotional distress damages.

The Court of Appeals reversed and held first that the trial court erred in granting summary disposition of the plaintiff's contract claims because it was undisputed that a contract regarding the common areas of the condominium existed between the plaintiff and the association and that the plaintiff was, as a matter of law, an intended third-party beneficiary of the association's agreement with the management company based on her status as a condominium unit owner.

The Court of Appeals also held the trial court abused its discretion in excluding non-economic damages evidence at trial. According to the court, the plaintiff's claim for "mental distress related to the prolonged disruption of her unit" was the type of damage that would "naturally flow" from the alleged breaches of duty at issue.

Holding: Defendants applied for leave to appeal to the Michigan Supreme Court. The court, in lieu of granting leave to appeal, reversed the part of the Court of Appeals decision relating to the introduction of non-economic damage evidence at trial. The court explained that, consistent with *Kewin v Massachusetts Mutual Ins Co*, 409 Mich 401 (1980) and *Price v High Pointe Oil Co, Inc*, 493 Mich 238 (2013), emotional distress damages are not typically recoverable for breaches of commercial contracts or from the negligent destruction of property. Because the plaintiff failed to establish any exception to these established rules, the trial court properly excluded evidence relating to non-economic damages at trial.

In all other respects, the Supreme Court denied the defendants' application for leave to appeal.

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The court's decision again confirms that the damages recoverable for breaches of commercial contracts and for the negligent destruction of property are limited to economic damages.

Significance: The court's decision again confirms that the damages recoverable for breaches of commercial contracts and for the negligent destruction of property are limited to economic damages. This remains true regardless of whether the requested non-economic damages actually or naturally stemmed from the alleged conduct.

Evidence that Is Blatantly Contradicted by the Record Cannot Be Used to Create a Genuine Issue of Material Fact

On October 2, 2013, the Michigan Supreme Court, in lieu of granting leave to appeal, reversed the judgment of the Court of Appeals for the reasons stated in the Court of Appeals dissenting opinion. In doing so, the court held that summary disposition should be granted where the only evidence in support of a claim or defense is so blatantly contradicted by the record that no reasonable juror could believe it. *Fuhr v Trinity Health Corp*, 837 NW2d 275 (2013).

Facts: The plaintiff was hired by Trinity Health in 2007 to oversee St. Mary's Hospital's surgical inventory. Over the course of his employment, the plaintiff received numerous complaints from subordinates regarding his behavior. He also had problems maintaining consistent inventory numbers. Despite these issues, the plaintiff's annual performance reviews were generally positive.

In the first week of April 2010, the hospital made the decision to terminate the plaintiff's employment. The decision was based largely on the plaintiff's inability to resolve the hospital's inventory issues. Several internal communications by hospital executives, who, at that time, made efforts to find a replacement for the plaintiff, confirmed the timing of the hospital's decision. Plaintiff was not formally discharged until May 2010.

Between the time of the decision and the plaintiff's formal discharge, the plaintiff contacted the U.S. Attorney's office about a suspected overbilling issue he became aware of with one of the hospital's vendors. Specifically, the plaintiff learned that a vendor had been taking surgical inventory from the hospital. Although the inventory was owned by the vendor, the need to restock the inventory would have resulted in multiple billings to the hospital. The plaintiff also reported the issues internally on April 16, 2010.

Several weeks later, on May 10, 2010, the hospital formally terminated the plaintiff's employment. The plaintiff then sued the hospital, claiming that his discharge violated the Whistleblower's Protection Act (WPA), MCL 15.361 *et seq.* The plaintiff alleged that he was fired for reporting the suspected overbilling to the U.S. Attorney's office. During his subsequent deposition, the plaintiff claimed for the first time that his supervisor specifically told him that he was discharged because of his report to the U.S. Attorney's office. His supervisor refuted this allegation and testified that no reason was provided to the plaintiff for the hospital's decision to terminate his employment. The supervisor's testimony was corroborated by an e-mail that the plaintiff sent shortly after his discharge, in which he stated that he was never given a reason for his termination. The evidence also demonstrated that the hospital made the decision to discharge the plaintiff before his reports of the overbilling.

The defendants — the hospital and Trinity Health — eventually filed a motion for summary disposition, which the trial court granted. The trial court held that the plaintiff failed to establish the necessary causal connection between the report and his discharge because "ample evidence" showed that the decision to discharge the plaintiff was made before he ever reported the suspected overbilling.

The Court of Appeals reversed the trial court and held that the plaintiff's deposition testimony constituted direct evidence of unlawful discrimination under the WPA because, if believed by the jury, it would establish the plaintiff's claim that he was discharged for reporting overbilling to the U.S. Attorney's office. The court explained that trial courts may not make findings of fact or weigh credibility in deciding motions for summary disposition. Because, in the majority's view, the conflicting evidence created a genuine issue of material fact, the trial court erred by granting the defendants' motion for summary disposition.

Judge Joel Hoekstra dissented and would have affirmed the trial court's grant of summary disposition for the defendants because the plaintiff's self-serving deposition testimony was "blatantly contradicted by the record so that no reasonable jury could believe it." Despite the plaintiff's testimony that his supervisor told him he was discharged because of his report to the U.S. Attorney's office, the record reflected that the hospital made the decision to terminate the plaintiff's employment at least one week before he made the report. Consequently, Judge Hoekstra would have affirmed the trial court's dismissal of the plaintiff's complaint because the plaintiff failed to establish a genuine issue of material fact of unlawful discrimination under the WPA.

Judge Joel Hoekstra dissented and would have affirmed the trial court's grant of summary disposition for the defendants because the plaintiff's self-serving deposition testimony was "blatantly contradicted by the record so that no reasonable jury could believe it."

Holding: In an order in lieu of granting the defendants' application for leave to appeal, the Michigan Supreme Court reversed the judgment of the Court of Appeals for the reasons stated in Judge Hoekstra's dissenting opinion and reinstated the trial court's order dismissing the plaintiff's claim.

Significance: By reversing the Court of Appeals decision for the reasons stated in Judge Hoekstra's dissenting opinion, the Supreme Court necessarily determined that, on some level, the weighing of evidence is appropriate at the summary disposition stage. If evidence presented is so contradicted by the record as a whole so that no reasonable juror could believe it, the trial court may reject the evidence as being incapable of creating a genuine issue of material fact.

An Insured Is Not Entitled to Double Recovery Under a Coordinated Health Insurance Policy for Medical Expenses Previously Paid by a No-Fault Insurer

On July 29, 2013, the Michigan Supreme Court held that a plaintiff is not entitled to a double recovery from both the primary no-fault insurer and his health insurer for medical expenses incurred as a result of a motor vehicle accident covered by no-fault insurance. *Harris v Auto Club Ins Ass'n*, 494 Mich 462; 835 NW2d 356 (2013).

Facts: The plaintiff suffered injuries when the motorcycle he was operating was struck by a motor vehicle. After the accident, the plaintiff sought insurance coverage for his medical expenses from both the assigned no-fault insurer and his own health insurer. The plaintiff's health insurance policy expressly disclaimed coverage for any medical expense that the plaintiff, himself, "legally [did] not have to pay." The plaintiff's health insurer initially paid nearly $20,000 in benefits, but eventually retracted the payments and denied coverage. The assigned no-fault insurer, which was the primary insurer for the expenses, then began paying the plaintiff's medical bills.

The plaintiff filed suit against both the no-fault insurer and his health insurer, claiming entitlement to a duplicate recovery for payments that were made directly to his medical providers. The trial court granted summary disposition in favor of the insurers. The trial court held that because the no-fault insurer was the primary insurer for the expenses and the health insurance policy coordinated benefits, the health insurer had no obligation to pay medical expenses that were already covered by the no-fault insurer.

The Court of Appeals reversed in a split decision. The court held that, even if the no-fault insurer was ultimately obligated to pay the medical expenses, the plaintiff became legally responsible for the expenses at the time he received medical treatment. Because the plaintiff was legally responsible for paying the expenses, his health insurer was obligated to pay those expenses under its policy with the plaintiff even if the expenses were already covered by the no-fault insurer.

Holding: The Supreme Court reversed. The court recognized that the sole issue before it was whether a person seeking no-fault benefits for injuries arising out of a motor vehicle accident may also recover for those injuries under a separate health insurance policy that disclaimed liability to pay for care or services that the plaintiff "legally [did] not have to pay."

The court held that such a person is not entitled to such a duplicate recovery because, unlike normal circumstances, where medical expenses arise from a covered motor vehicle accident, the no-fault insurer, not the individual, is the party that is legally obligated to pay. Once the plaintiff in this case made a claim to recover no-fault benefits, the assigned no-fault insurer became legally obligated to pay his medical expenses. At that point, and regardless of when the plaintiff incurred the medical expenses, the expenses became expenses for which the plaintiff "legally [did] not have to pay" and his health insurer had no obligation to pay those expenses under the language of the health insurance policy. Consequently, the court reversed that portion of the Court of Appeals decision and reinstated the judgment of the trial court.

Justice Cavanagh dissented because, in his view, the Court of Appeals properly reasoned that the plaintiff was legally obligated to pay his medical expenses at the time he received medical care and, consequently, he was entitled to recover medical expenses from his health insurer.

Significance: In reaching its decision, the court confirmed its previous acknowledgement in *Smith v Physicians Health Plan, Inc*, 444 Mich 743; 514 NW2d 150 (1994) that an insured may be entitled to multiple recovery from his no-fault insurer and health insurer only when each of the insured's policies are uncoordinated. Where the no-fault insurance obligations arise from statute, such as under MCL 500.3114(5)(a) in the case of an accident between a motorcycle and motor vehicle, the insured did not elect or pay for uncoordinated no-fault benefits, and no double recovery is permitted.

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