MICHIGAN DEFENSE
QUARTERLY

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Editor's Notes

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

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President's Corner

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

If it isn't broke. . .

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On September 11, 2013, Bruce A. Courtade, then President of the State Bar of Michigan, wrote a letter to the Secretary of State requesting a declaratory ruling that would close a loophole in the Michigan Campaign Finance Act, and require full disclosure of financing for judicial elections. On September 21, 2013, Greg McNeilly, President of the Michigan Freedom Fund, announced that a bill was being drafted to make State Bar of Michigan membership fees optional.[1] "Right now, if you want to practice (law), you are required to pay essentially a union due that you may or may not see value in," said Mr. McNeilly.[2] "We now have a majority of workers that have freedom (thanks to right to work); lawyers shouldn't be second class citizens."[3] "Every worker needs freedom," said Mr. McNeilly. "You come out of law school with $100,000 in debt and then you're forced to pay a union due with no benefit, why?"[4]

The bill mentioned by Mr. McNeilly materialized on January 23, 2014, when State Senator Arlan Meekhof proposed SB 743, to make membership in the State Bar voluntary. On February 13, 2014, in response to a request by the State Bar, the Michigan Supreme Court entered Administrative Order 2014-5, establishing the Task Force on the Role of the State Bar of Michigan. AO 2014-5 directs the Task Force to consider whether the State Bar's current programs and activities support its status as a mandatory bar and to make recommendations regarding changes to State Bar activities. Task Force Chairman Al Butzbaugh requested that members of the Michigan bar provide feedback by March 28, 2014.

The Supreme Court's establishment of the Task Force, and the request for feedback, are welcome opportunities for rational reflection and discussion.

On a purely logical basis, the purported "right to work" rationale for SB 743 is flawed. The State Bar does not engage in collective bargaining for its member's wage, work hours, benefits or work conditions.

Even more importantly, the current proposal for a voluntary bar also makes no provision for the funding of Michigan's attorney disciplinary system. Since 1978, Michigan has had a bifurcated disciplinary system consisting of an investigation and prosecution agency (the Attorney Grievance Commission) and a separate adjudicative agency (the Attorney Discipline Board). Neither of these agencies receive any taxpayer or other public funds. These agencies are supported solely by the mandatory dues paid to the State Bar of Michigan by all active and inactive members. SB 743 does not establish any alternative source for funding of the attorney disciplinary system. Under a system of voluntary bar dues, financial support of the disciplinary system would also become purely voluntary. Under a system of purely voluntary bar dues, the only other alternative for funding the disciplinary system would be to place the disciplinary system in the hands of a state government agency. In all likelihood, that system would be funded (as it is in states that currently have voluntary bars) in whole or in part through separate financial assessments against attorneys.

This, of course, further illustrates the superficial nature of the right to work analogy. SB 743 is not about an attorney's freedom or "right to work." The bill does not guarantee an attorney's right to practice without paying fees, nor does it guarantee that the fees will be lower. Rather, it merely removes the requirement that attorneys pay

Even more importantly, the current proposal for a voluntary bar also makes no provision for the funding of Michigan's attorney disciplinary system.

dues to the State Bar of Michigan. Every state that has a voluntary bar also requires attorneys to pay registration fees or an occupational tax. These mandatory charges can be equivalent to or substantially higher than the $305 fees currently paid by Michigan attorneys (for example, Connecticut $675 per year, Illinois $342 per year and Massachusetts $300 per year). Moreover, if an attorney also wants the additional range of services and resources customarily provided by the voluntary bar association, he or she must also pay that association's membership fee (depending on the date of the applicant's admission, Connecticut as high as $280 per year, Illinois as high as $320 per year and Massachusetts as high as $195 per year).

There are substantial reasons for rejecting the proposal for a voluntary bar, however, quite apart from the defective analogy to "right to work." There is no serious question that the full range of services and resources for Michigan lawyers and the public provided by Michigan's mandatory bar could not be provided by a voluntary bar with limited participation by Michigan lawyers. The range of services and resources currently provided by the Michigan Bar include:

- The Michigan Bar Journal
- The Practice Management Resource Center
- The website of the State Bar, which includes extensive links to publications and other resources of interest to attorneys and the public
- Lawyer assistance and mentoring
- Lawyer referral services
- Practical skills courses for new lawyers
- Publications and resources assisting attorneys with the use of technology
- Ethical opinions and Ethics Helpline
- Support for committees and sections of the bar
- Publications and resources helping attorneys successfully and efficiently manage their pro bono programs
- Updates regarding new statutes and appellate opinions
- The Access to Justice program
- Public education resources

Probably the greatest concern for diminished services and resources with a voluntary bar will be in the areas of publicly provided legal services and public education. In his 1992 concurring opinion for the Wisconsin Supreme Court, supporting the re-establishment of the integrated bar, Justice William Bablitch explained his concern that these public benefits would likely diminish with the abolition of the integrated bar:

> I fear, in fact I predict with certainty, that a return to a voluntary bar would be a return to those days of stagnation, to those days when the question of "what's in it for me?" drowned out the question of social responsibility. The lessons of the past are evident.
>
> The mandatory bar has been an essential force in assisting lawyers to fulfill their roles as guardians of the rule of law. Of equal importance, the mandatory bar has been a guiding force in assisting lawyers to deliver an increasing quality of justice to society and to those they represent. Many if not most of the services the bar delivers in pursuit of these goals are not self-supporting and are not capable of being subject to user fees. To cite but a few, they include: publications to members keeping them up to date on legal developments including orders and decisions of this Court which regulate the profession and discipline attorneys; publications for public consumption informing the public on matters of justice and the rights and responsibilities of citizens under law; lawyer referral service, assisting members of the public to find qualified lawyers regarding specific legal issues; assistance and promotion of pro bono activities; fee arbitration service; assistance in the disciplinary system by appointing approximately 200 lawyers and lay persons to district grievance committees; ethical advice and guidance to members; assistance to alcoholic, ill and disabled lawyers through the "lawyers helping lawyers" program.
>
> If the bar is voluntary, market forces will eventually dictate that much of the bar's resources, economic and personnel, will have to be directed at recruiting and maintaining membership. The "what's in it for me" syndrome will drive programs, services, and personnel in the direction of self interest, not social responsibility.
>
> If we go back to a voluntary bar, time and money spent on recruiting will mean less time and resources spent on programs. Guess what programs?

The arguments for and against a mandatory bar must be weighed carefully, and without relying upon false analogies.

> If we go back to a voluntary bar, time and money spent on maintaining membership will mean time and money not spent on other services. Guess what services will suffer?
>
> The answers are obvious. Programs and services not targeted to the "bottom line" will inevitably suffer.[5]

The arguments for and against a mandatory bar must be weighed carefully, and without relying upon false analogies. Upon thoughtful consideration and discussion, the many benefits of an integrated bar (and the risk of diminished services and resources provided by a voluntary bar) are obvious. I have written to the Task Force on the Role of the State Bar of Michigan, and expressed my personal support for the integrated State Bar of Michigan. Embarking on the road to a voluntary bar is not in the best interests of the public or the legal profession.

Endnotes

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5. *In the Matter of the State Bar of Wisconsin*, 169 Wis 2d 21, 29-30, 485 NW2d 225 (1992) (Bablitch, J., concurring).

Whistleblower Assertions of Financial Reporting Fraud:

How Counsel Can Protect Their Corporate Clients

By: Barry Jay Epstein, Ph.D., CPA, CFF, *Cendrowski Corporate Advisors LLC*

Executive Summary

Increased protections and greater financial incentives have created an environment that encourages whistleblowing by employees. Whistleblowing can cost corporations millions in monetary awards, penalties, and damaged reputations. Attorneys can help their corporate clients avoid these damages by promoting internal governance, financial reporting, and internal control matters.

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Reports of financial fraud and misconduct are on the upswing, with regulators and legal experts predicting millions of dollars in payouts to corporate whistleblowers in 2014. Even when their charges are not sustained, whistleblowers can cause serious reputational harm to companies. Corporate counsel can assist in managing this risk, and the attendant costs of defending against such claims, if they actively take part in promoting certain corporate governance, financial reporting and internal control matters.

The volume of allegations made by whistleblowers is large — and growing. The SEC's 2013 report on the Dodd-Frank Whistleblower Program says that tips and complaints rose by over 200 in just a year, to 3,238 in 2013.[1] The Sarbanes-Oxley Act of 2002 (SOX) created protections that have encouraged this activity.[2] The provisions of SOX are intended to protect employees, including officers and agents of publically-traded corporations, from retaliation by their employers for reporting suspected fraudulent activity. It requires public companies to provide anonymous reporting mechanisms, such as hotlines, so employees can convey suspicions of fraud without fear of reprisal, as well as putting in place requirements that companies protect whistleblowers from retaliation. Coverage under the provision exists if the employee reasonably believes the alleged misconduct constitutes a violation of any rule or regulation of the SEC, or any provision of federal law relating to fraud against shareholders.

Furthermore, if the employee reasonably believes he or she suffered retaliatory action or a negative employment consequence as a result of reporting such activity, he or she may file a claim with OSHA, which is the agency empowered to enforce the whistleblower provisions of a score of Federal statutes, including SOX. In order to avail himself or herself of this option, the employee must satisfy four strict requirements. First, a short 90-day filing deadline must be observed. Second, there must be a "reasonable belief" by the complainant that the company violated the pertinent law. Third, there must be a *prima facie* showing that the protected activity was a contributing factor in the adverse employment action that followed "blowing the whistle." Fourth and finally, there must be evidence of the employer's awareness that the activity was protected, coupled with its inability to demonstrate that the same personnel action would have been taken in the absence of the protected behavior. Unless all these criteria are met, OSHA will not pursue the matter on behalf of the worker.

The passage of Dodd-Frank in 2010 set the stage for increased whistleblower activity by significantly strengthening the monetary incentives for employees who expose financial fraud.[3] Whistleblowing has coincidentally lost much of its stigma, and is now popular, widely-recognized as respectable, and sometimes lucrative. Although the SEC has granted awards to only a few corporate whistleblowers so far,

the most recent instance, in 2013, was for the noteworthy amount of $14 million.[4]

Standards for whistleblower protection are still evolving, and proposed liberalizations via amendments to SOX may encourage yet more filings, especially if current restrictions, such as having only 90 days to file a complaint, are relaxed.

To date, only a few of the allegations brought against companies by whistleblowers have been sustained, but this may change. Indeed, as of 2007, not one of the nearly 1,000 complaints filed under SOX had resulted in adjudicated findings against the employer corporations. However, a number of cases were settled before being fully litigated, which suggests, at least, that there may have been fire as well as smoke in those cases.[5] Looking forward, the former SEC chief of enforcement, George Canellos, has warned — in a September 2013, *Wall Street Journal* interview — that "there are a good number of cases that are going to involve awards to whistleblowers in the many millions of dollars each."[6]

Entities accused of fraud or misconduct by whistleblowers will incur various costs, some quite serious, and many not readily subject to direct measurement or observation. These can include the distraction of boards and executives, legal costs, and, perhaps worst of all, damage to company reputations, even if allegations are never proven. In the author's own experience, diversion of management attention from running the business is the most under-recognized cost of litigation of any stripe, including defending against whistleblower allegations.

Corporate counsel can play a critical role in protecting companies against the costs imposed by whistleblowers, most particularly by strengthening internal control programs, thus mitigating the increased risks of employees carrying their allegations directly to regulatory authorities. Even if such reporting occurs, the quality of the company's internal reporting and oversight procedures can greatly increase the likelihood that a favorable outcome will ultimately be attained. Indeed, SEC officials have strongly urged companies facing investigation to demonstrate their internal compliance programs and commitment to ethical standards, and this clearly influences SEC decision-making regarding accused malefactors.[7]

While most employees choose to report fraud and misconduct internally, a 2011 report by the Ethics Resource Center states that one out of every six whistleblowers eventually reports externally, and, perhaps of greater concern, nearly 20% of those do so without first attempting to make an internal report.[8] It is quite possible that those who omit taking the internal grievance route are unconvinced of management's commitment to being responsive to complaints of this nature. If so, a stronger and more effectively communicated ethical enforcement program might, over time, ameliorate this problem. Elimination of even a fraction of reports now being made to external agencies would represent a worthwhile saving for companies, and is thus worthy of managements' and counsels' efforts.

In conjunction with input from qualified internal control consultants, corporate counsel can contribute to the protection of their clients by impressing upon them the need for robust controls that are consistently evaluated and strengthened.

In conjunction with input from qualified internal control consultants, corporate counsel can contribute to the protection of their clients by impressing upon them the need for robust controls that are consistently evaluated and strengthened. Management is, of course, used to hearing of the importance of internal controls from auditors, and often reflexively resists their entreaties on grounds of poor cost-to-benefit ratios. When it comes to fraud and misconduct, counsel should be quick to counter the always popular "it can't happen here" syndrome. A stern lecture regarding potential costs, including reputational risks, could provide just the impetus needed to earn a favorable management response.

Corporate counsel is also encouraged to work with appropriate outside experts to design, implement, and monitor the effectiveness of customized internal controls. Consultation with attorneys can bring not only a different perspective, but also specific knowledge to bear, both of which can prove invaluable in accomplishing optimal, cost-effective control system design. They are furthermore viewed as being sufficiently removed from the daily functioning of the finance and controllership areas of responsibility that an added quality of objectivity is seen as attaching to their recommendations. Attorneys are much more likely to have knowledge of the actual ramifications experienced by companies and their management teams when faced with controls-related weaknesses resulting in whistle-blowing episodes. Sharing these legal "war stories" acquired via personal experience, professional reading and conversations with peers can provide a real-world wake-up call for managers that mere auditors cannot deliver.

Corporate counsel can help develop policies that discourage or prevent financial reporting fraud, asset theft, and other infractions including management fraud schemes such as vendor fraud, anti-trust misconduct, and expense

account abuses while encouraging legitimate whistle-blowing when abuses are actually observed. There is now a substantial amount of literature dealing with internal controls. Reports offered by the Committee of Sponsoring Organizations of the Treadway Commission (COSO) are an invaluable resource for those crafting and monitoring internal controls for derivative usage and financial reporting. They provide information regarding enterprise risk management and fraud-deterrence planning.[9] A number of "how to do it" guides and treatises are also widely available.[10] Attorneys, especially those experienced in dealing with white-collar crime matters, would bring highly credible perspectives to the selection, development, implementation and monitoring of these practices. This would be a natural adjunct to their roles in such corollary matters as creating the audit committee charter and a corporate code of ethics, and in providing guidance on transparency in both internal and external reporting in order to protect the company from assorted allegations by disappointed investors and others.

Corporate counsel can help clients install secure hotlines and other procedures to ensure protection for would-be whistleblowers, so that allegations of retaliation are harder to sustain. Having an outside party involved is widely seen as being the wisest course of action, and legal counsel are the most natural choice to fulfill this role.

Finally, corporate counsel can develop a comprehensive, graduated and fair disciplinary process for those committing infractions of company policy. Having a wider horizon and range of experience than most managers do, counsel have the requisite frame of reference to recommend appropriate responses, and can also assist in constructing effective means of communicating these to the employees. This brings an objectivity to these tasks that management, even with the best of intentions, cannot hope to convey.

Thus, attorneys serving as corporate counsel, in conjunction with auditors, accounting systems experts, and corporate management, can ameliorate and even obviate the substantial risks attendant to the whistle-blowing role that company managers and employees are being encouraged to assume. With timely attention to controls and related matters, alert and involved legal counsel can effectively deal with the still small risks of large monetary awards or penalties, as well as the more substantial risks resulting from management distractions and reputational harm.

Corporate counsel can help clients install secure hotlines and other procedures to ensure protection for would-be whistleblowers, so that allegations of retaliation are harder to sustain.

Endnotes

1. U.S. Securities and Exchange Commission, *2013 Annual Report to Congress on the Dodd-Frank Whistleblower Program*, Office of the Whistleblower, Washington, DC (2013). Online.
2. Sarbanes-Oxley Public Company Accounting Reform and Investor Protection Act of 2002 (SOX), PL 107-204, 116 Stat 745, 15 USC 7262.
3. Dodd-Frank Wall Street Reform and Consumer Protection Act, PL 111-203, § 929-Z, 124 Stat 1376, 1871, 15 USC 78o.
4. Steeves, Rich, "SEC payment signals support of whistleblower program," *Inside Counsel* (2 Oct. 2013). Online.
5. Reason, Tim and Taub, Stephen, "Whistleblowers Never Win," *CFO* (8 June 2007). Online.
6. Ensign, Rachel Louise, "Why 2014 Could be Huge for Corporate Whistleblowers," *Wall Street Journal Risk and Compliance Journal Blog* (27 Jan. 2014). Online.
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9. The Committee of Sponsoring Organizations of the Treadway Commission (COSO), http://www.coso.org (19 Feb. 2014).
10. See, *inter alia*, Cendrowski, Harry, Martin, James P., and Petro, Louis W., *The Handbook of Fraud Deterrence* (John Wiley & Sons, Inc., 2007).

MDTC Schedule of Events 2014

2014

May 8 & 9	DRI Central Regional Meeting — Ohio
May 14–16	Annual Meeting — The Atheneum Hotel, Greektown
September 12	Golf Outing — Mystic Creek
September 17	Respected Advocate Award Presentation — Grand Rapids
September 17–19	SBM Annual Meeting — Grand Rapids
September 25	Board Meeting — Okemos *Special Guest — John Hohman, State Court Administrator*
October 2	Meet the Judges — Hotel Baronette, Novi
October 22–26	DRI Annual meeting — San Francisco, CA
November 6	Past Presidents Dinner – Marriott, Troy
November 7	Winter Meeting – Marriott, Troy

2015

March 26	Board Meeting – Okemos
May 14–15	Annual Meeting – The H Hotel, Midland
September 11	Golf Outing – Mystic Creek
October 7	Respected Advocate Award Presentation – Novi
October 7–11	DRI Annual Meeting – Washington, D.C.
October 7–9	SBM Annual Meeting – Novi Expo Center
November 12	Past Presidents Dinner – Sheraton, Novi
November 13	Winter Meeting – Sheraton, Novi

What Not To Do:

What Constitutes "Negative Information" Protectable Under the Uniform Trade Secrets Act?

By: Carey DeWitt, *Butzel Long*

Executive Summary

Trade secret litigation often involves a dispute about whether data actually used by the plaintiff constitutes a protectable secret. Yet secrets in the form of formulae, processes, methods, and other discoveries that are not being used because they have been found to be ineffective also can constitute protectable trade secrets. This article discusses in detail statutes and cases that address this equally important but less often addressed form of trade secrets.

"Our bravest and best lessons are not learned through success, but through misadventure."
— Amos Bronson Alcott

Trade secret litigation often involves a dispute as to whether data actually in use by the plaintiff constitutes a protectable secret. And at first glance, the Uniform Trade Secrets Act ("UTSA") may appear to suggest, by emphasizing a secret's "value," that a protectable trade secret is to be in active use or at least may be actively used or applied in the future. UTSA (enacted in 48 states) defines a "trade secret" as:

> information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
>
> (i) derives independent economic value, actual or potential, from not being generally known to, or readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
>
> (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[1]

But what about secrets in the form of formulae, processes, methods, and other discoveries that are *not* being used because they have been found to be ineffective? It might be argued that such secrets have no "actual," or even "potential," independent economic value under the UTSA definition above because they are not in use or at all likely to be used. Nonetheless, as the following discussion will demonstrate, so long as the other statutory requirements are met, UTSA protects secret methods or configurations not in use that have been tried (or examined) and then rejected.

This is significant in that many successful entrepreneurs can describe a painful and expensive series of wrong turns, blind alleys, failed research, or unproductive "shots in the dark" that they made or undertook. Many such entrepreneurs believe that failures, mistakes, and analyses of rejected options are the only means by which to get the process, formula, plan, or method right, given their market needs and objectives. This "trial and error" information is valuable because, by process of elimination, such experiences or research efforts have moved the entrepreneur along the road to greater success.

Although it is not set out in the statute by specific statement, UTSA allows for the protection of secrets in the form of "negative" information — data as to approaches, methods, or configurations that are not used and should not be used because they do

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WHAT CONSTITUTES "NEGATIVE INFORMATION"?

not work well, just as it protects "positive" methods actually adopted and in use. Applying the statutory definition, such data as to methods or devices that have been found not to be effective: (1) is "information"; (2) may well be both actually and potentially valuable because it may not generally be known to or readily ascertainable by others who could gain from knowledge of options not to pursue; and (3) may be the subject of reasonable measures to maintain secrecy.

The pre-UTSA Restatement of Torts, First Edition (not followed uniformly by courts on this point), did not accommodate negative data,[2] at least directly, but the drafters' Comments to UTSA specifically noted the Act's modification of the First Restatement rule:

> The definition of "trade secret" contains a reasonable departure from the Restatement of Torts (First) definition which required that a trade secret be "continuously used in one's business." The broader definition in the proposed Act extends protection to a plaintiff who has not yet had an opportunity or acquired the means to put a trade secret to use. The definition includes information that has commercial value from a negative viewpoint, for example the results of lengthy and expensive research which proves that a certain process will ***not*** work could be of great value to a competitor.[3]

Recognizing the value of trial and error results, courts have increasingly found negative data entitled to trade secret protection.[4] For example, in *Inflight Newspapers, Inc v Magazines In-Flight, LLC,*[5] the court found that the trade secret at issue was "not the finished product" but rather the "process," derived over the "years through trial and error" research, by which the finished product resulted.

In *Leatt Corp v Innovative Safety Technology,*[6] the court noted that "[i]nformation that is kept confidential and that was obtained as a result of a significant expenditure of time and resources undoubtedly has 'independent economic value' to its owner. . . . Likewise, information can have independent economic value even if there is no actual product on the market utilizing the information or it relates solely to test failures. . . . Accordingly, the design features Plaintiffs are trying to protect in the present case have the requisite 'independent economic value.'"

In *Crane Helicopter Services, Inc v United States*,[7] the United States Court of Federal Claims upheld trade secret status for certain negative design information and (quoting the drafters' Comments) noted that "the definition of trade secrets under the UTSA includes information that has commercial value from a negative viewpoint, for example the results of lengthy and expensive research which proves that a certain process will *not* work could be of great value to a competitor."

Recognizing the value of trial and error results, courts have increasingly found negative data entitled to trade secret protection.

Also quoting the drafters' Comments as to "commercial value from a negative viewpoint," in *Mylan Technologies, Inc v Zydus Noveltech, Inc*,[8] the court found that "[i]t is therefore true that, in order for Mylan to prove that its information is a trade secret, Mylan does not need to prove that it has continuously used that information, or even that it has used the information at all in its operations. . . . In other words, Mylan does not need to prove that it uses or ever used the information, but such proof might weigh in favor of finding that the information has value."

And in *Integrated Cash Management Services, Inc v Digital Transactions, Inc,*[9] "the Court credit[ed] . . . testimony that a significant amount of time and money was spent in investigating alternatives that, in the end, were not fruitful," finding that "[s]uch a trial and error process is also protectable as a trade secret of ICM."[10]

Pre-UTSA authority also supports the proposition that negative information may be trade secret protected, and is still cited by courts in trade secret cases. For example, in the 1966 case, *Allis-Chalmers v Continental Aviation,*[11] the court considered a claim involving certain engine pump technology and found that

> [i]n developing the pump, some $50,000.00 was spent on "blind alley" or "negative test result" research on one particular problem and some $30,000.00 on another such research project. Particular designs were developed for both the Models B and C which represent distinct advantages over other pumps currently available. The confidential, proprietary information relating to the Allis-Chalmers pump represents competitive advantages over competitive pumps, and such advantages would remain in an Allis-Chalmers pump as modified for use on the battle tank engine.

The court therefore granted an injunction barring the defendant employee's work on similar pumps at his new employer.[12]

In a pre-UTSA decision cited in the Uniform Act's drafters' Comments for the proposition that "liability [may be] imposed for developmental cost savings with respect to [a] product not marketed," *Telex Corp v IBM Corp,*[13] the court upheld a liability finding based upon such developmental cost savings, finding, *inter alia*, that "if Telex had not misappropriated and used IBM trade secrets, it would have itself spent $10,000,000

more than it did in connection with the work on its equivalent of the Merlin disc. The trial court found that IBM had itself expended $30,000,000 to develop the Merlin, and that it took six years to do so. Telex, on the other hand, through the use of IBM trade secrets was able to develop its equivalent in some eighteen months."[14]

So if negative data can qualify as a trade secret, the question is presented, what kinds of negative data may be so recognized? As might be expected, much of the litigation surrounding this issue focuses on technical product data, as in the *Allis-Chalmers* pump technology decision and the *Telex* disc technology decision discussed above.[15]

In *Winston Research Corp v Minnesota Mining and Mfg Co,*[16] the court found that specifications of "basic mechanical elements and their relationship to each other . . . were not publicly known, and were arrived at only through painstaking research and extensive trial and error," and, therefore, constituted a trade secret entitled to protection.

And in *Imperial Chemical Industries Limited v National Distillers and Chemical Corp,*[17] the Second Circuit, in reversing the trial court's denial of plaintiff's motion for a preliminary injunction as to certain "autoclave reactor" technology, emphasized and adopted the trial court's finding that "although the components of such reactor are available in [literature available to the public], development of the know-how . . . to operate a commercial process using such a reactor based upon information in the public domain would have required vast research, at great expense in money and time, plus considerable trial and error over an extended period of time. In making its agreements with [plaintiff], it was obviously [defendant's] purpose to avoid the difficulties and the time and expense that would be required to arrive at a commercially feasible process . . . ."

In 2003, in *Crane Helicopter Svcs v United States,*[18] *supra*, the court discussed practical reasons for protecting negative (and positive) technical information contained within a recitation of "differences and similarities" between two helicopter designs (design changes made and those *not* made as between two helicopter models of nonparty Bell Helicopter, whose trade secrets the court found were involved):

> Crane also has argued that the descriptions, contained in the record, of the differences between the UH-1 series helicopters and the 204B helicopter are too general to be classified as trade secrets. Even if plaintiff [Crane] is correct, however, a general discussion of a difference between the two helicopters would reveal the fact of the differences, thus making the process of identifying the differences between the two aircraft less time and cost consuming. Likewise, at least one of the documents contained in the record, the minutes of the Final Type Certificate Board Meeting contained in Exhibit 97, also includes a list of the differences and similarities between the 204B and the UH-1, and could be used to determine which parts of the two aircraft are similar. For example, the document states that [REDACTED]. It is important to note that the "definition [of trade secrets under the UTSA] includes information that has commercial value from a negative viewpoint, for example the results of lengthy and expensive research which proves that a certain process will not work could be of great value to a competitor."[19] . . . The fact that there are certain, non-obvious similarities between the aircraft in question also can constitute a trade secret. Thus, the information contained in Exhibit 97 identifying which parts are not different between the Bell 204B and the Bell UH-1 series helicopters also may be considered trade secrets. Based on the above discussion, the court finds that the information in question is not readily ascertainable to a person who could receive economic benefit from the information.

Pre-UTSA authority also supports the proposition that negative information may be trade secret protected, and is still cited by courts in trade secret cases.

In addition to technical or product specification data, there is no reason that protected negative data could not include so-called "soft" or "business" information, such as business methods, marketing plans, and customer preferences. (Ask any business person engaged in the sale of a product or service how valuable such "soft" (purportedly non-technical) data can be.) What do such data have in common with technical, e.g., product specification or "scientific," data? The common element is trial and error, resulting in rejection of unworkable solutions, options, plans, methods, or even customers. Specifically, a marketing strategy determined by experience not to work well, or a customer found not to be profitable after experience, or a logistical technique found not to be so effective as that ultimately adopted is akin under UTSA to negative technical data as to engineering choices that were rejected in an engine design (e.g., *Allis-Chalmers, supra*).

It is well established that such "soft" data in its positive form (secrets/data

WHAT CONSTITUTES "NEGATIVE INFORMATION"?

currently being "used" by the plaintiff) is protectable under UTSA. For example, in *Superior Consultant v Bailey*,[20] the United States District Court for the Eastern District of Michigan found that "[s]trong circumstantial evidence before the Court also indicates a substantial likelihood that defendant Bailey accessed other confidential information about Superior that would be of economic value to third party competitors, and was subject to Superior's efforts of secrecy, i.e. business plans, pitched work."[21]

There is no logical reason that soft business data cannot be protectable as a trade secret when it is negative. For example, in *Capital Corp, et al v Product Action International, LLC*,[22] the court discussed the matter as follows: "The evidence demonstrated that Roark came to Fast Tek with a library of trade secret information of Product Action's *processes and methods* that it had developed through trial and error over the lifetime of the company. Utilizing this information without the burden of expense and time of its development, Fast Tek gained a competitive advantage in that it could offer the same quality of service as Product Action at a lower price. . . . 'The Defendants should not be permitted to use [Plaintiff's] trade secrets to *skip the trial and error phase* to gain a competitive advantage.'"

The *Capital Corp* court's explanation demonstrates the fact that underlying many "positive" trade secrets is a set of negative data examined before adoption of the more successful method in current use. In essence, theft of a positive trade secret is also often and actually theft of a set of pre-existing negative secrets.

And if a negative "business method" trade secret is protectable (e.g., *Capital Corp* above), how different, really, is specific customer data in terms of its value or validity as a negative trade secret? The court answered this question in *Courtesy Temporary Services v Camacho*,[23] which found a customer list, key customer contacts, markup rates, sales volume, and "specific customer requirements" (all common elements of modern customer lists) protected as trade secrets:

> The compilation by Courtesy of its list of customers was the result of lengthy and expensive efforts, including advertising, promotional campaigns, canvassing, and client entertainment. The court below, however, ruled that such "work effort" of Courtesy in compiling its customer list was "not any secret" entitled to protection and, on such erroneous basis, denied the injunction as to Courtesy's customer list. Contrary to the court's ruling, it is this very "work effort," or process of acquiring and retaining clientele, that constitutes a protectable trade secret.
>
> A list of customers or subscribers "built up by ingenuity, time, labor and expense of the owner over a period of many years is property of the employer," and "[k]nowledge of such a list, acquired by an employee by reason of his employment, may not be used by the employee as his own property or to his employer's prejudice." (Greenly v. Cooper (1978) 77 Cal.App.3d 382, 392 [143 Cal. Rptr. 514].) Employees, by appropriating only those customers who, after Courtesy's efforts, chose to patronize Courtesy and saving themselves comparable efforts in screening those entities who declined Courtesy's patronage, have acquired commercially invaluable information.
>
> . . . .
>
> … If a customer list is acquired by lengthy and expensive efforts which, from a negative viewpoint, indicate those entities that have not subscribed to plaintiff's services, it deserves protection as a "trade secret" under the act.[24]

In addition to technical or product specification data, there is no reason that protected negative data could not include so-called "soft" or "business" information, such as business methods, marketing plans, and customer preferences.

In this sense, customer lists/customer data sets are, once again, negative trade secrets presenting as positive information.

Similarly, in *Maharis v Omaha Vaccine Co*,[25] the Ninth Circuit noted that "customer lists . . . which exclude people not interested in the product have value from a negative viewpoint." And in the influential pre-UTSA case, *Hollingsworth Solderless Terminal Co v Turley,* the court noted that "[e]ven if the names of plaintiff's customers appear in a public directory, however, those names may appear among the names of many other businesses which may be neither actual nor even potential customers of the plaintiff. Hence, it may be costly to parse from such a directory potentially profitable customers from entries *not worth pursuing*."[26]

Perhaps this thinking, that positive results and rejected negative methods/negative customer data can actually be two sides of the same coin, is part of the reason that there were pre-UTSA decisions protecting negative data despite the language in the Comments to the First Restatement, *supra*, that to be a trade secret the data was to be "continuously used in one's business."[27]

For example, in 1965 in *Imperial Chemical*, *supra*,[28] the Second Circuit

found specifically that the plaintiff's "trial and error" results were protectable. In *Klamath-Orleans Lumber, Inc v Miller*,[29] the court found that "by any definition it is clear that plaintiff had on file a '*preferred*' or '*select*' customers list" (implying the screening of less desirable customers) of "substantial economic value to its business. 'There can be no doubt that [a] list of preferred customers, ascertained originally by continuous solicitation and investigation, and the specially arranged list of charges and bonuses, developed by long experience, [constitutes] a trade secret of value.'"[30]

Negative data other than product specification, business method, business planning, and customer information has received trade secret protection. For example, in a case involving computer software (also now potentially covered by the Digital Millennium Copyright Act[31]), *Integrated Cash Management Services, Inc v Digital Transactions, Inc*,[32] the court found that a "trial and error process is also protectable as a trade secret of ICM. . . . ," noting that "[c]omputer software has received judicial recognition as a trade secret."[33] In qualifying the data as a trade secret,[34] the court explained that "it is well-settled that 'a trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process and operation of which, in unique combination, affords a competitive advantage and is a protectable secret.'"[35]

Similarly, in a case involving only moderately "hard" data, *Matter of Belth v Insurance Department of New York,*[36] the court granted trade secret protection to a description of a computer program, details of mathematical models, and certain statistical assumptions developed by an insurance company. The court did so on the basis that competitors with "unfair" access to this data would not "hav[e] to do the work or undertak[e] the risk or expense themselves."[37]

By the logic of the above decisions, there is no reason to believe that other "soft" data in negative form could not be fully protectable as trade secrets, such as tried and rejected warehousing strategies, inventory control methods, receivables insurance methods, quoting processes, margins, marketing strategies, product placement methods, market niche analyses, cash flow methods and strategies, business plans, and order placement strategies. All such secrets may have in common the painstaking trial and error resulting in the rejection of unworkable methods. As with all claimed trade secrets, if such negative information is kept reasonably secret and has value because it is not generally known or ascertainable, it may qualify as protectable under the Uniform Trade Secrets Act.

Perhaps this thinking, that positive results and rejected negative methods/negative customer data can actually be two sides of the same coin, is part of the reason that there were pre-UTSA decisions protecting negative data despite the language in the Comments to the First Restatement, *supra*, that to be a trade secret the data was to be "continuously used in one's business."

Practice Pointers:

1. Conduct a "trade secret audit" by inventorying the client's trade secrets and assessing the degree of protection company procedures currently provide for the secrets involved, including, but not limited to, the above-described "negative data." Implement appropriate changes based upon the audit results. (An audit will often reveal 5 or 6 areas of needed improvement as to, e.g., training, data security, "stepped" (graduated) password protocols, plant access procedures, bilateral agreements with customers and suppliers, exit interviews, and employee and executive onboarding protocols.) The value proposition presented by such an audit (and any resulting changes in trade secret protection protocols) is prevention of the extremely serious damage that unchecked theft of trade secrets can do to the total asset value and vitality of the client, given that most modern client value is contained in intellectual property such as trade secrets. Loss of sales, customers, executives, and employees typically accompanies "successful" trade secret theft.
2. All employees with access to trade secrets should sign at least non-disclosure agreements, and often non-solicitation agreements, invention agreements, and non-competes, including protection for "trial and error" data.
3. Take proper care (using experts) of data and "metadata" contained within clients' (and opponents') IT systems, an important source of evidence in trade secret litigation.
4. Act quickly to seek legal remedies for threatened trade secret misappropriation, as what may seem to be a reasonable delay is often injurious to injunction practice. Realize that while a bilateral contract is helpful in prosecuting such claims, UTSA can provide relief as to threatened misappropriation even in the absence of a contract.
5. Beware of the "threatening letter," cease and desist, nasty warning

phone call, or other actions short of litigation. For reasons of expense or wishful thinking, for example, clients often believe that such methods are an effective approach to the problem. If such methods are demonstrably likely to resolve the matter, they may be attempted (very quickly), but in the emergency presented by threatened trade secret theft, they are very often ineffective, and worse, often injuriously tend to prove the date of the plaintiff's knowledge (creating troublesome evidence of delay in seeking the injunction) or, worst of all, may well convince the opponent (and his or her counsel) that the threatened enterprise is unlikely to sue if relief is not obtained through informal resolution attempts. ("If they were going to sue me, they would have done so already.") Such letters may even lead the opponent to sue the client in a jurisdiction more likely to be hostile to the plaintiff's claims.

6. Clients should instruct potential new employees not to access or bring with them from former employers (and not to use) other organizations' trade secrets. Employment contracts should contain such a provision. Executives supervising the new employee should be instructed accordingly, before hire. Similarly, departing employees themselves should be required to return all data and be reminded to be scrupulous as to non-use and non-disclosure of the client's data in any new position.

7. As an advocate in trade secret litigation, recognize, exploit, and be prepared for claims premised on the value of negative data.

Endnotes

1. *See* Uniform Laws Annotated (ULA) (emphasis added), § 1; *see, e.g.,* California Uniform Trade Secrets Act, West's Annotated Cal Civ Code 3426-3426.11; Michigan Uniform Trade Secrets Act, MCL 445.1902.
2. Restatement (First) of Torts, § 757, Comment B.
3. UTSA, § 1, Comment 4 (underscoring and bold face added; italics in the original), drafted by the National Conference Of Commissioners On Uniform State Laws, With Prefatory Note And Comments, Approved by the American Bar Association, Baltimore, Maryland, February 11, 1986, citing on this point *Telex Corp v IBM Corp*, 510 F2d 894 (CA 10, 1975).
4. *See, e.g., Leatt Corp v Innovative Safety Tech, LLC,* 2010 US Dist LEXIS 37382, p 18 (SD Cal, 2010); *Integrated Cash Management Services, Inc v Digital Transactions, Inc,* 732 F Supp 370, 377 (SDNY, 1989), *aff'd*, 920 F2d 171 (CA 2, 1990); *Cybertek Computer Products, Inc v Whitfield,* 1977 Cal App LEXIS 2140, 203 USPQ (BNA) 1020 (Cal Super, 1977); *Norbrook Labs Ltd v GC Hanford Mfg Co*, 297 F Supp 2d 463, 484-87 (NDNY, 2003), *aff'd,* 126 Fed Appx 507, 2005 U.S. App. LEXIS 4881(CA 2, 2005); *Inflight Newspapers, Inc v Magazines In-Flight, LLC,* 990 F Supp 119, 132 (EDNY, 1997); *Metallurgical Indus Inc v Fourtek, Inc,* 790 F2d 1195, 1203 (CA 5, 1986); *Crane Helicopter Services, Inc v United States,* 56 Fed Cl 313, 325 (US Ct Claims, 2003); *Mylan Technologies, Inc v Zydus Noveltech, Inc,* 2013 Vt Super LEXIS 27, pp 21-22; *Courtesy Temporary Svcs v Camacho*, 222 Cal App 3d 1278, 1287-1288 (1990); *Hollingsworth Solderless Terminal Co v Turley,* 622 F2d 1324, 1332 (CA 9, 1980); *Maharis v Omaha Vaccine Co,* 1992 US App LEXIS 14588, pp 14-15 (CA 9, 1992); *see also Religious Tech Ctr v Wollersheim*, 796 F2d 1076, 1090 (CA 9, 1986).
5. 990 F Supp 119, 132 (EDNY, 1997).
6. 2010 US Dist LEXIS 37382, p 18 (SD Cal, 2010) (citations omitted).
7. *Crane, supra*, note 5 at 325.
8. 2013 Vt Super LEXIS 27, pp 21-22 (Vt Super Ct, 2013) (citations omitted).
9. 732 F Supp 370 (SDNY, 1989), *aff'd*, 920 F2d 171 (CA 2, 1990).
10. 732 F Supp at 377.
11. 255 F Supp 645, 652 (ED Mich, 1966).
12. 255 F Supp at 654.
13. *See supra*, note 3-4; *Telex Corp v IBM Corp*, 510 F2d 894 (CA 10, 1975); *see* drafters' Comments to UTSA (ULA) § 1.
14. 510 F2d at 932.
15. *Allis-Chalmers*, 255 F Supp 645, 646 (ED Mich, 1966); *Telex, supra,* note 14.
16. 350 F2d 134, 140 (CA 9, 1965), cited and discussed in detail with approval in *Cybertek Computer Products v Whitfield*, 1977 Cal App LEXIS 2140, 203 USPQ (BNA) 1020 (Cal Super, 1977).
17. 342 F2d 737, 743 (CA 2, 1965).
18. *Crane Helicopter Services, Inc, v United States,* 56 Fed Cl 313, 325 (US Ct Claims, 2003).
19. Quoting UTSA § 1(4) cmt. (emphasis in original); and citing *Religious Tech Ctr v Wollersheim,* 796 F2d 1076, 1090 (CA 9, 1986); *Metallurgical Indus, Inc v Fourtek, Inc,* 790 F2d 1195, 1203 (CA 5, 1986).
20. 2000 US Dist Lexis 13051 (ED Mich, 2000); *see also Pepsico v Redmond*, 54 F3d 1262 (CA 7, 1995) (marketing plans).
21. Citing MCL 445.1902(d) [UTSA]; *Merrill Lynch v Ran*, 67 F Supp 2d 764, 775 (ED Mich, 1999).
22. 884 NE2d 294 (Ind App, 2008) (emphasis added).
23. 222 Cal App 3d 1278, 1282, 1287-1289 (1990) (emphasis added), citing *Hollingsworth Solderless Terminal Co v Turley*, 622 F2d 1324, 1333 (CA 9, 1980).
24. *Id.* at 1287-1288 (emphasis added).
25. 1992 US App LEXIS 14588, pp 14-15 (CA 9, 1992), citing *Courtesy Temporary Svcs, supra,* note 23.
26. 622 F2d 1324, 1332 (CA 9, 1980) (emphasis added), citing *Klamath-Orleans Lumber Inc v Miller*, 87 Cal App 3d 458 (1978).
27. *See supra*, note 2.
28. *Imperial, supra,* note 17, 342 F2d at 743.
29. 87 Cal App 3d 458 (1978) (emphasis added).
30. 87 Cal App 3d at 465, quoting *Scavengers P Assn v Serv-U-Garbage Co,* 218 Cal 568, 573, 24 P 2d 489 (1933).
31. 17 USCA § 101, *et seq*.
32. 732 F Supp 370 (SDNY, 1989), *aff'd*, 920 F2d 171 (CA 2, 1990).
33. 732 F Supp at 375, quoting *Business Intelligence Services, Inc v Hudson*, 580 F Supp 1068, 1072 (SDNY, 1984), in turn citing *Matter of Belth v Insurance Dep't of New York*, 95 Misc2d 18, 406 NYS2d 649 (1977), and also citing *Q-Co Industries, Inc v Hoffman,* 625 F Supp 608, 617 (SDNY, 1985).
34. 732 F Supp at 377.
35. *Id.* at 376, quoting *Imperial Chemical Industries Ltd v National Distillers & Chem Corp,* 342 F2d 737, 742 (CA 2, 1965); and citing *Q-Co Industries, Inc v Hoffman,* 625 F Supp 608, 617 (SDNY, 1985).
36. 95 Misc2d 18, 406 NYS2d 649 (1977).
37. 95 Misc2d at 20.

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Daimler AG v Bauman: The United States Supreme Court brings General Jurisdiction over Corporate Defendants back "at Home"

By: Lauren A. Kwapis, *Bodman PLC*

Executive Summary

This is the first of two articles in this issue that discusses the impact of SCOTUS' recent decision in Daimler AG v Bauman*, on general personal jurisdiction. This article provides an in-depth look into the district and circuit court of appeals opinions, as well as the opinion of the United States Supreme Court. The Supreme Court rejected the argument that general personal jurisdiction could be established against a foreign corporation based on the activities of the corporation's subsidiary. However, an agent's forum contacts are still relevant when considering specific jurisdiction.*

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On January 14, 2014, the United States Supreme Court issued its opinion in *Daimler AG v Bauman*,[1] a ruling that could significantly limit a plaintiff's ability to bring a foreign or out-of-state domestic corporation into the plaintiff's preferred forum. *Daimler* addresses whether a court can exercise general jurisdiction over a corporation domiciled abroad based on the contacts of the corporation's subsidiaries. The plaintiffs, a group of twenty-two Argentina residents, brought suit against DaimlerChrysler Aktiengesellschaft ("Daimler"), the German parent company of the plaintiffs' former employer, Mercedes-Benz Argentina ("MBA"). The plaintiffs alleged that MBA collaborated with Argentina's state security forces to kidnap, torture, and kill the plaintiffs and/or their family members during Argentina's "Dirty War" between the late 1970s and early 1980s. Seeking to hold Daimler liable for MBA's alleged conduct, the plaintiffs filed suit in the Northern District of California asserting claims under the Alien Tort Statute ("ATS") and the Tort Victims Protection Act ("TVPA")[2] naming Daimler as the sole defendant.

Establishing personal jurisdiction over the German-based Daimler in California required some creativity. Plaintiffs could not rely on specific jurisdiction. All the incidents alleged in the complaint occurred in Argentina, and the plaintiffs themselves lacked any connection to the California forum. Daimler's own direct contacts to the state were limited to a listing on the Pacific Stock Exchange, prior lawsuits filed in the state to protect patent rights and advocate against local clean air laws, and a visit by some Daimler employees and their families to a California nature camp. The district court found that these contacts were too few to permit the exercise of general jurisdiction over the company.[3]

Alternatively, the plaintiffs argued that the district court could find general jurisdiction over Daimler under an agency theory based on the forum contacts of another Daimler subsidiary, Mercedes-Benz United States, LLC ("MBUSA"). MBUSA, a Delaware limited liability corporation with its principal place of business in New Jersey, functioned as Daimler's exclusive importer and distributer of Mercedes-Benz vehicles in the United States. Under an independent contractor agreement with Daimler, MBUSA purchased the German manufactured vehicles, imported them into the United States, and distributed the cars to dealerships all over the country for individual sale. Although it was neither domiciled nor headquartered in California, MBUSA's forum contacts were substantial. MBUSA maintained multiple California facilities including a regional office, a vehicle preparation center, and a classic car

center. MBUSA was also the largest supplier of luxury vehicles to the California market, accounting for 2.4 percent of Daimler's worldwide sales. For these reasons, Daimler did not dispute that the district court had general jurisdiction over MBUSA.[4]

But MBUSA was not being sued. Daimler was. Plaintiffs therefore had to show that MBUSA's jurisdictional status should be attributed to Daimler. In the Ninth Circuit, a subsidiary's forum contacts may be imputed to a parent corporation based on agency principles when the subsidiary "performs services that are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services."[5] Calling the issue as a "close question," the district court found that MBUSA's forum contacts should not be attributed to Daimler because Daimler would likely not have undertaken United States importation and distribution on its own in the absence of MBUSA.[6]

The Ninth Circuit's Opinion.

The Ninth Circuit Court of Appeals initially affirmed dismissal of the plaintiffs' claims,[7] but this decision proved to be short lived. Upon the plaintiffs' motion for rehearing, a three-judge panel vacated the initial opinion and issued a new ruling that reversed the district court's judgment.[8] Finding that Daimler "simply could not afford to be without a U.S. distribution system," the panel concluded that MBUSA's services were so important to Daimler's business that "they would almost certainly be performed by other means if MBUSA did not exist," including through a different Daimler subsidiary, or through a separate entity.[9] Based on this rationale, the panel attributed MBUSA's contacts to Daimler and found personal jurisdiction appropriate.

Daimler filed a petition for rehearing en banc, which was denied over a strongly-worded dissent.[10] In addition to taking issue with the panel's "reformulat[ion]"[11] of the Ninth Circuit's agency test, the en banc dissent warned that the panel's opinion conflicted with the Supreme Court's holding in *Goodyear Dunlop Tires Operations, SA v Brown*.[12]

In *Goodyear*, the Supreme Court ruled that a foreign subsidiary's placement of a product into the stream of commerce in the forum state was insufficient to render it subject to general jurisdiction. Rather, a foreign corporation could be subject to general jurisdiction only when its in-state contacts were "so continuous and systematic as to render [it] essentially at home in the forum state."[13] Under *Goodyear*, the paradigm bases for a corporation's "home" are its state of incorporation and principal place of business.

The United States Supreme Court reversed the Ninth Circuit's panel decision and held that California could not exercise general jurisdiction over Daimler.

The Supreme Court's Reversal.

The United States Supreme Court reversed the Ninth Circuit's panel decision and held that California could not exercise general jurisdiction over Daimler.[14] Returning to civil procedure essentials, the Court began with a review of the distinction between the two categories of personal jurisdiction: specific jurisdiction and general jurisdiction. Specific jurisdiction is proper when "the in-state activities of the corporate defendant [have] not only been continuous and systematic, but also [give] rise to the liabilities sued on," [15] and may be proper based on occasional, or even a single instance of in-state contact. General or "all-purpose" jurisdiction, on the other hand, is proper "only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive as to render it essentially at home in the forum State."[16]

Since the Court's landmark decision in *International Shoe*, specific jurisdiction has expanded significantly, departing from a "rigidly territorial focus"[17] and permitting the courts to hear actions arising from the defendant's limited, but significant in-state contacts or purposeful availments. By contrast, general jurisdiction has remained relatively stagnant, with the Court "declin[ing] to stretch" it beyond "traditionally recognized" limitations.[18]

Consistent with these traditional limits, general jurisdiction over a corporate defendant is proper only if the defendant is "at home" in the forum state. Citing *Goodyear*, the Court explained that a corporation is considered "at home" in: (1) the state of its incorporation; (2) the state of its principal place of business; or (3) a state in which its contacts are "so continuous and systematic," that they render the corporation "comparable to a domestic enterprise in that State."[19] The Court cited *Perkins v Benguet Consolidated Mining Co*,[20] as the "textbook" example of the third "at home" category.

Perkins involved a corporation established under the laws of the Philippines whose president relocated to an office in Ohio while overseas operations ceased during World War II. From his Ohio office, the president conducted the company's business, carried on correspondence, maintained its files, distributed funds, held directors' meetings, and supervised the recovery of the company's properties in the Philippines. The *Perkins* Court held that an Ohio resident could sue the defendant corporation in Ohio on an

action arising from events occurring outside of the forum state because "Ohio was the corporation's principal, if temporary, place of business."[21]

Unlike in *Perkins*, general jurisdiction was lacking over the defendants in *Goodyear*, *supra*, where their forum contacts were limited to placing a product into the forum's stream of commerce. Similarly, there was no general jurisdiction in *Helicopteros Nacionales de Colombia, SA v Hall*,[22] where the defendant's contacts included only a few business visits, equipment purchases, and acceptance of checks drawn from an in-forum bank account.

With this precedent in mind, the Court rejected the Ninth Circuit's agency test for general jurisdiction as overly broad. The Court reasoned that asking whether the subsidiary's in-forum contacts and activities are "important" to the foreign parent corporation is no test at all because it would always yield a pro-jurisdiction result. The parent corporation would likely not have engaged its subsidiary in the in-forum activities if they were anything *other than* important to the parent. "Anything a corporation does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do by other means if the independent contractor, subsidiary or distributor did not exist."[23] The Court did not, however, expressly find that agency is never relevant to general jurisdiction. Instead, the Court held that even if general jurisdiction over MBUSA were proper, the California district court would still lack general jurisdiction over Daimler because Daimler's own forum contacts "hardly render it at home there."[24]

The Court was also careful to instruct that general jurisdiction is not proper in every state where a corporate defendant locates an affiliate or subsidiary, or engages in "substantial, continuous and systematic" business.[25] Were that the case, Daimler could be named as a defendant in California (or in any other state where MBUSA engages in substantial business) regardless of where, or how the underlying claim arose. "For example, as plaintiffs' counsel affirmed [in oral argument], under the proffered jurisdictional theory, if a Daimler-manufactured vehicle overturned in Poland, injuring a Polish driver and passenger, the injured parties could maintain a design defect suit in California."[26] The focus on whether the defendant is at home in the forum state limits the number of places where a corporation may reasonably expect to be hauled into court. Elaborating on this point in a footnote, the Court explained that the general jurisdiction determination "calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them."[27]

Final Takeaways

Under *Daimler*, a corporation is only subject to general jurisdiction in: (1) the state of its incorporation; (2) the state in which its principal place of business is located; or (3) the state in which its contacts are so systematic and continuous it can reasonably be said to be "***at home***" in the state. Cases falling within the third category are considered "exceptional," and may only occur under circumstances similar to those in *Perkins*. Further, it is not enough for a plaintiff relying on general jurisdiction to demonstrate that the defendant's subsidiary is "at home" in the forum state — the parent corporation's own contacts must also be comparable to that of a domestic business. Stated another way, even if a corporate defendant does substantial business in a forum state, that forum may lack jurisdiction over the defendant for suits not arising from those in-state contacts if the defendant is incorporated and headquartered elsewhere.[28]

For personal jurisdiction, agency theory is down, but not out. An agent's forum contacts are still relevant to specific jurisdiction when the action arises from the in-state contacts.[29] Moreover, the Court did not address whether a subsidiary's forum contacts may be imputed to a parent corporation under an alter ego theory, which permits the exercise of jurisdiction over a parent company that exerts such control over its subsidiary that the two entities are no longer legally distinct for personal jurisdiction purposes.[30] The United States Court of Appeals for the Sixth Circuit has recognized that the alter ego theory may be used to establish specific jurisdiction.[31]

Practitioners would be remiss to overlook *Daimler*'s potential value in the representation of domestic corporate defendants. Applied to a United States-based corporation, *Daimler* prohibits a plaintiff from establishing general jurisdiction over a parent corporation "at home" in another state based on a subsidiary's business in the plaintiff's preferred forum. As Justice Sotomayor explained in her concurrence:

> [T]he principal announced by the majority ***would apply equally to preclude general jurisdiction over a U.S. company that is incorporated and has its principal place of business in another U.S. state***…. [F]or example, a General Motors auto-worker who retires to Florida would be unable to sue GM in that State for disabilities that develop from the retiree's labor at a Michigan parts plant, even though GM undertakes considerable business operations in Florida.[32]

Thus, *Daimler* may prove to be an important tool to control the scope of litigation against large corporate clients.

Endnotes

1. *Daimler AG v Bauman*, ____US____; 134 S Ct 746; ___ LEd2d ___ (2014).
2. 28 USC 1350; 106 Stat 73, note following 28 USC 1350.
3. *See Bauman v DaimlerChrysler AG*, No C-04-00194 RMW, 2005 WL 3157472, at *8-10 (ND Cal, 2005) ("*Bauman I*").
4. In light of the Court's holding in *Goodyear*, *infra*, that general jurisdiction requires that a corporation be "at home" in the forum state, which is akin to being domiciled or maintaining a principal place of business there, perhaps Daimler should have challenged the district court's exercise of general jurisdiction over MBUSA. However, because Daimler did not object, the Supreme Court assumed without deciding that California had general jurisdiction over MBUSA. *Daimler*, 134 S Ct at 758.
5. *Daimler,*134 S Ct at 759, citing *Doe v Unocal Corp*, 248 F3d 915, 929 (CA 9, 2001).
6. *Bauman I*, 2005 WL 3157472, at *11-12.
7. *Bauman v DaimlerChrysler Corp*, 579 F3d 1088, 1096-1097 (CA 9, 2009) ("*Bauman II*") *vacated*, 603 F3d 1141 (CA 9, 2010).
8. *Bauman v DaimlerChrysler Corp*, 644 F3d 909 (CA 9, 2011) ("*Bauman III*").
9. *Bauman III*, 644 F3d at 922.
10. *Bauman v DaimlerChrysler Corp*, 676 F3d 774, 775 (CA 9, 2011) (O'Scannlian, J., dissenting) ("*Bauman IV*").
11. *Id*. at 776-777, n1, n2.
12. *Goodyear Dunlop Tires Ops, SA v Brown*, ___ US___, 131 S Ct 2846, 180 LEd2d 796 (2011).
13. *Id*. at 2851.
14. *Daimler*, 134 S Ct at 760-762.
15. *Id*. at 754, citing *International Shoe Co v Washington*, 326 US 310 (1945).
16. *Id*. at 751, quoting *Goodyear*, 131 S Ct at 2851.
17. *Id*. at 755.
18. *Id*. at 757-758.
19. *Id*. at 760-761.
20. *Perkins v Benguet Consol Mining Co*, 342 US 437 (1952).
21. *Daimler*, 134 S Ct at 756.
22. *Helicopteros Nacionales de Colombia, SA v Hall*, 466 US 408 (1984).
23. *Daimler*, 134 S Ct 759, quoting *Bauman IV*, 676 F3d at 777 (O'Scannlian, J., dissenting).
24. *Id*. at 760.
25. *Id*. at 760-762.
26. *Id*. at 751.
27. *Id*. at 762, n20.
28. *See Hertz Corp v Friend*, 559 US 77, 93-94 (2010) (noting that a corporation's principal place of business will usually be its headquarters).
29. *Daimler*, 134 S Ct at 759, n13, citing *International Shoe*, 326 US at 316, and *Asahi Metal Industry v Superior Court*, 480 US 102, 112 (1987).
30. *See Carrier Corp v Outokumpu Oyj*, 673 F3d 430, 450-451 (CA 6, 2012).
31. *Id*.
32. *Daimler*, 134 S Ct at 773, n12 (Sotomayor, J., concurring) (emphasis added).

Personal Jurisdiction in Michigan following the United States Supreme Court's Decisions in *Daimler* and *Walden*

By: Sheldon Klein and Brian McGinty, *Butzel Long*

Executive Summary

This is one of two articles in this issue that discusses the impact of SCOTUS' recent decision in Daimler AG v Bauman*, on general personal jurisdiction. This article provides a general overview of the Supreme Court's decisions in two cases:* Daimler*, pertaining to general jurisdiction and* Walden v Fiore*, pertaining to specific jurisdiction. It discusses the impact of these decisions on Michigan jurisdiction statutes and interpretive case law.*

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Introduction

Twice in the first two months of 2014, the United States Supreme Court announced decisions regarding the constitutional limits of general and specific personal jurisdiction.[1]

In *Daimler v Bauman*,[2] the Court significantly reshaped the law of general jurisdiction over corporations, holding that general jurisdiction may be exercised only when a corporation is "essentially at home," which is limited to its place of incorporation or principal place of business, except in unusual circumstances. In *Walden v Fiore*,[3] the Court revisited the law of specific jurisdiction over individuals. It re-emphasized that specific jurisdiction must be based on the defendant's, not the plaintiff's, contacts with the forum state and, thus, that a defendant is not subject to jurisdiction in a forum merely because that is where the plaintiff's injury is felt.

Daimler will significantly change the law of general personal jurisdiction in Michigan, effectively re-writing the pertinent Michigan jurisdictional statutes and superseding a significant portion of the relevant case law. The impact of *Walden* will be less dramatic, but it too will constrain the outer boundaries of the exercise of specific personal jurisdiction.

Daimler v Bauman (General Jurisdiction)

As succinctly stated in the first sentence of the opinion, *Daimler* concerned "the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States."[4] Specifically, Argentineans who had been employees of a South American subsidiary of the company now known as Daimler AG brought suit against Daimler in the United States District Court for the Northern District of California, seeking redress for the complicity of Daimler's Argentine subsidiary in human rights violations during Argentina's "Dirty War" in the 1970s and 1980s.

The Supreme Court held that Daimler was not subject to general jurisdiction in California. It did so on grounds far broader than the unusual facts at issue, fundamentally rejecting the standard for general jurisdiction as applied by lower courts for many years.

The *Daimler* standard allows jurisdiction only where the company is "essentially at home."[5] The Court never quite defined "at home," except to say that the contacts must be "comparable to a domestic enterprise in that State."[6] The Court went on to explain that:

> [T]he place of incorporation and principal place of business are paradigm . . . bases for general jurisdiction. . . . Those affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable."[7]

The Court acknowledged "the possibility that in an exceptional case[,] . . . a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State."[8] However, the one example of such an exception noted by the Court, *Perkins v Benguet Consol Mining Co*,[9] suggests that exceptions will be few and far between.[10]

While the Court went to great lengths to explain its new rule as being perfectly in accord with past precedent, it is at a minimum a significant departure from the general jurisdiction standard embodied in many state statutes and applied by lower courts. Previously, most jurisdictions found general jurisdiction to exist whenever a company carried on "continuous and systematic" business,[11] such that a large national or multinational company might be subject to general jurisdiction in numerous (or all) states. *Daimler* took dead aim at this standard, stating:

> Plaintiffs would have us . . . approve the exercise of general jurisdiction in every State in which a corporation "engages in a substantial, continuous, and systematic course of business." That formulation, we hold, is unacceptably grasping.[12]

Thus, under *Daimler*, even a company that does "continuous and systematic business" (as previously understood) in all 50 states will now usually be subject to general jurisdiction in only one or two states.[13]

Impact of *Daimler* on Michigan Law

Michigan's corporate general jurisdiction statute, MCL 600.711, provides for jurisdiction based on:

(1) Incorporation under the laws of this state.

(2) Consent, to the extent authorized by the consent and subject to the limitations provided in section 745.

(3) The ***carrying on of a continuous and systematic part of its general business within the state***.[14]

The *Daimler* standard allows jurisdiction only where the company is "essentially at home."

As previously discussed, *Daimler* squarely rejected the subpart 3 standard, or at least re-defined "continuous and systematic business" to mean "maintaining its principal place of business within the state." As a result, numerous Michigan court decisions are no longer good law.

For example, *Kircos v Goodyear Tire & Rubber Co*[15] upheld general personal jurisdiction over Goodyear, "an Illinois corporation with no real estate, place of business, or license to do business in Michigan," because it "solicited sales in Michigan by direct mail, advertising media, personal contact, and automobile races," "maintained a dealer in Michigan," and "had dozens of sales in Michigan throughout the year."

Likewise, *Helzer v F Joseph Lamb Co*[16] held that general jurisdiction in an automobile negligence case was appropriate over a Canadian company[17] that had no physical location in Michigan, but that "regularly buys and sells parts in Michigan, sends a company courier to Michigan on a daily basis, and has a direct computer link-up with its Michigan parent corporation."

Similarly, in *Lincoln v Fairfield-Nobel Co*,[18] the court found general personal jurisdiction existed over a New York corporation operating in Michigan through an independent contractor because defendant made "numerous mail order sales of clothing to several shops in Michigan over a period of years." In addition, "salesmen conducted sales throughout the state, operated display booths at Cobo Hall on several occasions at shows, [and] advertised and conducted a successful operation in Michigan."

Finally, in *Knight v Rhoades Aviation, Inc*,[19] general personal jurisdiction was found based on a variety of factors previously considered highly important to general jurisdictional analysis but now rendered obsolete: "[D]efendant Rhoades Aviation routinely flies to and from Michigan, servicing Michigan clients and benefiting from Michigan's legal and business systems," and "actively solicits its business in Michigan by sending daily faxes to prospective clients."

All these cases, and most other cases upholding jurisdiction under MCL 600.711(3), are no longer good law.

Walden v Fiore (Specific Jurisdiction)

In *Walden v Fiore*, the plaintiffs were a couple of professional gamblers who had been traveling in the Caribbean. Defendant was a Georgia police officer who had been deputized to work with the Drug Enforcement Administration (DEA). During a layover in Atlanta, Georgia, defendant confiscated $97,000 in cash from plaintiffs and refused to return it, despite an alleged lack of evidence of any crime. After the plaintiffs returned to one of their residences in Las Vegas, Nevada,[20] they produced proof of the legitimacy of the seized cash, and it was eventually returned. In

the meantime, however, defendant allegedly created a false affidavit in an attempt to establish probable cause for forfeiture of the money. Plaintiffs sued defendant for constitutional violations.

The United States Supreme Court held that the defendant lacked sufficient minimum contacts with Nevada to subject him to limited jurisdiction there. Justice Thomas, who wrote the opinion of a unanimous Court, explained that "[d]ue process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties."[21] Accordingly, "the relationship must arise out of contacts that the defendant *himself* creates with the forum State . . . . [The] analysis looks to the defendant's contacts with the forum State."[22] Since the defendant officer had no contact with Nevada, he could not be sued there; the plaintiffs' connection to Nevada and the fact that they were harmed while in Nevada were insufficient.

The *Walden* opinion did not really break new ground, as the idea that a defendant could only be subject to jurisdiction based on his own actions rather than those of the plaintiff is not novel. However, the Ninth Circuit in *Walden* had found that the Georgia police officer was subject to jurisdiction in Nevada under the prior Supreme Court case of *Calder v Jones*,[23] interpreting it to allow the exercise of jurisdiction where the effects of an intentional tort were foreseeably felt.

In *Calder*, the Court upheld the exercise of jurisdiction over two Florida authors who had published in California a defamatory article about actress Shirley Jones, a California resident. *Walden* squarely rejected the Ninth Circuit's broad reading of *Calder*, explaining that *Calder* was based on the specific facts and the nature of the libel tort:

> The crux of Calder was that the reputation-based "effects" of the alleged libel connected the defendants to California, not just to the plaintiff. The strength of that connection was largely a function of the nature of the libel tort. . . . [T]he reputational injury caused by the defendants' story would not have occurred but for the fact that the defendants wrote an article for publication in California that was read by a large number of California citizens. Indeed, because publication to third persons is a necessary element of libel, see id., §558, the defendants' intentional tort actually occurred in California. . . . In this way, the "effects" caused by the defendants' article—i.e., the injury to the plaintiff's reputation in the estimation of the California public—connected the defendants' conduct to California, not just to a plaintiff who lived there. That connection, combined with the various facts that gave the article a California focus, sufficed to authorize the California court's exercise of jurisdiction.[24]

All these cases, and most other cases upholding jurisdiction under MCL 600.711(3), are no longer good law.

Impact of *Walden* on Michigan Law

Walden's narrow reading of *Calder* is generally consistent with that of most lower courts, including courts applying Michigan law. For example, in *Air Products and Controls v Safetech Intern*, the Court of Appeals for the Sixth Circuit explained:

> The Sixth Circuit, as well as other circuits, have narrowed the application of the Calder "effects test," such that the mere allegation of intentional tortious conduct which has injured a forum resident does not, by itself, always satisfy the purposeful availment prong. . . . We have applied Calder narrowly by evaluating whether a defendant's contacts with the forum may be enhanced if the defendant expressly aimed its tortious conduct at the forum and plaintiff's forum state was the focus of the activities of the defendant out of which the suit arises.[25]

Thus, unlike *Daimler*, *Walden* does not represent a significant change in Michigan law.

However, *Walden* does clarify the limits on the application of a key portion of the Michigan personal jurisdiction statute and arguably is in tension with some Michigan case law. Michigan's specific jurisdiction statute for individuals, MCL 600.705(2), allows specific jurisdiction over an individual based on "[t]he doing or causing an act to be done, or ***consequences to occur, in the state resulting in an action for tort***."[26] Insofar as the provision can be read to allow jurisdiction based on nothing more than damage being suffered in Michigan, *Walden* constrains such a reading.

While most Michigan case law has refused to subject a defendant to personal jurisdiction when the defendant had few or no contacts with the state other than harm to a plaintiff located in Michigan, a few cases have found jurisdiction in such circumstances. For example, in *Ajuba Int'l, LLC v Saharia*,[27] all acts alleged to have been done by the defendants occurred in India, and their direct effect was to harm an Indian corporation, which was only an indirect subsidiary of a Michigan LLC. Nevertheless, the court found that jurisdiction was appropriate because "Defendants are alleged to have misappropriated Ajuba International's trade secrets and confidential information and

tortiously interfered with its contracts and business relationships, thereby causing consequences in Michigan resulting in an action for tort."

Similarly, in *Moellers North America v MSK Covertech*,[28] the plaintiff, a Michigan corporation, sued a German corporation, its Georgia subsidiary, and Swiss and German individuals for tortuous interference and related torts. The sole connection with Michigan was that plaintiff was located in and suffered its injury in Michigan. Relying on *Calder v Jones*, the court found that jurisdiction existed because defendants engaged in "intentional acts aimed at a Michigan corporation . . . If they were successful, they would have expected the effects to be felt at the Moellers' corporate headquarters and sole place of business in Michigan."[29]

These cases and any similar ones have likely been rendered infirm by *Walden*, as has any application of MCL 600.705(2) that lacks some additional purposeful contact with the state of Michigan.

Conclusion

Daimler will significantly reshape existing Michigan law regarding general personal jurisdiction over corporations. Effectively, the Michigan courts now have jurisdiction over far fewer corporations than they did prior to *Daimler*. Whereas the state could previously exert its adjudicatory power over any company with a substantial presence within the Michigan borders, the current list of companies over whom the courts can assert jurisdiction is mostly coextensive with the list of companies incorporated or organized in Michigan. In far more instances than before, Michigan plaintiffs will now have to litigate in other states in order to obtain jurisdiction over corporate defendants.

Walden will have a less dramatic effect as it is consistent with the primary thrust of Michigan case law. The implication of *Calder* that a defendant could be haled into court even without having specifically directed actions toward the state had already been largely rejected by courts interpreting Michigan law even before *Walden* did so explicitly. Thus, *Walden* will restrain Michigan courts

from reaching too broadly outside the state's borders but will largely reinforce existing legal principles.

Endnotes

1. In its new decisions, the Supreme Court often used the more descriptive, though less common, labels of "all-purpose" and "case-specific" jurisdiction, rather than general and specific. This article uses general and specific, as they remain the standard nomenclature.
2. 571 US ___; 134 S Ct 746 (2014).
3. 571 US ___; 134 S Ct 1115 (2014).
4. 134 S Ct at 750.
5. *Id.* at 751.
6. *Id.* at 758, n11.
7. *Id*. at 760 (internal citation and quotation omitted).
8. *Id.* at 762 n19.
9. 342 US 437 (1952).
10. *Perkins* involved a Philippine entity whose normal business operations were shut down due to the World War II Japanese occupation of that country. During the occupation, the company was operating primarily out of Ohio. Because Ohio was, at least for the time being, the company's principal place of business, jurisdiction was appropriate even though the dispute did not involve events that occurred in Ohio.
11. Although there was not a clear or consistent definition of what contacts qualified as continuous and systematic, it included activities such as "marketing or shipping products, or performing services or maintaining . . . offices there." Wright and Miller, Fed Prac & Proc (3d) §1067.5, at 507.
12. *Daimler, supra* at 761 (citations omitted).
13. This restriction of jurisdiction over large companies provides much of the ammunition for a spirited opinion by Justice Sotomayor that concurs only in the judgment. In Sotomayor's opinion, large companies are now "too big for general jurisdiction." (Concurrence, at 2) She views this as bad public policy, inasmuch as it insulates huge corporations at the expensive of individuals and small businesses, and is inconsistent with past precedent. Moreover, she takes issue with the Court's deciding issues that were not briefed or preserved and with its emphasis on predictability, which she believes will not be enhanced by the new jurisdictional standard.
14. MCL 600.711 (emphasis supplied).
15. 70 Mich App 612, 614 (1976).
16. 171 Mich App 6, 11 (1988).
17. The opinion in *Daimler* mentions international comity as a supporting rationale for its new jurisdictional rule, i.e., that some of the United States' neighbors or allies may be offended by its courts' asserting jurisdiction over their citizens and businesses. *Helzer* did not mention considerations of comity.
18. 76 Mich App 514, 518 (1977).
19. Unpublished opinion per curiam of the Court of Appeals, issued January 12, 2006 (Docket No. 255952).
20. The plaintiffs apparently also owned a residence in California, and it is this residence that was shown on their identification.
21. 134 S Ct at 1122.
22. *Id.* at 1122 (internal quotations omitted, emphasis in original).
23. 465 US 783 (1984).
24. *Id*. at 1123-1124.
25. 503 F3d 544, 552 (CA 6, 2007) (Michigan law) (internal quotations and citations omitted).
26. MCL 600.705(2) (emphasis supplied). The same standard applies to corporations under MCL 600.715(2).
27. 871 F Supp 2d 671 (ED Mich, 2012).
28. 870 F Supp 187 (WD Mich, 1994).
29. *Id.* at 192.

Supreme Court Insurance BOLO (Be on the Lookout) Report

By: Kimberlee A. Hillock, *Willingham & Coté, P.C.*

Executive Summary

The Supreme Court has either granted leave or ordered oral argument on several cases that have the potential of significantly affecting insurance law. For almost all calendar cases in which the Supreme Court has heard oral argument, an opinion or order will be issued by July 31st, the end of the court's calendar year.[1] *Therefore, insurance practitioners should be on the lookout for these decisions sometime between now and July 31, 2014. This article lays out the significant insurance issues before the Court.*

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Tienda v Integon Nat'l Ins Co:

Is an itinerant worker insured in North Carolina but with a Michigan driver's license an "out-of-state resident" at the time of the Michigan accident, which pursuant to MCL 500.3163(1) would require the North Carolina insurer to provide Michigan no-fault benefits to the insured's passengers?

The insured was an itinerant worker who in the year of the accident spent seven months in Florida, then two months in North Carolina, then less than one month in Michigan before the motor vehicle accident occurred. While in North Carolina, the insured obtained an auto insurance policy from defendant insurer, listing his North Carolina address, but providing his Michigan driver's license. After the accident, the insurer denied the insured's claim for benefits on the basis that he misrepresented the primary garaging location of the vehicle when he knew he planned to take the vehicle to Michigan. The insurer denied the claims of the insured's passengers on the basis that the insured was a Michigan resident, and the insurer was only required to pay for injuries in Michigan if the owner of the vehicle was a resident of another state pursuant to MCL 500.3163(1). The passengers filed suit against the North Carolina insurer and sought benefits from the assigned claims carrier. The assigned claims carrier moved to intervene as a defendant and filed a cross claim against the North Carolina insurer.

Both insurers moved for summary disposition. The trial court granted summary disposition to the assigned claims carrier and denied the North Carolina insurer's motion. The trial court concluded that the insured's residence was irrelevant, stating that it could not base recovery to passengers on whether the insured was a Michigan resident. Nevertheless, the trial court concluded that the insured was a resident of Florida because that is where he had spent the most time.

The North Carolina insurer appealed, and the Court of Appeals reversed.[2] The Court of Appeals first held that residency of the insured was paramount to whether benefits were owed under MCL 500.3163(1). It analyzed the factors in *Workman v DAIIE*,[3] and *Dairyland Ins Co v Auto-Owners Ins Co*,[4] but found that they did not completely answer the residency question. It then likened an itinerant worker to a journeyman ballplayer who is regularly traded every season, and concluded that because the insured was living in Michigan at the time of the accident, the assigned claims carrier rather than the North Carolina insurer owed benefits.

The assigned claims carrier applied for leave to appeal to the Michigan Supreme Court. On February 5, 2014, the Supreme Court directed the clerk to schedule oral

argument on whether to grant the application, and directed the parties to submit supplemental briefs addressing:

> whether the insured upon whose policy the plaintiffs seek the payment of benefits was an "out-of-state resident," as that term is used in MCL 500.3163(1), at the time of the Michigan accident giving rise to the plaintiff's claim.[5]

This case is scheduled for oral argument in a special session on April 30, 2014.

Hannay v Dep't of Transportation

Does wage loss qualify as "bodily injury" for purposes of avoiding governmental immunity? Did the evidence establish the loss of income from work plaintiff would have performed or merely plaintiff's loss of earning capacity?

In 2007, plaintiff was injured in an accident involving a vehicle owned by the state of Michigan. Claiming serious impairment of bodily function, she filed a third-party negligence action pursuant to MCL 500.3135 against the state. At the close of plaintiff's proofs at the bench trial, the state moved to dismiss on the basis that it was liable only for bodily injury and property damage under MCL 691.1405. The Court of Claims took the motion under advisement, and after closing argument rendered a judgment for plaintiff in the amount of $474,904 in noneconomic damages, $767,076 in work-loss benefits, and $153,872 in allowable expenses for ordinary and necessary services.

The state appealed to the Court of Appeals arguing that the Court of Claims erred in awarding economic damages and, alternatively, the Court of Claims erred in calculating damages. The Court of Appeals affirmed.[6] It rejected the state's argument that the motor vehicle exception to the Governmental Tort Liability Act limited the state's liability to treatment of the bodily injury itself and did not extend to the broader damages associated with bodily injury. The court held:

> [B]odily injury that must be incurred to maintain an action against a governmental entity and the items of damages recoverable from those injuries are separate and distinct from one another. Accordingly, 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, and the trial court did not err by awarding those economic damages to plaintiff in this case.

The trial court concluded that the insured's residence was irrelevant, stating that it could not base recovery to passengers on whether the insured was a Michigan resident. Nevertheless, the trial court concluded that the insured was a resident of Florida because that is where he had spent the most time.

The court likewise upheld the trial court's calculation of damages based on the plaintiff's testimony that she was employed as a dental assistant and enrolled at a community college working toward her degree as a dental hygienist at the time of the accident. The state applied for leave to appeal to the Michigan Supreme Court. On September 27, 2013, the Court granted the state's application limited to the following issues:

> (1) whether economic loss in the form of wage loss may qualify as a "bodily injury" that permits a plaintiff to avoid the application of governmental immunity from tort liability under the motor vehicle exception to governmental immunity, MCL 691.1405 (see *Wesche v Mecosta Co Rd Comm*, 480 Mich 75 (2008)); and (2) whether the evidence in this case establishes that the plaintiff incurred a loss of income from work that she would have performed as opposed to a loss of earning capacity.[7]

Several amicus briefs have been filed in this matter. Oral argument was originally scheduled for April 3, 2014. However, on March 21, 2014, the Supreme Court adjourned oral argument and ordered that the case be heard at the same future session as *Hunter v Sisco*. [14]

Rambin v Allstate

Does "taken unlawfully" under MCL 500.3113(a) require the person using the vehicle or motorcycle to know that such use has not been authorized by the vehicle or motorcycle owner?

The plaintiff borrowed a motorcycle from an acquaintance. While riding the motorcycle, the plaintiff collided with a car and was injured. According to plaintiff, the acquaintance told him he owned the motorcycle. However, the motorcycle had in fact been stolen. The plaintiff admitted he was aware that he did not have a valid license to operate a motorcycle at the time of the accident. The plaintiff filed suit against the insurer of the car and the insurer assigned by the Assigned Claims Facility. Both insurers moved for summary disposition, arguing that the plaintiff was not entitled to personal protection insurance benefits because he was using a motor vehicle that he had taken unlawfully, and he did not have a reasonable belief that he was entitled to take and use the vehicle pursuant to MCL 500.3113(a). The trial court granted summary disposition to the insurers.

The Court of Appeals reversed.[8] It recognized that there were two levels of

inquiry: the first required an analysis of whether the injured person had taken the vehicle unlawfully. If it was determined that the vehicle was taken unlawfully, the second level of inquiry was whether the person had the reasonable belief that he was entitled to take and use the vehicle. Focusing on the first prong, the court found that the plaintiff had every reason to believe that he had taken the motorcycle from its rightful owner. It held that there had to be some sort of unlawful conduct and intent on the part of the injured person in order for there to be an unlawful taking. The court thus concluded that "there is no dispute that plaintiff did not take the vehicle in violation of the Michigan Penal Code, and that, viewed from plaintiff's (the driver's) perspective, there was no 'unlawful taking.'"

The insurer of the motor vehicle applied for leave to appeal to the Supreme Court. On May 1, 2013, the Supreme Court scheduled oral argument on whether to grant leave, and instructed the parties to address:

> whether the plaintiff took the motorcycle on which he was injured "unlawfully" within the meaning of MCL 500.3113(a), and specifically, whether "taken unlawfully" under MCL 500.3113(a) requires the "person . . . using [the] motor vehicle or motorcycle" to know that such use has not been authorized by the vehicle or motorcycle owner, see MCL 750.414; *People v Laur*, 128 Mich App 453 (1983), and, if so, whether the Court of Appeals erred in concluding that plaintiff lacked such knowledge as a matter of law given the circumstantial evidence presented in this case.[9]

Oral argument was held at a special session on October 23, 2013. A decision remains pending.

Acorn Investment Co v Michigan Basic Property Ins Ass'n

Does a judgment entered on an appraisal award constitute a verdict under MCR 2.403(O)(2)(c) for case evaluation sanction purposes?

The plaintiff filed a claim with his insurer for a fire that occurred on his property. The insurer denied the claim on the basis that the policy had been cancelled prior to the fire, and the plaintiff filed suit. The trial court granted summary disposition to plaintiff ruling that the cancellation was ineffective. The case proceeded to case evaluation, which returned an award of $11,000. The plaintiff accepted and the insurer rejected the award. The parties then agreed to submit the case to an appraisal panel, which returned an award of $20,877. The plaintiff moved for entry of judgment, which also sought case-evaluation expenses and debris-removal expenses. The trial court entered judgment in plaintiff's favor in the amount of the appraisal award plus interest, but declined to award case-evaluation sanctions or debris-removal expenses. The plaintiff appealed.

The trial court entered judgment in plaintiff's favor in the amount of the appraisal award plus interest, but declined to award case-evaluation sanctions or debris-removal expenses.

The Court of Appeals affirmed,[10] concluding that the plaintiff did not obtain a "verdict" entitling it to case-evaluation sanctions under MCR 2.403(O)(2)(c), and that it waived its claim for debris-removal expenses. The court reasoned that the appraisal process was effectively an arbitration, and an order of judgment entered pursuant to an arbitration or settlement was not a "verdict" within the meaning of the court rule. The court further concluded that the plaintiff waived the right to claim debris-removal expenses because it failed to raise the issue in the appraisal process.

The plaintiff applied for leave to appeal to the Michigan Supreme Court. On June 7, 2013, the Supreme Court ordered oral argument on the application and instructed the parties to address: "whether the Wayne Circuit Court judgment in this case amounted to a 'verdict' that entitled the plaintiff to case evaluation sanctions under MCR 2.403(O)(2)(c)."[11] Oral argument was held on December 11, 2013. A decision remains pending.

Hunt v Drielick

Was there a legally implied lease agreement between two trucking company defendants and, if so, did the Court of Appeals err in concluding that coverage was excluded on the basis that the semi was being used in the business of one of the defendants rather than on the basis that the semi was under lease to a carrier?

This case involves a coverage dispute regarding trucking policies. It is the second time that this case has been before the Court of Appeals. Empire Fire & Marine Insurance Company insured Drielick Trucking, which was owned by Roger Drielick. The policy contained a named driver exclusion pertaining to Roger's brother Corey Drielick. The policy excluded coverage for the subject semi when it was engaged in business or under lease to a carrier. At some point, Corey was driving the semi to Great Lakes to pick up a load. The semi did not have a trailer attached. When he was approximately one half mile away from

Great Lakes, he struck plaintiffs' vehicle. Plaintiffs filed suit against Roger, Corey, and Drielick Trucking, as well as Great Lakes and Sargent Trucking, Inc. Roger submitted a clam to Empire. Empire denied defense and indemnity on the basis that Corey was an excluded driver, and on the basis that the semi was under lease to or being used in the business of Great Lakes.

Plaintiffs settled with Great Lakes and Sargent. The Drielick defendants assigned their right to collect on the insurance claims to plaintiffs, Great Lakes, and Sargent. Great Lakes filed writs of garnishment against Empire. Empire filed a motion to quash the writs based on its reasons for denying the claim. The trial court denied the motion to quash, finding that Empire improperly denied coverage because (1) the named driver exclusion did not comply with the statute, and (2) the trial court found that the business exclusion was ambiguous.

In the first appeal, the Court of Appeals agreed that the named driver exclusion did not comply with the statute. However, the court found that the business exclusion was unambiguous. It reversed this portion of the trial court's decision, and remanded for further factual findings to determine whether the business use exclusion applied. The evidence at the time of remand was that there was an orally revoked written lease agreement with Sargent, and there was no written lease agreement with Great Lakes. Sargent's role in the litigation was not made clear in either opinion.

On remand, the trial court held that the business use exclusion did not apply because (a) Corey was not transporting a trailer at the time of the accident, and (b) Corey was not under orders to be at Great Lakes at a particular time. It further found that because there was no written lease and no state identification card from Great Lakes, this suggested the truck was not being used in the business of anyone who had leased the truck.

Empire appealed to the Court of Appeals a second time. The Court of Appeals reversed the trial court's ruling and quashed the writs of garnishment.[12] It concluded that because Corey was under dispatch at the time of the accident and was purposefully driving to the yard to transport property, the semi was being used to carry property in any business within the meaning of the exclusion, even though the semi was not actually carrying property at the time of the accident. Plaintiffs applied for leave to appeal.

On September 18, 2013, the Michigan Supreme Court granted leave to appeal. In its grant order, it directed the parties to address:

> (1) whether a lease agreement is legally implied between Roger Drielick Trucking and Great Lakes Carriers Corporation under the facts of the case and under applicable federal regulation of the motor carrier industry; and (2) if so, whether the Court of Appeals erred in resolving this case on the basis of the first clause of the business use exclusion in the non-trucking (bobtail) policy issued by Empire Fire and Marine Insurance Company, instead of on the basis of the second clause, which excludes coverage for "'[b]odily injury' or 'property damage' . . . while a covered 'auto' is used in the business of anyone to whom the 'auto' is leased or rented."[13]

Oral arguments were held March 5, 2014. A decision remains pending.

For future updates to the BOLO report, go to http://www.willinghamcote.com/Practice-Areas/Appellate-Work.

Endnotes

1. MCR 7.312, Michigan Supreme Court Processing of Cases and Administrative Matters, H.7.
2. 300 Mich App 605 (2013).
3. 404 Mich 477; 274 NW2d 373 (1979).
4. 123 Mich App 675; 333 NW2d 322 (1982).
5. Michigan Supreme Court Docket No. 147483.
6. 299 Mich App 261 (2013).
7. Michigan Supreme Court Docket No. 146763.
8. 297 Mich App 679 (2012).
9. Michigan Supreme Court Docket No. 146256.
10. 298 Mich App 558 (2012).
11. Michigan Supreme Court Docket No. 146452.
12. 298 Mich App 548 (2012).
13. Michigan Supreme Court Docket Nos. 146433-146435.
14. Michigan Supreme Court Docket No. 147335.

All That One In A Million Talk: A Legal Analysis of Cleanup Criteria

By: Douglas G. McClure, *Conlin, McKenney & Philbrick, PC*

Executive Summary

Acceptable risk in the realm of environmental cleanups is an elusive concept, but it does have legal bounds. The published cleanup criteria for most hazardous substances are based on hypotheses, assumptions, and predictions, not proof of actual harm, and they are not written in stone. Michigan law allows much higher site-specific criteria to be calculated and applied at sites where assumptions such as population size do not hold.

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We have a difficult time coming to grips with being exposed to even very low concentrations of a chemical that has been released into the environment. Environmental laws reflect that unease by creating and enforcing generic cleanup criteria on the level at which remaining concentrations in soil or groundwater are not expected to cause one additional case of cancer out of a very large assumed population of persons exposed over their lifetimes. EPA and many states and municipalities often utilize an assumed population of 100,000 persons, or even 1,000,000 persons.

Stated another way, EPA's National Contingency Plan provides for an acceptable *individual* risk range, below which no response activity is necessary, anywhere within the range of 1 in 10,000 (10^{-4}) to 1 in 1,000,000 (10^{-6}). 40 CFR 300.430. This means an individual's risk of contracting cancer from their lifetime of exposure to the chemical is acceptable if it is between 0.001% and 0.0001%, respectively. Compare this to our baseline risk of cancer mortality. The average person has roughly a 30% chance of developing cancer over his or her lifetime. http://www.cancer.org/cancer/cancerbasics/lifetime-probability-of-developing-or-dying-from-cancer And of course we all have a 100% chance of eventual death.

In this light, a cleanup criterion protecting against a one in a million additional risk really does virtually nothing to reduce our overall cancer risk. A person's overall cancer risk will be virtually the same — 99.99996% the same — as it was before the cleanup. The common law maxim "*de minimis non curat lex*" tells us that the law cares not for trifles. But in the realm of administrative cleanup criteria law, it does. The purpose of this article is not to judge whether this is good public policy, but instead to shed light on the assumptions that underlie it, so we know what we are hearing from regulators and how to respond.

The 1994 movie *Dumb and Dumber* (New Line Cinema) contains a scene that captures the subjective, often irrational, response to the concept of one in a million. The character of Lloyd (Jim Carrey) is overjoyed when he hears that he has "a chance" of love with Mary (Lauren Holly):

> LLOYD: What do you think the chances are of a girl like you and a guy like me ending up together?
>
> MARY: Lloyd, that's difficult to say. I mean we hardly —
>
> LLOYD: *Hit* me with it! Just give it to me straight — What are my chances?

MARY: Not good.

LLOYD: You mean not good, like one out of a hundred?

MARY: I'd say more like one out of a million.

LLOYD (overjoyed): So, you're telling me there's a chance. *Yesss!!*

Later on in the movie, a man comes to their door with news of Mary's husband:

LLOYD (shocked and confused): *Husband*?! Wait a minute. What was all that one in a million talk?

Environmental laws like CERCLA and RCRA, and their state analogues, are intended to be "protective" of human health through reducing "unacceptable" risk of exposure to hazardous substances in soil, water, groundwater, and air. Regulators usually derive cleanup criteria by extrapolating from the concentrations that cause tumors in lab rats and mice, using a straight line "linear" model to hypothesize what concentration in soil or groundwater or indoor air (the dose) over a lifetime of exposure might cause no more than one human cancer (the response) in an assumed exposed population.

This assumes that a human being metabolizes a toxin in the same way as a rat or a mouse. Another assumption is that if a substance causes cancers at high doses, a proportionally smaller dose will cause a proportionally smaller number of cancers. In fact, we now know that for many toxins there is a *favorable* biological response to very low exposures (known as a "hermetic" dose-response.) Consider aspirin, which at a high dose causes fatal internal bleeding, but two tablets cure a headache with no ill effects, and many doctors now recommend a daily dose for heart health.

Courts have rejected the linear dose-response model as unreliable, as in *Henricksen v ConocoPhillips Company*, 605 F Supp 2d 1142, 1165-1166 (ED Wash, 2009):

> The use of the no safe level or linear "no threshold" model for showing unreasonable risk "flies in the face of the toxicological law of dose-response, that is, that 'the dose makes the poison,' which refers to the general tendency for a greater dose of a toxin to cause greater severity of responses in individuals, as well as greater frequency of response in populations." Federal Judicial Center, Reference Manual on Scientific Evidence 475 (2d ed. 2000). Other courts have similarly rejected expert opinions that are based on the "no-threshold" model. As one court explained in excluding the plaintiffs' experts using the same no threshold theory, "[t]he linear non-threshold model cannot be falsified, nor can it be validated. To the extent that it has been subjected to peer review and publication, it has been rejected by the overwhelming majority of the scientific community. It has no known or potential rate of error. It is merely an hypothesis." *Whiting v. Boston Edison Co*., 891 F.Supp. 12, 25 (D. Mass. 1995). "In layman's terms, the model assumes that if a lot of something is bad for you, a little of the same thing, while perhaps not equally bad, must be so in some degree. The model rejects the idea that there might be a threshold at which the neutral or benign effects of a substance become toxic." *Id.* at 23. *Sutera v. Perrier Group of America Inc.*, 986 F.Supp. 655, 666 (D. Mass. 1997) ("Accordingly, although there is evidence that one camp of scientists . . . believes that a non-linear model is [an] appropriate basis for predicting the risks of low-level exposures to benzene, there is no scientific evidence that the linear no-safe threshold analysis is an acceptable scientific technique used by experts in determining causation in an individual instance.").

The common law maxim *"de minimis non curat lex"* tells us that the law cares not for trifles. But in the realm of administrative cleanup criteria law, it does.

In Michigan, our Supreme Court has gone so far as to declare that "mere" exposure (presumably at *any* dose) to a hazardous substance is not a legally cognizable injury unless and until it manifests into a present physical injury. *Henry v Dow Chemical Co*, 473 Mich 63, 72-73, 85 (2005):

> [Michigan] squarely rejects the proposition that mere exposure to a toxic substance and the increased risk of future harm constitutes an "injury" for tort purposes. . . . [J]udicial recognition of mere exposure to a toxic substance as a sufficient trigger for tort liability could lead to a stampede of litigation that would divert resources from more immediate and compelling claims, such as those brought by individuals with actual disease or injury, to less meritorious claims.

Generic cleanup criteria also assume a lifetime exposure to a certain very large population (e.g., 1,000,000 people.) But what if the actual exposed population at a site of contamination is much smaller? In that case, it should be appropriate to calculate site specific cleanup criteria for the chemicals of concern, using EPA's acceptable individual risk range of 1 in 10,000, as opposed to 1 in 100,000 or 1 in 1,000,000. The 1 in 10,000 individual risk range for carcinogens was upheld as

reasonable in *State of Ohio v EPA*, 997 F2d 1520 (DC Cir, 1993):

> The States also argue that the actual risk range selected is not adequately protective. EPA concluded, though, that all levels of exposure within the risk range are protective of human health. EPA has used 10^{-4} as an upper bound for establishing risk levels in the past, see 53 Fed.Reg. 51,394, 51,426 (1988), and "[m]any ARARs, which Congress specifically intended be used as cleanup standards at Superfund sites, are set at risk levels less stringent than 10^{-6}," 55 Fed.Reg. 8717 (1990). The States offer no evidence challenging EPA's position that 10^{-4} represents a safe level of exposure, and in any event, we give EPA's findings on this point significant deference.

And yet many individuals, legislators, and regulators prefer the 1 in 1,000,000 or 1 in 100,000 risk threshold for all cleanups, regardless of the exposed population size. This may or may not be what most people really want, so it is important to realize when it is being enforced at a site. It is also important to see that it is not rational when only a small population is at risk of lifetime exposure.

Like Jim Carrey's character Lloyd, when we hear someone say one in a million, we hear what we want to hear, regardless of the actual chances, and regardless of what the cleanup criterion really means. An individual may think, understandably, that it would be unacceptable if he or she became that one person in a million who gets cancer under the hypothetical model estimates of risk, and may want action to eliminate that risk. Mary says "one in a million" and Lloyd hears "there's a chance." Love, as they say, is blind. But regulation should not be.

Given our baseline 30% lifetime cancer risk, we should recognize that the additional one in a million hypothetical risk of cancer posed by the lifetime of exposure to the chemical merely changes an exposed person's lifetime cancer risk from 30% to 30.000001%. Rounding that to the nearest hundredth, or thousandth, or ten thousandth, leaves the person with the same lifetime cancer risk as before the cleanup.

The precautionary principle is pushed beyond reason when the exposed population is only a small fraction of the assumed population. A cleanup criterion based on 1,000,000 people being exposed no longer makes sense in terms of preventing one case of cancer in an exposed population of, say, 100 people. One way to address this, while still maintaining an acceptable individual risk, is to use EPA's 1 in 10,000 risk range (10^{-4}) when determining a remedial goal at a small population site.

Like Jim Carrey's character Lloyd, when we hear someone say one in a million, we hear what we want to hear, regardless of the actual chances, and regardless of what the cleanup criterion really means.

Let's use as an example the chemical 1,4 dioxane, which is listed as a likely human carcinogen by EPA. Michigan's cleanup statute, Part 201 of the Natural Resources and Environmental Protection Act, requires that "[i]f a hazardous substance poses a carcinogenic risk to humans, the cleanup criteria derived for cancer risk under this section shall be the 95% upper bound on the calculated risk of 1 additional cancer above the background cancer rate ***per 100,000 individuals*** using the generic set of exposure assumptions established . . . for the appropriate category or subcategory."[1]

On December 30, 2013, as required by recent amendments to Part 201, the MDEQ promulgated new administrative rules which include generic cleanup criteria for hazardous substances, including 1,4 dioxane. The residential cleanup criterion for 1,4 dioxane in groundwater under these administrative rules is 85 parts per billion (ppb), meaning that 1 person out of an exposed population of 100,000 people might be expected to develop cancer during his or her lifetime because of that exposure. Each of these hypothetical persons in this hypothetical exposed population therefore has a 1 in a 100,000 (i.e., 0.00001 or 10^{-5}) calculated *individual* risk of contracting that one additional cancer by drinking groundwater containing 85 ppb of 1,4 dioxane over his or her lifetime.

The MDEQ algorithm contained in the administrative rules for calculating groundwater cleanup criteria uses a 10^{-5} "target risk level" to calculate 85 ppb as the cleanup criterion for 1,4 dioxane in groundwater. This equates to 850 ppb under a 10^{-4} target risk level. If this results in less than one estimated cancer in a population under 100,000, then Part 201 is satisfied and the public should be too. Less than one person harmed is zero persons harmed, since individual people are not divisible.

As discussed above, EPA has officially stated that 10^{-4} is an acceptable *individual* risk of contracting cancer from exposure to a hazardous substance in the environment. To determine whether 1/10,000 is appropriate for individual risk as either a screening criteria or a final cleanup goal at a specific site, the actual size of the exposed population can be taken into account. Where the exposed population is, say, 100 people exposed over a lifetime, and if each per-

son is subject to a 1/10,000 individual risk of cancer from the exposure, then the population risk is 0.0001 times 100, which equals 0.01 people, which is less than one person harmed, which means no one is harmed. And this is still conservative because it is unlikely that all 100 persons will stay put and be exposed to the contaminant, at the assumed constant dose, for their entire lives.

For a site with an exposed population of 100 people, then, it would appear to be entirely appropriate to use 850 ppb as a site specific groundwater cleanup criterion for 1,4 dioxane, because that results in an "acceptable" (per EPA) individual estimated risk of 10^{-4}, and does not result in a single estimated case of cancer in the exposed population. There is no rational (or legal) basis for using the 1/100,000 target risk standard, much less 1/1,000,000, for the cleanup goal under these circumstances.

This approach to creating a site specific cleanup criterion based on population size also satisfies Part 201 of NREPA. As discussed above, Part 201 provides that cleanups should seek a level of residual contamination that would cause only one excess cancer to occur in a *population* of 100,000 exposed individuals. This readily translates to 10 individual cancers in an exposed population of 1,000,000, and less than one individual cancer in a population less than 100,000. Part 201 does not dictate or specify a range for acceptable *individual* risk levels at exposed populations of less than 100,000 people.

In this light, if we calculate cleanup criteria based on EPA's 1/10,000 (10^{-4}) acceptable *individual risk* threshold (i.e., 850 ppb instead of 85 ppb for 1,4 dioxane in groundwater), then an exposed population of 100 people will be expected to have less than one excess cancer case. As demonstrated above, Michigan's 85 ppb generic cleanup criterion for 1,4 dioxane in groundwater presents an individual risk of 1/100,000 (10^{-5}). Multiplying the criterion by 10 (to 850 ppb) multiplies the individual risk by 10 (to 1/10,000, which is 0.0001 or 10^{-4}). Exposing all of those 100 people to this concentration in groundwater over their lifetimes results in a total *population risk* of 100 × .0001 = 0.01, which is less than one person. This meets the Michigan statutory requirement for population risk (less than one excess cancer in a population less than 100,000), and no person is subjected to an *individual risk* of more than 1 in 10,000, which EPA has lawfully deemed to be acceptable as demonstrated above.

The Michigan statute invites this type of site specific approach. Section 20120a(14) of Part 201 provides:

> Approval by the department of remedial action based on the categorical standard in subsection (1)(a) or (b) shall be granted only if the pertinent criteria are satisfied in the affected media. The department shall approve the use of probabilistic or statistical methods or other scientific methods of evaluating environmental data when determining compliance with a pertinent cleanup criterion if the methods are determined by the department to be reliable, scientifically valid, and ***best represent actual site conditions and exposure potential***."[2]

In addition, Section 20120b provides:

(1) The department ***shall approve*** numeric or nonnumeric site-specific criteria in a response activity under section 20120a if such criteria, in comparison to generic criteria, ***better reflect best available information concerning the toxicity or exposure risk posed by the hazardous substance or other factors***.

(2) Site-specific criteria approved under subsection (1) may, as appropriate:

(a) Use the algorithms for calculating generic criteria established by rule or propose and use different algorithms.

(b) Alter any value, parameter, or assumption used to calculate generic criteria.

(c) Take into consideration the depth below the ground surface of contamination, which may reduce the potential for exposure and serve as an exposure barrier.

(d) Be based on information related to the specific facility or information of general applicability, including peer-reviewed scientific literature.

(e) Use probabilistic methods of calculation.

(f) Use nonlinear-threshold-based calculations where scientifically justified.[3]

Therefore, it is perfectly reasonable, rational, and lawful in a state like Michigan to utilize a site-specific cleanup criterion that is 10 times the published generic cleanup criteria at many, perhaps most, sites, since the actual exposed population is usually orders of magnitude smaller than 100,000 people. The regulated community and their environmental consultants, as well as regulators, should consider making such adjustments where appropriate.

Endnotes

1. MCL 324.20120a(4) (emphasis added).
2. MCL 324.20120a(14) (emphasis added).
3. MCL 324.20120b (emphasis added).

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MDTC Legislative Report

The first months of 2014 have been relatively quiet in Lansing as the majority and minority parties have been gearing up for the bitter election campaign to come. So far, the most significant controversies of the New Year have involved differences of opinion as to how a modest surplus should be spent — a problem most of us would like to have more often, but a ripe source of political disagreement nonetheless. This issue has been addressed, in part, by a $329 million supplemental appropriations Act signed on March 14, 2014 (**2014 PA 34)**, which provides $215 million for badly needed road repairs and lesser amounts for a variety of other programs. Spirited discussions will continue about what to do with the rest, but if past experience may be used as a guide, we may expect that the legislators on both sides of the aisle will want to complete their work on this year's budget as quickly as possible, to accommodate a more prompt departure for the campaign trail.

2013 Public Acts

When the dust from last year's session settled, there were 277 Public Acts of 2013. The noteworthy acts finalized since the completion of my last report include:

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2013 PA 182 (Initiated Law 1), passed in response to a voter-initiated petition drive, which now **prohibits coverage of elective abortions in health plans without a specially-purchased rider**.

2013 PA 205 – House Bill 5156 (Shirkey – R), created by enactment of the "trailer bill" discussed in my last report, **introduced to remedy some of the defects in 2013 PA 164, the hurriedly-enacted Court of Claims legislation** also summarized in that report.

2013 PA 252 – Senate Bill 661 (Meekhof – R), which was originally introduced to increase the statutory limits on the amounts of political contributions, but was significantly expanded to serve another purpose as well – to derail the Secretary of State's proposal to require identification of contributors to organizations sponsoring those aggravating but highly effective "issue ads" that invade our television sets so pervasively during the election campaign seasons.

2013 PA 199 – House Bill 4064 (Heise – R) and 2013 PA 201 – House Bill 4532 (Price – R), which will **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 eliminated those provisions in response to criticism that this would improperly confer a power of taxation upon the Court. I have recently been informed by a knowledgeable source that the same concern is likely to shelve pending proposals for mandatory e-filing.

2014 Public Acts

As of this writing on March 18, 2014, there are 34 new Public Acts of 2014. In addition to the supplemental appropriations act previously discussed, the 2014 Public Acts which may be of interest to civil litigators include:

2014 PA 3 – Senate Bill 337 (Brandenburg – R), which has **amended the Revenue Act, MCL 205.21, 205.27a and 205.30, to establish new procedures and time limitations** for tax audits and review of tax assessments; to limit tax liability of purchasers of businesses; and to limit the personal liability of officers, members, managers and partners of corporations and other business entities for taxes owed by the corporation or entity.

2014 PA 11 – Senate Bill 475 (Hildenbrand – R), which has created a new "trampoline court safety act." This new act **establishes safety requirements for operation of "trampoline courts" – commercial or institutional venues for recreational use of trampolines –** and participation in the activities conducted in those facilities, and limits the potential liability of operators by its declaration that "an individual who participates in trampolining accepts the danger that inheres in that activity insofar as the dangers are obvious and necessary."

Old Business and New Initiatives

In my report last June, I discussed House Bill 4612 (Lund – R), which has **pro-**

So far, the most significant controversies of the New Year have involved differences of opinion as to how a modest surplus should be spent — a problem most of us would like to have more often, but a ripe source of political disagreement nonetheless.

posed several reforms of the Insurance Code's automobile no-fault insurance provisions. Most notably, the bill, as introduced, would replace the current unlimited lifetime medical and rehabilitation benefits for injured persons with a new maximum of one million dollars. It proposes other changes as well, including, new language limiting payment of PIP benefits to payments for products, services and accommodations that are "medically appropriate," as opposed to "reasonably necessary" for an injured person's care, recovery or rehabilitation; new cost containment measures, including limitations on provider reimbursements and attendant care services; creation of a new non-profit Michigan Catastrophic Claims Corporation to replace the existing Michigan Catastrophic Claims Association; a required premium reduction of at least $150 per vehicle to reflect anticipated cost savings; and creation of a new Michigan Automobile Insurance Fraud Authority.

House Bill 4612 was reported by the House Insurance Committee with a Substitute (H-1) on May 2, 2013, after two public hearings featuring substantial testimony in opposition, and has awaited further consideration by the full House on the second reading calendar ever since. The votes to pass it have not been found, as there are many differing opinions as to how these issues should be addressed.

There is still strong interest in passing some form of no-fault insurance reform this year, and thus, the discussions of alternatives have continued. House Speaker Jase Bolger has recently proposed a new plan featuring a ten million dollar catastrophic benefit cap and a required ten percent premium reduction. The Coalition Protecting Auto No-Fault (CPAN) has opposed Speaker Bolger's plan, contending that it would significantly limit the treatments and services available to injured accident victims. Oakland County Executive L. Brooks Patterson has also spoken forcefully in opposition to the Speaker's proposal. Senate Bill 818 (Papageorge – R) has proposed another alternative, which would **tie the amounts paid for no-fault medical benefits to the amounts approved for workers' compensation benefits**. This bill was introduced on February 25, 2014, and referred to the Senate Insurance Committee.

As of this writing, there has been no publicly-disclosed compromise on these issues, which could well be left for final resolution in this year's lame duck session.

Another serious controversy has been sparked by the recent introduction of Senate Bill 743 (Meekhof – R), which would **eliminate compulsory membership in the State Bar of Michigan**. The introduction of this bill was prompted by dissatisfaction with positions taken by the State Bar, and most particularly, its recent suggestion that the Secretary of State should require disclosure of contributors to judicial campaigns. In response to this legislation, the Supreme Court has convened a commission to study objections to the State Bar's political activities and consider whether membership in the State Bar should be a voluntary choice. Further consideration of Senate Bill 743 has been held in abeyance pending receipt of the commission's recommendations.

Also of interest is Senate Bill 636 (Nofs – R), which would **amend the Michigan Telecommunications Act to create new procedures**, effective January 1, 2017, **to allow telephone service providers to discontinue traditional land line telephone service in favor of voice over internet or wireless service**. This bill has been passed by both houses, and was ordered enrolled for presentation to the Governor on March 13, 2014.

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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Medical Malpractice Report

Doctrine of Avoidable Consequences

Braverman v Granger, ___ Mich App 208; ___ NW2d ___ (2014). Application for leave to appeal pending in the Supreme Court.

The Facts: The plaintiff's decedent received a kidney transplant because of her end-stage renal disease. The transplanted kidney began showing signs of rejection, which required treatment that removed blood from the body, separates the blood cells from the plasma to filter out the antibodies involved in the rejection, and returns the blood cells. Typically, replacement plasma is given to the patient, but the decedent was a Jehovah's Witness; according to that religion's tenets, a Jehovah's Witness cannot receive whole blood or blood products—like plasma — as a part of medical treatment. This refusal to accept replacement plasma negatively affected bleeding and blood clotting, and the decedent had to have the kidney removed because of bleeding and clotting. The kidney was removed, but there was still clotting, and the decedent ultimately died.

The plaintiff sued for medical malpractice. There was no criticism of the transplant procedure, and it was conceded that rejection of the organ was a known risk because the kidney came from her daughter, and the decedent's body could have developed antibodies during pregnancy that would make the decedent's body treat the kidney as a foreign body. Rather, the plaintiff was critical of the blood-thinning medications prescribed, the way the plasmapheresis (the blood-removal procedure) was handled, and the alleged failure to recognize the signs of internal bleeding. The defendants moved for summary disposition under the doctrine of avoidable consequences, arguing that the decedent likely would have survived if she had not refused blood transfusions. The plaintiff responded that the First Amendment right to free exercise of religion prevented the court from effectively holding her religious-based decision to refuse treatment against her.

The trial court employed an objective standard in deciding the motion, as opposed to a more subjective, case-by-case standard that would have considered the decision in light of the decedent's religious beliefs. The trial court emphasized that it was undisputed that the blood transfusion would have saved her life. Employing an objective standard that did not take religious beliefs into account, the trial court concluded that no factfinder could determine that the refusal of a life-saving blood transfusion was a reasonable choice. Accordingly, the trial court granted summary disposition. The plaintiff appealed.

The Ruling: The Court of Appeals affirmed. The court held that the doctrine of avoidable consequences prevents a party from recovering damages that could have been avoided by reasonable effort. The refusal of the blood transfusion meant that the decedent did not make such a reasonable effort. The question the Court of Appeals was left with was whether a plaintiff's religious views should be taken into account when considering the application of the doctrine.

The Court of Appeals rejected the argument that the objective application of the doctrine violated the decedent's First Amendment rights, and relying on persuasive authority from other jurisdictions, held that a court or jury taking into account the decedent's religious beliefs would constitute a governmental endorsement of the Jehovah's Witnesses' beliefs, and would also permit a jury to weigh the reasonableness of a person's religious beliefs. Both would violate the First Amendment, the panel concluded. The objective standard would also eliminate ***all*** subjective considerations from the analysis, and thus would not be treating religious-based subjective considerations any differently.

Judge Boonstra wrote a separate concurrence, concurring in the result and the reasoning of the majority, but adding his view that while the First Amendment gives every person the right to freely exercise religious beliefs, "every person bears responsibility for the decisions and choices that he or she makes in life." Judge Boonstra wrote that shifting responsibility for the decedent's refusal to accept a blood transfusion to her medical professionals would place those professionals in "the untenable position of having to choose between bearing legal responsibility for the consequences of [the decedent's] religion-based choices, or, alternatively, opting not to treat her." Judge Boonstra stressed that the "First Amendment does not require that medical professionals be placed between such a rock and hard place."

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Braverman stands for the proposition that a refusal of treatment based on religious grounds will be given no better (or worse) consideration simply because the refusal was premised on a religious belief.

Practice Tip: It is not uncommon for a medical-malpractice lawsuit to involve a claim for damages that might have been avoided if a plaintiff had taken (or not taken) some specific action. In cases where it can be established that the bad result at issue could have been avoided, for example, had a plaintiff not refused a certain procedure, counsel should consider asserting the doctrine of avoidable consequences. *Braverman* stands for the proposition that a refusal of treatment based on religious grounds will be given no better (or worse) consideration simply because the refusal was premised on a religious belief.

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Appellate Practice Report

Expediting Civil Appeals in the Michigan Court of Appeals

Pursuing or defending an appeal in the Michigan Court of Appeals can be a lengthy process. Briefing does not begin until after all transcripts have been ordered, and that process alone can take up to 91 days in most civil cases. MCR 7.210(B)(3)(b)(iv). The appellant's brief is typically due 56 days from the date all transcripts are received by the Court of Appeals in civil cases, and the appellee's brief is due 35 days later. MCR 7.212. Both appellants and appellees, however, can obtain extensions with relative ease. Once briefing is completed, the parties must wait for oral argument to be scheduled. Delays of up to a year or more are not uncommon.

With this timeline, it may be necessary in some cases to attempt to expedite the appellate process. The Michigan Court Rules provide three basic procedures for expediting appeals in the Michigan Court of Appeals.

First, an appellee may file a motion to affirm. See MCR 7.211. See also IOP 7.211(C)(3). This motion, which can be filed only after the appellant's brief has been filed, requests that the court affirm the order or judgment entered below because "(a) it is manifest that the questions sought to be reviewed are so unsubstantial as to need no argument or formal submission; or (b) the questions sought to be reviewed were not timely or properly raised." See MCR 7.211(C)(3). These motions can be granted only with a unanimous order.

A review of case law suggests that the Court of Appeals rarely grants motions to affirm. And even where the Court of Appeals does so, there is a risk that the Michigan Supreme Court will reverse and remand to the Court of Appeals for plenary consideration. See, e.g., *Cunningham v Contl Cas Co*, 139 Mich App 238; 361 NW2d 780 (1984).

Second, an appellant may file a motion for peremptory reversal. MCR 7.211(C)(4). This motion argues that error "is so manifest that an immediate reversal of the judgment or order appealed from should be granted without formal argument or submission." *Id.* Like a motion to affirm, a motion for peremptory reversal may be granted only by a unanimous order. Again, a review of case law shows that these motions are rarely granted.

Finally, a party seeking to expedite the appellate process may file either a motion for immediate consideration (in the case of applications for leave to appeal) or a motion to expedite (in the case of appeals as of right). MCR 7.211(C)(6); IOP 7.211(C)(6). Although the Michigan Court Rules suggest that motions for immediate consideration can be filed only to expedite consideration of another motion (such as a motion to affirm or a motion for peremptory reversal), the court's Internal Operating Procedures indicate that a party may file a motion for immediate consideration of an application for leave to appeal as well. See IOP 7.211(C)(6) ("A motion for immediate consideration is not substantive, but is designed to expedite consideration of *another* accompanying or pending motion, application for leave, or original proceeding.") (emphasis in original). In addition, while the Michigan Court Rules do not explicitly mention motions to expedite an appeal as of right, the Court's Internal Operating Procedures clearly provide for such relief. *Id.* ("If a party

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The Michigan Court Rules provide three basic procedures for expediting appeals in the Michigan Court of Appeals.

seeks to expedite the submission and/or decision of an entire appeal on the merits, a motion to expedite must be filed.").

The Court of Appeals appears to exercise its authority to expedite proceedings where there is potentially irreparable harm or where a lower court has entered an injunction. The Court of Appeals has expedited proceedings, for example, to stay an injunction issued by a trial court, *Michigan Council 25, AFSCME v Wayne Co*, 136 Mich App 21; 355 NW2d 624 (1984), where members of the Michigan House of Representatives sought to enjoin the immediate effect of two bills, *Hammel v Speaker of House of Representatives,* 297 Mich App 641; 825 NW2d 616 (2012), and where a plaintiff's professional license was at issue. *McCabe v Miller & Assoc, LLP,* unpublished opinion per curiam of the Court of Appeals, issued October 9, 2007 (Docket No. 275498), 2007 WL 2935032.

In sum, the various methods for expediting appellate consideration appear to succeed only in extraordinary circumstances. Nevertheless, they do succeed at times. Therefore, appellate counsel may be wise to consider whether a case is so clear cut that a motion to affirm or a motion for peremptory reversal is in order, or whether a delay raises the possibility of irreparable harm.

The Duty to Order the Complete Record in the Michigan Court of Appeals

One common misunderstanding about practice in the Michigan Court of Appeals is the belief that an appellant need order only the transcripts that it feels are germane to its appeal. According to this view, an appellant challenging entry of an order granting summary disposition in an opponent's favor, for instance, should not be required to order the transcript of every hearing that preceded entry of summary disposition.

The Michigan Court Rules and the Michigan Court of Appeals' Internal Operating Procedures, however, are clear: Unless an appellant obtains permission from a court to order a partial record, the appellant must order the complete record, which includes the transcript of each hearing. This conclusion arises largely from Michigan Court Rule 7.210(B)(1)(a), which states that an appellant must "order from the court reporter or recorder the full transcript of testimony and other proceedings in the trial court or tribunal." *Id.*

The Court's Internal Operating Procedures also provide that appellants may not make their own determination about what is and is not relevant, but must order the complete transcript. For example, IOP 7.210(B)(1)-1 states: "The appellant is responsible for securing the timely filing of the *complete* transcript for appeal, not just the transcript(s) that the appellant believes are relevant to the appeal."

It also absolves cross-appellants from any responsibility for ordering the necessary transcripts: "Note that under MCR 7.207(D), the cross-appellant is not responsible for the production and filing of the transcript unless the appellant abandons the initial appeal or it is dismissed." See IOP 7.210(B)(1)-1.

An appellant also is excused from this responsibility if the parties stipulate that some portion less than the full transcript be filed, if the parties agree on a statement of facts, or if the trial court orders that "some portion less than the full transcript . . . be included in the record for appeal." MCR 7.210(B)(1)(c). An appellant must secure this order by filing a motion "within the time required for filing an appeal." *Id.*

Consequently, appellees and cross-appellants may justifiably insist that appellants order a complete record, including the transcripts necessary for a cross-appeal. Whether it is prudent to file a motion against an appellant who fails to do so, however, is another matter. The Court of Appeals currently charges $100 per motion. Depending on the size of the record, it may be more cost-effective for an appellee to simply order any missing transcripts.

Effect of Pending Motions for Attorney Fees on the Finality of a Judgment

A fundamental rule of appellate jurisdiction is the need for a "final" decision – whether it be a judgment or order. In Michigan, a final judgment or order is typically "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties." MCR 7.202(6)(a)(i). In federal court, a "'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v United States*, 324 US 229, 233 (1945).

But what if there is an attorney fee issue outstanding at the time the underlying judgment or order is entered? Does that affect the time for filing an appeal? In light of a recent United States Supreme Court decision, the answer appears to be that it depends on whether you are in

The Court of Appeals appears to exercise its authority to expedite proceedings where there is potentially irreparable harm or where a lower court has entered an injunction.

state or federal court, and whether the claim for attorney fees is based on a (1) contract or (2) a court rule or statute.

In *Ray Haluch Gravel Co v Central Pension Fund of the Int'l Union of Operating Eng'rs*, ___ US ___; 134 S Ct 773; 187 L Ed 2d 669 (2014), the Supreme Court resolved apparent uncertainty among the federal circuits regarding whether a decision on the merits is "final" if there is an unresolved claim for attorney fees based on a contract. Federal courts have long recognized that an unresolved issue of attorney fees generally does not prevent the judgment on the merits from being final. See *Budinich v Becton Dickinson & Co*, 486 US 196 (1988). But the First Circuit in *Haluch* concluded that this general rule did not "mechanically" apply where the "entitlement to attorneys' fees derived from a contract," the "critical question" being "whether the claim for attorneys' fees is part of the merits." 695 F3d 1, 6 (CA 1, 2012).

The Supreme Court reversed, holding that the rule adopted in *Budinich* "did not depend on whether the statutory or decisional law authorizing a particular fee claim treated the fees as part of the merits." 134 S Ct at 780. The Court explained that fees and costs are generally treated as "collateral for finality purposes," and that the "operational consistency" and "predictability" of this rule would be compromised "by providing for different jurisdictional effect to district court decisions that leave unresolved otherwise identical fee claims based solely on whether the asserted right to fees is based [17] on a contract or a statute." 134 S Ct at 780-781.

The *Haluch* Court did appear to leave open one possible exception — cases where "'the substantive law requires [attorney] fees to be proved at trial as an element of damages.'" *Id*. at 781, quoting FR Civ P 54(d)(2). In those cases, "'such damages typically are to be claimed in a pleading and may involve issues to be resolved by a jury.'" *Id*., quoting Advisory Committee's 1993 Note on subd (d), par (2) of FR Civ P 54, 28 USC App, pp 240-241. But in the "vast range of cases where a claim for attorney's fees is made by motion under [Rule 54(d)(2)]," there is no distinction between statutory and contract-based fee requests. *Id*. at 782.

So what about cases pending in Michigan courts? Does the same rule apply? Maybe not. Although the case law is sparse, it appears that the Michigan Court of Appeals has taken a different approach to finality when it comes to unresolved attorney fee issues.

On the one hand, MCR 7.202(6)(a)(iv) provides that postjudgment orders "awarding or denying attorney fees or costs under MCR 2.403, 2.405, 2.625 or other law or court rule" are considered "final orders" that are separately appealable. See *Mossing v Demlow Products, Inc*, 287 Mich App 87, 93-94; 782 NW2d 780 (2010) (holding that an order awarding attorney fees and costs entered after an appeal has been filed must be separately appealed). As a result, a party should not wait to appeal the judgment or order deciding the merits of the case until after the attorney fee issue is resolved. See, e.g., *Jenkins v James F Altman & Nativity Ctr, Inc*, unpublished opinion per curiam of the Court of Appeals, issued May 31, 2005 (Docket No. 256144); 2005 Mich App LEXIS 1368, at *8-9 (holding that the plaintiffs could not challenge the trial court's summary disposition decision because they did not timely appeal; although they did timely appeal from the trial court's postjudgment order awarding attorney fees and costs, the Court of Appeals held that its jurisdiction was limited to the postjudgment order).

On the other hand, the Court of Appeals has, on at least two occasions, held that there is no final judgment if there is an unresolved claim for *contractual* attorney fees. In *Jets v Hampton Ridge Props*, unpublished opinion per curiam of the Court of Appeals, issued Aug 29, 2013 (Docket Nos. 294622, 297844); 2013 Mich App LEXIS 1475, the plaintiffs filed a lawsuit claiming breach of contract. Following a bench trial, the trial court found in favor of the plaintiffs and awarded damages. The trial court entered a judgment to that effect on March 25, 2009, and also determined that the plaintiffs were entitled to contractual attorney fees. An opinion and order awarding attorney fees was entered on September 29, 2009, after which the defendants filed a claim of appeal.

On appeal, the plaintiffs argued that the Court of Appeals lacked jurisdiction "to consider any issues other than those relating to the award of attorney fees." *Id*. at *6. The Court of Appeals disagreed, finding that the March 25, 2009 judgment was not the final judgment because it "did not resolve the issue of contractual attorney fees, which was a distinct claim in plaintiffs' complaint." *Id*. Observing that "'[a]ttorney fees awarded under contractual provisions are considered damages, not costs,'" *id*. at *6, citing *Central Transp, Inc v Fruehauf Corp*, 139 Mich App 536, 548; 362 NW2d 823 (1984), the *Jets* court held that the plaintiffs'

The Court's Internal Operating Procedures also provide that appellants may not make their own determination about what is and is not relevant, but must order the complete transcript.

claim for contractual attorney fees "was not resolved until the trial court issued its September 29, 2009, order establishing the amount of contractual attorney fees, making that order the first judgment or order that dispose[d] of all the claims alleged in plaintiffs' complaint." *Id*. at *6-7 (citations and internal quotations omitted).

The Court of Appeals followed a similar analysis in *Laurel Woods Apts v Roumayah*, unpublished opinion per curiam of the Court of Appeals, issued Dec 11, 2012 (Docket No. 299396); 2012 Mich App LEXIS 2512. In that case, the plaintiff landlord brought an action against the defendants, its tenants, for breach of contract and attorney fees in connection with a fire that the landlord claimed was the result of the defendants' negligence. Prior to trial, "the trial court instructed the parties that it would decide the issue of plaintiff's claim for contractual attorney fees after the jury trial." *Id*. at *4. As a result, the landlord's claim for attorney fees "was not an issue in the jury trial." *Id*. at *4-5.

Following the trial, the jury found in the landlord's favor and awarded damages, but in an amount far less than the landlord had requested. The trial court entered a judgment on the jury's verdict, as well as a separate order denying the landlord's request for attorney fees under the parties' lease agreement. *Id*. at *5-6. The landlord moved for reconsideration of the attorney fees order, and also moved for JNOV, a new trial, and/or additur. The trial court denied the landlord's JNOV motion on June 4, 2010, and denied reconsideration of the attorney fees order on July 13, 2010. The landlord filed its claim of appeal on August 3, 2010.

As in *Jets*, the tenants in *Laurel Woods Apts* argued that the Court of Appeals only had jurisdiction to address the attorney fee issue, as no claim of appeal had been filed within 21 days of the denial of the landlord's motion for JNOV. The Court of Appeals, however, rejected that argument. The court reasoned that because the landlord "claimed attorney fees in count II of its complaint pursuant to a provision of the parties' lease," this contractual attorney fees claim "needed to be adjudicated in order to dispose of all the claims in the complaint." *Id*. at *13. As that claim was not resolved until the entry of the attorney fees order, the Court of Appeals concluded that even though it was "entered after the judgment, the attorney fees order was the 'first' 'final order' under MCR 7.202(6)(a)(i)." *Id*.

So what should practitioners take from all of this? In federal court, the rule appears to be clear: unless the substantive law requires that a claim for attorney fees be pleaded and proved at trial as an element of damages, it will be treated as a collateral "cost" issue that does not affect the finality of the decision on the merits.

But in Michigan, the Court of Appeals appears to treat contractual attorney fees differently than requests for attorney fees based on a statute or court rule, with only statutory or court-rule based attorney fee awards being considered as separately appealable "postjudgment" orders. See *Laurel Woods Apts*, 2012 Mich App LEXIS, *9 n 4 (noting that "Plaintiff's claim for attorney fees under the contract . . . is distinct from a postjudgment claim for attorney fees"). Thus, if a judgment on the merits has been entered in a case where a claim for contractual attorney fees has been made, in all likelihood that judgment will not be considered final for purposes of appeal.

Continuing an Appeal Bond on Remand When a Judgment is Reversed as to the Amount of Damages Only

Appeal bonds are commonplace when a money judgment is being appealed and the appellant wishes to secure a stay of execution on the judgment pending appeal. Typically, a reversal on appeal will result in the appeal bond being released. But what if the reversal is only *partial*? For example, what if the judgment is affirmed as to liability, but reversed and remanded only for a redetermination of damages? Although the Michigan Court Rules do not directly address this situation, there is authority from other jurisdictions suggesting that an appeal bond remains enforceable under those circumstances.

MCR 7.209(F)(1) requires an appeal bond to contain a promise by the appellant to "prosecute the appeal to decision" and to "perform or satisfy a judgment or order of the Court of Appeals or the Supreme Court." However, it is silent when it comes to the effect of a *partial* reversal that affirms *liability* but reverses and remands only as to the calculation of *damages*.

Federal courts addressing the issue in the context of stay bonds issued under FR Civ P 62(d) ("If an appeal is taken, the appellant may obtain a stay by supersedeas bond . . . .") have widely recognized "that the [appellant] remains liable [under the bond] when the question on remand is not whether a party will receive damages, but merely how the

Thus, if a judgment on the merits has been entered in a case where a claim for contractual attorney fees has been made, in all likelihood that judgment will not be considered final for purposes of appeal.

damages will be calculated." *Beatrice Foods Co v New England Printing & Lithographing Co,* 930 F2d 1572, 1576 (CA Fed, 1991). Thus, "when an appellee has proven that damages are due, and the remand is merely to determine the proper quantum of injury . . . the bond remain[s] effective during this recalculation period." *Id*. Unless an appellee is required to "prove on remand that he suffered a compensable harm," it cannot be said that the appellant has substantially prevailed on appeal such that the bond should be discharged. *Id*. See also Moore's Manual – Federal Practice and Procedure, § 28.14 ("If, after an appeal, there remains a question of whether any compensable harm was done, the bond may lapse. If, however, an appellee has proven that damages are due and the court remands merely to determine the amount of the injury, the surety remains liable.").

As the *Beatrice Foods* court recognized, "the regional circuits agree" on this rule. See *Morrison Knudsen Corp v Ground Improvement Techniques, Inc*, 532 F3d 1063, 1071 (CA 10, 2008) ("The purpose of a supersedeas bond 'is to secure the judgment throughout the appeal process against the possibility of the judgment debtor's insolvency.' Although this court remanded for a retrial on the issue of damages, we affirmed the judgment finding MK's termination of GIT was wrongful. . . . We hold, therefore, that the Supersedeas Bond is still enforceable because MK failed to prosecute its appeal 'to effect.'"); *Tennessee Valley Authority v Atlas Machine & Iron Works, Inc*, 803 F2d 794, 799 (CA 4, 1986) ("Because the previous appeal resulted in an affirmance of Atlas' liabili-

In sum, although the Michigan Court Rules are silent on the issue, decisions from other jurisdictions provide a persuasive basis for arguing that an appeal bond should not be discharged when a judgment is reversed and remanded only for a determination of damages.

ty and a remand solely for a redetermination of damages, we conclude that Atlas and its surety, Fireman's Fund, remained liable under the terms of the supersedeas bond."); *Franklinville Realty Co v Arnold Constr Co*, 132 F2d 828, 829 (CA 5, 1943) ("As to the refusal to discharge the surety, the judgment on the former appeal was not a judgment of reversal but one of affirmance with a reversal limited to taking evidence and obtaining findings not upon whether appellee should have a judgment, but upon whether the judgment it had obtained should be for the same or a less sum. To abide this judgment as finally entered pursuant to the mandate, the surety remained bound.").

State appellate courts in other jurisdictions have likewise followed this rule. In *Spooner Const & Tree Serv, Inc v Maner*, 314 Mont 268; 66 P3d 263 (2003), the Supreme Court of Montana found the "relevant case law" to "clearly establish" that "a surety remains in effect when the question on remand is the amount of damages and not whether a party is entitled to damages. . . . However, if a question of liability, or whether a party is entitled to damages remains after an appeal, the bond may lapse." *Id*. at 277. See also *Holt Group, LLC v Kellum,* 260 P3d 50 (Colo App, 2010) ("Because the division in *Holt I* disturbed only the amount of, and not Kellum's basic responsibility to pay, Holt's attorney fees, we conclude that Kellum did not prosecute the appeal in *Holt I* to the 'effect' required to allow for the discharge of the supersedeas bond as it related to attorney fees."); *Bromberg v Finnell*, 80 Nev 189, 192-195; 391 P2d 31 (1964) (holding that the sureties on a bond remained "answerable thereon" because the only issue on remand involved a damage recalculation).

In sum, although the Michigan Court Rules are silent on the issue, decisions from other jurisdictions provide a persuasive basis for arguing that an appeal bond should not be discharged when a judgment is reversed and remanded only for a determination of damages.

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Legal Malpractice Update

Voiding a contract and returning deposited client funds from an attorney's trust account ends an attorney-client relationship for statute of limitations purposes. This may not, however, preclude a client from successfully pleading other claims that do not sound in malpractice if the elements of such a claim can be met.

Clara Adams v Attorney Defendants, unpublished opinion per curiam of the Court of Appeals, issued January 16, 2014 (Docket No. 311040).

The Facts: Plaintiffs initially retained the attorney defendants in conjunction with an attempt to procure property in 2005 related to an agreement drafted by the attorney defendants and entered into by plaintiff Clara Adams and defendant Eric Adams. Clara provided $260,000 to Eric, which was then held in the attorney defendants' trust account. In October 2005, Clara and Eric sent a letter to the attorney defendants, stating that the agreement was "null and void" and that the funds should be returned to Clara. Defendants thereafter returned the appropriate funds.

Plaintiffs filed suit against the attorney defendants, alleging liability under three legal theories: legal malpractice, fraud, and conversion of money. The trial court found that plaintiffs' claims for fraud and conversion of money, were, in substance, claims for legal malpractice. The trial court determined that because defendants' representation of plaintiffs ceased in 2005, her complaint filed in 2010 was not timely because plaintiffs' claims were not brought within the two-year limitations period applicable to legal malpractice claims, MCL 600.5805(6). The trial court granted the defendants' motion for summary disposition, and plaintiffs appealed.

The Ruling: The Court of Appeals affirmed the trial court's decision, but concluded that the trial court had erroneously concluded that the plaintiffs' claims of fraud and conversion sounded in legal malpractice. Nonetheless, summary disposition on those claims on other grounds was appropriate.

As to the legal malpractice claim, the Court of Appeals determined that any attorney-client relationship that may have existed between plaintiffs and the attorney defendants ceased in October 2005 when they were directed to return the funds held in trust. The subsequent oral agreement(s) that Clara entered into with Eric "reviving" the nullified written agreement, but with several modifications, did not obligate the attorney defendants in any way since they were not a party to the agreement. Additionally, the terms of the initial agreement were fulfilled once the agreement was nullified by Clara and Eric and the remainder of the funds was returned to Clara. As a result, reviving that already-fulfilled agreement had no effect on the attorney defendants.

The Court of Appeals further concluded that because any attorney-client relationship between plaintiffs and the attorney defendants ended in 2005, plaintiffs' claims of fraud and conversion for actions that allegedly took place in 2010 were not properly construed as claims of legal malpractice.

Regardless, the court held that summary disposition on these claims was appropriate on other grounds because plaintiffs had failed to state a claim upon which relief could be granted. As to the fraud claim, plaintiffs made no allegation that false statements were made with the intent that they should act upon them nor did plaintiffs allege how they actually relied on any statements made by the attorney defendants. The Court of Appeals found the conversion claim fatally deficient because the plaintiffs' claim was based on the initial agreement, which was deemed null and void. Not only was the agreement voided, but the funds related to the agreement were returned to the plaintiffs.

Practice Note: When claims are pleaded based on events with no temporal proximity to the parties' attorney-client relationship, a court will likely determine that these claims do not sound in malpractice for statute of limitations purposes.

A judge's errant ruling will not support a claim for legal malpractice.

Eric Adams v Attorney Defendants, unpublished opinion per curiam of the

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The Court of Appeals further concluded that because any attorney-client relationship between plaintiffs and the attorney defendants ended in 2005, plaintiffs' claims of fraud and conversion for actions that allegedly took place in 2010 were not properly construed as claims of legal malpractice.

Court of Appeals, issued January 21, 2014 (Docket No. 312578).

The Facts: The attorney defendants drafted a consent judgment that plaintiff later used as a basis for a legal malpractice action against them. Plaintiff also alleged that the attorney defendants failed to timely object to an order for sanctions that omitted certain lawyers' names. The attorney defendants argued that plaintiff had hired a new lawyer to replace them that had two opportunities to save the sanctions order and eliminate all damages, but did not do so.

The trial court held that the consent judgment barred amendment of the sanctions order and the Court of Appeals dismissed Adams' appeal after he failed to file a brief. The attorney defendants highlighted that plaintiff's new lawyer could have asked the Court of Appeals to remand the case to the trial court to amend the sanctions order while the case was on appeal or could have appealed the trial court's improper interpretation of the consent judgment and had the error corrected.

The trial court dismissed plaintiff's malpractice claim, determining that plaintiff's new lawyer could have corrected the sanctions order, relying on *Boyle v Odette*, 168 Mich App 737, 745; 425 NW2d 472 (1988), and *Estate of Mitchell v Dougherty*, 249 Mich App 668, 682; 644 NW2d 391 (2002) (concluding that a lawyer cannot be liable for failing to appeal after being replaced by another lawyer before the end of the statutory period). Plaintiff appealed.

The Ruling: The Court of Appeals concluded that there were no errors warranting relief, and affirmed the trial court's dismissal of plaintiff's claim. The Court of Appeals disagreed that *Boyle v Odette* and *Estate of Mitchell v Dougherty* were applicable to plaintiff's claim that the attorney defendants negligently drafted the consent judgment in the first instance. Nevertheless, the Court of Appeals concluded that the trial court had erroneously interpreted the consent judgment and plaintiff failed to appeal the interpretation, which broke the causal connection between the attorney defendants' drafting of the consent judgment and plaintiff's damages.

Practice Note: A legal malpractice claim cannot survive merely on "the occasional aberrant ruling of a fallible judge or an intransigent jury" in the underlying case.

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Supreme Court Update

Local Zoning Ordinance Prohibiting Uses of Land that Violate Federal Law is Preempted by the Michigan Medical Marihuana Act

On February 6, 2014, the Michigan Supreme Court held that Michigan's Medical Marihuana Act ("MMMA"), allowing the possession, use, and cultivation of marijuana in limited circumstances, preempts a local ordinance that prohibits uses of real property within the city that are in violation of federal law, including the federal controlled substances act, which prohibits the manufacture, distribution, and possession of marijuana. *Ter Beek v City of Wyoming*, __ Mich __; __ NW2d __ (2014).

Facts: The plaintiff, a medical marijuana patient residing in the City of Wyoming, challenged the City's zoning ordinance that prohibits conduct otherwise permitted by the MMMA. The City enacted the zoning ordinance in 2010, approximately two years after the MMMA went into effect, to prohibit all uses of real property "that are contrary to federal law, state law, or local ordinance." The plaintiff is a qualified medical marijuana patient under the MMMA who wished to grow, possess, and use medical marijuana in his home. Although the proposed growth and use of medical marijuana in his home was allowed under the MMMA, it was prohibited under federal law and, by reference, the City's ordinance.

The plaintiff sued the City seeking declaratory relief and alleging that the ordinance is preempted by § 4(a) of the MMMA, which exempts registered medical marijuana patients from "penalty in any manner" related to specified uses of marijuana in Michigan. According to the plaintiff, because the ordinance penalizes – by way of its reference to federal law — the use, possession, or growth of medical marijuana within city limits, it directly conflicts with and is preempted by the MMMA.

The parties filed competing motions for summary disposition. The City argued that the ordinance was not preempted by the MMMA because it enforces the federal prohibition on marijuana and the federal Controlled Substances Act ("CSA"), in turn, preempts the MMMA. The trial court agreed with the City and granted its motion for summary disposition.

The Court of Appeals reversed, holding that the zoning ordinance "directly conflicts with the MMMA." The court explained that, because the ordinance prohibits conduct deemed legal under state law, "there can be no doubt that enforcement of the ordinance could result in the imposition of sanctions that the immunity provision of the MMMA does not permit." The court additionally held that the MMMA remains enforceable and is not preempted by the CSA because, although it provides limited immunity under state law, it does not "interfere with federal enforcement of the CSA" as it relates to marijuana.

Holding: The Michigan Supreme Court affirmed the Court of Appeals decision, holding that the City's zoning ordinance "directly conflicts with, and is preempted by, § 4(a) of the MMMA," but that the same provision of the MMMA is not preempted by the federal CSA. The court first explained that, under the Michigan Constitution, municipal ordinances are subject to the laws of the State of Michigan. The court then explained that because the City's ordinance incorporates the federal CSA's general prohibition on the use and possession of marijuana, it prohibits and

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Thus, there exists a "positive conflict" between the MMMA and the ordinance to the point that they "cannot consistently stand together." Given this conflict, the court concluded that the MMMA preempts the ordinance.

penalizes those permitted uses of medical marijuana that the MMMA expressly states are not subject to penalty "in any manner." Thus, there exists a "positive conflict" between the MMMA and the ordinance to the point that they "cannot consistently stand together." Given this conflict, the court concluded that the MMMA preempts the ordinance.

The court also rejected the City's arguments that the MMMA is, itself, preempted by the federal CSA. The court concluded that, although the MMMA and CSA "differ with respect to medical use of marijuana," the provision of the MMMA at issue, § 4(a), provides only a limited state-law immunity that in no way prohibits the federal government from enforcing the CSA's prohibitions relating to marijuana. Thus, granting the plaintiff's requested relief "does not limit his potential exposure to federal enforcement of the CSA against him" and, consequently, "the state law here does not frustrate or impede the federal mandate."

Significance: Although the court concluded that the local ordinances that seek to ban all uses of real property that would violate federal law are preempted by the MMMA, the court limited its holding and clarified that it is not meant to "foreclose all local regulation of marijuana." Rather, local ordinances are preempted only to the extent they specifically conflict with the MMMA. In all other respects, local regulation of marijuana is not preempted and likely remains permitted.

Executing a Lease of Personal Property in Michigan is Sufficient "Use" of the Property for Assessing Use Tax under the Michigan Use Tax Act

On February 6, 2014, the Michigan Court of Appeals held that the lease of an aircraft never actually possessed by the owner constitutes a "use" of the aircraft under the Michigan Use Tax Act ("UTA"). *NACG Leasing v Dep't of Treasury*, __ Mich __; __ NW2d __ (2014).

Facts: In 2005, the petitioner company purchased a DC-8 aircraft and immediately leased it, under a five-year lease, to another company which had previously taken possession of the aircraft before the petitioner purchased it. The following year, the Michigan Department of Treasury ("Treasury") issued a use tax assessment against the petitioner in the amount of $414,000, plus a $103,500 penalty.

The UTA states that a 6% use tax is to be levied "for the privilege of using, storing, or consuming tangible personal property in this state." MCL 205.93(1). The "use" of personal property includes "[t]he exercise of a right or power over tangible personal property incident to the ownership of that property including transfer of the property in a transaction where possession is given." MCL 205.92(b).

The petitioner challenged the use tax assessment before the Michigan Tax Tribunal. The Tribunal originally granted the petitioner's motion for summary disposition, holding that the petitioner did not incur a use tax liability because, among other things, it did not have possession of the aircraft and did not maintain control over it in the form of taking responsibility for its maintenance, insurance, or repair. However, the Treasury moved for reconsideration and the Tribunal, in granting the motion for reconsideration, reversed its previous decision and entered judgment in favor of the Treasury on the full amount of the assessment.

On appeal, the petitioner argued that the Tribunal erred in determining that the purchase and immediate lease of the aircraft fell within the UTA's definition of "use," for which use tax could be imposed. The Court of Appeals agreed with the petitioner and reversed the Tribunal decision, holding that the lease of the aircraft did not constitute a "use" under the UTA for which use tax could be imposed. The court determined that the petitioner ceded control of the aircraft by entering into the lease agreement simultaneously with its purchase of the aircraft. According to the court, "plaintiff did not retain any right of use of the aircraft." The court concluded that, because the UTA defines "use" as including a transfer of property "where possession is given," the transfer of the aircraft without an accompanying transfer of "possession" precluded the use tax assessment under the UTA.

Holding: The Michigan Supreme Court reversed and held that the Tribunal properly upheld the use tax assessment because, although the petitioner never had actual possession of the aircraft, its execution of the lease agreement constituted an exercise of control incidental to the ownership of the aircraft.

The court further held that the Court of Appeals erred in reading the UTA's definition of "use" to require a transfer of possession. Instead, the court explained that the UTA prefaced the transfer of possession language with the term "including," which the court noted is "a

The Michigan Supreme Court reversed and held that the Tribunal properly upheld the use tax assessment because, although the petitioner never had actual possession of the aircraft, its execution of the lease agreement constituted an exercise of control incidental to the ownership of the aircraft.

term of enlargement, not limitation." In other words, while the UTA provides that the transfer of possession is "one way to satisfy 'use' under the UTA," it is not the only way. Another way to satisfy "use" under the UTA is to lease personal property to another. The court explained that it is basic property law that a property owner's lease of property to another is an "exercise of a right or power … incident to the ownership of that property."

Thus, because the petitioner exercised a right that is incidental to the ownership of the aircraft by leasing it to another, its conduct constitutes a "use" for which a tax may be assessed under the UTA.

Significance: The court clarified and narrowed the scope of prior case law relating to the "use" of leased personal property in Michigan. In doing so, the court made clear that simply executing a lease of personal property in Michigan is, itself, a use of the personal property falling under the purview of the UTA.

Notwithstanding the Possibility that Extrinsic Evidence may Establish a Contrary Intent by the Drafters, an Unambiguously Written Agreement Should be Enforced as Written

In an order in lieu of granting leave to appeal, the Michigan Supreme Court reversed the majority decision of the Court of Appeals for the reasons stated in the Court of Appeals dissenting opinion and held that an unambiguously written contract should be enforced as written without regard to extrinsic evidence of the parties' intent in entering into the agreement. *Costella v City of Taylor*, __ Mich __; __ NW2d __ (2014) (Order).

Facts: The plaintiff worked as a firefighter for the City of Taylor for 19 years, including 6 years in the position of fire chief. The plaintiff's terms of employment were contained within his Personal Services Contract ("Contract"), through which he waived his rights under the Fire Fighters and Police Officers Civil Service System Act and agreed to receive a lump-sum payment of 26 weeks of his base salary to be paid at the time of his removal from his position as fire chief.

Under the terms of the Contract and the Collective Bargaining Agreement ("CBA") between the City and the Firefighters' Association, the plaintiff was also entitled to receive pension benefits upon his retirement based on the calculation of his Final Average Compensation ("FAC") by the Taylor Police & Fire Retirement System ("Board"). The CBA stated that the FAC calculation was to encompass the plaintiff's "base wage, including any deferred compensation."

The plaintiff was removed from his position as fire chief in November 2005 and, two days later, he retired. The City initially refused to pay to the plaintiff the lump-sum called for in the Contract, but was ordered to make the payment after the parties arbitrated the dispute. The Board then calculated the plaintiff's pension benefits by including the lump-sum payment as part of the plaintiff's compensation. The City finance director objected to this calculation and, as a result, the Board sought clarification from the arbitrator as to whether the payment was compensation or a severance payment to be excluded from the calculation of pension benefits.

The arbitrator issued a Clarification of Decision and Award, stating that the Contract is "clear and unambiguous" that the parties did not intend to include the lump-sum payment as part of the plaintiff's FAC calculation. The arbitrator also noted that, unlike prior agreements between the City and other city officials that expressly included severance payments as part of the FAC calculation, the Contract contained no such language.

The plaintiff filed an action in the circuit court, seeking to vacate the arbitrator's Clarification of Decision and Award. The circuit court vacated the arbitrator's decision, and the plaintiff appealed to the Board. Relying on the arbitrator's clarification, the Board determined that the lump-sum payment should have been excluded from the FAC calculation.

The plaintiff eventually filed a complaint for superintending control in the circuit court in an effort to force the Board to include the lump-sum payment in its FAC calculation. The circuit court granted the Board's motion for summary disposition, holding that, because "a rational interpretation of the [lump-sum payment] allows for it to be considered severance pay," the decision of the Board was not contrary to law, arbitrary, capricious, or a clear abuse of discretion.

On appeal, the Court of Appeals majority reversed the circuit court. The court held that, although the lump-sum payment "was in the nature of a severance payment," rather than compensation, the evidence demonstrated that the drafters of the Contract intended the lump-sum payment to be included in the FAC calculation. According to the majority, the circuit court erred by not considering the intent of the parties when reaching its decision to uphold the Board's decision to exclude the payment from its calculation.

In doing so, the court held that the Court of Appeals erred by ignoring longstanding contract principles that require courts to enforce unambiguous contracts as written without regard to extrinsic evidence of the parties' intent.

Judge Borrello issued a dissenting opinion, in which he explained that the Contract was unambiguous and, consequently, no parol evidence of the parties' intent in drafting the Contract should be considered. Instead, the Contract should have been enforced as written, and the Board properly determined that the lump-sum payment, which constituted a severance payment, should not have been included in the calculation of the plaintiff's FAC.

Holding: The Michigan Supreme Court, in an order in lieu of granting leave to appeal, reversed the Court of Appeals majority decision for the reasons stated in the Court of Appeals dissenting opinion. In doing so, the court held that the Court of Appeals erred by ignoring longstanding contract principles that require courts to enforce unambiguous contracts as written without regard to extrinsic evidence of the parties' intent. Because the Contract was unambiguous and did not confer upon the plaintiff the benefit of having the lump-sum severance payment included in the FAC calculation, the court concluded that "the circuit court did not clearly err in concluding that [the Board's] final decision regarding the plaintiff's pension benefits … was supported by competent, material and substantial evidence on the whole record."

Significance: By upholding the reasoning of the Court of Appeals dissenting opinion, the court confirmed not only the standards to be applied in reviewing trial court decisions in actions for superintending control, but also the principles applicable to the enforcement of unambiguously written contracts.

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MDTC Amicus Activity in the Michigan Supreme Court

I am providing this updated interim report to supplement the last report concerning Michigan Supreme Court and Court of Appeals activity during the period between December 13, 2013 up to and including Tuesday, March 11, 2014.

The Michigan Supreme Court will hear oral argument in April in the case of *Hannay v MDOT* (Supreme Court No. 146763).
This case will address whether the "motor vehicle" exception to the governmental immunity statute (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.

Because of the unique interplay between Michigan's No-Fault Act, which allows recovery of economic and noneconomic damages against third-party tortfeasors, and the Governmental Tort Liability Act (GTLA), which only allows "bodily injury" and "property" damages to be assessed against the government for the negligent operation of a motor vehicle, this case has garnered significant attention and has resulted in a divergence of views on the subject.

The Negligence Law Section, the Insurance Institute of Michigan, Michigan Townships Association with Macomb, Wayne and Oakland Counties, County Road Association of Michigan, and Michigan Municipal Risk Management Authority all filed briefs *amicus curiae* in the Court to address the question.

The crux of the issue relates to the effect of reading the GTLA to provide only for "bodily injury" damages against governmental entities, even though the No-Fault Act would allow certain excess "economic loss" damages, and, in some cases, noneconomic loss damages against other third-party tortfeasors. Thus, the end result could be that certain of the remedies ordinarily available under the No-Fault Act to plaintiffs who sue for injuries incurred in motor vehicle accidents will not be available in actions under the motor vehicle exception to governmental immunity.

In my last report, I also mentioned ***Hunter v Sisco*, Supreme Court No. 147335,** a case in which the Court of Appeals panel rejected plaintiff's argument that he was entitled to *any* other non-economic damages under the motor vehicle exception. A motion for reconsideration of the Supreme Court's denial filed in late November 2013 is still pending in that case. I suspect the Court will dispose of the motion after it decides *Hannay* because the result of the Court's decision in the latter case will likely impact the rule of law from the Court of Appeals decision in the former case.

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, M.D.*, 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 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

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Two Court of Appeals decisions, however, seem to indicate that MCL 600.2301 allows a trial court to amend the complaint to reflect the date *post-notice* period so that it does not act to time-bar the action.

ordered convening of the special panel. The date for supplemental briefing has passed and the panel waived oral argument per MCR 7.215(J)(5).

This case is a medical malpractice action filed against the various defendants arising out of an alleged act of malpractice in which the plaintiff alleged her "left recurrent laryngeal nerve" was errantly transected during a thyroidectomy procedure. This required additional surgical intervention to repair the nerve and ultimately left the plaintiff with alleged upper respiratory problems and "bilateral true vocal cord paralysis."

MCL 600.2912(b)(1) requires that for a plaintiff to pursue a medical malpractice action, he or she must provide a written "notice of intent" to file such an action against the defendants and then wait 154 days if the defendants do not respond or specifically indicate they do not intend to settle (more about this in a moment), or, alternatively, 182 days. Under MCL 600.5838(a)(1) (subject to a discovery exception not applicable in this case), a plaintiff's medical malpractice claim "accrues" when the act of malpractice occurs. After that date of accrual, the cause of action is then subjected to a two-year statute of limitations (suit must be filed within two years of the date of accrual or it will be time barred). MCL 600.5805(6).

Various courts have addressed the issue of whether the premature filing of a complaint after the notice of intent is served (either before 154 days (if defendant did not respond or specifically indicates no intent to settle or engage in good-faith settlement negotiations) or 182 days) implicates the two-year limitations period. Thus, if the complaint is filed within the notice period, but prematurely, then the 154- or 182-day "notice period" does not act to "toll" that limitations period. MCL 600.5856(d); MCL 600.2912b. Therefore, the filing of a complaint within this window that is upon a date beyond the two years from the date of accrual will be time-barred.

Two Court of Appeals decisions, however, seem to indicate that MCL 600.2301 allows a trial court to amend the complaint to reflect the date *post-notice* period so that it does not act to time-bar the action. That is essentially what the trial court did in this case.

In *Burton v Reed City Hospital Corp*, 471 Mich 745 (2005), the Michigan Supreme Court held if a plaintiff files his or her complaint *before the notice period expires*, MCL 600.2912b does not "toll" the limitations period. The Court reasoned the language of that provision is mandatory and MCL 600.5856(d) only tolls the limitations period if the plaintiff's notice complies with MCL 600.2912b.

In *Zwiers v Growney*, 286 Mich App 38 (2009), the Court of Appeals held that MCL 600.2301 allowed a trial court to equitably amend the complaint to reflect a post-date of the waiting period so that the premature filing did not erase the tolling of the statute of limitations.

In a subsequent case, *Driver v Naini*, 490 Mich 239 (2011), the Supreme Court held a plaintiff could not amend an original notice of intent to add a non-party defendant and have that amendment "relate back" to the original notice for purposes of the statute of limitations. The Court disavowed that MCL 600.2301 would apply in a situation in which there was no technical viability to the claim – because if a complaint is filed prematurely within the notice period, but after the statute of limitations has expired, there is no "pending" action for MCL 600.2301 to remedy.

Subsequent to that case, in *Tyra v Organ Procurement Agency of Michigan*, 302 Mich App 208 (2013) (COA Docket No. 298444), the Court of Appeals ignored this nuanced reading of MCL 600.2301 and held a trial court could use this provision to permit plaintiff to amend her complaint on the basis of *Zwiers* and MCL 600.2301. So, the Court of Appeals ruled in *Tyra* that a trial court could exercise its discretion to allow amendment of a premature complaint to escape the failure of tolling where it was filed prematurely.

The defendants appealed, arguing that Supreme Court precedent has since refuted the theory that MCL 600.2301 allows a trial court to equitably "fix" the fatal filing defect by allowing amendment of the complaint so it is filed on the proper day. This is what the trial court did in the instant case and defendants appealed. While noting *Tyra* precedentially controlled its holding, the Court of Appeals panel in this case goes on to criticize that decision and provides reasoning why it should be overruled. The court states:

> Subsequently, and to the contrary, the Michigan Supreme Court in *Driver* held that a plaintiff cannot commence an action that tolls the statute of limitations against a particular defendant until the plaintiff complies with the notice-waiting-period requirements of MCL

The issue in this case affects the timeliness of medical malpractice claims and the necessity of plaintiffs to strictly comply with the notice periods and filing deadlines of complaints.

> 600.2912b. Nothing [in subsequent Supreme Court precedent] altered [the] holding. . . . [T]he focus of MCL 600.5856(c) is compliance with the notice waiting period set forth in MCL 600.2912b. Therefore, but for *Tyra*, we would conclude that the trial court erred when it relied on *Zwiers* to determine that it could amend the plaintiff's complaint under MCL 600.2301. After the Michigan Supreme Court's decision in *Driver* reached the opposite result on this point of law, this Court's holding in *Zwiers* is no longer controlling law.

The court also notes that the shorter 154-day notice period is implicated only if the healthcare provider specifically indicates its intent not to settle; it does not apply if the healthcare provider defendant merely indicates or acknowledges the notice.

The issue in this case affects the timeliness of medical malpractice claims and the necessity of plaintiffs to strictly comply with the notice periods and filing deadlines of complaints.

Another case in the Court of Appeals and now on application for leave to appeal in the Supreme Court is ***DNR v Rexair, Inc.*, Supreme Court Case No. 148442**. This is an interlocutory appeal from a prior Court of Appeals ruling that the defendants were not entitled to *actual* attorney fees and costs incurred in defending a motion filed by the state to enforce the terms of a consent decree governing environmental remediation. Although the case is on an interlocutory application, the Michigan Manufacturers Association and Michigan Chamber of Commerce have filed amicus briefs supporting the defendant's application for leave to appeal.

The underlying issue is whether the trial court had authority in the absence of any statute or court rule to award *actual* as opposed to *reasonable* attorney fees as sanctions for the state's pursuit of an enforcement action against the defendant for the alleged violation of the consent order. This case was the subject of a previous remand order from the Supreme Court. Once again, it is a case addressing the thorny issue of attorney fee awards after sanctions are imposed against a party in litigation.

I believe this case should be addressed by the Supreme Court. It would be a good MDTC amicus opportunity.

Another pending application raises an issue of some significance concerning the confluence of subject-matter jurisdiction in circuit court over personal injury actions, the Workers' Disability Compensation Act (WDCA), and the exclusive remedy provision of the latter act. In a published opinion, ***Thomai v MIBA Hydramechanica Corp,* Court of Appeals Case No. 310755**, the court addressed a case in which the plaintiff, an employee of defendant, was injured while operating a machine at work. He filed suit in circuit court, which dismissed the action, citing MCL 418.131(1), which provides that workers' compensation benefits provided under the WDCA are the exclusive remedy for an employee injured at work. The only exception listed in this exclusive remedy provision is suits for "intentional torts."

Here, the Court of Appeals interpreted the statute, as well as prior Supreme Court precedent as allowing for this exception to apply to "deliberate acts" by the employer that are shown to have occurred over a period of time. The allegation in this case is that the machine that injured the plaintiff was in disrepair and needed constant maintenance. Because the employer knew about this, but did nothing about it, the act of the employer being *deliberate* could constitute the "intentional" act needed to bring the case out of the exclusive remedy provision of the WDCA.

An application for leave to appeal was filed in the Supreme Court on December 26, 2013. Michigan Manufacturers Association has filed a brief in support of the application. This case is significant because it will address the extent of subject-matter jurisdiction of circuit courts in Michigan, the contours of the "exclusive remedy" provision in the WDCA, and the definition of "intentional tort" to take a case out of that exclusivity provision. Case law subsequent to the precedent relied on by the Supreme Court panel in this case suggests that to be an "intentional tort" that falls within the exception the employer must have both committed intentional acts and intended the result of those acts. This rationale does not comport with the Court of Appeals' holding in the instant case.

I believe this case should be addressed by the Supreme Court. It would be a good MDTC amicus opportunity.

In ***Clum v Jackson National Life Ins Co,* Supreme Court Case No. 148298**, the Supreme Court is also being asked to address the "cat's paw" theory of liability in a reverse racial discrimination case brought under Michigan's Elliott-Larsen Civil Rights Act (ELCRA).

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

The "cat's paw" theory of liability imputes "liability to a principal [employer] based on a non-decisionmaker's racial animus." That is, a plaintiff tries to hold his employer liable for a supervisor's discriminatory animus when that supervisor did not make the employment decision at issue in the case.

The plaintiff in *Clum* was a white male who alleged he was terminated due to a skewed and false report prepared by a supervisor that implicated plaintiff in having racially charged motivations against a black co-worker arising out of an incident in which the plaintiff and the black co-worker got into an argument. The plaintiff alleged the supervisor was afraid if his report objectively reported the facts that he himself would be charged with racism and would be terminated as previous employees had been for similar incidents.

The question addressed in *Clum* was whether the principal, i.e., the employer, could rightfully terminate the plaintiff due to the allegedly false report of a non-decisionmaker when the employer allegedly did not know the report was false, and whether that falsification reflected racial animus or was discriminatory based on race such that it could be imputed to the employer.

The Court of Appeals affirmed the trial court's approval of the "cat's paw" instruction to the jury. The Court of Appeals cited to U.S. Supreme Court and Sixth Circuit precedent, *inter alia,* that allowed such an instruction in cases in which intermediary or mid-level managerial employees made decisions and took actions that materially affected the ultimate adverse decision that served as the basis for the discrimination complaint.

I believe this case should be addressed by the Supreme Court. It would be a good MDTC amicus opportunity.

A couple of other notes of interest.

On February 6, 2014, the Michigan Supreme Court issued two unanimous opinions. In ***Ter Beek v City of Wyoming, Supreme Court Case No. 145816***, the Court held that Michigan's Medical Marijuana Act was not preempted by federal law, and prohibited enactment of a city ordinance that penalized conduct consistent with the allowances for use and possession of medical marijuana.

In ***NAGC Leasing v Dep't of Treasury, Supreme Court Case No. 146234***, the Michigan Supreme Court held that a "lease" of personal property (an airplane) to a shell company by the purchasing company was a transaction subject to Michigan's 6% "use tax" because the lease agreement constituted use of tangible, personal property within the meaning of the Use Tax Act, MCL 205.91 *et seq*.

On March 5, the Michigan Supreme Court heard oral arguments in the case of ***Hunt v Drielick,*** **Supreme Court No. 146433** to address the effects of a commercial lease agreement on the applicability of the two clauses in the "business use" exclusion of a non-trucking, bobtail insurance policy to consider coverage of injuries incurred in an accident involving the subject truck and other parties.

This is not an exhaustive list. There are a couple of labor cases, a tax case, and some diverse civil cases that are on application, or that are being briefed, and will eventually be argued before the Court. This is a rundown of what appear to me to be the highlights of the interim report period.

The MDTC's ability to weigh in on these important legal issues is made possible through the tireless efforts of our volunteer brief writers. As 2014 gets underway, 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.

MDTC E-Newsletter
Publication Schedule

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

For information on article requirements, please contact:

Alan Couture
ajc@runningwise.com, or

Scott Holmes
sholmes@foleymansfield.com

MDTC 2014 2nd Kingpin Throwdown

The 2nd Kingpin Throwdown was held on Thursday, March 13, 2014 at 5:30 pm at Clique Lanes, 533 Stocking Ave, in Grand Rapids. The event was sponsored by **D-4 eDiscovery, Elijah Ltd, O'Keefe and Associates**, and **Kane & Trap,** who kept us well fed and hydrated.

The winners of the Bob Lebowski Cup were the "Striking Young Gentlemen," from Miller Johnson with an incredible score of 2,029. Foster Swift's team, "Motion to Strike," came in second with 1,930, followed closely by Smith Haughey's, "Over the Line," with 1,924. Rhoades McKee's team, "Too Legit to Split," came in at 1,822, followed by Varnum's "Split Happens," at 1,810. Dickinson Wright's "Dickinson Steamroller," rounded out the field with 1,743.

Photos from the event:

Court Rules Update

By: M. Sean Fosmire, *Garan Lucow Miller, P.C.*
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Michigan Court Rules Adopted and Proposed Amendments

For additional information on these and other amendments, visit the Court's official site at:

http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Pages/default.aspx

ADOPTED

2011-26 — Case evaluation sanctions

Court Rule: MCR 2.403
Issued: March 20, 2013
Adopted: October 2, 2013
Effective: January 1, 2014

This rule adds language adding two additional events that would permit the delayed submission of a request for costs under the case evaluation rule: an order regarding rehearing or reconsideration, and an order for other post-judgment relief.

2012-03 — Costs for foreign language interpreters

Court Rule: 1.111
Issued: January 29, 2014
Effective: immediate
Comments to: May 1, 2014

Continuing the Court's ongoing struggle with this issue, it entered this administrative order, finding a need and giving it immediate effect, but soliciting comments from interested persons. The court will address this issue at an upcoming public hearing.

Whenever a court issues an order denying an interpreter, or imposing costs after granting an interpreter, a new procedure for review of that decision is instituted. The chief judge of the circuit, or another judge assigned by SCAO, will review the request de novo. The review is to be expedited, and proceedings are stayed pending the outcome.

Recall that the rule was previously amended to provide for the imposition of the costs of a court-appointed interpreter if the party requesting the interpreter has an income higher than 125% of the federal poverty level, unless the court finds that the imposition of the costs would "unreasonably impede the person's ability to defend or pursue the claims involved in the matter." The Michigan Supreme Court has an ongoing dispute with the U.S. Department of Justice on this issue.

2013-10 — Duration of attorney's appearance

Court Rules: 2.107 and 2.117
Issued: January 29, 2014
Effective: May 1, 2014

This rule inserts the term "final order" to clarify that the duration of an appearance by an attorney filing or defending a post-judgment motion is the same as the duration of an attorney's appearance filing or defending original pleadings.

MCR 2.107 governs how service is to be made. Once an attorney enters an appearance, service is made on the attorney. Subrule 1-c provides that, after entry of judgment and expiration of the appeal period, notice of any further proceedings is to be served on the party, rather than the attorney, on the presumption that the attorney's

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

Subrule 1-c provides that, after entry of judgment and expiration of the appeal period, notice of any further proceedings is to be served on the party, rather than the attorney, on the presumption that the attorney's period of service is now at an end.

period of service is now at an end. This amendment adds the phrase "or final order" to this subrule.

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

2013-20 — Depositions and discovery for actions pending elsewhere

Court rule: 2.305
Adopted: October 2, 2013
Effective: January 1, 2014

Subparagraph (E) is amended to remove references to actions pending in other states or territories.

A new subparagraph (F) is added to deal with other states and territories:

Action Pending in Another State or Territory. A person may request issuance of a subpoena in this state for an action pending in another state or territory under the Uniform Interstate Depositions and Discovery Act, MCL 600.2201 et seq., to require a person to attend a deposition, to produce and permit inspection and copying of materials, or to permit inspection of premises.

2013-28 — Electronic juror questionnaires

Court Rule: 2.510
Issued: January 29, 2014
Effective: May 1, 2014

This rule allows courts to authorize prospective jurors to complete and return questionnaires electronically and allows courts to maintain the questionnaires electronically.

Negligence Law Section: 2014 Outstanding Achievement Award

Peter L. Dunlap

The Negligence Law Section of the State Bar of Michigan proudly confers its Outstanding Achievement Award upon Peter L. Dunlap, for his distinguished service to the legal community.

Mr. Dunlap will be recognized on Thursday, August 14, 2014, from 5:30–7:30 p.m., at the Country Club of Lansing.

Please email neglawsection@comcast.net if you are interested in attending the reception to honor him. There is no charge to attend. We simply ask that you let us know if you plan to attend in advance.

Prior Recipients
2008 — Justice Elizabeth Weaver
2009 — Attorney, Dean Robb
2010 — Judge Elizabeth Gleicher, Court of Appeals
2011 — Justice Michael Cavanagh
2012 — William D. Booth
2013 — William F. Mills
2014 — Peter L. Dunlap

Member News – Work, Life, and All that Matters

Bowman and Brooke Announces Newest Partner, Jenny Zavadil: Jenny Zavadil's practice is concentrated on defending automobile manufacturers in product liability and consumer actions. Jenny regularly defends corporate clients in complex discovery matters and serves as national discovery counsel for a major automobile manufacturer in the areas of airbags and rollover curtains, event data recorders, handling and stability, roof, and crashworthiness. Jenny has significant experience in all areas of discovery management, including collecting, processing, and producing hard copy documents and electronically stored information, as well as handling all aspects of written discovery. Before joining Bowman and Brooke, Jenny clerked for Michigan Supreme Court Justice Michael F. Cavanagh. Building on this experience, Jenny's practice also involves researching and writing appellate briefs and complex pre- and post-trial motions.

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).*

Adoption of MDTC List Serve Policy

At its January 25, 2014 Board Meeting, MDTC adopted the following List Serve Policy, effective immediately.

MDTC List Serve Policy
The MDTC Expert List is offered to MDTC members in connection with the practice of law only. It may not be used for any other purpose or by any person who is not a member of MDTC.

This list is designed to be used as a conduit for informational purposes only.

A member seeking information about an expert may send an email to the various active list serves:

genliab@mdtc.org
comlit@mdtc.org

MDTC takes no position with regard to the licensure, qualifications, or suitability of any expert on this list.

MDTC does not guarantee the confidentiality of your list serve postings. Please exercise tact and professionalism.

MDTC does not archive its requests for information or responses.

By: Edward Perdue, *Dickinson Wright PLLC*
eperdue@dickinsonwright.com

DRI Report

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

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

The DRI Annual Meeting will be held at the San Francisco Sheraton in October 2014. This has been an amazing venue in the past, and for golfers there is an opportunity to participate in a golf outing organized by the DRI Veterans Network at the scenic and historic Presidio Golf Club overlooking San Francisco Bay and the Pacific Ocean. Let me know if you would like any more information.

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:

Employment and Labor Law (Wednesday, May 7, 2014) - Scottsdale, AZ
DRI's 37th annual Employment and Labor Law Seminar is the definitive educational and networking event for management-side labor and employment attorneys, in-house counsel, human resources professionals, and employment practices liability insurance carrier representatives. Always intensely practical, and accompanied by superior written materials, the Employment and Labor Law Seminar has become a "must-attend" for experienced practitioners, as well as those who are just getting started in labor and employment law. Don't miss this opportunity to learn from some of the best practitioners and professionals in the labor and employment arena.

Business Litigation (May 8, 2014) – Washington, DC
The business litigation climate continues to change rapidly, making it critical for clients and the attorneys representing them to stay abreast of the new developments and navigate these changes skillfully so they can get back to business. DRI's 2014 Business Litigation Seminar will provide just that — up-to-the-moment information on new agencies, decisions, regulations, and practices — in a collegial environment brimming with networking opportunities.

Drug and Medical Device (May 15, 2014) – Washington, DC
DRI's 30th annual Drug and Medical Device Seminar is the preeminent program for in-house and outside counsel who represent pharmaceutical and medical device manufacturers. We are pleased to feature a number of nationally recognized judges, attorneys (in-house and outside counsel), and other professionals who will address cutting-edge topics that are relevant to all who practice in this area. This year's program will offer a variety of presentations, including a panel discussion about warning in a digital age, a trial skills demonstration, a panel discussion with a state and a federal judge on coordinating parallel proceedings, and litigation insights from leading defenders of drug and device cases. In addition to the outstanding program, there will be numerous networking opportunities, including our annual Young Lawyers Blockbuster, an exclusive in-house counsel breakout, a diversity luncheon, and a service project.

DRI's ninth annual Diversity for Success Seminar and Diversity Expo will provide an in-depth look at diversity and inclusion initiatives in both the law firm and corporate legal environments.

Fidelity and Surety Roundtable (Friday, May 16, 2014) – Chicago, IL
The Fidelity and Surety Roundtable will be held on May 16, 2014 in Chicago. In past years, a lively group in excess of 50 attendees, including many surety company representatives, has attended the program. Due to its limited size, the Roundtable provides a forum for a lively and informative discussion on various aspects of surety and fidelity bonds. The night before the Roundtable, the attendees gather for a great networking dinner. A majority of past attendees agree that our Roundtable is the most informative and interactive surety program that they have ever attended. The 2014 Roundtable will focus on current issues facing surety and fidelity claims counsel and claims professionals. Topics will include the Surety's options when faced with a default; defeating the "innocent spouse" defense to an indemnity action; the issue of employer-outsourcing on fidelity claims; and the impact of recent U.S. Supreme Court and other reported decisions on recovery and judgment enforcement efforts.

Hot Topics in International Dispute Resolution (Thursday, May 22, 2014) – Amsterdam, Netherlands
DRI International is proud to present its sixth annual international seminar, Hot Topics in International Dispute Resolution, 22-23 May in Amsterdam, Netherlands, which is specially designed to discuss hot topics and developments in international dispute resolution arising out of cross border business activities. DRI International provides a unique forum to meet, discuss, share ideas, and network with fellow litigators and litigation focused in-house counsel from around the globe on international issues.

Diversity For Success Seminar and Diversity Expo (June 12–13, 2014) – Chicago, IL
DRI's ninth annual Diversity for Success Seminar and Diversity Expo will provide an in-depth look at diversity and inclusion initiatives in both the law firm and corporate legal environments. Panelists will engage attendees with spirited dialogue regarding strides that have been made, the challenges to creating a more inclusive profession, and opportunities for individual and organizational growth. Hear creative strategies to help achieve desired diversity objectives while increasing lawyer productivity, law firm profitability, and client satisfaction. Friday's Diversity Expo is an excellent opportunity for DRI member lawyers and their respective firms to interview with corporations and insurance companies that value diversity and have made a serious commitment to diversify their outside counsel list.

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 or 616-336-1038.

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