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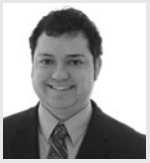

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Michigan Defense Quarterly is a publication of the MDTC. All inquiries should be directed to Madelyne Lawry, (517) 627-3745.

President's Corner

By: Joshua Richardson, *Foster Swift Collins & Smith PC*
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Joshua K. Richardson is a shareholder in the Lansing office of Foster, Swift, Collins & Smith, P.C., where he concentrates his practice primarily on commercial litigation, employment litigation, and insurance regulatory law.

Mr. Richardson is admitted to practice law in Michigan, the U.S. District Court for the Eastern and Western Districts of Michigan and the Eastern District of Wisconsin, the U.S. Sixth Circuit Court of Appeals, and the U.S. Supreme Court. Mr. Richardson earned his B.A. from Michigan State University in 2004 and his J.D. from Indiana University School of Law - Bloomington in 2007.

Mr. Richardson is a member of the State Bar of Michigan, the American Bar Association, the Ingham County Bar Association, the Federal Bar Association, the Defense Research Institute, and is a Barrister member of the American Inns of Court. Mr. Richardson also sits on the Board of Directors for the Boys & Girls Club of Lansing, where he served as Chair of the Board in 2015 and 2016.

On The Shoulders of Giants

It is with great pride that I begin my tenure as the president of the Michigan Defense Trial Counsel, an exceptional organization comprised of passionate, skilled, and energetic professionals. Through my involvement with the MDTC over the years, it has been my privilege to meet and work with so many of you, and I hope to meet and work with even more of you in the coming year as we continue to have a positive impact on the legal system and the practice of law.

Looking ahead, I am reminded of all that the MDTC has accomplished in the past year. Under the wise tutelage of our immediate past president, **Richard W. Paul** (**Dickinson Wright**), the MDTC coordinated several outstanding educational events, submitted amicus support in several cases of paramount legal importance, and continued to maintain critical services for its members, including publication (in print and digital formats) of the Michigan Defense Quarterly, which is overseen by Quarterly Editor, **Michael James Cook** (**Collins Einhorn**), and a group of amazing associate editors.

Rick Paul was also instrumental in planning and hosting the MDTC's second annual Excellence in Defense Awards, an event that surpassed even our optimistic expectations in attendance and overall presentation. With the assistance of past president, **James E. Lozier** (**Dickinson Wright**), Rick Paul and the MDTC Board also created the first ever Appellate Advocacy Award, given biennially to honor those civil appellate attorneys who, in addition to displaying themselves as the best of the very best in appellate practice, exhibit integrity, professionalism, and superb judgment and ethical standards. The award is named for one of Michigan's preeminent appellate attorneys and the award's first recipient, **John P. Jacobs** (**Jacobs & Diemer**).

Perhaps above all else, Rick Paul ensured that the organization stayed on track with its mission of benefiting its members and promoting excellence in civil litigation.

Critical to the MDTC's mission, of course, is the continuing and unwavering support and efforts of the MDTC leadership, including each member of the Board of Directors, each committee member, and the section and regional chairs, who put in countless hours behind the scenes to keep the organization running smoothly. Our current Executive Committee is comprised of hard-working and forward-thinking lawyers, each of whom brings to the table a unique perspective and a shared collaborative vision to improve upon the years of great work by past leaders. A special thanks to each of them for their hard work and dedication: Vice President, **Irene Bruce Hathaway** (**Miller Canfield**), Treasurer, **Terence Durkin** (**Kitch, Drutchas, Wagner, Valitutti & Sherbrook**), and Secretary, **Deborah Brouwer** (**Nemeth Law**).

Our organization also could not survive – and it would be criminal to not recognize – our Executive Director, **Madelyne Lawry**, and her team for their tireless efforts in keeping this organization running smoothly. For those of us who have had the privilege to work alongside Madelyne, it is not a stretch to say that she is the backbone of the MDTC. Madelyne has remained steadfast in her commitment to the MDTC and its members since she began with the organization many years ago, and we are all thankful for her continued energy, support, and guidance.

Perhaps above all else, Rick Paul ensured that the organization stayed on track with its mission of benefiting its members and promoting excellence in civil litigation.

Members, of course, are the focus and base of any good organization, and the MDTC is no exception. We thank each of you for your involvement, and we look forward to improving upon the organization to continue benefitting you and your practice.

It is truly an honor to carry on the rich traditions of the MDTC and to build upon all that the organization has accomplished over the years. I encourage each of you to assist in this effort by taking an active role in the MDTC this year. I hope to see you all at future MDTC events, and I look forward to working with and for you throughout the coming year.

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

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Sacculina Castrata: A Theory on Barnacles[1]

By: John Hohmeier

Executive Summary

Lately, there have been more and more claims for no-fault benefits from medical providers, particularly wholesale distributors in Michigan. Many of these providers, however, are not properly licensed in the State of Michigan. Under the Public Health Code and the no-fault act, any medical provider not licensed in Michigan is precluded from claiming no-fault benefits. .

John Hohmeier joined Scarfone & Geen, P.C. in 2012 to litigate first- and third-party No Fault cases. He was both Trial and Appellate Counsel in *Dawoud v State Farm Mut Auto Ins*, where the Court of Appeals issued a published opinion further limiting and clarifying the derivative nature of medical provider's rights in the no-fault arena. Mr. Hohmeier is also a Chair for the Insurance Law section of the Michigan Defense Trial Counsel. While still in school at Thomas M. Cooley Law School, his commentary on the interaction of emotion and brain chemistry with a person's ability to recall veridical memories was published in the Thomas M. Cooley Law Review.

A Brief Intro to the Barnacles

There are two specific types of barnacles: free-living barnacles and parasitic barnacles. I am not interested in the free-living barnacles and neither should you be. I am interested in the ones that attach to a host and feed by extending thread-like "rhizomes"[2] of living cells into their hosts' bodies from their points of attachment.[3] Anyone who has seen small, shrimp-like organisms attached to the underbelly of a whale can understand what I mean.

Now, strictly speaking about the no-fault system in Michigan, there are a ton of parasitic barnacles out there feeding off the whale-like host that is no-fault.[4] With the opioid epidemic a full-blown crisis in the United States, however, this particular dithyramb focuses on some purveyors of pills and prescription medications that have realized that the host (Michigan no-fault) is a high-yield, and high-energy environment to suckle at the teat of abundance.

Here Come the Barnacles

Let us get right to the point because Michigan has some pretty stringent laws in this area: every single person or entity dealing or supplying in the chain of pharmaceuticals[5] that are making their way to Michigan cities/consumers needs to be licensed in the State of Michigan – from manufacturers to wholesalers to middlemen to dispensers: **everyone** needs to be licensed. Without a pharmaceutical license, any given person or business cannot manufacture, offer for sale, or essentially make any money off any type of medication that is prescribed.[6]

Michigan's Public Health Code requires any type of pharmacy, manufacturer, or wholesale distributor doing business in Michigan to be **licensed**- not in other states, but licensed in Michigan.[7] MCL 333.17748 provides:

> To do business in this state, a pharmacy, **manufacturer**, or **wholesale distributor**, whether or not located in this state, *must be licensed* under this part. To do business in this state, a person that provides compounding services must be licensed as a pharmacy or manufacturer under this part and, if a pharmacy, authorized to provide compounding services under this section and sections 17748a and 17748b. To do business in this state, an outsourcing facility must be licensed as a pharmacy under this part.[8]

MCL 333.17706, defines "manufacturer" as follows:

> "Manufacturer" means a person that prepares, produces, derives, propagates, compounds, processes, packages, or repackages a drug or device salable on prescription only, or otherwise changes the container or the labeling of a drug or device salable on prescription only, and that supplies, distributes, sells, offers for sale, barters, or otherwise disposes of that drug or device and any other drug or device salable on prescription only, to another person for resale, compounding, or dispensing

MCL 333.17709(5) defines "wholesale distributor" as:

> a person, other than a manufacturer, who supplies, distributes, sells, offers for sale, barters, or otherwise disposes of, to other persons for resale, compounding, or dispensing, a drug or device salable on prescription only that the distributor has not prepared, produced, derived, propagated, compounded, processed, packaged, or repackaged, or otherwise changed the container or the labeling of the drug or devise.[9]

There are some entities out there doing business in Michigan that may try to call themselves a "billing company" in order to hide the actual nature of the business and mask what it actually does to make money. One needs only to go on any given website of any of these barnacles, however, to understand that they are "offering for sale" a number of substances and medications available upon prescription.[10]

There are a multitude of different reasons why any particular insurance carrier should **not** pay these entities. For example, any violation of the Michigan Public Health Code along the chain of dispensing makes the dispensing of the product "unlawful" by the sheer fact that it violates the law. In the no-fault context, however, the no-fault act and the Public Health Code work in perfect harmony with one another on this issue.

The Host: Michigan's No-Fault System

Claims for personal injury protection benefits ("PIP benefits") against any no-fault insurance carrier are subject to the mandates of the Michigan no-fault act. This is why any medical provider that has been suing insurance carriers for the better part of fifteen years now[11] invariably claims that it is entitled to be paid because it provided "reasonably necessary" products/services to the injured person for her or his care/recovery. MCL 500.3107 requires any medical provider to cross this threshold in order for its claim to be considered valid.

Unfortunately (and I do not know why), a lot of litigants and courts seem to skip over some of the essential components that need to be checked off before any claim can be considered valid. For example, there are multiple cases where the accident was staged and there was never an injury. In these cases, I have been asked: why would someone treat if there was never an accident? Wrong question and it obviously it assumes a lot of things, but there are more…

"Why would someone go and get $160,000 in physical therapy treatment if they were not hurt in the first place?" The questions are not that important but the place where they come from is: too many people assume that a claim is legitimate just because a person was in an accident or just because treatment was provided. Too many people assume that there was an accident, assume that there was an injury, assume that the person needed treatment, and assume that the treatment was "lawful." Well, do not assume anything.

MCL 500.3157: An Inherent Guard to Barnicling

Do not rush to your Webster Dictionary – just assume that the word "barnicling" is a thing.[12] Even if it is not, you probably know what I mean. Anyway, assuming that all of the other elements are present for a valid no-fault PIP claim (i.e. an accident, an injury, carry on), an injured person (and/or his/her medical provider) can still only pursue claims for allowable expenses under MCL 500.3107 where the products/treatment are provided by people and entities that comply with Michigan licensing requirements.

Much to the chagrin of some of these barnacles doing business in Michigan, "the Legislature intended that only treatment lawfully rendered, including being in compliance with licensing requirements, is subject to payment as a no-fault benefit."[13] This applies to nearly every medical provider and includes doctors, physical therapists, nurses, transportation companies, and pharmaceutical companies.

MCL 500.3157 reads:

> A physician, hospital, clinic or other person or institution **lawfully** rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance, and a person or institution providing rehabilitative occupational training following the injury, **may charge a reasonable amount** for the products, services and accommodations rendered.[14]

At least at the appellate level, MCL 500.3157 has been consistently applied to various entities who attempt to provide products/services in Michigan that require a license but do not actually have the proper licensing. For example, in *Healing Place at N Oakland Med Ctr v Allstate Ins Co*,[15] the Court of Appeals made it very clear that a company who refuses to follow Michigan's licensing requirements is precluded from charging for its products/services in a no-fault case. The Court stated:

> [T]he plain language of MCL 500.3157 requires that before compensation for providing reasonable and necessary services can be obtained, **the provider** of treatment, whether a natural person or an institution, **must be licensed** in order to be lawfully rendering treatment.[16]

Even putting the pharmaceutical aspect of this article aside, regardless of the medical provider or entity you encounter in your specific case, or what type of "products/services" they offer, there are two appellate decisions that any carrier can use as authority.[17] In both of these cases, the entity provided services akin to adult foster care, but failed to obtain the proper Michigan license to carry on such a business (and charge for it).[18]

The two corporations made claims for no-fault benefits and the no-fault insurers denied the claims taking the position that the services were unlawful pursuant to MCL 500.3157 because the corporations were not properly licensed. At the trial court level, summary disposition was granted to both of the no-fault insurers. When the decisions were appealed, the Court of Appeals affirmed the trial court in both instances.

In both of these cases, the Court concluded that because the medical provider was not properly licensed, the claim was unlawful and, therefore, **not** payable by the insurance carrier.[19] Such is the case with any and all products/services being claimed by either a real-person Plaintiff in a main suit claiming the bill of an unlawful entity or the entity itself filing suit – this includes the barnacles trying to make bread off of the opioid crisis in this country, particularly Michigan, so let us get back to them.

Reality Check for the Standoffish and Sophisticated Barnacles

These modern-day barnacles can be brassy insofar as they may try to claim that they "don't touch" the drugs.[20] As far back as 1996, however, the Court of Appeals has specifically cited to the definition of "wholesale distributor"[21] and held that even people/entities who may never touch the dope must be licensed.[22] In *Borchardt v Dept of Commerce*, the Court recognized that MCL 333.17748 precluded any person or entity from dealing in pharmaceuticals in virtually **any** capacity without the proper licensing.

In *Borchardt*, the Court recognized that MCL 333.17748 precluded even a "middleman" who (maybe) picked up the phone and facilitated various parties along the chain, but then accepted a fee where appropriate, violated Michigan's Public Health Code.[23] What is great is that the Court was very specific that even a barnacle who only facilitated the dope deal – like a "middleman" or facilitator – needed to be licensed to engage in such practice.[24]

Because the middleman in *Borchardt* was not licensed as a wholesale distributor, or for any pharmaceutical involvement for that matter, it was unlawful. Citing directly to the wholesale distributor statute in Michigan's Public Health Code, the Court indicated that "the board found that the petitioner acted as a middleman in the sale of drugs and was acting as a wholesale distributor without a license to do so."[25]

Using the same statute analyzed by the Court of Appeals in *Borchardt*, most of these modern-day barnacles can be classified as wholesale distributors because they are "suppl[ying]" or "distribut[ing]" or "offer[ing] for sale" medication to "other persons" for "dispensing." So when these barnacles are not properly licensed to deal in pharmaceuticals, their services/products are unlawful and, therefore, not reimbursable as a no-fault benefit.[26]

The Long Conclusion: Barnacles or Not, You Got a Job to Do

> In my experience, whatever happens clings to us like barnacles on the hull of a ship, slowing us slightly, both uglifying and giving us texture. You can scrape all you want, you can, if you have money, hire someone else to scrape, but the barnacles will come back or at least leave a blemish on the steel.[27]

For reasons that exceed this article, there is little that any of us theoretical law people can do about these pervasive barnacles acting like Romulus sucking on the mother wolf's teat that is Michigan no-fault.[28] It is worth mentioning at this point, however, that barnacles have no "true heart."[29] They have some weird organ close to their mouth that does something that does not even remotely elicit thoughts or an idea of what people like us view a human heart to be…so why would we ever think that ethics or morality would ever catch up with them?

It is also worth mentioning that the geological history of barnacles can be traced back way before us humans. In fact, they can be traced back to 510 to 500 million years ago. That being said, barnacles did not become common in the fossil record until the Neogene period which is within the last 20 million years.[30] Why is this important? Because even though barnacles may exist, their impact may not be felt for a significant time later.[31]

Now, being introduced to barnacles by my grandfather, the simplest explanation from him was that barnacles sustain off of the life of something else – so when the host dies, so do the barnacles unless they latch onto something else. Science will tell you that, in part, a barnacle's poor skeletal preservation is due to their restriction to high-energy environments…and the high-energy environments were not present until fairly recently.

At this point in time, Michigan is a high-energy environment for barnacles looking to attach themselves and feed off an easy host for several reasons. For one, courts see way too many lawsuits and are (for the most part) prone to assume that every claim is (to some extent) legitimate. Another is that there are no laws or regulations against lay-people or unlicensed people actually owning medical facilities in Michigan.

Anyone in the know would agree that the 2008 *Miller v Allstate*[32] decision essentially emboldened anyone, especially lay people, to incorporate and own medical facilities in Michigan and start feeding off of no-fault carriers. When some of these barnacles have no professional ties to the community and no ethical ties to the patient or the profession…is there any wonder that they/them/it sometimes do not care to comply with Michigan's licensing requirements?

The barnacles are here. They are feeding off probably the largest available host in

the country at this point. With Michigan being the only State that currently provides unlimited, lifetime medical benefits to auto-accident victims, the barnacles have attached themselves to a whale.[33] Be prepared, be diligent, but do not be surprised the next time you see one of these parasitic barnacles.

Endnotes

1 A sacculina is a parasitic barnacle. "When a female Sacculina is implanted in a male crab it will interfere with the crab's hormonal balance. This sterilizes it and changes the bodily layout of the crab to resemble that of a female crab by widening and flattening its abdomen, among other things. The female Sacculina then forces the crab's body to release hormones, causing it to act like a female crab, even to the point of performing female mating dances." https://en.wikipedia.org/wiki/Sacculina.

2 A continuously growing horizontal underground stem that puts out lateral shoots and adventitious roots at intervals. See Wikipedia (yep).

3 Barnes, *Invertebrate Zoology* (Philadelphia, PA: Holt-Saunders International, 1982), pp 694–707.

4 For purposes of this article, the host is the no-fault system, aka the whale.

5 Pursuant to a prescription.

6 The actual scope of the statute is much more far reaching than this article.

7 MCL 333.17748.

8 Emphasis added.

9 ML 333.17708 defines: "Prescription drug" means a drug to which 1 or more of the following apply:
(a) The drug is dispensed pursuant to a prescription.
(b) The drug bears the federal legend "CAUTION: federal law prohibits dispensing without prescription" or "Rx only".
(c) The drug is designated by the board as a drug that may only be dispensed pursuant to a prescription.

10 Arguably, any entity "offering for sale" (even if only on their website) any given pill or pharmaceutical (pursuant to a prescription) would fall within the Michigan Public Health Code's mandate that the entity obtain a Michigan license.

11 There are very few no-fault barnacles engaging in litigation today that were even in existence 10 years ago. The rise in solicitation and the promulgation of lay-owned medical facilities in Michigan has grown at an incredible rate since about 2010, which is entirely ironic for reasons that outstrip this article.

12 See what I did there?

13 *Cherry v State Farm*, 195 Mich App 316, 320; 489 NW2d 788 (1992).

14 Emphasis added.

15 *Healing Place at N Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 59; 744 NW2d 174 (2007) (emphasis added).

16 *Id.* Emphasis added.

17 Those cases are *Healing Place at Oakland Med Ctr, supra note* 15, and *Cherry, supra* note 15, which have since been cited in multiple opinions as well.

18 Despite the explosion of lay-owned medical facilities in Michigan in the past decade, all of them still need to be licensed to some extent or another. The LARA database is your ultimate tool and search engine for this.

19 There was no further inquiry into the services provided and there was no hint, comment, or discussion of any possibility that some of the individual services could be compensable because a license was not required for that particular service. See *Healing Place at Oakland Med Ctr v Allstate Ins Co*, *supra* note 15; *Cherry, supra* note 15.

20 They call themselves "billers"…unreal.

21 MCL 333.17748.

22 *Borchardt v Dept of Commerce*, 218 Mich App 367, 369-70; 554 NW2d 348 (1996) (the Court was actually analyzing the statutes as they existed in 1989 but the current statute does not differ in any meaningful sense). Even if any given barnacle argues that it is just acting as a biller or some sort of "middleman" arranging various parties across the country – some packaging the medication, some distributing the medication to the storefront, some dispensing the medication to the actual patient, and some just billing for the products/services – the Borchardt decision further supports the argument that these barnacles are practicing medicine without the proper licensing.

23 *Id.* at 370.

24 *Id.*

25 *Id.*

26 MCL 500.3157.

27 Nick Flynn (born January 26, 1960) is an American writer, playwright, and poet.

28 To be perfectly candid, it is up to the trial courts and the advocates on the ground level to recognize and realize a legitimate (lawful) claim and to get rid of illegitimate (unlawful) claims. There is little doubt in this authors mind that Michigan's lenience towards lay-owned medical facilities (which have no ethical ties to either the community, the profession, or the patient) is one of the main catalysts. The *Miller v Allstate* decision, infra, does not help either nor does the fact that it seems to be left to insurance carriers and the civil arena (rather than law enforcement and local authority) to curb these practices, but I digress.

29 A sinus close to the esophagus performs a similar function, with blood being pumped through it by a series of muscles.

30 Foster & Buckeridge, *Barnacle palaeontology,* in: Southward, A.J. Barnacle biology, Crustacean Issues, 5, pp 43-63 (1987). See also Doyle, et al, *Miocene barnacle assemblages from southern Spain and their palaeoenvironmental significance*, Lethaia, vol 29, no 3, pp 267–274 (1997).

31 It takes time to identify these parasitic barnacles. Given Michigan no-fault's mandate that claims (when reasonable proof is provided) be paid within 30 days, more often than not insurance carriers would rather pay than test their fate in the trial courts.

32 *Miller v Allstate Ins Co,* 481 Mich 601; 751 NW2d 463 (2008).

33 Medicaid and Medicare are huge whales in and of themselves but rarely if ever do these no-fault barnacles submit their claims to Medicare or Medicaid – they all want the premium no-fault dollar.

Kids, These Days, Can Get Away With Filing Lawsuits

By: Nicholas Huguelet and Deborah Brouwer, *Nemeth Law, P.C.*

Executive Summary

Over the last few decades, arbitration agreements have become more and more popular. This is particularly true with respect to employment disputes. Although arbitration clauses have received widespread judicial and legislative acceptance in employment agreements, courts generally have refused to enforce arbitration agreements against one group of employees – minors.

Nicholas Huguelet, Senior Attorney practices in labor and employment law and has represented clients before federal and state courts, administrative agencies and arbitrators in both Michigan and Ohio. He has experience representing and counseling both private and public sector clients in collective bargaining, employment disputes and statutory and regulatory compliance.

Deborah Brouwer, an attorney since 1980, Ms. Brouwer practices exclusively in labor and employment law, with particular experience in the defense of lawsuits against employers, including claims of race, age, religion, national origin, gender and disability discrimination, harassment and retaliation, as well as FLSA, FMLA and non-competition suits. She also provides harassment training and conducts discrimination and harassment investigations for employers. She has extensive experience in appearing before administrative agencies, including the EEOC, MDCR, MIOSHA, OSHA and the NLRB. She also appears frequently before the Michigan Court of Appeals and the Sixth Circuit Court of Appeals.

As the U.S. Supreme Court recently confirmed in *Epic Systems Corp v Lewis*,[1] case law recognizing the value of private arbitration to settle employment disputes is long-past its infancy, but infancy remains an issue with the case law. Many employers nowadays require arbitration agreements somewhere in the hiring process. Taco Bell, for example, includes an agreement to arbitrate in its employment application.[2] 24 Hour Fitness included such an agreement in its employee handbook.[3] And Sears maintains an arbitration policy and agreement in a separate document.[4] These mandatory arbitration clauses generally are broadly written, covering any employment-related dispute between the employer and its employees. For decades, these arbitration clauses have received widespread judicial[5] and legislative[6] acceptance. Despite this general acceptance, however, courts have, with few exceptions, refused to enforce arbitration agreements against one group of employees – minors.

Enforceability Of Arbitration Agreements Under The FAA

The Federal Arbitration Act ("FAA") was enacted "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts."[7] Since its enactment, courts have noted a "strong federal policy in favor of arbitration."[8] This policy has been extended to the employment field, with the US Supreme Court rejecting "the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context."[9] Indeed, courts have enforced arbitration agreements in a variety of employment law suits, including Title VII[10], ADEA,[11] and FLSA[12] claims.

Not all arbitration agreements are automatically enforceable, however. Because the FAA places arbitration agreements on equal footing with other contracts, they are subject to the same defenses applicable to all other contracts.[13] These include state-law contract defenses, such as fraud, forgery, duress, mistake, lack of consideration or mutual obligation, and unconscionability.[14] Even in applying these defenses, though, the strong federal policy favoring arbitration is taken into account.[15]

Infancy Doctrine In Michigan

One such state-law contract defense is the infancy doctrine. "The well-established Michigan common law rule is that a minor lacks the capacity to contract."[16] In the absence of the capacity to contract, a contract with a minor remains voidable at the minor's election.[17] After reaching the age of majority, the minor may disaffirm contracts entered into during his infancy.[18]

There is, however, an exception to the infancy doctrine for "necessaries." "The most usual things which are considered necessaries are those answering the bodily needs of the infant, without which the individual cannot reasonably exist…."[19] At common law, these necessaries largely included medical care[20] and clothing.[21] Statutorily, necessaries also include educational loans,[22] life or disability insurance,[23] and medical care for specific reasons.[24]

A minor retains the right to disaffirm a contract for common law necessaries, if the contract is so unreasonable as to be evidence of fraud or undue advantage.[25] On the other hand, a minor is statutorily precluded from disaffirming a contract entered into under a willful misrepresentation of the minor's age.[26] Since arbitration agreements are placed on equal footing as other contracts, infancy (when applicable) can be raised as a defense to such agreements.

Courts Addressing Infancy Defense

When raised, the infancy defense is often – but not always – successful. *Sheller v Frank's Nursery & Crafts, Inc*[27] is the first reported case to consider the infancy defense to an employment arbitration agreement and is one of the few cases in which the arbitration agreement was enforced. In that case, the minor plaintiff brought a Title VII sexual harassment claim against her former employer, alleging that her supervisor had created a hostile work environment. The employer promptly filed a motion to compel arbitration based on a broad arbitration provision contained in the plaintiff's employment application. That arbitration clause required that the employee bring "any claim" against the employer to binding arbitration. In addressing the employer's motion, the court reviewed the infancy doctrine in Illinois, noting that "[t]he infancy law doctrine exists to protect the inexperienced and improvident minor from the consequences of dealing with others."[28] The court also stated that the infancy doctrine "is to be used as a shield and not as a sword."[29] With these considerations in mind, the court found that the public policy behind the infancy doctrine was not implicated in this situation because the employer required all of its employees, including adults, to sign the same arbitration agreement.

The *Sheller* court also found that the infancy doctrine does not permit minors to be placed in a better position after disaffirmance than the minor would otherwise be in if the minor had never entered into the agreement. The court held that permitting the suit to go forward would allow the minors to retain the advantage of the contract (employment) while repudiating the basis of employment (the application). As a result, the court granted the employer's motion to compel arbitration, finding that public policy would not be served by permitting disaffirmance.

Eight years later, in *Stroupes v The Finish Line, Inc*[30] the Eastern District of Tennessee declined to follow *Sheller* in a case with very similar facts. In *Stroupes*, the minor plaintiff filed a Title VII sexual harassment claim against her former employer. Like *Sheller*, the plaintiff's employment application contained an arbitration agreement requiring arbitration of all claims against the employer. The *Stroupes* court disagreed with the *Sheller* court's conclusion that disaffirmance would permit the plaintiff to use her minority as a sword, arguing that "the only issue affected by [plaintiff's] use of the infancy doctrine is the appropriate forum to adjudicate her claims." Additionally, the court in *Stroupes* noted that allowing the suit would not permit the plaintiff to both disaffirm the contract and sue on the contract, because the plaintiff's suit was not based on the contract, but on statutory rights. According to the *Stroupes* court, if *Sheller*'s reasoning were adopted, it would eviscerate the infancy doctrine.

Finally, the *Stroupes* court ruled that it was not within its authority to create an exception to Tennessee's infancy doctrine. The Tennessee Legislature enacted certain statutory exceptions, including employment-related exceptions, in the infancy doctrine. Creating a common law exception for arbitration agreements, the court reasoned, would be contrary to the Legislature's implicit recognition of a minor's ability to disavow such arbitration agreements.

The court in *Smith v Captain D's, LLC*,[31] applied similar reasoning to the *Stroupes* court in refusing to enforce an arbitration agreement against the minor plaintiff. There, the plaintiff brought negligent hiring, supervision, and retention claims against her former employer arising out of her alleged assault and rape during working hours by a supervisor. Prior to beginning her employment, the plaintiff and her grandmother signed an arbitration agreement requiring the plaintiff to bring all claims against the employer to binding arbitration. As in *Stroupes,* the court held that "[w]hile recognizing the breadth of the language in the arbitration provision, we unquestionably find that a claim of sexual assault neither pertains to nor has a connection with [the Plaintiff's] employment."[32] Accordingly, the employer's motion to compel arbitration was denied.

Lopez v Kmart Corporation,[33] also agreed with *Stroupes*'s analysis of the impact of statutory law. The California law applicable in that case codified the infancy doctrine, although the statute did provide that certain contracts (e.g. real estate contracts) were void *ab initio*. In refusing to enforce the arbitration agreement, the court found: "[t]hat the California legislature expressly excepted particular types of contracts, and did *not* except employment or arbitration agreements like the agreement at issue here, further supports the Court's conclusion that plaintiff's right to disaffirmance remains intact in this instance." In denying the employer's motion to compel arbitration, the court also noted that the arbitration agreement was not a condition of employment.

In *Douglass v Pflueger Hawaii, Inc*,[34] the Supreme Court of Hawai'i also looked to statutory provisions permitting the employment of minors, but, contrary to *Stroupes* and *Lopez*, found that the Legislature intended for the plaintiff to have the capacity to enter into a binding

arbitration agreement. Historically, in Hawai'i, sixteen- and seventeen-year-olds were required to obtain parental consent to work. In 1969, however, the Legislature amended the law to permit these minors to work absent parental consent. The Supreme Court of Hawai'i viewed this relaxation of the statutory requirements as a cue that the Legislature "clearly viewed minors in this particular age group – being only one to two years from adulthood – as capable and competent to contract for gainful employment and, therefore, should be bound by the terms of such contracts."[35] As a result, the court ruled that the employer's arbitration agreement could be enforced against the plaintiff, "a seventeen-year-old high school graduate, who was only four months away from majority" at the time he was hired.[36] The particular agreement in that case, however, failed for lack of mutual assent and consideration.

Foss v Circuit City Stores, Inc,[37] introduced an interesting twist on the above case law, in that, there, the minor employee forged his mother's consent to an arbitration agreement contained in his employment application. Despite the misrepresentation, the court ruled that the plaintiff was not estopped from asserting his infancy as a defense. Because Maine's infancy doctrine is statutory and requires written ratification of a contract upon reaching the age of majority, the *Foss* court rejected the defendant's argument that the employee had ratified the arbitration agreement by continuing to work, submitting time cards, and by filing the lawsuit. Accordingly, the plaintiff was permitted to move forward with his claims.

Conclusion

Although the issue is unsettled in Michigan, employers hiring minors risk that their arbitration agreements may not be enforced. The weight of the case law tends to cut against enforcement of arbitration agreements. Indeed, courts that have decided the issue since the early *Sheller* decision have largely declined to follow its reasoning. Additionally, the *Douglass* analysis may actually support a finding against enforcing arbitration agreements, because Michigan's Youth Employment Standards Act requires all minors, regardless of age, to obtain a work permit prior to employment.[38] Further, while minors are prohibited by statute from disavowing a contract following a material misrepresentation regarding their age, the misrepresentation raised in *Foss* would not likely change the outcome, since the Michigan Supreme Court has found that parents do not have the authority to waive the rights of their children.[39] Thus, employers should be aware of the potential risk of nonenforcement of their arbitration agreements against employees under the age of majority.

Although the employer's ratification arguments in *Foss* were unsuccessful in that case, an employer seeking to enforce its arbitration agreement against a minor could argue that continued employment constituted ratification of the arbitration agreement. The better practice, however, would be to require the employee to re-sign the arbitration agreement after reaching the age of majority.

Endnotes

1 *Epic Systems Corp v Lewis*, ___ US ___; 138 S Ct 1612 (2018).

2 *See e.g., Wilcox v Taco Bell of Am, Inc*, No. 10-cv-2383, 2011 WL 3566687 (MD Fla, Aug 15, 2011).

3 *Carey v 24 Hour Fitness USA, Inc*, 669 F3d 202 (CA 5, 2012).

4 https://archive.org/details/ArbitrationPolicyAgreementEN2017.

5 *See e.g., Circuit City Stores v Adams*, 532 US 105, 123; 121 S Ct 1302 (2001).

6 Federal Arbitration Act, 9 USC §§ 1, *et seq.*

7 *Gilmer v Interstate/Johnson Lane Corp*, 500 US 20, 24; 111 S Ct 1647 (1991).

8 *See e.g., Cooper v MRM Inv Co*, 367 F3d 493, 498 (CA 6, 2004).

9 *Circuit City Stores, supra* note 5.

10 *Willis v Dean Witter Reynolds, Inc*, 948 F2d 305, 310 (CA 6, 1991).

11 *Gilmer, supra* note 7.

12 *Bailey v Ameriquest Mortgage Co*, 346 F3d 821, 822 (CA 8, 2003).

13 9 USC § 2.

14 *Cooper*, *supra* note 8 at 498.

15 *Id.*

16 *Woodman v Kera LLC*, 486 Mich 228, 237; 785 NW2d 1 (2010).

17 *Holmes v Rice*, 45 Mich 142, 142; 7 NW 772 (1881).

18 *Reynolds v Garber-Buick Co*, 183 Mich 157, 162; 149 NW 985 (1914).

19 *In re Dzwonkiewicz's Estate*, 231 Mich 165, 167; 203 NW 671 (1925).

20 *Id.*

21 *Wood v Losey*, 50 Mich 475, 477-78; 15 NW 557 (1883); *see also Muller v CES Credit Union*, 161 Ohio App3d 771 (5th Dist, 2005) (states that contract for the purchase of necessities, which "are food, medicine, clothes, shelter or personal services usually considered essential for the preservation and enjoyment of life" are valid exceptions to the general rule).

22 MCL 600.1404(2).

23 MCL 500.2205.

24 MCL 333.5127(1) (consent to medical care for a minor infected with venereal disease or HIV); MCL 333.6121(1) (consent to substance abuse related medical care); MCL 333.9132(1) (consent to prenatal and pregnancy related health care)

25 *Squire v Hydliff*, 9 Mich 274, 277 (1861).

26 MCL 600.1403.

27 *Sheller by Sheller v Frank's Nursery & Crafts,* 957 F Supp 150 (ND Ill, 1997).

28 *Id.* at 153.

29 *Id.*

30 *Stroupes v Finish Line, Inc,* No. 4-cv-133, WL 5610231 (ED Tenn, 2005).

31 *Smith v Captain D's,* 963 So2d 1116 (Miss, 2007).

32 *Id.* at 1121.

33 *Lopez v Kmart Corp*, No. 15-cv-1089, 2015 WL 2062606 (ND CA, 2015).

34 *Douglass v Pflueger Haw*, 110 Hawai'i 520; 135 P 3d 129 (2006).

35 *Id.* at 529.

36 *Id.*

37 *Foss v Circuit City Stores, Inc*, 477 F Supp 2d 230 (D ME, 2007).

38 MCL 409.104(1).

39 *Woodman*, *supra* note 16.

Read All About It: How The Press Release Process Works — Before And After

By: Douglas Levy, *Hatslakha Inc.*

Executive Summary

Over the last decade or so social media became a more prominent form of "media." Despite the rise of social media, press releases can still play a significant role in marketing one's practice. Several steps should be taken in order to make a press release effective in the age of social media and reach a large audience.

Douglas Levy, a freelance writer and editor at West Bloomfield-based Hatslakha Inc., has strong experience in law-related matters. He has spent 27 years of his career in newspapers and trade publications, including nearly 10 years at Michigan Lawyers Weekly, as well in PR and communications for a private law practice. Contact him at djlwalks131@gmail.com or (917) 929-5942.

In a time when there is so much "nontraditional" media (i.e., Facebook, Reddit, LinkedIn) as compared to "traditional" media (i.e., print, television, radio), do press releases still matter? More importantly, is putting together and distributing a press release a good way to market your practice?

As someone who has been on both the media and personal representative side, I say yes to both questions — as long as you (1) understand what putting together a press release means; and (2) send it out with realistic expectations.

You have definitely heard about how crucial a social media presence is for not just a law practice, but for **any** business. The advantages are immediate and obvious — it is a great way to toot (tweet?) your own horn, it is a free platform (for the most part; you do have to pony up for sponsored tweets and posts), and there is no need to target traditional media. At least that is what you have been told to believe.

The thing is, traditional media still exists. Whether it is newspapers, trade publications, television, or radio stations, their importance cannot be discounted. These outlets reach hundreds of thousands of readers, viewers, and listeners of all demographics. Social media, while widespread and influential, often only goes so far as to people who want to know and follow things related to your practice — unless something goes "viral," usually for unintended, often embarrassing reasons.

That is why press releases are important. They let you announce to the media that your practice is doing or has done something newsworthy, and stoke the reporter/editor/producer to be interested enough to follow through with a call/email for more information — ideally, leading to a story.

While the medium for sending press releases out has shifted from paper to email, there still are basic tenets to crafting a press release, along with the right and wrong ways to follow up. If you are not working with a PR firm or do not have an in-house communications manager, you will want to follow closely.

Write The Release On Firm Letterhead

Just like sending a correspondence to a client or opposing counsel, press releases should be on official firm letterhead. If you are sending your press release via email, make sure the firm's basic contact information is at the bottom, such as the firm logo, website, phone number and social network links. You also can attach your release to an email as a Word document, with the full letterhead as part of it, or provide a link to an online version of the press release.

Put Specific Contact Information At The Top

If a media source wants to get in touch with someone at your firm to follow up on the press release, make that someone clear at the beginning: "CONTACT: John Smith, communications director, (313) 555-5785, jsmith@mastersonlaw.com." Try not to include more than two contact names.

Indicate Whether The Press Release Has Time-Sensitive Information

Some years ago, I got a call from a business owner who had sent me a press release the week prior. He was furious that our newspaper didn't write anything about his business. I thanked him for sending the press release, then politely explained that not all items that come our way are in our readers' best interest, and invited him to still send releases our way for consideration.

He screamed back: "But I **specifically** wrote at the top, 'For Immediate Release'!"

This gentleman apparently didn't understand what "For Immediate Release" meant. When those three words appear above the headline, that means the information within the press release is not under any embargo and can be disseminated at any time. It does not mean every media outlet that receives the press release must release a story about it **at all**, let alone immediately.

If you have information that you would like to keep from being released until a certain time and date, you should indicate that; for example, "Embargoed until 5 p.m. Wednesday, April 25." Media outlets generally will honor your request out of professional courtesy, but in full disclosure, I have been privy to seeing — and cringing at — rival publications leaking embargoed information.

Write A Headline That Gets Attention — And Delivers On What It Says

Be specific about what it is you are trying to push forward. Often times an assignment editor will determine whether to continue reading based on the headline alone.

Too often over my career, I have received press releases that have had headlines promising big things ahead, but under-delivered once I read through the release. The sizzle quickly fizzled.

Take advantage of the fact that press release headlines do not have the same kind of space limitations that a newspaper's news hole does. Instead of the average 60 characters for a news headline, you can have approximately 160 characters to tout your item, but choose wisely and do not get tripped up on adding unnecessary small words just to fill things out. Format the headline bold, and do not worry about "shouting" by using all caps.

For the second headline (or subhead), expand on the subject at hand further, but keep it to approximately half the characters as the main headline.

First Things First Paragraph

At the opening of the first paragraph, put in a dateline and date that the press release was sent out ("LANSING, Michigan, May 31, 2017"), followed by an em-dash. After that, use at least two, but no more than three, sentences in the opening paragraph to sum up what it is you are promoting. Follow the news writing standard of laying out the five W's — who, what, when, where and why — in the first sentence, then follow through with additional details in the sentences and paragraphs that follow.

Can I Quote You On That?

Feel free to include a quote from someone who is directly involved with the business at hand. If your firm has obtained a new attorney via a lateral move, have him or her offer something to say about the move ("I'm looking forward to being a part of Masterson Law's governmental law practice group, especially now that newly considered state legislation could bring big changes to how our clients handle things"). You can even follow that up with a managing partner's take on the acquisition of the new attorney ("Lois has proven herself a reputable expert on how townships and boroughs are different from cities and counties when it comes to municipal matters. We're fortunate to have her as part of our governmental law practice group").

Depending on what the news outlet plans to do with the press release, these quotes could end up in the publication or on the air verbatim. However, if these quotes are crafted strategically, an editor could very well say, "What does she mean by 'newly considered state legislation'? We'd better call the firm about this." Next thing you know, a story.

Tell Me More About Yourself

The last paragraph should have boilerplate information about your firm or yourself as an attorney, so that the editor or writer knows what your business is and what it does:

> **About Masterson Law:** Founded in 1988 by John and Arthur Masterson, Masterson Law provides legal expertise to municipal and governmental entities across Michigan. The firm has received accolades over its 30 years, including being named among DBusiness' "Top 10 Law Firms," the Municipal Law Attorneys Associations' "Premier Firms," and LawBizUSA's "Gold-Ranked Power Lawyers." Learn more at (313) 555-0000 or www.mastersonlaw.com.

Read It Over Again — Carefully

Just like with writing a motion, a brief, or a contract, your press release should be looked over with the utmost care. This means spellchecking, proofreading, editing, rewriting, condensing, and recasting. Afterwards, you should pass it on for someone else at your firm to do the same things with fresher eyes. If you are writing a press release for someone else at the firm, make sure that he or she has had a chance to review it to make sure everything about him/her is accurate.

OK, It Has Been Sent Out. Now What?

As I mentioned earlier, you should have realistic expectations when sending out a press release. First and foremost, it is important to understand that news outlets are in no way obligated to follow through with you after reading your press release. You are simply letting a reporter/editor/producer know that you have something interesting going on. If they want to contact you, they can. If they do not want to, they won't.

Do not think of the latter scenario as being blown off or slighted. Like you in your legal practice, media sources are constantly making strategic business decisions, the business at hand here being dissemination of information. I have worked with many news editors who put deep consideration into every press release that came their way. Each newspaper knows its audience, and if the editors think that what is being pitched to them is not of interest to the publication's readers, or if they can detect that the press release is slightly more than an advertisement marketed as something with true news value, they will pass on it.

If you decide to follow up with any of the places you send your press release to, in order to gauge their interest and maybe give your message a second chance to be in their consciousness, hear them out if they pass and be careful not to push them. (Also, do not keep them on the phone if they say they are on a deadline. You certainly would not want anyone to disturb you while writing an 11th-hour motion.)

Keep Your Cool

One thing you should never do is become defensive if a media outlet says no. This can only hurt any future relationship you have with them. Besides, it is just bad form. As lawyers, you have standards to uphold; lashing out at a TV station that turns down your request to talk about your latest court victory puts you in a bad light — not just to the news outlet, but potentially to prospective clients.

Another thing to understand is, just because a publication or station takes your press release and runs with it, that does not necessarily mean they will spin your story the way you intended. You could give a great interview to a reporter about your practice opening a new wing in a historic building — only to find out the next day that the reporter focused the story solely on something you mentioned briefly in the interview, something not at all related to your firm's expansion but newsworthy in the eyes of that reporter.

We Will Keep You In Mind

Finally, just because a news outlet says no to something of yours, you are not necessarily cast into a black hole. Media outlets are always seeking sources for their stories. If reporters know you are a renowned business litigator because they saw your press release about a complex case you handled, they will want to hold onto your name for, as an example, when they are putting together a story about a municipal deal gone sour and need an expert in business law to offer an assessment.

Mastering the art of the press release is a lifelong process. But as long as you keep crafting and sending quality press releases, and recognize how the places you send them to operate when they receive press releases, you will have a better chance at being recognized by media outlets — and their viewers/readers/listeners — for what you do best.

Appellate Practice Report

By: Phillip J. DeRosier, *Dickinson Wright PLLC*, and Trent B. Collier, *Collins Einhorn Farrell P.C.*
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Final Order Pitfalls

Figuring out what counts as a "final order" for appellate purposes can cause headaches. But a lot may ride on getting this issue right. Misinterpret the rules governing finality and you might miss a jurisdictional deadline for filing a claim of appeal. So, painful as it is, the subject of finality deserves attention.

Finality varies from context to context and from court to court. (It's especially tricky in bankruptcy appeals.) We'll focus here only on civil cases in the Michigan Court of Appeals.

The significance of finality has to do with the Court of Appeals' jurisdiction. Michigan's constitution grants the Court of Appeals jurisdiction as "provided by law."[1] The Legislature granted the Court jurisdiction "over all final judgments from the circuit court, court of claims or probate court "as those terms are defined by law and Supreme Court rule."[2] The Court of Appeals also has jurisdiction to consider applications for leave to appeal.[3] A party can file an application from, among other things, a circuit court's final order in an appeal from a **district court's** final order.

Michigan Court Rule 7.202(6) defines "final judgment" and "final order" as used in these rules. In a civil action, "'final judgment' or 'final order' means

> (i) the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties, including such an order entered after reversal of an earlier final judgment or order
>
> (ii) an order designated as final under MCR 2.604(B) [which allows courts in "receivership and similar actions" to designate certain orders as final],
>
> (iii) in a domestic relations action, a postjudgment order affecting the custody of a minor,
>
> (iv) a postjudgment order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule,
>
> (v) an order denying governmental immunity to a governmental party, including a governmental agency, official, or employee under MCR 2.116(C)(7) or an order denying a motion for summary disposition under MCR 2.116(C)(10) based on a claim of governmental immunity.…

Often, a single case includes more than one order that fits this definition. You might have an order resolving all claims, such as an order granting summary disposition, followed by an order granting case-evaluation sanctions. Both are "final orders." The losing party has a claim of appeal from both. (A prevailing party isn't "aggrieved" in a legal sense and therefore lacks standing to appeal."[4]). So you may have more than one "final order."

Wait, you might say. Courts must specify in each order whether it "disposes of the last pending claim and closes the case." Can't I just go by the circuit court's finality designation? In a word: no.

Michigan Court Rule 2.602(A)(3) requires a judgment to state whether it resolves the last pending claim and closes the case.[5] The Staff Comments to the 1998 Amendment indicate that the Supreme Court added this language at the suggestion of the Michigan Judges Association "to **facilitate docket management**."[6] In other words, this language isn't about determining finality for appellate purposes; it's about informing circuit court

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clerks when to close a case. The Court of Appeals has therefore held that the "disposes of the last claim" certification "does not end the inquiry into whether an order is final."[7] Finality is a question for appellate review just like any other.[8] That means a litigant relies on this designation at its peril.

A last warning: not all final orders are created equal. Some final judgments include all previous orders for appellate purposes.[9] But this rule of incorporation doesn't apply to certain final judgments and orders. Michigan Court Rule 7.203 states: "An appeal from an order described in MCR 7.202(6)(a)(iii)-(v) is limited to the portion of the order with respect to which there is an appeal of right."[10] So a claim of appeal from a final judgment under Michigan Court Rule 7.202(6)(a)(i)—say, an order granting summary disposition—includes all previous orders. An appeal from an order granting case-evaluation sanctions does not.

If there's a single lesson here, it's this: don't take "final order" literally. Sometimes a final order for appellate purposes is the last order in a case. Often, it's not. To avoid game-changing errors, consult the Michigan Court Rules, consult governing caselaw, and consult an appellate specialist.

Misinterpret the rules governing finality and you might miss a jurisdictional deadline for filing a claim of appeal.

A Word of Caution Against Stipulating to a Judgment or Order Reserving Issues for Potential Future Appeals

With certain limited exceptions, only "final" decisions are appealable as a matter of right. In Michigan, that typically means "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 the federal system, a decision is final if it "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). A recent decision from the Sixth Circuit illustrates the danger of parties stipulating to a "final" judgment or order that purports to "reserve" certain issues for further proceedings, including potential future appeals.

Wait, you might say. Courts must specify in each order whether it "disposes of the last pending claim and closes the case." Can't I just go by the circuit court's finality designation? In a word: no.

In *Bd of Trustees of Plumbers, Pipe Fitters & Mech Equip Serv, Local Union No 392 v Humbert*, 884 F3d 624 (CA 6, 2018), the plaintiff union sued an employer claiming that it had failed to pay the union certain monies under the terms of the parties' collective bargaining agreement. The district court granted summary judgment to the union as to liability, but did not determine the amount of damages to which the union was entitled. *Id.* at 625.

Wanting to proceed immediately with an appeal on the liability issue, the parties agreed to the entry of a "Stipulated Judgment Order" providing that the employer would pay an agreed-upon amount of damages to the union if the district court's liability determination was upheld on appeal. The judgment specifically recited, however, that "none of the parties are waiving any rights or arguments in any subsequent proceedings, appeals, and/or further proceedings before the District Court and/or the United States Court of Appeals for the Sixth Circuit with respect to any issues, including but not limited to the amount of the damages to which the Plaintiffs are entitled to recover." *Id.*

The Sixth Circuit dismissed the appeal, finding that the "Stipulated Judgment Order" wasn't final because it "[left] open the possibility of 'piecemeal appeals.'" *Id.* at 626, quoting *Page Plus of Atlanta, Inc v Owl Wireless, LLC*, 733 F3d 658, 660 (CA 6, 2013). The Court observed that "[t]he point of the finality requirement . . . is to make the parties bring all of their issues—liability, damages, and whatever else they choose to litigate—in a single appeal." *Id.* The parties' "Stipulated Judgment Order" violated that fundamental principle because it would "'let the parties pause the litigation, appeal, then resume the litigation' on whatever issues they like" in the event that the court were to reverse the district court's liability determination. *Id.* (citation omitted).

The Sixth Circuit further explained that it didn't make a difference whether the litigation "potentially **would** come to a close" if the court affirmed the district court's decision on liability. *Id.* What mattered was that "the 'potential for piecemeal litigation'" remained if the Court did "anything but affirm." *Id.* (citation omitted).

It doesn't appear that either the Michigan Supreme Court or Court of Appeals has addressed this particular procedural issue, but there is little doubt that the result would be the same under the Michigan Court Rules. By definition, an order or judgment that reserves certain issues for further proceedings doesn't "dispos[e] of all the claims and adjudicate[e] the rights and liabilities of all the parties." MCR 7.202(6)(a)(i).

So while it may seem efficient to craft a judgment or order that decides the core issue in a case (such as liability) and leaves other issues potentially subject to being revisited in the event of a remand, the appellate courts don't see it that way. They see it as giving rise to the potential of piecemeal appeals, which are highly disfavored. If parties wish to preserve appellate rights, they need to ensure that a judgment or order is truly "final."

Endnotes

1 See Const 1963, art 6, § 10.
2 MCL 600.308(1).
3 MCL 600.308(2).
4 *Kocenda v Archdiocese of Detroit*, 204 Mich App 659, 666; 516 NW2d 132 (1994).
5 MCR 2.602(A)(3).
6 MCR 2.602, Staff Comment to 1998 Amendment (emphasis added).
7 *McCarthy & Assocs, Inc v Washburn*, 194 Mich App 676, 680; 488 NW2d 785 (1992).
8 *Id.*
9 *See, e.g., Washington v Starke*, 173 Mich App 230, 241-42; 433 NW2d 834 (1988).
10 MCR 7.203.

Legal Malpractice Update

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Rooker-Feldman doctrine bars FDCPA action against attorney-defendants based on erroneous interest rate calculation in state-court judgment

VanderKodde v Attorney Defendants, __ F Supp 3d __, 2018 WL 2229127 (WD Mich 2018), issued May 15, 2018.

Facts:

Plaintiffs filed a federal lawsuit against two groups of attorney-defendants claiming that they violated the FDCPA (and two state court statutes) by obtaining judgments and serving writs of garnishment that included an interest rate that wasn't authorized by state law. Attorney-defendants filed motions to dismiss based on the *Rooker-Feldman* doctrine: the principle that federal courts are precluded from acting as *de facto* courts of appeal for state court decisions. *Rooker-Feldman* prevents a party losing in state court from seeking what in substance would be appellate review of the state-court judgment based on the losing party's claim that the state-court judgment itself violated the loser's federal rights.

One group of attorney-defendants argued that the basic point of plaintiffs' claims is that the interest rate in the judgments is wrong and that the proper avenue to remedy an incorrect provision in a judgment is an appeal from that judgment in state court. It would violate *Rooker-Feldman* for the federal district court to review whether the interest rate in the state-court judgment was correct. So the attorney-defendants argued that the federal district court lacked jurisdiction over plaintiff's claims.

In a separate motion, the second group of attorney-defendants argued that a writ of garnishment is a state-court order subject to *Rooker-Feldman*. So if the interest calculated in a writ of garnishment was incorrect, the proper mechanism to have challenged the writ was to object in the state-court garnishment proceedings, not through a federal FDCPA action.

Ruling:

Judge Maloney agreed with attorney-defendants. First, the Court held that the plaintiffs' injuries from the incorrect interest rate were produced by the state-court judgments. It was not disputed that the interest requested in the writs of garnishment was calculated using the interest rate authorized by the underlying judgments. And *Rooker-Feldman* bars federal district courts from reviewing claims of legal error in state-court judgments. Consequently, the Court lacked jurisdiction over plaintiffs' FDCPA claims.

Similarly, the court determined that plaintiffs' injuries arose from the execution of the writs, not the statements contained in the request for the writs. The Michigan Court Rules provide a mechanism to object or challenge a defective writ: MCR 3.101. Yet plaintiffs never filed any objections in the garnishment proceedings. Because the plaintiffs never challenged the writs in state court, the federal court would have had to conclude that the writs were invalid or otherwise erroneously issued by the state court in order to grant plaintiffs any relief. In other words, the federal district court would have had to sit as an appellate court or grant relief from state-court orders. That is precisely what *Rooker-Feldman* prohibits.

The court also rejected the plaintiffs' argument that writs of garnishment did not function as final orders. Judge Maloney specifically held that garnishment proceedings are independent civil actions and that the writ constitutes an order of the court such that *Rooker-Feldman* applies. For *Rooker-Feldman* purposes, a state-court decision is final when the time for an appeal has expired. Because plaintiffs did not timely object

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to the garnishment in the state-court proceedings, the garnishment proceedings reached a final conclusion.

Practice Note:

As Judge Maloney explained in this case, "[t]he plaintiffs' remedy was to file an objection or an appeal, not a federal lawsuit." The court pointed out that where parties have the opportunity to challenge the amount of money that will be garnished, they should do so: "Parties should not sit on their hands, have the money garnished, and then sue in a different forum to recover the difference between the amount of interest collected and the amount owed."

It's noteworthy that another recent FDCPA decision in the Western District of Michigan reached a contrary conclusion regarding whether a writ of garnishment is a final order such that *Rooker-Feldman* applies, but under different factual circumstances. See *In re: FDCPA Cognate Cases*, 2016 WL 1273349 (WD Mich 2016) (noting that the costs added to the garnishment in those cases weren't awarded or expressly provided for in a judgment).

The use of *Rooker-Feldman* as a defense to FDCPA claims is growing and the law is evolving.

Lawyer-Guardian ad Litems entitled to immunity under the Government Tort Liability Act

Farris v Attorney-Defendant, __ Mich App __; __ NW2d___; 2018 WL 2269775 (2018)

Facts:

Attorney-defendant was appointed lawyer-guardian ad litem ("LGAL") in a child protective proceeding involving the child's parents. As a result of those proceedings, both parents' parental rights were terminated. The Supreme Court remanded the case to the trial court for reconsideration in light of the abolishment of the one-parent doctrine (see *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2015)), and the child's father's parental rights were subsequently reinstated.

After the reinstatement of his parental rights, the father, as next-friend, filed suit against attorney-defendant for legal malpractice arising from attorney-defendant's role as the plaintiff's LGAL. The complaint alleged that attorney-defendant failed to "inform himself of the true facts" of the child protective proceedings and failed to adequately advocate for the plaintiff-child.

Attorney-defendant moved for summary disposition under MCR 2.116(C)(7), arguing that he was entitled to governmental immunity under the Government Tort Liability Act (GTLA). The GLTA provides, "A guardian ad litem is immune from civil liability for an injury to a person or damage to property if he or she is acting within the scope of his or her authority as guardian ad litem." MCL 691.1407(6). But plaintiff argued that the GTLA only applied to a guardian ad litem (GAL), not an LGAL. The trial court disagreed, and plaintiff appealed.

Rooker-Feldman prevents a party losing in state court from seeking what in substance would be appellate review of the state-court judgment based on the losing party's claim that the state-court judgment itself violated the loser's federal rights.

Ruling:

The crux of the issue presented to the Court of Appeals is whether an LGAL falls within the plain meaning of "guardian ad litem" as it appears in the GTLA.

The GTLA doesn't define "guardian ad litem," while the Probate Code differentiates between a GAL and an LGAL. But the Legislature expressed a clear intent that the Probate Code definitions shouldn't be applied elsewhere. Thus, the fact that a GAL is defined separately from an LGAL in the Probate Code didn't affect the court's interpretation of what the Legislature intended by using the term "guardian ad litem" in the GTLA.

The court analyzed the differences between a GAL and a LGAL. For example, a GAL need not be an attorney, while an LGAL must be an attorney. The appointment of a GAL does not create an attorney-client relationship. And, unlike a GAL, a LGAL can't be called as a witness to testify regarding matters related to the child custody proceedings.

The duties of an LGAL also go beyond the duties of a GAL. The LGAL may advocate for a position, call witnesses, and participate in all aspects of the litigation. But an LGAL is not a party's attorney—it is an independent representative of the child's **best interests**. In fact, the court may appoint an **attorney** to represent the child if the child's interests differ from the LGAL's determination of the child's best interests.

The Court of Appeals turned to *Black's Law Dictionary* to define "guardian ad litem" as used in the GTLA. Using the dictionary definition, the court framed the issue presented as: "[W]hether an LGAL is someone appointed by the court to appear in a lawsuit on behalf of a minor and has the legal authority and duty to care for the minor's person or property." If they are, then they are entitled to immunity under the GTLA.

Although there are differences between a GAL and an LGAL, the Court of Appeals held that the LGAL serves the same basic function as a GAL: independently investigating, determining, and representing the child's best interests. Because an LGAL fits within the dictionary definition of "guardian ad litem" and serves the same basic function as a GAL, the Court of Appeals determined that the Legislature intended for LGALs to be covered under the GTLA.

Practice Note:

The Court of Appeals decision buttresses the importance of the LGAL's ability to make independent decisions regarding the child's best interests. If LGALs were not included in the class of GALs afforded immunity under the GTLA, lawyers may be reluctant to serve as LGALs. The Court of Appeals recognized that a LGAL's "independence and autonomy is essential to accomplishing" its task, and that an LGAL's ability to protect the best interests of the child would be "inherently compromised in the absence of immunity."

But an LGAL doesn't have carte blanche. Immunity only extends to their role as a LGAL. A court may also remove a LGAL if necessary.

MDTC Legislative Report

By: Graham K. Crabtree, *Fraser, Trebilcock, Davis & Dunlap PC*
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As I finish this report on June 6th, our legislators are rushing to finish as many projects as they can in the week or two of session that remains before this year's summer recess. Conference Committees are reaching the necessary compromises on the budget for the next fiscal year, and a variety of uncontroversial bills have been sent to Governor Snyder for his approval. With the return of mild weather, the advocacy on the Capitol lawn has resumed – some of it loud and angry, but most of it mannerly - so far.

A few controversial measures have been presented, and some have contributed to the partisan dust-up that is typically seen at the start of active campaigning in an election year when all legislative seats are up for grabs. **Senate Bill 897 (Shirkey – R)**, which would impose new work requirements for able-bodied Medicaid recipients, was passed by the Senate on April 19th on a party-line vote. The bill was reported by the House Appropriations Committee on June 6th by another party-line vote, with changes that have not satisfied its opponents, and it is anticipated that it will be passed and sent to the Governor before the recess.

The Legislature has now had and missed its chance to approve the proposed voter-initiated law legalizing recreational use of marijuana, which will now appear on the ballot in November. Many Republicans were on the fence about approving this measure, which would have allowed them to amend it to their liking later, with a simple majority vote. Many Democrats preferred to have the question submitted to the voters because an initiated law approved by the voters cannot be amended without a three-quarters vote in both Houses. At the end of yesterday's deadline, there were insufficient votes for approval, and thus no vote was taken.

In bitterly contentious sessions held on June 6th, the House and Senate voted to approve the voter-initiated law to repeal the Prevailing Wage Law, MCL 408. 551, *et seq*., which has previously required contractors to pay union-scale wages and benefits prevailing in the particular locality for state-funded construction projects. With the Legislature's vote to approve this highly controversial initiated law, the proposed repeal will now take effect without the approval of the Governor, who has been opposed to the repeal.

New Public Acts

There are now a total of 170 Public Acts of 2018 – 88 more than when I last reported on March 26th. The new Public Acts which may be of interest include the following:

2018 PA No. 131 – Senate Bill 841 (Brandenburg – R), which will amend the Uniform Partnership Act, MCL 449.46, to shield partners in limited liability partnerships from liability for all debts, obligations and liability of the partnership incurred while registered as a limited liability partnership. This will expand the scope of the protection previously provided by this provision, which has been limited to liability of the partnership for debts, obligations and liabilities arising from negligence, wrongful acts, omissions, misconduct or malpractice by another partner or an employee or agent of the partnership. This limitation of liability will not be affected by the dissolution of the limited liability partnership, but will not affect the personal liability of a partner for a debt, obligation or other liability of the partnership incurred or arising prior to the August 1, 2018 effective date of this amendatory act.

2018 PA No. 128 – House Bill 5012 (Lilly – R), which will amend the Michigan Election Law, MCL 168.862 and 168.879, to require a candidate who files a petition for a recount to allege a good-faith belief that, but for fraud or mistake, he or she would have had a reasonable chance of winning the election. This amendatory act,

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which will take effect on August 1st, was adopted in response to the petition for recount of the 2016 vote for the President filed by Green Party candidate Jill Stein, who had received less than 2% of the vote and therefore had no chance of altering the outcome by means of the requested recount. The necessary incentive for good-faith compliance with this new requirement will be provided by **2018 PA No. 130 – Senate Bill 290 (Robertson – R)**, also effective on August 1st, which will require payment of substantially increased fees for filing of recount requests when the difference between the number of votes cast for the winner and the petitioner is more than the greater of 75 votes or 5% of the sum of the votes cast for both candidates.

2018 PA No. 100 – House Bill 5456 (Wentworth – R), has amended the Revised Judicature Act to add a new Chapter 30A, to be known as the "Asbestos Bankruptcy Trust Claims Transparency Act." The provisions of this new chapter will require plaintiffs in actions seeking damages for exposure to asbestos to pursue opportunities to apply for and receive compensation for the alleged injuries from available asbestos trusts, and provide proof to the defense and the court of their efforts to do so. As used in these new provisions, an "asbestos trust" is defined to include a "government-approved or court-approved trust, qualified settlement fund, compensation fund, or claims facility that is created as a result of an administrative or legal action, a court-approved bankruptcy, or under 11 USC 524(g), 11 USC 1121(a), or another applicable provision of law and that is intended to provide compensation to claimants arising out of, based on, or related to the health effects of exposure to asbestos."

The defendant in an asbestos action will be allowed to seek discovery of trust claim materials, and plaintiffs will be required to consent to their disclosure. Trust claim materials may be used to prove alternative sources of the alleged harm, and may therefore serve as a basis for allocation of responsibility. If a plaintiff files an additional asbestos trust claim after obtaining a judgment in an asbestos action, a defendant or judgment debtor may seek to reopen and adjust the judgment by motion filed within one year after entry of the judgment.

This amendatory act creating the new Chapter 30A was effective April 2, 2018, and will apply to actions filed on and after that date. Its provisions will also apply to pending actions in which trial has not commenced before the effective date, but will not apply to any action in which a trial has been scheduled to occur before November 1, 2018.

2018 PA No. 95 – House Bill 5257 (Iden – R), will amend the Penal Code to create a new section 750.409b, which will administer a firm slap on the wrist to anyone who knowingly possesses ransomware with the intent to use or employ it for the purpose of introducing it into the computer, computer data, computer system, or computer network of another person without authorization from that person. The new section will define "ransomware" as "a computer or data contaminant, encryption, or lock that is placed or introduced without authorization into a computer, computer system, or computer network and that restricts access by an authorized person to a computer, computer data, computer system, or computer network in a manner that results in the person responsible for the placement or introduction of the ransomware demanding payment of money or other consideration to remove the computer contaminant, or restore access to the computer, computer system, computer network, or data." Violation will be a felony, punishable by imprisonment for up to 3 years. This new provision will take effect on July 1st.

[O]ur legislators are rushing to finish as many projects as they can in the week or two of session that remains before this year's summer recess.

New Initiatives

New bills of interest include:

House Bill 5675 (Sheppard – R), which would amend the Revised Judicature Act to add a new section MCL 600.2979, providing new caps on noneconomic damages, equal to the caps applied in medical malpractice cases, in actions for personal injury arising from the ownership, maintenance, or use of a motor vehicle. This bill was introduced and referred to the House Insurance Committee on March 1st.

House Bill 5779 (Lucido – R), which would amend the Revised Judicature Act, MCL 600.3815 and 600.3825, to provide that the court cannot order forfeiture or sale of a vehicle, boat, aircraft or other personal property as part of a judgment or order for abatement of a nuisance unless the owner of the property: 1) has been deported; 2) fails to claim an interest in the property; or 3) has been convicted of, or entered into an approved plea agreement for a nuisance offense listed in MCL 600.3801, and the property in question has been used for, or in furtherance of the offense. This bill was introduced and referred to the House Judiciary Committee on April 11th.

House Bill 5817 (Camilleri – D), which would amend the Revised Judicature Act, MCL 600.6419, to allow the State Administrative Board, "on the advice of the Attorney General," to hear, determine and allow claims of less than $5,000 against the Department of Transportation based upon the existence of potholes in the improved portion of the highway. This bill was introduced and referred to the House Committee on Transportation and Infrastructure on April 17th.

Senate Bill 1021 (Bieda – D), which would create a new act to be known as the "independent counsel act." The new act would allow the Governor or the Attorney General to petition the Court of Appeals for appointment of an independent counsel to investigate and prosecute cases of criminal activity when the Governor or the Attorney General determine that the Attorney General has a conflict of interest or there is the appearance of a conflict of interest with respect to the specific criminal matter. This bill was introduced and referred to the Senate Government Operations Committee on May 17th.

Old Business

In my last report, I discussed the highlights of a bipartisan package of eight Senate bills inspired by the sordid business of MSU team doctor Larry Nassar and his history of sexually abusing young women referred to him for medical

treatment. Those bills proposed a variety of measures designed to prevent similar abuses in the future and ensure that Nassar's victims and others similarly situated would be afforded an opportunity to seek and obtain a legal remedy against their abusers and those who should act on reports or evidence of such abuse but do not. These bills were introduced in the Senate on February 27th and subsequently passed with lightning speed on March 14th. A more deliberative approach has been taken in the House, which passed bill substitutes for three of the eight Senate bills on May 24th. The Senate has concurred in the House substitutes for two of those bills, which have now been enrolled for presentation to the Governor. Those bills are:

Senate Bill 871 (O'Brien – R) which, if approved, will amend the Code of Criminal Procedure, MCL 767.24, to extend the statutory limitation period for bringing charges of second-degree and third-degree criminal sexual conduct in cases where the victim is under 18 years of age. Under current law, charges for those offenses may be brought within 10 years of the offense or by the victim's 21st birthday, whichever is later. As passed by the Senate, the bill would have eliminated the limitation entirely for second-degree CSC and allowed prosecutions for most third-degree CSC offenses involving minors to be brought within 30 years, or by the victim's 48th birthday. As amended in the House, the bill would extend the period of limitation for those second and third-degree CSC offenses in a manner considerably less extreme than the extension proposed by the Senate. Charges of second-degree and third-degree CSC involving a victim under 18 years of age could be brought within 15 years after the offense (or identification of the perpetrator by DNA), or by the victim's 28th birthday, whichever is later.

Senate Bill 872 (Knezek – D) which, if approved, will amend the Revised Judicature Act, MCL 600.5805, and add a new § 600.5851b, to provide new extended periods of limitation for civil actions seeking damages for criminal sexual conduct. Section 5805 would be amended to provide a new 10-year period of limitation for civil actions based upon conduct that would constitute CSC under MCL 750.520b through MCL 750.520g (first, second, third and fourth-degree CSC and assault with intent to commit any of those offenses). For purposes of this new provision, it would not be necessary for a criminal prosecution or other proceeding to have been brought as a result of the conduct in question, or that a conviction result if any such prosecution or proceeding is brought.

The new § 5851b would provide a longer period of limitation for suits arising from acts of CSC committed against a minor. As passed by the Senate, the bill would have allowed the victim in those cases to file suit at any time before reaching his or her 48th birthday. The extension approved by the House was considerably less, allowing the victim to file suit within 3 years after the time the victim discovered or should have discovered the injury and the causal relationship between the injury and the CSC offense, or the victim's 28th birthday, whichever is later. As passed by the Senate, the extension of the limitation period would have applied retroactively to December 31, 1996, but for all such claims accruing more than 3 years before the effective date of this amendatory legislation, the claim would have to be filed within one year after the effective date. As passed by the House, the bill would allow retroactive application to December 31, 1996, limited to cases involving the specific circumstances of Nassar's case, but new claims arising from those offenses committed more than 2 years before the effective date of the legislation would have to be brought within 90 days.

This truncation of the Senate package should not cause any fear that the Legislature has opted to provide anything less than a comprehensive response to the Nassar problem. On May 24th, when the amended Senate bills were passed, the House also passed its own package of 24 bills designed to address every remaining issue. **(House Bills 5537, 5539, 5658-5661, 5783-5784, 5787-5800, 5982 and 6043)**. Those bills have proposed the creation of two new acts and amendment of several existing acts, including the Penal Code, the Code of Criminal Procedure, the Public Health Code, the Child Protection Law, the Revised School Code, the Crime Victims Rights Act, the Freedom of Information Act, and the Michigan Election Law.

The changes proposed by the House bills are too extensive and complex to be properly summarized here, but their general purposes are to: provide increased criminal penalties for sexual offenses against minors and other child sexually abusive activity; provide new administrative licensing sanctions for licensees who commit such offenses; regulate the performance of invasive medical procedures and require supervision and recording of those procedures; expand the statutory requirements for reporting of sexual offenses and increase the penalties for failure to do so; establish new procedures to facilitate the reporting and proper handling of complaints alleging improper sexual conduct in schools and colleges; protect the privacy of victims who choose to proceed anonymously in actions alleging sexual misconduct; and allowing the Governor greater authority to remove members of the State Board of Education and elected University Trustees for corrupt conduct, misfeasance or malfeasance in office.

These House bills appear to be on a very fast track. They were reported by the Senate Judiciary Committee on June 6th after the Committee heard testimony in a single hearing held the day before, and will now be considered by the full Senate. I will go out on a limb to predict that they will also be on the Governor's desk before the summer recess begins.

Online Resources

Our readers are again reminded that copies of legislative materials, including bills, resolutions, legislative analyses, the House and Senate journals, and a detailed history of each bill and resolution, may be found on the Legislature's very excellent website. The website includes copies of all public acts and the official compilation of Michigan statutory law. The available bills and resolutions include the versions as originally introduced and as passed by each house, and also includes links to bill substitutes which have been reported from the House and Senate committees or adopted in proceedings before the full House or Senate.

Medical Malpractice Report

By: Kevin M. Lesperance and David J. Busscher

Qualified Protective Orders Permitting *Ex Parte* Meetings for Everyone!

The Issue:

In the world of medical malpractice defense in Michigan, motions for a qualified protective order ("QPO") permitting defense counsel to meet with a patient's/plaintiff's healthcare providers *ex parte*, i.e., without plaintiff's counsel present, are standard practice. *Ex parte* meetings with treating healthcare providers have been permitted in Michigan for many years, as part of the state's broad discovery policies and promotion of efficient litigation practices. These meetings provide valuable insight regarding the facts and opinions held by the healthcare provider without the formality and expense of a deposition, and in a context where the provider can freely speak without the often disruptive influence of plaintiff's counsel. Before the Health Information Portability and Accountability Act of 1996 ("HIPAA"), which went into effect on April 14, 2003, these meetings were governed (and permitted) by common law in Michigan.

After HIPAA, however, it became necessary for practitioners to obtain a QPO consistent with the applicable HIPAA provisions regarding protected health information before such *ex parte* meetings could occur. Because the law concerning QPOs is somewhat nuanced and often applied inconsistently, we have seen fellow practitioners in cases where a plaintiff's medical condition is at issue in claims other than medical malpractice often shy away from them. This is unfortunate, though, because a QPO allowing *ex parte* meetings with a plaintiff's healthcare providers is obtainable, and a valuable tool that levels the playing field, provides opportunity for efficient informal discovery, and can reveal helpful witnesses with an intimate knowledge of the medical conditions and treatment at issue. Accordingly, we recommend that in any personal injury case where a plaintiff's medical condition is at issue, you should consider obtaining a QPO and meeting *ex parte* with the plaintiff's treating healthcare providers. The purpose of this article is to provide you with the legal background necessary to accomplish that task.

HIPAA Permits Disclosure of Protected Health Information in Litigation:

HIPAA is the federal regulation that governs the retention, use, and transfer of information obtained during the course of the physician-patient relationship.[1] It imposes rigorous requirements regarding the use of protected health information. As explained by the Michigan Supreme Court, "under HIPAA, the general rule pertaining to the disclosure of protected health information is that a covered entity may not use or disclose protected health information without a written authorization from the individual described in 45 CFR 164.508, or, alternatively, the opportunity for the individual to agree or object as described in 45 CFR 164.510."[2] Though the restrictions are burdensome, HIPAA does not impose a complete ban on the disclosure of protected heath information. 45 CFR § 164.512 "enumerates several specific situations in which '[a] covered entity may use or disclose protected health information without the written authorization of the individual, as described in [45 CFR] 164.508, or the opportunity for the individual to agree or object as described in [45 CFR 164.510….]."'[3] Included within those situations is disclosure for judicial proceedings, which allows a healthcare provider to disclose the protected information in response to an order or in response to a discovery request if the healthcare provider receives satisfactory assurance that reasonable efforts were made to secure a qualified protective order.[4]

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The applicable HIPAA provision pertaining to Qualified Protective Orders, 45 CFR § 164.512, provides specifically as follows:

Uses and disclosures for which an authorization or opportunity to agree or object is not required:

A covered entity may use or disclose protected health information without the written authorization of the individual, as described in § 164.508, or the opportunity for the individual to agree or object as described in § 164.510, in the situations covered by this section, subject to the applicable requirements of this section. When the covered entity is required by this section to inform the individual of, or when the individual may agree to, a use or disclosure permitted by this section, the covered entity's information and the individual's agreement may be given orally.

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(e) Standard: Disclosures for judicial and administrative proceedings

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(i) *Permitted Disclosures*. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

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(ii) In response to a subpoena, discovery request or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

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(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

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(iv) For the purposes of paragraph (e)(1)(ii)(B) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

***

(B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.

(v) For purposes of paragraph (e)(1) of this section, **a qualified protective order means**, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, **an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that**:

(A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

(B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

45 CFR § 164.512 (emphasis added). Importantly, these are the **only** provisions a QPO must contain to be qualified under HIPAA. Plaintiffs often request additional provisions, such as notice of the *ex parte* meeting or even the ability to attend the meeting, but those provisions are not by any means required by law, and in fact work to defeat the *ex parte* nature of the meeting itself.

Michigan Law Permits *Ex Parte* Meetings

Under Michigan law, when the physical condition of a party is in controversy, medical information about the condition is subject to discovery to the extent that the party does not assert the physician-patient privilege. Specifically, MCR 2.314(A) provides that when a mental or physical condition of a party is in controversy, medical information about the condition is subject to discovery to the extent that (a) the information is otherwise discoverable under MCR 2.302(B); and (b) the party does not assert that the information is subject to a valid privilege. MCR 2.314(B)(1) then explains, as follows:

> A party who has a valid privilege may assert the privilege and prevent discovery of medical information relating to his or her mental or physical condition. The privilege must be asserted in the party's written response to a request for production of documents under MCR 2.310, in answers to interrogatories under MCR 2.309(B), before or during the taking of a deposition, or by moving for a protective order under MCR 2.302(C). A privilege not timely asserted is waived in that action, but is not waived for the purposes of any other action. [MCR 2.314(B)(1).]

In *Domako v Rowe*, 438 Mich 347; 475 NW2d 30 (1991), for instance, the Court addressed the waiver of the physician-patient privilege in a medical malpractice context, as well as the permissibility of *ex parte* interviews of the plaintiff's treating physicians by defense counsel. Defense counsel in *Domako* subpoenaed medical records of the plaintiff's subsequent treating physician, and the plaintiff executed releases for medical records. Defense counsel then met *ex parte* with the plaintiff's physician. The plaintiff in *Domako* claimed that this *ex parte* interview violated the physician-patient privilege.

The Court held that by signing the authorization form permitting the release of medical information (which a plaintiff is required to do in order to maintain a medical malpractice action under Michigan law[5]), and by not asserting the privilege in response to a request to produce, the plaintiff waived the privilege for purposes of the action.[6] The Court based its decision on MCR 2.314(B)(1), and found that the Court Rules require a plaintiff to decide whether to assert the privilege at the discovery stage, rather than at trial. *Id*. The *Domako* Court reasoned that, "[o]nce the privilege is waived, there are no sound legal or policy grounds for restricting access to the witness."[7] The Court found that defense counsel was permitted to conduct *ex parte* interviews of a plaintiff's physicians once the privilege was waived.[8] This holding recognized that informal discovery methods such as *ex parte* meetings, even though they are not specifically provided for in the Michigan Court Rules, provide "equal access to relevant evidence and efficient, cost-effective litigation."[9] The fact that *ex parte* meetings are not referenced in the Court Rules certainly does not mean that that form of informal discovery is prohibited.[10]

The Supreme Court's decision in

Domako stands for the proposition that a plaintiff cannot assert the physician-patient privilege and then prevent the defense from obtaining relevant medical information from treating healthcare providers in preparation for trial (including through *ex parte* meetings), while still using that medical information to support a claim. In Michigan, that privilege is statutory and provided in MCL 600.2157, which states that "a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character," except as otherwise provided by law. Based on this privilege, MCR 2.314(B)(1) allows a party to "prevent discovery of medical information relating to his or her mental or physical condition," although the privilege is waived if not timely asserted.

It is difficult, though, for a plaintiff alleging any kind of personal injury to invoke that privilege and still maintain their case. MCL 600.2157 itself provides automatic waiver of the privilege in certain circumstances:

If the patient brings an action against any defendant to recover for any personal injuries, or for any malpractice, and the patient produces a physician as a witness in the patient's own behalf who has treated the patient for the injury or for any disease or condition for which the malpractice is alleged, the patient shall be considered to have waived the privilege provided in this section as to another physician who has treated the patient for the injuries, disease, or condition.

Obviously, where a plaintiff must produce evidence to support their claims regarding their medical condition and alleged damages, the plaintiff cannot also invoke the physician-patient privilege and prevent discovery of those issues. Beyond that, MCR 2.314(B)(2) imposes serious consequences where a plaintiff prevents discovery through the assertion of privilege:

Unless the court orders otherwise, if a party asserts that the medical information is subject to a privilege and the assertion has the effect of preventing discovery of medical information otherwise discoverable under MCR 2.302(B), the party may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or mental or physical condition.

For this reason, the physician-patient privilege is rarely asserted by plaintiffs in actions where a QPO may be appropriate, either because the privilege has been automatically waived, or because claim of the privilege would compromise their ability to prove the injury and damages that are essential to their claim. In fact, where such a privilege is asserted to prevent discovery, defense counsel should strongly consider a motion for summary disposition.

Furthermore, even after the passage of HIPAA, the Michigan Supreme Court recognized, in *Holman v Rasak*, 486 Mich 429; 785 NW2d 98 (2010), that defendants may still conduct *ex parte* interviews as previously allowed in *Domako*, *supra*, so long as compliance with federal law has been achieved. In *Holman*, the trial court prohibited the defendants from conducting oral interviews of plaintiff's healthcare providers, and found that such meetings were prohibited by HIPAA.[11] The Court of Appeals held this was an erroneous conclusion and found "[q]uite simply, defendants may conduct an *ex parte* oral interview with [plaintiff's] physician if a qualified protective order, consistent with 45 CFR § 164.512(1)(e), is first put in place."[12] The Michigan Supreme Court affirmed the Court of Appeals, reasoning that Michigan's law allowing *ex parte* interviews and HIPAA could be read harmoniously.[13]

QPOs and *Ex Parte* Meetings Are Not Limited to Medical Malpractice Cases:

QPOs permitting *ex parte* meetings are not limited to medical malpractice actions, but yet many practitioners are under the impression such an order should only be entered in a case claiming medical malpractice. Part of this misunderstanding probably stems from the automatic waiver of the physician-patient privilege of a plaintiff in a medical malpractice case—there is less hassle to determine whether or to what extent a plaintiff claims to have waived the privilege. In addition, the central issue in a medical malpractice case is the medicine itself, so the medical condition of the plaintiff is relevant not only to issues of causation and damages, but also to what duty was owed in the first place, i.e., the standard of care. This differs from many other types of cases, where a physical injury or medical condition is only connected to the analysis of damages, with central liability issues in the case focusing elsewhere.

Nevertheless, **a QPO allowing *ex parte* meetings is appropriate in any case where a party puts their physical condition at issue—not just in medical malpractice cases. The same benefits that *ex parte* meetings provide in medical malpractice actions, including "equal access to relevant evidence and efficient, cost-effective litigation,"[14] are just as applicable to other types of cases.** In *Davis v Dow Corning Corp*, 209 Mich App 287, 293; 530 NW2d 178 (1995), the Michigan Court of Appeals specifically held, in light of *Domako*, that *ex parte* meetings are proper following waiver of the physician-patient privilege "in all types of civil litigation." In *Davis*, a products lability action, a QPO permitting *ex parte* meetings was found to be appropriate because the plaintiffs "brought personal injury claims" and "placed their physical conditions in controversy."[15] Similarly, the Court of Appeals has found that *ex parte* interviews with treating physicians were proper, following the waiver of the physician-patient privilege, in the context of a life insurance dispute,[16] and in the context of an automobile negligence claim.[17] The Court in *Davis* explained that "nothing in the Court's reasoning in *Domako* regarding the propriety of ex parte interviews with treating physicians is tied in any manner to the unique features of medical malpractice cases."[18] The Court instead observed that "the *Domako* decision is based upon this state's broad policy favoring far-reaching, open, and effective discovery practice, applicable in all types of civil litigation, and the conclusion that ex parte discovery interviews appear to advance those well-recognized policy goals."[19]

The availability of *ex parte* meetings in any context, medical malpractice or otherwise, is a key tool for defense counsel. Whereas a plaintiff's attorney often has months or years to obtain and review records, defense counsel often has to scramble to analyze a plaintiff's claims and specifically any evidence of personal injury or damages. Similarly, a plaintiff's attorney has access to the plaintiff's healthcare providers long before a claim is filed, and does not have to contend with a refusal to waive privilege by their own client. Participating in *ex parte* meetings as defense counsel is strategically important, because it allows factual investigation and consideration of potential witnesses

without the plaintiff's attorney being involved and aware of the direction of the defense. The meetings allow defense counsel both to determine whether a given witness may hurt or help the defense, and to determine whether the plaintiff has already met with a particular witness. The *ex parte* meetings also really do promote efficient and economic discovery practices, allowing short, informal meetings with treating healthcare providers that help determine whether a more formal and costly deposition may be necessary. It would be frustrating, inefficient and costly to notice a treating healthcare provider for a deposition, only to pay the associated costs and learn that the witness has no relevant testimony to provide. Plaintiff attorneys recognize these benefits, and regularly fight to prohibit or restrict *ex parte* meetings, but defense counsel should not sacrifice the benefits of *ex parte* meetings for the ease of avoiding a fight.

Additional QPO Provisions Are Unnecessary And Improper:

Often, in response to Motions for Qualified Protective Orders, plaintiffs implore Courts to impose additional conditions or restrictions to Qualified Protective Orders beyond those required to comply with federal HIPAA requirements. As already quoted above, HIPAA requires a Qualified Protective Order to contain two provisions: (1) that protected health information will not be disclosed outside the context of litigation; and, (2) that it will be destroyed at the end of litigation.[20] Neither Michigan law nor HIPAA contain any requirements to include any additional provisions in QPOs. Despite that fact, plaintiffs often assert that both Michigan law and HIPAA require additional provisions to "protect plaintiff's rights," and regularly request that a host of additional provisions be included that seek to obstruct your client's rights to the same discovery as the plaintiff, often including a request for notice of the *ex parte* meetings and the opportunity to be present at those meetings, as well as a host of other additional provisions we have seen.

However, Michigan law is extremely clear that additional requirements on QPOs beyond those required by HIPAA are improper, and that it is in fact an error to impose conditions in a Qualified Protective Order "unrelated to compliance with HIPAA, or any related privacy concerns, and in the absence of evidence to support a reasonable concern for intimidation, harassment, and the like."[21] The Michigan Court of Appeals specifically and unequivocally addressed the issue of additional provisions in QPOs in the case of *Szpak v Inyang*, 290 Mich App 711; 803 NW2d 904 (2010). There, the Court made clear that absent specific, extraordinary, case-specific facts showing that justice requires additional QPO provisions beyond those required by HIPAA, no such provisions should be imposed. There is no need to address each specific issue raised there, but any practitioner pursuing a QPO should be familiar with that case (as well as *Holman* and *Domako*). Despite this clear law, plaintiff attorneys nevertheless often try to convince a court that an additional provision or two is necessary and appropriate. In those situations, and really in every case, it is helpful to point out that the Court of Appeals regularly reverses a trial court's decision to add unnecessary provisions to a QPO.[22] In fact, the Court of Appeals has determined that the issue is so legally clear that it has even peremptorily reversed the decision of a trial court to require that defense counsel provide notice of *ex parte* meetings to the plaintiff's attorney, relying on *Szpak*, *Domako*, and *Holman*.[23]

Put simply, where a plaintiff puts his or her physical or medical condition at issue, there is sufficient good cause to enter a QPO allowing *ex parte* meetings with the plaintiff's healthcare providers such that it should really be entered as a matter of course. Many plaintiff attorneys just stipulate to the entry of a QPO, recognizing the clear applicable law, while others fight every step of the way hoping to get something out of the trial court in an area of law potentially unfamiliar to the trial judge. Importantly, the QPO does not create a new right—Michigan law already permits *ex parte* meetings as a form of discovery. The only reason a QPO is necessary is so that protected health information is guarded as required under HIPAA, and so that medical providers can be assured that they will not be violating HIPAA by disclosing the requested medical information. It can be helpful to add some explanatory provisions to the QPO, such as a provision stating that the healthcare providers are not required or forced to speak/meet with defense counsel; a provision stating that the provider may have his or her own counsel present at any such meeting if desired; and a provision stating that defense counsel will provide a copy of the QPO to a provider before the meeting takes place.

Beyond these explanatory provisions, though, a QPO should only provide that the protected health information will not be disclosed outside the context of litigation and that it will be destroyed at the end of litigation, because that is all that HIPAA requires. With these provisions in place through a QPO, *ex parte* meetings with the plaintiff's healthcare providers should be available and seriously considered by defense counsel in any case where a plaintiff's medical condition is at issue – and not just in medical malpractice cases.

Endnotes

1 *In re Petition of Attorney Gen for Investigative Subpoenas*, 274 Mich App 696, 699; 736 NW2d 594 (2007).

2 *Holman v Rasak*, 486 Mich 429, 438-439; 785 NW2d 98 (2010).

3 *Id*. at 439.

4 45 CFR § 164.512(e).

5 See MCR 2.314.

6 *Domako*, 438 Mich at 356-357.

7 *Domako*, 438 Mich at 361.

8 *Id*. at 362.

9 *Id*.

10 *Id*.

11 *Id*. at 432

12 *Holman v* Rasak, 281 Mich App 507, 515; 761 NW2d 391 (2008).

13 *Holman*, 486 Mich at 432.

14 *Id*.

15 *Davis*, 209 Mich App at 293.

16 See *GP Enterprises, Inc v Jackson Nat Life Ins Co*, 202 Mich App 557, 567; 509 NW2d 780 (1993).

17 See *Belote v Strange*, unpublished per curiam opinion of the Court of Appeals, issued October 25, 2005 (Docket No. 262591); 2005 Mich. App. LEXIS 2642.

18 *Davis*, 209 Mich App at 293.

19 *Id*.

20 45 CFR § 164.512(e)(v).

21 *Szpak v Inyang*, 290 Mich App 711, 716; 803 NW2d 904 (2010).

22 See *Dilworth-Stricklin v St Joseph Mercy Hosp Ann Arbor*, Order of the Court of Appeals, issued January 4, 2013 (Docket No. 310181) and *Roddenberg v St Joseph Mercy Hosp*, Order of the Court of Appeals, issued March 19, 2013 (Docket No. 313228), (relying on *Szpak*, and recognizing that trial courts abused their discretion by imposing additional conditions to QPO in the absence of identified facts specific to the case showing that justice required those conditions.

23 *Estate of Mary L. Brown v Borgess Medical Center*, Order of the Court of Appeals, issued September 14, 2015 (Docket No. 327653)

No-Fault Report

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Killing the Goose … Again (And We're Not Talking About the Detroit Tigers Rally Goose!)

Court of Appeals Refuses to Enforce Fraud Exclusion in the Face of an Admittedly Fraudulent Claim for Attendant-Care-Service Benefits in a Controversial 2-1 Decision

In the January 2017 issue of the MDTC Quarterly magazine, we published an article extolling the virtues of the Court of Appeals' decision in *Bahri v IDS Property Casualty Ins Co*, 308 Mich App 420, 864 NW2d 609 (2014) and how it was such a powerful tool in rooting out fraudulent no-fault insurance claims.[1] In *Bahri*, the Court of Appeals determined that where an injured claimant submitted a claim for no-fault benefits that was directly and specifically contradicted by other evidence, such as surveillance, the fraud exclusion contained within most insurance policies could conceivably be triggered. This, in turn, would result in voiding all coverages under the no-fault policy – not just the particular benefits for which the claim was filed. Simply put, an insured's fraudulent claim for, say, household replacement service expenses could void all coverages under the policy, including claims for medical expenses, even though the medical providers themselves were obviously not a party to the fraudulent conduct.

In the very next issue, though, published in April 2017, entitled: "Killing the Goose that Laid the Golden Egg," this author analyzed the Court of Appeals' Valentine's Day gift to the plaintiff's bar in *Shelton v Auto-Owners Ins Co*, 318 Mich App 648, 899 NW2d 744 (2017), which was released on February 14, 2017. In that case, the Court of Appeals ruled that the only parties bound by the fraud exclusion contained within an insurance policy are the named insured, his or her spouse or a relative of either domiciled in the same household – all of whom obtain their benefits through MCL 500.3114(1). All other claimants who are "strangers to the insurance contract," including motorcyclists, occupants of motor vehicles who do not have a policy of insurance available to them in their household or pedestrians who similarly do not have a policy of insurance available to them in their households, derive their benefits by statute . . . not by contract.[2] Therefore, as "strangers to the insurance contract," these claimants are not bound by the fraud exclusion contained within those policies. Although the Court of Appeals' decision in *Shelton* seems to open the door for fraudulent claims, at least those of us who practice extensively in this area believed that we had a "bright line rule" between fraudulent conducts perpetrated by the named insured, his or her spouse or a relative domiciled in the same household, and the proverbial "strangers to the insurance contract." Given the fact that the Michigan Supreme Court denied the insurer's application for leave to appeal,[3] it seemed as if the Michigan Supreme Court had little interest in taking up the issue of fraudulent no-fault insurance claims.

However, on May 29, 2018, the Court of Appeals issued a published, and therefore binding, decision, which effectively "kills the goose that laid the golden egg" in *Bahri, supra,* once again! In a controversial 2-1 decision, which seems destined to find its way to the Michigan Supreme Court, the Court of Appeals in *MEEMIC Ins Co v Fortson,* __ Mich App __; __ NW2d __ (Docket No. 337728, rel'd 5/29/2018), over a strongly worded dissent by Judge Cameron, issued a number of rulings that effectively gut the impact of *Bahri* and its progeny, even where the fraud is being perpetrated by the named insured himself!

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As noted above, *Fortson* was a 2-1 decision. The majority opinion was authored by Judge Michael J. Kelly. Judge Kelly was joined by Judge Jane Markey. Judge Thomas Cameron dissented.

In *Fortson*, MEEMIC Insurance Company insured Richard and Louise Fortson. Their son, Justin Fortson, was a resident relative. In September 2009, Justin Fortson, then 19 years old, was riding on the hood of a vehicle when the driver suddenly accelerated and turned. Justin was thrown from the vehicle and struck his head on the ground. As a result, he suffered a fractured skull, a traumatic brain injury and bruising on his shoulder. After his initial hospitalization, he returned to live with his parents, who began submitting claims for 24-hour per day attendant care service benefits. MEEMIC paid the attendant care claims without question, as the claims representative testified that she knew that Justin had sustained a serious traumatic brain injury with significant residual effects requiring "24/7 supervision." In June 2010, MEEMIC notified the Fortson's that their policy would be cancelled effective July 29, 2010.

In 2014, MEEMIC conducted an investigation and determined that despite the attendant care submissions, the parents were not providing Justin with "daily direct supervision." Instead, MEEMIC uncovered the following information:

> Indeed, the investigation showed that Justin had been periodically jailed for traffic and drug offenses and had spent time at an inpatient substance-abuse rehabilitation facility. Additionally, on social media, Justin had referenced spending time with his girlfriend and smoking marijuana. Based on its investigation, MEEMIC concluded that Louise and Richard had fraudulently represented the attendant care services they claim to have provided. MEEMIC terminated Justin's no-fault benefits and filed suit against Louise and Richard, alleging that they had fraudulently obtained payment for attendant care services that they had not provided. Louise and Richard filed a counter complaint, arguing that MEEMIC breached the insurance contract by terminating Justin's benefits and refusing to pay for attendant care services. [*Fortson*, slip op at 2.]

Following the close of discovery, both sides filed cross motions for summary disposition. The Berrien County Circuit Court granted the insurer's motion for summary disposition, and denied the Fortson's cross-motion for summary disposition.

On appeal, the Court of Appeals reversed the decision of the lower court and remanded the matter back to the Circuit Court for further proceedings consistent with the majority opinion. In doing so, the Court of Appeals issued a number of key rulings.

However, on May 29, 2018, the Court of Appeals issued a published, and therefore binding, decision, which effectively "kills the goose that laid the golden egg" in *Bahri, supra,* once again!

First, the Court of Appeals recognized that the parents had undoubtedly submitted a fraudulent claim for no-fault attendant care service benefits. Each of the necessary fraud elements, set forth in the Michigan Supreme Court's decision in *Titan Insurance Company v Hyten*, 491 Mich 547; 817 NW 2d 562 (2012), were satisfied. The parents admitted that they were aware that Justin was incarcerated and that he had spent time at an inpatient drug rehabilitation facility, during which time they continued to submit claims for attendant care services which were not being performed. Therefore, the Court of Appeals accepted as true the assertion that MEEMIC's named insureds (the parents) had committed fraud with regard to the claim for attendant care services.

However, the Fortson's argued that their son, Justin Fortson, was an "innocent third party" "because there were no allegations or evidence that Justin participated in or even benefitted from his parents' fraud." The Court then determined that the abrogation of the "innocent third party" rule only comes into play when there is fraud in the procurement of the policy, not fraud in a claim submitted under the policy. In this regard, the Court observed that in both *Hyten, supra*, and *Bazzi v Sentinel Ins Co,* 315 Mich App 763, 891 NW 2d 13 (2016) (which abrogated the "Innocent Third Party" Doctrine as applied to statutorily mandated benefits), the fraudulent acts were committed while procuring the subject policy of insurance. Therefore, the "innocent third party" rule still survived in this case because the policy was "properly procured." As stated by the Court of Appeals:

> "This is because there is a meaningful distinction between fraud in the procurement of a no-fault policy and fraud arising *after* a claim was made under a properly procured policy. For instance, when a policy is rescinded on the basis of fraud in the procurement of the policy, it is as if no valid policy ever existed. As this Court explained in *Bazzi*, mandating no-fault benefits when an insurer can declare a policy void *ab initio* on the basis of fraud in the procurement would be akin to requiring the insurer to provide benefits in the case where the automobile insurer had never obtained an insurance policy in the first place." [Citation omitted]. Thus, fraud in the procurement essentially taints the entire policy and all claims submitted under it. In contrast, 'if there is a valid policy in force, the statute controls the mandated coverages.' Here, when Justin submitted his claim that there *was* a valid policy in place, there were no allegations of fraud in the application tainting the validity of the policy. Therefore, under the No-fault Act Justin was required to seek no-fault benefits from his parents' no-fault policy. See MCL 500.3114(1). The mere fact that fraud arose in connection with attendant care services forms submitted *after* Justin made his claim simply has no bearing as to whether or not there was a valid policy in effect at the time he made his claim. Accordingly, we conclude that the trial court erred in finding *Bazzi* dispositive. [*Fortson*, slip op at 3-4.]

In this regard, the Court of Appeals recognized that what MEEMIC was trying to do was to rescind coverage altogether. Noting that "rescission is generally viewed as an equitable remedy," the Court must weigh the equities and in doing so, the Court of Appeals noted:

> However, in this case, equity appears to lean in favor of protecting the innocent third party who was statutorily mandated to seek coverage under a validly procured policy and was, unlike the Claimant in *Bahri*, wholly uninvolved in the fraud committed *after* the policy was procured. [*Id,* fn 1.]

In this regard, Judge Cameron, in his dissent, squarely rejected this so-called "meaningful distinction" and noted that the fraud exclusion contained in the policy applied with equal force to both a fraud in the insurance application, and fraud in the making of a claim – regardless of the identity of the person submitting the fraudulent claim.

Next, the Court addressed the validity of the fraud exclusion contained in the MEEMIC policy, which provides:

> This entire policy is void if any **insured person** has intentionally concealed or misrepresented any material fact or circumstance relating to:
>
> A. This insurance;
>
> B. the Application for it;
>
> C. or any claim made under it.

The Court noted that pursuant to its earlier decision in *Shelton, supra,* if a person were not an "insured person" under an insurance contract, but rather were "strangers to the contract," they would not be bound by any fraud exclusion contained in the policy. The court recognized that Justin Fortson was, in fact, an "insured person" under the insurance contract. However, the Court of Appeals ruled that, even as applied to an "insured person," the fraud exclusion conflicted with the priority provisions in MCL 500.3114(1) and was therefore void. As noted by the Court of Appeals:

> Under MEEMIC's logic, by duplicating statutory benefits in a no-fault policy, an insurer can avoid paying no-fault benefits to an injured Claimant if someone other than the Claimant commits fraud and triggers a fraud-exclusion clause that allows the policy to be voided. We do not agree that the statutory provisions can be so easily avoided. 'An insurer who elects to provide automobile insurance is liable to pay no-fault benefits subject to the provisions of the No Fault Act.' [Citation omitted]. Contractual provisions in an insurance policy that conflict with statutes are invalid. [Citation omitted]. Because MCL 500.3114(1) mandates coverage for a resident relative domiciled with a policy holder, the fraud-exclusion provision, as applied to Justin's claim, is invalid because it conflicts with Justin's statutory right to receive benefits under MCL 500.3114(1). And, as explained above, his statutory right to receive benefits under the No-fault Act was triggered because his parents had a validly procured no-fault policy in place at the time of the motor vehicle accident.

As noted above, in *Shelton*, the Court of Appeals ruled that "strangers to the contract" are not bound by the fraud exclusion in an insurance contract. In *Fortson*, the Court of Appeals took the analysis one step further and essentially ruled that the insurer's incorporation of no-fault benefits into an insurance policy was simply a way of attempting to avoid the court's ruling in *Shelton.* As a result, if an "insured person" other than the injured person is submitting a fraudulent claim, the injured person's entitlement to benefits is still preserved.

Next, the Court of Appeals determined that even if the fraud exclusion clause was valid, with regard to the claims presented by Richard and Louise Fortson on behalf of their son, the fraud exclusion was no longer applicable because the policy had been cancelled back in 2010! As a result, even though Justin's claim for no-fault benefits was preserved or "locked in" as of the date of the accident, which is typically what happens with regard to "occurrence policies," the same could not be said for the parents. Because they were no longer "insured persons" under the insurance contract (because the policy was no longer in force), they were no longer bound by the fraud exclusion contained in the policy! As stated by the Court of Appeals:

> Accordingly, once the policy was cancelled on July 29, 2010, Louise and Richard were no longer named insureds under the policy, which means that they were no longer 'insured persons' as defined in the policy. Further—and this is key—because the fraud was committed *after* the cancellation of the policy, when they were no longer insured persons, their actions were irrelevant for purposes of triggering the fraud-exclusion clause. [*Fortson*, slip op at 6.]

What the court is essentially saying is that even though the injured person's right to recover benefits continues under the policy, the other provisions of that policy, such as the fraud exclusion, no longer apply.

The Court of Appeals' majority grudgingly noted that the insurer is not without a remedy. It can deny the attendant care claims based on fraud. It could also conceivably sue the parents to recover payment of the attendant care monies wrongfully paid. The majority simply ruled that the insurer could not utilize the general fraud exclusion to void all coverages available under the policy in the future.

As noted above, Judge Cameron issued a dissent. First, Judge Cameron opined that "the majority resurrects, albeit in a new form, the abolished innocent third party rule" which had been abrogated in the Court of Appeals' decision in *Bazzi, supra.* In this regard, Judge Cameron noted that whether a policy is void due to a fraud in the application, or void due to a fraudulent claim, the result should be the same—Justin "should not be allowed to continue to collect PIP benefits"[4] because the policy no longer exists.

Second, Judge Cameron noted that with regard to the majority's invalidation of the general fraud exclusion clause, "the majority's holding carves out an unprecedented exception to the general rule that a fraud provision in an insurance policy is valid."[5] In this regard, Judge Cameron noted that

"there is no meaningful distinction for purposes of coverage between a policy holder and resident relative" under MCL 500.3114(1). According to Judge Cameron:

> Whether a policy holder or a resident relative, the policy's provisions are applicable to the no-fault claim as long as they do not conflict with the No-fault Act. [Citation omitted]. In this case, the policy, including the fraud provision, applies to Justin's claim as a resident relative, and that fraud provision does not contravene the No-fault Act. [Citation omitted]. Contrary to what the majority claims, the policy is not 'duplicating statutory benefits.' Instead, it is providing the terms of coverage, which are subject to the No-fault Act. [*Fortson*, slip op at 3 (Cameron, J. dissenting).]

Finally, Judge Cameron argued that under the policy, all of the provisions carry through, even after the policy is cancelled, because the basis for the "claim" — the automobile accident — occurred while the policy was still in effect. As noted by Judge Cameron:

> The claims for attendant care benefits — even if sought after the cancellation of the contract — still originate from the initial claim for no-fault benefits. Defendants cannot avoid the consequences of committing fraud simply because the policy is no longer in effect. Any such outcome contravenes the purpose of an occurrence-based policy.

Based upon the strength of Judge Cameron's dissenting opinion, it seems highly likely that MEEMIC will, in fact, file an application for leave to appeal with the Michigan Supreme Court.

SO NOW WHAT?

If the reader works for an insurance company that handles first-party no-fault claims, or represents insurers in first-party litigation, you should probably look at precisely who is submitting the potentially fraudulent attendant care service claim forms. In many cases, it is the attorney for the injured claimant that is submitting the claims for attendant care services – not just the service providers individually. In those cases, the author questions whether the "innocent third-party" Doctrine really applies. After all, the claim is being submitted **by the injured person himself**, through his or her legal representative – his or her attorney! Certainly, when representing an injured claimant, his or her attorney should be counseling both the injured claimant and his or her care providers not to submit fraudulent claims, which could conceivably jeopardize the injured person's entire claim under the general fraud exclusion in the policy. Furthermore, if the attorney demands that the insurer issue a three-party check, payable to the injured claimant, the attendant care service provider, and the law firm, could it not be argued that, by negotiating such third-party checks, the injured claimant is complicit in the fraud being perpetrated by his or her service providers?

Second, the insurer should change its attendant care service claim forms and require that the injured person sign off, and thereby ratify, any claims for attendant care service benefits that are purportedly rendered on his or her behalf. If the insurer utilizes its own attendant care service claim forms, which does not contain a space for the injured claimant to ratify the claim, the forms should immediately be altered to incorporate language to the effect of:

> I, [injured person] affirm that the above-described attendant care/nursing care/supervisory care services were, in fact, performed by the individual identified above, for the hours and on the dates identified above, and were performed for my benefit.

In *Fortson*, it appears that the attendant care service claim forms were being submitted by the service providers, without any verification or ratification by the injured claimant.[6] If Justin Fortson had verified, and perhaps even ratified, the attendant care service claim forms that were being submitted on his behalf, the author doubts whether he would still be considered an "innocent third party" under those circumstances.

Third, perhaps the Legislature should step in and amend the No-fault Insurance Act to make the provisions of MCL 500.3173a(2), applicable to claims arising out of the Michigan Assigned Claims Plan (where there are no policies of insurance) applicable in all cases involving claims for no-fault insurance benefits. In other words, our elected representatives should consider legislatively overruling both *Shelton* and *Fortson*, and finally provide insurers and defense counsel with valuable tools to combat fraudulent no-fault insurance claims.

Finally, there is always hope that the Michigan Supreme Court might take up the insurer's appeal, reverse the decision of the Court of Appeals and give the insurers some ammunition to combat the blatantly fraudulent claims for no-fault insurance benefits that undoubtedly drive up the cost of no-fault insurance benefits.[7] In the meantime, insurers and their defense counsel will simply need to deal with this decision by making the changes referenced above. Stay tuned.

Endnotes

1 Don't believe me? I invite the reader to spend two weeks in the medical fraud unit of any defense firm that specializes in the defense of first-party, no-fault insurance claims, and it becomes obvious that fraudulent nofault claims are rampant, particularly in southeast Michigan.

2 Incidentally, many insurance policies specifically identify these "strangers to the insurance contract" as intended third party beneficiaries under the insurance contract, under the definition of the term "insured." Should they not be likewise bound by the fraud exclusions contained within those policies under a third-party-beneficiary theory? That is a topic for another article.

3 *Shelton v Auto-Owners Ins Co*, 501 Mich 951, 904 NW2d 851 (2018)

4 *Fortson*, slip op at 2 (Cameron, J. Dissenting)

5 *Id*, slip op at 2 (Cameron, J. Dissenting)

6 Again, refer to the statement in the majority opinion that the injured party, Justin Fortson, was "wholly uninvolved in the fraud committed **after** the policy was procured." *Fortson*, slip op at 4, fn 1.

7 For example, according to information available on the MCCA website, www.MichiganCatastrophic.org, reimbursement for attendant care service claims paid by the insurer constitute the single largest percentage of reimbursement moneys paid to nofault insurers.

Supreme Court Update

By: Daniel A. Krawiec, *Clark Hill PLC*
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Supreme Court Clarifies Manufacturer Liability for Product Misuse Under MCL 600.2947

On May 23, 2018, the Michigan Supreme Court held that a product manufacturer is liable under MCL 600.2947 only when two conditions are met: First, the product must have been used in a materially different manner than intended, as "misuse" is defined in the statute; Second, the particular misuse of the product was "reasonably foreseeable" by the manufacturer, as that term is defined in the common law. The Court also held the common law meaning of the term "reasonably foreseeable" under that statute should be applied. *Iliades v. Dieffenbacher North America, Inc.*, No. 154358, 2018 WL 2338911, --- N.W.2d ---- (Mich. 2018).

Facts: On June 10, 2011, a 500-ton press machine closed on press operator Steven Iliades, causing him severe back fractures and burns. The press, which created injection-molded rubber parts for the automotive industry, was equipped with a presence sensing device known as a "light curtain." The light curtain consisted of beams of light which passed in front of the press opening and, when interrupted, stopped the press cycle. The press normally ejected rubber parts for manual removal, but sometimes the parts fell to the floor instead. The presses were generally set to start another cycle automatically despite an improper ejection, and therefore the operators were trained to set the press to manual mode before attempting to retrieve an improperly ejected part. On the date of his injury, Iliades placed his torso and back completely inside the press in order to retrieve an improperly ejected part. Iliades did not set the machine to manual beforehand, and since his position was behind the light curtain, the machine automatically started another cycle and closed with him between its plates.

Iliades filed a products liability action against the manufacturer alleging negligence, gross negligence, and breach of warranty. The manufacturer moved for summary disposition, arguing Iliades' actions in climbing partway into the press did not constitute a reasonably foreseeable misuse. The trial court granted the motion, finding Iliades misused the press by crawling beyond the light curtain into the press to retrieve a part without first disengaging the automatic cycling, but that it was not reasonably foreseeable a trained press operator would do so. The Court of Appeals, in reversing, opted not to decide whether Iliades' conduct constituted "misuse," but held the dispositive issue was whether Iliades' conduct was foreseeable. Applying a criminal law standard for gross negligence to define foreseeability, the court concluded it was common practice for press operators to disregard their training and to rely on the light curtains as the sole safety device when removing parts. Consequently, Iliades was not grossly negligence because he had no reason to know the light curtain could be cleared if he got between the press and the light curtain.

Ruling: The Michigan Supreme Court reversed the judgment of the Court of Appeals and remanded the case back to that court. The Court of Appeals had erred by not first deciding whether and how Iliades misused the press. The plain language of MCL 600.2974(2) sets forth a two-part test for manufacturer liability pertaining to reasonably foreseeable misuse, both parts presenting legal issues for court resolution. A court must first determine whether misuse of the product occurred, and if so, whether the misuse was reasonably foreseeable by the manufacturer.

The Court of Appeals framed the issue too broadly by asking whether it was reasonably foreseeable press operators at the facility in question would rely on light curtains as the exclusive safety devices. The Michigan Supreme Court held that it should have instead focused on Iliades' specific use (i.e., placing his body beyond the light curtain without disengaging the automatic cycling) and determined if that use was misconduct. The

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Court of Appeals also erred by imposing a criminal gross negligence standard of foreseeability onto the analysis. Because the Legislature did not plainly show a contrary intent, it is instead the common-law meaning of "reasonably foreseeable" which applies.

> The Court of Appeals had erred by not first deciding whether and how Iliades misused the press.

Practice Note: The statute in question, MCL 600.2947, details other scenarios in which a manufacturer may escape liability. This decision suggests that, to the extent the requirements of any other manufacturer immunities are not precisely defined in the statute, an argument should be made to the common law definition of that term to define these requirements, unless it has already been otherwise decided by the Supreme Court. This decision also demonstrates the importance of successfully framing the issue. Not all cases will receive similar attention on appeal and how the alleged misuse is characterized by the trial court at the first step of the analysis will surely affect whether a court determines any misuse was reasonably foreseeable.

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Amicus Report

By: Anita Comorski, *Tanoury, Nauts, McKinney & Garbarino, P.L.L.C.*[1]
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The MDTC has continued to participate as amicus curiae in several important cases pending before the Supreme Court. Following are updates on two cases in which the MDTC has filed amicus briefs.

The MDTC has filed an amicus brief in *Yu v Farm Bureau General Insurance Company of Michigan*, wherein the Supreme Court granted full leave to appeal, requesting that the parties address a variety of issues, including: "(1) whether the plain language of the insurance policy precluded coverage; (2) if so, whether and under what circumstances the doctrine of equitable estoppel may be applied to require an insurer to expand coverage that is contrary to the express terms of an insurance contract; (3) whether an equitable estoppel claim requires that (a) a party against whom the doctrine of equitable estoppel is to be applied has full knowledge of the facts and circumstances involved, and (b) justifiable reliance on the part of the party seeking to invoke it is shown; and (4) whether the defendant-insurer should be equitably estopped from denying coverage in this case."[2] The Supreme Court invited amicus participation from interested parties. Given the potential impact that the eventual decision could have on the interpretation and application of the doctrine of equitable estoppel, the MDTC chose to file a brief in support of the defendant's position. The MDTC's amicus brief was authored by **Peter J. Tomasek** of **Collins Einhorn Farrell, PC**.

Factually, the *Yu* case arose out of the plaintiffs' suit for breach of contract. The plaintiffs had purchased a residence in 2006 and obtained a homeowners insurance policy from the defendant Farm Bureau. Relevant to the issues raised on appeal, the policy contained a provision which precluded coverage if the house was vacant more than 60 days or unoccupied for more than 6 months. In 2010, the plaintiffs had moved from the premises to an apartment located closer to plaintiff Yu's new job. However, the plaintiffs did not inform Farm Bureau of their move. In February 2013, the plaintiffs made a claim for water damage. In connection with that claim, Farm Bureau's adjuster visited the property and observed that the plaintiffs were apparently in the process of moving from the home. Farm Bureau paid that claim. In June or July 2013, the plaintiffs listed the home for sale. In December 2013, Farm Bureau received information that the house was for sale and vacant. Farm Bureau issued a cancellation notice dated December 16, 2013. The at-issue claim involved additional water damage that was discovered on December 25, 2013.

Farm Bureau denied the second water damage claim on the basis that the plaintiffs did not reside at the property, the house was vacant for more than 60 days, and was unoccupied for more than 6 months. The plaintiffs filed a declaratory action, seeking a determination that Farm Bureau was liable under the policy. On cross-motions for summary disposition, the trial court found in favor of the defendant Farm Bureau and dismissed the action. The Court of Appeals reversed in a 2-1 unpublished decision, finding that Farm Bureau was equitably estopped from denying coverage. The majority held that the information that Farm Bureau received in February 2013 to the effect that the plaintiffs' were apparently in the process of moving from the residence should have led Farm Bureau to conclude that the property was vacant or soon would be, yet Farm Bureau did not advise the plaintiffs of the need to change their coverage, thereby leading plaintiffs to believe that they were covered when the policy was renewed. The dissent would have held that the clear and unambiguous policy language precluded coverage and that the factors necessary to apply equitable estoppel had not been met. Farm Bureau's application for leave to appeal was granted by the Supreme Court, which requested briefing on the issues set forth above.

Anita Comorski is a principal in the Appellate Practice Group at Tanoury, Nauts, McKinney & Garbarino, P.L.L.C. With over fifteen years of appellate experience, Ms. Comorski has handled numerous appellate matters, obtaining favorable results for her clients in both the State and Federal appellate courts.

The MDTC has continued to participate as amicus curiae in several important cases pending before the Supreme Court.

Addressing the issues as articulated by the Supreme Court, MDTC's amicus brief submitted that the plain language of the policy precluded coverage under the facts and circumstances in this case. Further, the MDTC argued that equitable estoppel is a limited doctrine that should not be applied to expand coverage beyond the express terms of an insurance contract. Moreover, the doctrine of equitable estoppel can only apply if the party against whom the doctrine applies (here, Farm Bureau) had full knowledge of the facts and circumstances. However, there is no duty imposed on Farm Bureau to investigate the representations made to it and there is no basis to assume that Farm Bureau's knowledge that the plaintiffs intended to move from the subject residence was equivalent to knowledge that the home was or would be vacant at any particular time. Finally, the MDTC's brief submitted that equitable estoppel should not apply to avoid the policy limitations where the plaintiffs presumably had knowledge regarding what was required under the terms of their insurance policy and certainly had knowledge of their own living situation.

It is anticipated that the *Yu* case will be argued and decided in the Supreme Court's next term, which begins in October 2018.

In a second case in which the MDTC had previously filed an amicus brief in support of the defendant's position, *Iliades v Dieffenbacher North America, Inc*, the Supreme Court has released a unanimous decision on May 23, 2018.[3] This recent decision is analyzed in some detail in the Supreme Court Update in this issue of the Quarterly. Nonetheless, the amicus committee wishes to acknowledge the work of **Irene Bruce Hathaway** of **Miller Canfield Paddack & Stone, PLC**, who authored the MDTC's amicus brief in this matter. The Supreme Court's eventual opinion tracked many of the arguments contained in the MDTC's amicus brief.

This update is only intended to provide a brief summary of the complex issues addressed in the amicus briefs filed on behalf of the MDTC. The MDTC does maintain an amicus brief bank on its website accessible to its members. For a more thorough understanding of the issues addressed in these cases, members are encouraged to visit the brief bank to review the complete briefs filed on behalf of this organization.

Endnotes

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2 Michigan Supreme Court Docket No. 155811.

3 Michigan Supreme Court Docket No. 154358.

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October 4	Meet the Judges - Sheraton Detroit Novi, Novi
October 17-20	DRI Annual Meeting - Marriott, San Francisco
November 8	MDTC Board Meeting – Sheraton, Novi
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