MICHIGAN DEFENSE
QUARTERLY

Volume 37, No. 4 - 2021

IN THIS ISSUE:

THE NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS

MICHIGAN CHAPTER

www.MichiganMediators.org

The following attorneys are recognized in 2021 for

Excellence in the field of Alternative Dispute Resolution


Earlene BAGGETT-HAYES


Thomas BEHM
Grand Rapids


Scott BRINKMEYER
Grand Rapids


Fred DILLEY
Grand Rapids


Gene ESSHAKI
Detroit


James FISHER
Grand Rapids


William GILBRIDE
Detroit


Lee HORNBERGER
Traverse City


Peter HOUK
Lansing


Richard HURFORD
Troy


Alan KANTER
Bloomfield Hills


Paula MANIS
Lansing


Jon MARCH
Grand Rapids


Paul MONICATTI
Troy


Ed PAPPAS
Troy


Robert RILEY
Dearborn


Lee SILVER
Grand Rapids


Sheldon STARK
Ann Arbor


Martin WEISMAN
Bingham Farms


Betty WIDGEON
Ann Arbor


Robert WRIGHT
Grand Rapids

Check available dates or schedule appointments online directly with Academy Members - for free.

Visit www.MichiganMediators.org/dateselector

NADN is proud creator of the DRI Neutrals Database
www.DRI.org/neutrals

dri™
The Voice of the Defense Bar

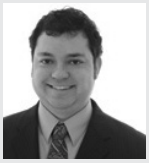
The National Academy of Distinguished Neutrals is an invitation-only association of the top-rated mediators & arbitrators throughout the US, and proud partner of the national defense and trial bar associations. For more info, visit www.NADN.org/about

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

Editor's Notes

Editor:
Michael James Cook
michael.cook@ceflawyers.com

Associate Editors:
Thomas D. Isaacs
thomas.isaacs@
bowmanandbrooke.com



Matthew A. Brooks
mbrooks@smithbrink.com

Katharine Gostek
katharine.gostek@kitch.com

Victoria L. Convertino
victoria.convertino@gmail.com

MICHIGAN DEFENSE
QUARTERLY

Volume 37, No. 4 - 2021

Cite this publication as 37-4 Mich Defense Quarterly

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

President's Corner

By: Terence P. Durkin, *Kitch Drutchas Wagner Valitutti & Sherbrook, P.C.*
Terence.durkin@kitch.com

Terence Durkin's practice blends labor and employment law with medical malpractice and general litigation. His years of experience as a litigator gives him a unique ability to help clients sort through the challenging and ever-changing world of labor and employment rules and regulations. Clients come to Terence and the firm's labor and employment practice group for guidance because they understand the priorities and risks involved with managing a diverse workforce, creating contracts, and implementing the best policies and procedures.

Terence and the Kitch labor and employment practice group offer a full array of employment and labor law services, including dispute resolution in all types of forums: the courts, mediation panels, arbitration, and administrative agencies. Clients rely on Terence to help them navigate collective bargaining, contract administration, and grievance and arbitration proceedings, and he often participates with them in those proceedings.

Terence plays an active role in the community by serving on the Executive Board of the Michigan Defense Trial Counsel, chairing the Ascension Providence Foundation, and being a member of the Plymouth Rotary. Most recently, he was elected to the Board of Directors and the Core Leadership Team of Oak Mac SHRM (Society of Human Resource and Management).

Terence received his Bachelor of Arts in political science from Millikin University in Decatur, Illinois, and his Juris Doctorate from Western Michigan University Cooley Law School, where he was Article Editor of the Journal of Practical and Clinical Law. He is licensed to practice law in Michigan as well as the United States District Courts of Eastern and Western Michigan.

He is married to Jessica and lives in Northville.

As my term as President comes to a close, I would like to thank the MDTC members for the opportunity to serve in this capacity. This past year has been nothing but unique with the challenges brought about by the COVID-19 pandemic. However, it has been a very rewarding experience both professionally and personally. The MDTC is a well-respected association that continues to strive for ways to remain on the leading edge of our profession, which we achieve through our active members and leadership team.

Over the past year, the MDTC, like many other organizations, had to cancel all in-person events due to COVID-19. These cancellations did not mean an end to MDTC's educational programing. Instead, the MDTC turned to a virtual platform, Zoom, where it held a plethora of educational programs that began in April and will continue into the future. These educational programs cover current topics and are open to both members and non-members. This is one of the many ways the MDTC stays on the leading edge.

As I referenced earlier, the MDTC is a well-respected association. By way of example, Judge Terence Ackert, the co-chair of the Lessons Learned Committee formed by the Michigan Supreme Court and SCAO, reached out to the MDTC to discuss the courts' response to the challenges of COVID-19. This discussion enabled our association the opportunity to provide feedback on where the courts did well and where improvements could be made.

The MDTC turned to a virtual platform, Zoom, where it held a plethora of educational programs that began in April and will continue into the future.

As many of you know, our profession and the MDTC lost a very valuable member. **Anita Comorski** passed away on December 12, 2020. Ms. Comorski was the Chair of the Amicus Committee, where she volunteered many hours of her time. She was highly regarded by her peers and clients. Ms. Comorski also took the time to mentor young attorneys. Given the vast amount of time that she volunteered and her efforts to mentor the next generation of attorneys, the MDTC has renamed the Volunteer of the Year award in her honor.

Going forward, the MDTC will continue to grow and adapt to the changes affecting society and our profession. We have a strong leadership team and very active members, a great combination for the MDTC's future. I know that the MDTC will be in extremely good hands with **Deborah Brouwer** as its next President.

In closing, I would like to thank the Executive Committee, Board of Directors, and Madelyne Lawry, and her staff for their support and guidance. Without all of these individuals, I would not have been successful in my role. Again, thank you for this opportunity to serve as your President.

Warmest regards,
Terence P. Durkin

Too Much or Not Enough? An Inside Look at Michigan's New Utilization Review Process

By Matthew LaBeau, *Collins Einhorn Farrell PC*
Matthew.LaBeau@Ceflawyers.com

Executive Summary

When the Legislature reformed the Michigan No-Fault Act on June 11, 2019, one of the many changes was to implement a utilization review process. This new procedure allows insurers and the Michigan Catastrophic Claims Association (MCCA) to seek further information and make determinations regarding treatment, training, products, services, or accommodations that were potentially overutilized or inappropriate. It also allows providers to appeal utilization determinations to the Department of Insurance and Financial Services (DIFS), and the parties to seek judicial review of decisions by DIFS. Previously, the only option for insurers and providers was to address these issues through the normal claims-handling process and subsequent litigation.

Matthew focuses his practice on defense litigation in first party No-Fault claims, uninsured and underinsured motorist claims, automobile negligence, premises liability, general liability, and contractual disputes. Matthew has extensive experience in defending catastrophic No-Fault claims, including claims for attendant care, home modifications, and vehicle modifications, as well as consulting insurers regarding catastrophic claims prior to litigation. Matthew has vast experience in all aspects of the litigation process from the discovery process through trial and routinely achieves successful results for his clients. He can be reachd at matthew.labeau@ceflawyers.com or 248-663-7724

Introduction

When the Michigan No-Fault Act was reformed on June 11, 2019, one of the many changes was the implementation of a utilization review process. This new process allows insurers and the Michigan Catastrophic Claims Association (MCCA) to seek further information and make determinations regarding treatment, products, services, or accommodations that were potentially overutilized or inappropriate. It also allows providers to appeal these determinations to the Department of Insurance and Financial Services (DIFS).

Per the No-Fault statute, the specific rules governing the utilization review process were left for DIFS to define through the administrative rule-making process. Effective December 18, 2020, DIFS has promulgated rules that provide procedures for insurers and the MCCA to request more information from providers and make determinations about overutilization and appropriateness of treatment, products, services, or accommodations. The rules also provide for appeals of determinations by providers to DIFS and judicial review of DIFS decisions by trial courts.

While these rules provide further guidance on the utilization review process, several questions are left unanswered. Once utilization reviews are implemented for claims throughout Michigan, various issues will likely be addressed through litigation. This article outlines the obligations for insurers and providers under the new rules for utilization reviews and explores certain areas that are yet to be determined.

Recent Changes Brought On by No-Fault Reform

On June 11, 2019, the Michigan No-Fault Act was amended, bringing sweeping changes to several provisions of a law that had been substantially the same for almost 50 years. Before these amendments, there was no mechanism to address the overutilization or appropriateness of treatment outside of the normal claims-adjustment process and subsequent litigation.

One of the changes ushered in by reform was the addition of MCL 500.3157a, which provides for utilization reviews and related requirements. A utilization review is defined as "the initial evaluation by an insurer or the [Michigan Catastrophic Claims Association] of the appropriateness in terms of both the level and the quality of treatment, products, services, or accommodations provided …. based on medically accepted standards."[1]

By rendering treatment, services, products, or accommodations to an injured person who is covered by personal injury protection (PIP) benefits, a physician, hospital, clinic, or other person is considered to have agreed to two obligations.[2] The first is to submit necessary records and other information concerning the treatment, products, services, or accommodations provided for a utilization review. The second is to comply with

any decision rendered by the director of DIFS.

Under this new statute, DIFS is required to promulgate rules under the Administrative Procedures Act to establish criteria for utilization reviews based on medically accepted standards and provide procedures for the utilization reviews.[3] The procedures are required to address acquiring records, bills, and other information. They are also required to address allowing an insurer to request an explanation and requiring a provider to explain the treatment, products, services, or accommodations provided. The procedures are also required to address the appeal of DIFS determinations by insurers and the MCCA.

Under MCL 500.3157a, an insurer or the MCCA may require a provider to explain the necessity or indication for treatment, products, services, or accommodations under the procedures promulgated by DIFS.[4] In addition, if an insurer or the MCCA determines that the treatment, products, services, or accommodations were overutilized or that the cost was inappropriate, a provider may appeal under the rules created by DIFS.[5]

After a lengthy public comment period and several revisions, DIFS issued its final rules effective December 18, 2020. These rules define the scope of utilization reviews, and set forth procedures for insurers to initiate utilization reviews and appealing certain adverse determinations. The rules also provide for judicial review of decisions issued by DIFS, an issue not specifically addressed by MCL 500.3157a.

The Scope of Utilization Reviews[6]

Utilization review rules are only applicable to benefits for treatment, training, products, services, and accommodations[7] provided to an injured person who is insured under a Michigan no-fault automobile insurance policy. The rules also only apply to treatment and training provided *after* July 1, 2020. The rules promulgated by DIFS apply to all automobile insurers providing coverage through a no-fault policy, a managed care plan, or through the Michigan Assigned Insurance Placement Facility (MAIPF). The rules also apply to the MCCA.[8]

The rules make it clear that insurers and the MCCA are not limited in their ability to contract with a medical review organization to perform utilization reviews on their behalf. The use of a medical review organization, however, does not absolve an insurer from complying with its obligations under the Michigan No-Fault Act or the administrative rules for utilization reviews.

The Request for Explanation[9]

A utilization review can be requested by an insurer or the MCCA when the treatment or training provided is:

- Not usually associated with a diagnosis or condition;
- Longer in duration than is usually required for a diagnosis for a condition;
- More frequent than is usually required for the diagnosis or condition; or
- Extends over a greater number of days than is usually required for the diagnosis or condition.

To trigger the review, an insurer must submit a request to the provider[10] to explain the necessity or indication of the treatment in writing. The written request for information must be submitted within 30 days of receiving a bill related to the treatment or training.

Once a provider receives a request for information, the provider must respond to the request within 30 days. An insurer may request that the provider include medical records, bills, and other information concerning the treatment or training provided. If the request for medical records, bills, or other information exceeds the information customarily submitted to the insurer with a bill, the insurer must reimburse the provider at a reasonable and customary fee, plus the actual costs of copying and mailing. The provider must be reimbursed within 30 days of the request for information by the insurer.

Determinations by the Insurer[11]

After reviewing the provider's written explanation, an insurer may decide that the provider overutilized, otherwise rendered or ordered inappropriate treatment or training, or that the cost[12] of the treatment or training was inappropriate. The insurer must issue a written notice of this determination, and must do so within 30 days of receipt of the written explanation from the provider.

The written notice of the determination must include specific information. This includes:

- The criteria or standards the insurer relied on in making the determination;
- Specific reference to the insurer's utilization review process and procedure;
- The amount of payment to the provider based on the results of the determination;
- An explanation of the difference between the amount paid and the amount billed;
- If applicable, a description of any additional records the provider must submit to the insurer to reconsider its determination;
- The date of the determination;
- A form to appeal the decision to DIFS.

As suggested above, a provider can appeal to DIFS the denial of a provider's bill on the basis that the provider overutilized or provided inappropriate treatment or training or that the cost was inappropriate. A provider is permitted to pursue such an appeal regardless of whether the insurer has requested a written explanation.

This section of the rules implicates an interesting issue. While the rules are set up for the insurer to initiate the utilization review process, the rules suggest that a provider can appeal **any** denial of a provider bill, as long as it was based on overutilization, inappropriate treatment, or inappropriate cost. For example, this would suggest that where an insurer did not request information under the rules but denied it based on a medical examination, a provider could appeal to DIFS. Given the use of the word "may" for insurers and providers alike, the parties can likely choose to forego the utilization review process entirely and address the claim through the normal litigation process.

The Appeals Process to DIFS[13]

A provider must appeal a decision made by an insurer within 90 days of the date of the disputed determination. The appeal must be submitted on a form approved by the department.[14] Within 14 days of receiving the appeal, DIFS must notify the insurer and injured person of the appeal and request any additional information necessary to review the appeal. Within 21 days of the date of the DIFS' notice, an insurer or the MCCA may file a reply.

Within 28 days of the insurer's reply, the DIFS director is required to issue a decision. The director may take an additional 28 days upon written notice to the insurer and the provider. The director must base his or her decision upon the written materials submitted by the parties. If the insurer does not file a reply, the director will make a decision based on the information available.

Judicial Review of the DIFS Decision[15]

A party can seek judicial review of a DIFS decision under MCL 500.244(1), which permits a person aggrieved by a decision under the Michigan Insurance Code to invoke judicial review under the Administrative Procedures Act.[16] Judicial review is permitted only after the party has exhausted all the available administrative remedies. A petition seeking judicial review of the determination must be filed in the county where the petitioner resides, has a principal place of business, or in Ingham County Circuit Court.[17]

A petition must be filed within 60 days of mailing the notice of decision from the director of DIFS. Within 60 days of the filing of the petition, DIFS must provide the entire record of the proceedings unless the parties stipulate to shorten the record. Any party unreasonably refusing to shorten the record can be taxed additional costs.

The review, conducted by the court without a jury, is confined to the record, unless evidence of a procedural irregularity is necessary. The court may request oral argument and the submission of written briefs. In addition, a party can seek leave of the court to present additional evidence to DIFS, and the court can order DIFS to take additional evidence. The party must make a showing, however, that there was an inadequate record made to DIFS or that additional evidence is material, and there is a good reason for failing to submit it to DIFS in the original proceeding.

The court may affirm, reverse, or modify the ruling by DIFS. The court has authority to set aside the ruling by DIFS if substantial rights of the petitioner have been prejudiced because the decision or order is:

- In violation of the constitution or a statute;
- In excess of the statutory authority or jurisdiction of the agency;
- Made upon unlawful procedure resulting in material prejudice to a party;
- Not supported by competent, material, and substantial evidence on the whole record;
- Arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion; or
- Affected by other substantial and material error of law.

Requirements of Insurers[18]

Within 60 days of the effective date of the rules,[19] i.e., February 16, 2021, insurers must have a utilization review program in place to review records and bills. The program must:

- Provide for bill review, including whether the provider charges for treatment and training comply with the Michigan No-Fault Act;
- Make determinations regarding the appropriateness of treatment and training based on medically accepted standards; and
- Issue determinations regarding whether treatment or training was overutilized or inappropriate and if the cost was inappropriate.

"Medically accepted standards" means the most appropriate practice guidelines for the treatment or training provided to an injured person. These practice guidelines may include generally accepted practice guidelines, evidence-based practice guidelines, or any other guidelines developed by the federal government or national or professional medical societies, boards, and associations.[20]

Insurers must submit the program to the director of DIFS on an annual basis on a form approved by DIFS[21]. No later than 90 days after submission of the carrier's plan[22], DIFS must issue either a conditional or unconditional certification. The director may issue an unconditional certification for a period of three years. The director may issue a conditional certification if the insurer does not substantially satisfy the stated criteria and the insurer agrees to take corrective action. At any time, the director may modify the certification from unconditional to conditional if the director determines that the insurer fails to comply with the rules for utilization review. The certification can be revoked completely if the insurer violates the rules and fails to complete a corrective action plan.

Insurers must apply for renewal of their certification no less than 90 days before the expiration of the current certification. Each insurer must submit an annual report no later than March 31 of each year regarding utilization review data and activities. The report will be subject to disclosure under the Michigan Freedom of Information Act[23]. Any proprietary information submitted by insurers is exempt from disclosure. Insurers must also retain copies of all requests, explanations, and determinations issued under the utilization review rules for at least (2) two years. The records must be submitted to DIFS upon request.

Issues Left to Be Determined

As referenced above, it is up to the insurers and the MCCA to develop a utilization review program. Certainly, it is possible that some carriers will create and administer their program from scratch. However, it seems more likely that insurers and the MCCA will engage a medical review organization to assist with the development of the program and, perhaps, perform some or all of the utilization review. Previously medical review organizations were used to perform bill audits based on the CPT codes to

assist with evaluating the reasonable and customary charges for allowable expenses. These organizations can also be utilized for similar purposes in determining whether a particular treatment modality or the length or frequency of treatment, is generally associated with a particular condition or diagnosis. One would expect that a medical professional would be involved in the process.

In litigation, such organizations have been subject to evidentiary foundation challenges by providers and claimants demanding to know the specific criteria and data used to reduce charges in conjunction with billing audits. With the rules directly referencing these organizations, insurers are further bolstered in using these organizations. However, it will be important that these organizations make their criteria and data available if requested.

It does not appear mandatory for an insurer to initiate the utilization review process to challenge a provider's claim. It is also appears that providers may be able to utilize the appeal process to DIFS without the insurer performing a utilization review. Whether an insurer or provider avails themselves of the process may depend on whether they believe DIFS to be a more advantageous venue to challenge the issue. If they avail themselves of the process, the administrative process must be exhausted before litigation can commence.

If the utilization review process truly is permissive and not an exclusive remedy, then the benefits of this review process are mitigated. It would seem that a goal of this process would be to streamline disputes over utilization and cost and, subsequently, reduce litigation and expense to the parties. If parties can pick and choose whether to participate in this process, it could lead to a chaotic and costly system where insurers and providers are subject to two adjudication systems with varying results on the same issues.

If litigation is commenced, the scope of that litigation is yet to be determined. Obviously, if neither party avails themselves of the utilization review process, then litigation would proceed in the same fashion as any standard no-fault case. However, if the process is utilized, then the litigation would essentially be an appeal of the DIFS ruling with a highly deferential standard of review. It is possible that future challenges will shape whether that deferential standard of review applies or whether such a review would be "de novo" with no deference to the underlying decision as if it never happened. Case law will undoubtedly provide further guidance on this process.

Furthermore, what constitutes "medically accepted standards" is vague. Providers and insurers will no doubt have vastly different positions on what constitutes medically accepted standards. This is one of the issues most likely to be litigated extensively.

Lastly, the utilization review rules make an insurer subject to interest if DIFS finds that a provider is entitled to payment under MCL 500.3142. This is found nowhere in MCL 500.3157a, and would seem to be modifying the reasonable proof standard referenced in MCL 500.3142, and case law making this generally a question for the jury to decide. It will be interesting to see if this automatic entitlement to interest is upheld. It also may give rise to additional lawsuits by providers seeking interest and attorney fees, under MCL 500.3148, only.

Conclusion

The new rules promulgated by DIFS provide the procedures that providers and insurers must follow should they implement a utilization review process. The rules also provide several requirements that insurers and the MCCA must follow when implementing these reviews. There are strategic considerations for all parties when determining whether to avail themselves of the utilization review process, including the nature and extent of the review. There are also several questions left unanswered that will require intervention by the courts. It will be essential for insurers, providers, and their counsel to become familiar with what these rules say and don't say going forward.

Endnotes

1 MCL 500.3157a(6)
2 MCL 500.3157a(1)
3 MCL 500.3157a(3)
4 MCL 500.3157a(4)
5 MCL 500.3157a(5)
6 R 500.62
7 For the remainder of this article, the phrase "treatment or training" refers to "treatment, training, products, services, and accommodations", which mirrors the usage of the phrase throughout the no-fault reform legislation, including MCL 500.3157(13)(k). Of note, though, is that, while the rules refer to "training", MCL 500.3157a makes no such reference.
8 While the rules indicate throughout that insurers and the MCCA can avail themselves of the utilization review process, in most cases it will be insurers utilizing this process. Therefore, this article will reference the applicability of the utilization review rules as they relate to insurers, only.
9 R 500.63
10 A provider includes a physician, hospital, clinic, or other person providing treatment, training, products, services, and accommodations to an injured person. R 500.61(l)
11 R 500.64
12 It should be noted that the cost of treatment or training is not mentioned as a trigger to initiate a utilization review, but the rules reference it as appropriate issue for determination.
13 R 500.65
14 The approved DIFS Provider Appeal Request form is attached as Appendix 1.
15 R 500.65(7)
16 MCL 24.301-.306
17 This would be a departure from the normal venue rules for a no-fault lawsuit Michigan. Currently, an insurer is deemed to conduct business in every county in the state, thus, making it subject to being sued in any county.
18 R 500.66
19 The effective date of the rules is December 18, 2020.
20 R 500.61(i)
21 The approved form for the program is attached as Appendix 2
22 DIFS can extend the time an additional 30 days upon written notice to the insurer.
23 MCL 15.231-.246

Attorneys as Public Bodies Under the WPA – Still The Law In Michigan, and Still A Curious Interpretation Of The Act

By Deborah Brouwer and Angelo Berlasi

Executive Summary

In 2016, the Michigan Court of Appeals held that for purposes of a Whistleblowers' Protection Act claim, the plaintiff's attorney was a public body, so that the plaintiff's report to the attorney regarding a possible PPO violation was protected activity under that Act. Despite the seeming breadth of that decision, subsequent courts have not been liberal in applying the 2016 case, typically concluding that the factual scenario at issue did not involve an actual report to a public body.

Ms. Brouwer has been an attorney since 1980, 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. Her email address is dbrouwer@nemethlawpc.com.

Mr. Berlasi focuses his practice in labor and employment counseling and litigation, exclusively representing employers. He has experience in matters involving allegations of discrimination, harassment, and retaliation; sales representative claims; bargaining unit disputes; and employment contract drafting and negotiation. Prior to joining Nemeth Law, Mr. Berlasi worked at several Detroit-area litigation firms, handling employment, commercial, and municipal issues, as well as insurance defense. He can be reached at aberlasi@nemethlawpc.com or (313) 567-5928.

Michigan courts have liberally viewed the Michigan Whistleblower's Protection Act ("WPA")[1] over the years, holding, for example, that an internal complaint to your employer is a report to a public body if your employer is a city agency; and that an employee is still a whistleblower even if reporting wrongdoing is part of the employee's regular job; and that an employee who reports solely out of her self-interest and not to protect the public is still covered by the Act. This trend continued in 2016, when the Michigan Court of Appeals, in *McNeill-Marks v MidMichigan Medical Center*,[2] held that a private conversation by an employee with her personal attorney was a report to a public body for purposes of the WPA because attorneys are licensed by the State of Michigan, itself a public body. In that case, McNeill-Marks told her attorney about a possible PPO violation by her adopted children's grandmother, who she had seen in the hospital where she worked. The employee was terminated for revealing protected health information (that the grandmother was a patient in the hospital) in violation of HIPAA.[3]

In concluding that McNeill-Marks' call to her attorney was a report to a public body, the Court reasoned that the attorney was licensed and a member in good standing of the State Bar of Michigan, a body created by state authority and, through regulation of the Michigan Supreme Court, was primarily funded by or through state authority.[4] As such, the appellate court found that McNeill-Marks had stated a prima facie claim under the WPA.[5]

Not surprisingly, the hospital sought leave to appeal to the Michigan Supreme Court, which ultimately denied the application on a 3-2 vote, as well as the subsequent request for reconsideration, despite a detailed dissenting statement from Justice Zahra.[6] As a result, the McNeill-Marks decision remains the law of the land. Still, subsequent Michigan decisions have scaled *McNeill-Marks* back somewhat by narrowly construing what constitutes a "report" to an attorney for purposes of the WPA.

Not all communications with an attorney are created equal

In *Rivera v SVRC Indus, Inc.*,[7] the Court of Appeals revisited the issue, focusing on when communication with an attorney might serve as a report to a public body under the WPA. Linda Rivera was the director of industrial operations at SVRC Industries. One day, Rivera conducted a disciplinary meeting with an employee, "LS," to address his insubordination issues. According to Rivera, LS made several statements that she perceived as threatening, including the possibility of a revolution in the United States and the fact that he could operate a firearm and was not afraid to pull the trigger, and that he did not discriminate.[8] Rivera reported the statements to management and asked whether she should report the incident to the police.

The company's attorney told Rivera that he had advised SVRC against filing a police report. After speaking with this attorney, Rivera told SVRC's CEO that she had contacted the attorney to discuss the incident; the CEO responded by text:

> Please be very careful with sharing confidential information about employees. If you want to file a personal protection order you can do so, which may mean filing a police report, but that is not what was advised by our attorney. Let's talk when you get to work in the morning.[9]

SVRC investigated the incident and ultimately terminated L.S.'s employment. The next day, Rivera was permanently laid off from her position for "budgetary and economic reasons."[10] Rivera sued SVRC, claiming it had violated the WPA by retaliating against her because she was about to report L.S.'s conduct to the police and because she reported L.S.'s conduct to SVRC's attorney.

The trial court concluded that, under *McNeill-Marks*, attorneys who are members of the State Bar of Michigan are members of a public body, and so Rivera's discussion with SVRC's attorney was protected activity under the WPA. On appeal, the Court of Appeals reversed, holding that the trial court had failed to analyze "deep[ly] enough" the nature of Rivera's conversation with SVRC's attorney in order to discern whether it constituted a report under the WPA.[11]

The court wrote that "[a] lthough *McNeill-Marks* does hold that a licensed attorney is a member of a 'public body' for purposes of the WPA, it does not compel the conclusion" that a particular plaintiff's conversation with a licensed attorney is necessarily "a 'report' of a violation (or suspected violation) of the law."[12] Rivera's conversation was not a report because she did not take the initiative to communicate any wrongful conduct to a public body in order to bring a hidden violation to light, as required under the WPA. Instead, she spoke to her employer's attorney at her employer's request. Further, Rivera's discussion with the attorney was not a report because the attorney was acting as SVRC's agent and the information was the same as already conveyed to her employer. Thus, the Court of Appeals concluded that the trial court erred by denying summary disposition in favor of SVRC regarding Rivera's WPA claim, based on the origin and nature of her communication with the attorney.[13]

Rivera then sought leave to appeal to the Michigan Supreme Court, which heard oral argument on that application in January 2021. On June 11, 2021, in lieu of granting leave, the Supreme Court affirmed in part, vacated in part, and reversed in part.[14] Relevant to this article is the Court's decision to vacate the Court of Appeals' holding that Rivera's conversation with her employer's attorney was not a 'report' for purposes of the WPA, because such holding was unnecessary in light of the grant of summary disposition to the defendant on the WPA claim.[15]

While it is interesting that the Court would go out of its way to note that a lower court had addressed an issue without needing to do so, more interesting were the two concurrences: one by Justice Zahra and one by Justice Viviano. Justice Zahra reiterated his view, previously stated in his dissent in *McNeill-Marks v. MidMichigan*[16] that the State Bar of Michigan is not a public body, and so its attorney-members are also not 'public bodies' under the WPA.[17] Justice Viviano took a slightly different tack: noting, that while attorneys may be members of the State Bar, and while the State Bar may be a public body, those attorneys are not true 'members' under the WPA because they have no role in the State Bar apart from paying dues. After expressing concern that the current broad interpretation of 'member' as including all attorneys could present some of those attorneys with ethical dilemmas, the justice asked whether such involuntary, nominal members should fall within the scope of the WPA and suggested that the issue might be considered in "an appropriate future case."[18]

The Sixth Circuit Court of Appeals weighs in

The Sixth Circuit Court of Appeals added its mark to the question of whether simply talking to an attorney is a protected activity under the WPA. In *Fritze v Nexstar Broadcasting*,[19] Cheryl Fritze worked as an editor for a local news station. In 2017, she complained to human resources that the news director "had engaged in an inappropriate sexual relationship with another female employee of WLNS" in violation of company policy.[20] WLNS investigated, but the allegation could not be substantiated. Following the investigation, another employee complained that the feud between Fritze and the news director had intensified and that Fritze "hate[d]" the news director and was "out to get" him.[21] The station opened a new review of Fritze and the news director's relationship, asking a neutral investigator to take a fresh look at the situation.[22] After interviewing employees who worked directly with Fritze, the investigator recommended that Fritze "be immediately removed from WLNS" because she had "exhibited countless acts of insubordination" and had "issues taking direction from" the news director.[23] After attempts to repair the relationship, Fritze was eventually discharged.

Fritze sued under the WPA, claiming she had been fired for raising concerns about inadequate investigations of sexual harassment of other employees. The district court granted summary judgment, reasoning that Fritze failed to satisfy several elements of a claim under the WPA; most importantly for our purposes, that she had failed to report to a public body despite having spoken to an attorney regarding her situation.[24]

On appeal, the Sixth Circuit observed first that in "…one Michigan intermediate court opinion," an attorney was treated as a public body, but subsequent Michigan decisions appear to have "cabined" that decision.[25] Referencing recent Michigan decisions that have narrowed the precedent established by *McNeill-Marks*, the Court noted that under Michigan jurisprudence, not all communications with attorneys

"categorically constitute reports to a public body."[26] According to the Court, courts "must engage in a deeper analysis of the particular facts and circumstances" of the plaintiff's communication with an attorney.[27] Importantly, the analysis must include a "search for record evidence of an attorney-client relationship" or evidence that the attorney "perform[ed] specific legal work" for the plaintiff.[28]

As for Fritze, the Court of Appeals agreed with the district court that Fritze had never reported a violation of law to a public body. Although she spoke to an attorney regarding her situation, she only had one meeting with the attorney and did not retain his services. As such, any relationship between the attorney and Fritze did not materialize to the level established in *McNeill-Marks*.[29]

In addition to *Rivera* and *Fritze*, other courts considered *McNeill-Marks,* accepting the initial proposition that a licensed Michigan attorney can be considered a public body for WPA purposes. Each, however, turned on separate determinations, such as the causation element of a WPA claim.[30] For example, in *Brooks v Genesee County*, the Michigan Court of Appeals cited *McNeill-Marks* in finding that the plaintiff's statements to an attorney and that attorney's wife regarding a witness committing perjury "…would, generally, qualify it as a protected activity under the WPA."[31] Despite this, the court found that the plaintiff had not offered any direct or indirect evidence to support the causation element of his WPA claim.[32] In *Yurk v Application Software Technology Corp.*, the United States District Court for the Eastern District of Michigan referenced *McNeill-Marks* when noting that the plaintiff had reported a suspected violation of law to an attorney. The court went on to say that it "…continues to proceed under the assumption that Yurk engaged in activity protected by the WPA by reporting to an attorney and by being 'about to report' to the City."[33] Again, despite this, the court concluded that plaintiff's alleged protected activity under the WPA had nothing to do with his termination.[34]

Reports to a public body extended …dentists?

In *Shephard v Benevis, LLC*, Tina Shephard and Georgette Welch worked as the dental hygienist and dental assistant at the same dental office. When the practice was sold and a new permanent dentist, Dr. Ewing, was brought on board, Shephard and Welch began to notice issues with his dentistry, including credentialling concerns, questionable insurance billing procedures, and suspected malpractice.[35]

Shephard and Welch reported the issues internally to the dental practice's office manager, its director of operations, and directly to Dr. Ewing. Another dentist affiliated with Benevis was called in to review Dr. Ewing's work and determined that there was no malpractice. A week later, during a meeting with Dr. Ewing and management, Shephard and Welch were discharged. They sued, alleging wrongful discharge in violation of the WPA.[36]

The trial court granted summary disposition in favor of Benevis, and the plaintiffs appealed. For purposes of the appeal, the parties did not dispute that, as a licensed dentist, Dr. Ewing was a public body under the WPA, citing *McNeill-Marks* as authority. The appellate court did reverse summary disposition, finding that reports of possible insurance fraud to Dr. Ewing were protected activity and that there were sufficient factual disputes as to the defendant's proffered, non-retaliatory reason for the plaintiff's discharge to proceed to trial.[37]

So the strange saga of "attorneys as public bodies" continues, although courts appear to be working to keep the doctrine's application as narrow as possible. The oddity of the *McNeill-Marks* holding is made clear by recalling the impetus for the WPA in the first place: enacted in the wake of the accidental PBB-contamination of livestock feed, the Act "encourage[s] employees to assist in law enforcement and ... protect[s] those employees who engage in whistleblowing activities. It does so intending to promote public health and safety. The underlying purpose of the act is the protection of the public. The act meets this objective by protecting the whistleblowing employee and by removing barriers that may hinder employee efforts to report violations or suspected violations of the law. Without employees who are willing to risk adverse employment consequences as a result of whistleblowing activities, the public would remain unaware of large-scale and potentially dangerous abuses."[38]

With the WPA, the Michigan Legislature sought to combat corruption or criminally irresponsible behavior in government or large businesses by protecting from retaliation the persons best placed to identify that corruption – employees.[39] As such, an employee who reports illegality to a public agency – presumably the agency in a position to address the illegality – should not be fired for that selfless act. It is not immediately apparent that, in enacting the WPA to protect whistleblowers acting to help public wellbeing, the legislature realized that an employee discussing workplace events with her attorney would someday be viewed as one of those whistleblowers and that the attorney would be granted the status of a public body. Surely the underpinning of the WPA was to encourage employees to take knowledge of wrongdoing to a state agency or law enforcement official that could then act on those reports and end the corruption. Labeling a private attorney as such a "public body" (based on the fact that the attorney owes her license to a state entity) does not seem likely to fulfill the Act's true purposes. In light of the concurrences offered by two Supreme Court justices in *Rivera v SVRC*, this oddity of Michigan jurisprudence may be revisited, and hopefully, soon.

Endnotes

1 MCL 15.361, *et seq*. The WPA states that "An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body,

unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action." MCL 15.362.

2 *McNeill-Marks v MidMichigan Med Ctr-Gratiot*, 316 Mich App 1; 891 NW2d 528 (2016).

3 *Id.* at 12.

4 *Id.* at 23.

5 We discussed *McNeill-Marks* in greater detail in *Michigan Defense Quarterly*, Vol. 34, No. 3 (2018).

6 Unfortunately, two justices recused themselves from the matter, leaving only five justices to decide this relatively significant issue.

7 *Rivera v SVRC Industries, Inc.*, 327 Mich App 446; 934 NW2d 286 (2019), affirmed, vacated, and reversed in part, __ Mich __; __ NW2d __; 2021 WL 2399760 (June 11, 2021) (Docket No. 159857).

8 *Id.* at 451.

9 *Id.* at 452.

10 *Id.*

11 *Id.* at 462.

12 *Id.*

13 *Id.* at 467.

14 *Rivera v SVRC Indust, Inc*, __ Mich __; __ NW2d __ (June 11, 2021) (Docket No. 159857).

15 *Id.*, slip op at 2.

16 502 Mich 851, 856-857 n 13; 912 NW2d 181 (2018) (Zahra, J., dissenting).

17 *Rivera*, slip op at 3 (Zahra, J., concurring).

18 *Id.* at 5 (Viviano, J., concurring).

19 *Fritze v Nexstar Broadcasting, Inc*, 847 Fed Appx 312 (CA 6, 2021).

20 *Id.* at 1.

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id.* at 3.

26 *Id.*

27 *Id.*, citing *Rivera,* 327 Mich App at 462.

28 *Id.*, citing *Newton v Mariners Inn*, unpublished per curiam opinion of the Court of Appeals, issued Nov. 28, 2017 (Docket No. 332498); 2017 WL 5759949, at *7

29 *Id.* at 3.

30 See *Brooks v Genesee Co*, unpublished per curiam opinion of the Court of Appeals, issued July 13, 2017 (Docket No. 330119); 2017 WL 2988838; *Yurk v Application Software Technology Corp,* unpublished opinion and order of the United States District Court for the Eastern District of Michigan, issued Jan. 17, 2018 (Docket No. 2:15-CV-13962); 2018 WL 453889.

31 *Brooks*, 2017 WL 2988838 at *3.

32 *Id.*

33 *Yurk*, 2018 WL 453889 at *10.

34 *Id.* at 13.

35 *Shephard v Benevis*, LLC, unpublished per curiam opinion of the Court of Appeals, issued Jan. 7, 2021 (Docket No. 350164); 2021 WL 70642.

36 *Id.* at *2.

37 *Id.* at *4, *9.

38 *Dolan v Cont'l Airlines/Cont'l Exp*, 454 Mich 373, 378–79; 563 NW2d 23 (1997).

39 House Legislative Analysis, HB 5088, 5089 (February 5, 1981).

The Op-Ed(ish) Column

By: Trent B. Collier, *Collins Einhorn Farrell PC*

This is a new(ish) and regular column for the Michigan Defense Quarterly. It's an open forum, available for opinion pieces, storytelling, and even entertaining law-related fiction. Any views and opinions expressed here are those of the author and do not necessarily reflect the official policy, view, opinion, or position of the MDTC.

Emotional Appeals

We rarely talk about the emotional part of being a lawyer. Beginning in law school, the prevailing model seems to be that lawyers are purely rational—that we're all in the business of coolly, logically evaluating arguments, all Spock and no Kirk. Chief Justice John Roberts famously adopted that model when he told Congress in 2005 that a judge's role is to call balls and strikes. There's an objective answer, he asserted, and a judge—like an umpire—simply applies the rules to the facts to determine that answer.

A growing body of scholarship on "law and emotion" challenges this lawyer-as-robot model. And it doesn't take much time in the legal trenches to discover that lawyers and judges don't exactly leave their emotions at home. Like it or not, emotions are an enormous part of law, on both sides of the bench.

Indeed, psychologists are discovering that human reasoning doesn't work quite the way we imagine it does. We'd like to think that we start with a blank slate, gather information, and then reach a conclusion based on that information. But that model doesn't match what psychologists have learned about the human mind.

In *The Righteous Mind*, social psychologist Johnathan Haidt argues that people tend to form automatic judgments and then reason backwards from them.[1] We get a gut sense—an "intuition," as Haidt calls it—and engage in reasoning to justify that intuition. That means we process information through our emotions. Our emotions even affect the kind of information we process, since we tend not to seek out information that contradicts our gut sense. According to Haidt, humans evolved an ability to reason not to seek the truth but to persuade other human beings to side with our gut sense. Our brains seek acceptance, not objective fact.

Haidt's summary of current psychological research suggests that emotions affect how we think about legal authorities, how we view the facts, and how we present our arguments. That fact might lead to pessimism about our ability to persuade others through logic and evidence. But there may be a more productive take. These psychological insights present two opportunities for advocates.

The first opportunity involves how we present our cases to judges. It's not enough to appeal to reason; a successful argument works on an emotional level, too. That doesn't mean that we should pander or amplify pathos. An emotionally manipulative argument is more likely to alienate a judge than win their vote. But it does mean that we should avoid the "argument only a lawyer could love." The research summarized in Haidt's book suggests that being *technically* right is not enough to persuade someone whose intuition points the other way. We have to anticipate that intuition and address it, too.

The second opportunity may pose a greater challenge. Taking this psychological research seriously means being more attentive to the intuitions that drive our *own* legal reasoning—the lenses through which we view facts and legal authorities. That's not easy to do, but the benefits can be significant.

Trent Collier is a shareholder and co-chair of the appellate department at Collins Einhorn Farrell P.C., in Southfield. His practice focuses on the defense of legal malpractice, insurance, and general liability claims at the appellate level. His e-mail address is Trent.Collier@CEFLawyers.com.

For example, consider how you view a lower court's opinion when you're the appellant. Chances are that you think the trial court got it wrong. And the more strongly you feel about your arguments, the more dismissive you'll be of the trial court's reasoning. You might even feel personally attacked or downright angry.

That reaction affects your advocacy. At worst, your emotional response to a trial court's opinion might make you use heated language when addressing it—a tactic that's almost certain to alienate an appellate judge. (Ask a professional-liability lawyer about what leads to most attorney discipline, and you'll probably hear about mismanaged trust accounts. But you might also hear about lawyers who believe so strongly in their own causes that they get destructively angry when others don't share their beliefs.[2]) At best, an emotional response to a trial court's reasoning may blind you to its merits. And if you can't see the merit in someone else's argument, you can't counter it effectively.

Of course, we don't have the option of turning off emotions when engaging in legal reasoning. Nor should we want to. As Haidt observes in *The Righteous Mind*, there's a term for a person who can reason without emotion: psychopath.[3]

But we *do* have the option of being more aware of the emotional lenses that shape our advocacy. Simply being aware of those lenses—asking ourselves what biases or agendas are driving our thinking—goes a long way toward mitigating their effect. And recognizing that judges also have emotional lenses helps us make our arguments more persuasive. In both ways, "emotional intelligence" leads to stronger advocacy.[4]

Endnotes

1 Johnathan Haidt, *The Righteous Mind: Why Good People Are Divided By Politics and Religion* (Vintage Books, 2013).

2 See, e.g., *Grievance Administrator v Fieger,* 476 Mich 231; 719 NW2d 123 (2006).

3 Haidt, *supra,* pp. 72-73.

4 Psychologist Daniel Goleman popularized this term with his seminal 1995 book, *Emotional Intelligence.*

Appellate Practice Report

By: Phillip J. DeRosier, *Dickinson Wright PLLC*

Appealing the Denial of Summary Disposition or Summary Judgment Following an Adverse Jury Verdict

A common avenue for challenging an adverse jury verdict on appeal is to argue that the trial court should have granted judgment notwithstanding the verdict (or, in federal court, a renewed judgment as a matter of law). But can a party also appeal an earlier denial of summary disposition or summary judgment by arguing that the case never should have been presented to the jury? The answer depends on whether the case is in state or federal court.

Michigan Courts

In Michigan, there is authority that a denial of summary disposition can be appealed even after a case has been submitted to a jury and a judgment entered. For example, in *McGrath v Allstate Ins Co*, 290 Mich App 434; 802 NW2d 619 (2010), Allstate Insurance Company denied coverage for damage to Mary McGrath's unoccupied home in Gaylord when some frozen pipes burst. Although McGrath's family apparently used the home for vacations, and she returned there periodically, she had been living full-time in an apartment in Farmington Hills for two years before the loss occurred. *Id*. at 437. After McGrath died some time later, the personal representative of her estate filed a lawsuit challenging Allstate's denial of coverage. *Id*. at 438.

Allstate filed two motions for summary disposition under MCR 2.116(C)(10) arguing that McGrath failed to notify Allstate of the home's unoccupied status as required under the policy. The trial court denied the motions finding that there was a genuine issue of material fact because there was evidence that, although McGrath was not residing in the home at the time the pipe burst, she intended to return. *Id*. at 438-440. A jury found in favor of the plaintiff, and a $100,000 judgment was entered against Allstate. *Id.* On appeal, Allstate argued that the trial court should have granted its motions for summary disposition because McGrath did not "reside" in the Gaylord home under the ordinary meaning of that term. The Court of Appeals agreed and vacated the judgment on the jury verdict. *Id*. at 440-445. See also *Oberle v Hawthorne Metal Products Co*, 192 Mich App 265, 271; 480 NW2d 330 (1991) ("[B]ecause plaintiff's complaint alleges a violation of the inherently dangerous activity doctrine, and thus active negligence, the trial court erred in allowing the issues of common-law and implied contractual indemnity to go to the jury. Commercial's motion for summary disposition pursuant to MCR 2.116(C)(10) should have been granted.").

Permitting a denial of summary disposition to be challenged even after a jury verdict appears to be consistent with Michigan's general rule that *all* interlocutory orders may be reviewed after a final judgment enters. See, e.g., *Shember v Univ of Mich Med Ctr*, 280 Mich App 309, 315; 760 NW2d 699 (2008) ("[A] party claiming an appeal of right from a final order is free to raise issues on appeal related to prior orders.").

In federal court, the ability to appeal the denial of summary judgment after a jury verdict is much more limited.

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

One note of caution: it is important to challenge *both* the denial of summary disposition *and* the jury verdict. In *1031 Lapeer LLC v Rice*, 290 Mich App 225; 810 NW2d 293, 301 (2010), a jury found that the defendant engaged in fraud in connection with a property lease. On appeal, the defendant argued that the trial court should have granted it summary disposition on the plaintiffs' fraud claims, but did not challenge the jury verdict itself. The Court of Appeals held that the fraud claims "properly withstood summary disposition" because "questions of fact existed." *Id*. at 239. Then, in dicta, the Court went on to observe that because the defendant "did not appeal the jury verdict itself, any error by the trial court in denying defendant's motion for partial summary disposition on plaintiffs' fraud claims would be irrelevant because no matter what this Court's ruling on the summary disposition issue, the jury verdict would still stand." *Id*.

Federal Courts

In federal court, the ability to appeal the denial of summary judgment after a jury verdict is much more limited. In *Ortiz v Jordan*, 131 S Ct 884; 178 L Ed 2d 703 (2011), the Supreme Court, resolving a conflict among the circuits, held that a party generally cannot appeal an order denying a motion for summary judgment after a full trial on the merits. The *Ortiz* Court explained that such an order "retains its interlocutory character as simply a step along the route to a final judgment," and that "[o]nce the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary judgment motion." *Id*. at 889. See also *Gerics v Trevino*, 974 F3d 798, 803 (CA 6, 2020) ("If a case involves disputed material facts, the jury or judge properly resolves those questions on the evidence received at trial. So it makes sense that we could not after the trial review a summary judgment appeal—one 'based on the evidence presented prior to trial, not the evidence received at trial[.]'") (citations omitted).

> In Michigan, there is authority that a denial of summary disposition can be appealed even after a case has been submitted to a jury and a judgment entered.

The only exception appears to be in situations where the request for summary judgment was based on a "purely legal" issue that does not require resolution of disputed facts. Such cases "'typically involve contests not about what occurred, or why an action was taken or omitted, but disputes about the substance and clarity of pre-existing law.'" *Gerics*, 974 F3d at 803, quoting *Ortiz*, 562 US at 190.

For example, in *Nolfi v Ohio Kentucky Oil Corp*, 675 F3d 538 (CA 6, 2012), the jury rendered a verdict against the defendants for fraud in connection with the issuance of securities related to oil and gas interests. Although the Sixth Circuit recognized the general rule precluding summary judgment appeals after a jury trial, it agreed to consider whether the defendants should have been granted summary judgment based on a purely legal issue concerning whether the "plaintiffs' loss causation theory [was] actionable under § 10(b) [of the Securities Exchange Act of 1934, 15 USC 78j(b)]." *Id*. at 645. In reaching the issue, the *Nolfi* court found that the Supreme Court left open the possibility that cases "involv[ing] . . . [only] disputes about the substance and clarity of pre-existing law" may still be considered. *Id*. See also *Hurt v Commerce Energy, Inc*, 973 F3d 509, 516 (CA 6, 2020) ("Appeals of summary judgment denials after a full trial on the merits are generally precluded, though the Supreme Court has acknowledged a possible exception for "'purely legal' issues capable of resolution 'with reference only to undisputed facts.'"), quoting *Ortiz*, 562 US at 188-190.

In short, although the Michigan Court of Appeals will consider an appeal of a denial of summary disposition after a jury trial, such review in the Sixth Circuit is far more limited, available only in cases in which the summary judgment denial involves a "purely legal" issue.

MDTC Insurance Coverage Report

By: Drew W. Broaddus, *Secrest Wardle*
dbroaddus@secrestwardle.com

***Dye Salon v Chubb Indemnity Co, et al,* opinion of the U.S. District Court for the Eastern District of Michigan, issued February 10, 2021 (Docket No. 20-11801), and**

***Stanford Dental PLLC v The Hanover Ins Group, et al,* opinion of the U.S. District Court for the Eastern District of Michigan, issued February 10, 2021 (Docket No. 20- 11384).**

Last quarter (and a few months before that in Vol. 37 No. 1), this report focused on the effects of COVID-19 and various governments' responses to it on the world of insurance coverage. In particular, we looked at several business interruption suits relating to the pandemic. In the months since, dozens of decisions have been issued in such cases across the county – most finding no coverage either because of the lack of direct physical loss or because of a virus exclusion. These two decisions, *Dye Salon* and *Stanford Dental*, are particularly notable because they were decided under Michigan law.

In *Dye Salon,*[1] the insured sought business interruption coverage for a Ferndale, Michigan Salon that had to shut down its business and significantly curtail operations under various Executive Orders issued by Michigan's Governor relating to the COVID-19 pandemic. *Stanford Dental* involved a similar claim by a dentist's office. Because the two cases raised almost identical issues, the District Court heard the insurers' motions for summary judgment together.

The parties in both cases argued extensively about whether the businesses had suffered a direct physical loss, either because the Executive Orders brought about a "loss of use" or because the virus itself physically "damaged" the premises. Judge Matthew Lietman found it unnecessary to answer those questions, however, because in both cases the policies contained virus exclusions, which were dispositive.

The insureds in these cases argued that the exclusions should not apply because their losses were caused by Governor Whitmer's Executive Orders and not by the COVID-19 virus. Judge Lietman rejected this argument based on the exclusions' anti-concurrent cause language. He found no requirement under the policies' terms that the virus be the most immediate and direct cause of an insured's losses; the virus exclusions applied even where some "other cause or event contributes concurrently or in any sequence to the loss." The court also rejected the insureds' assertions that the exclusion was ambiguous, citing several cases from other states that had applied the exclusion to similar facts. Finally, Judge Lietman rejected the insureds' "regulatory estoppel" argument – which was based on the notion that insurers misrepresented the scope of the "Virus or Bacteria" exclusion when they sought the insurance commissioner's approval. Apart from being factually speculative, the court found that this doctrine had no foundation in Michigan law and had been rejected in most other states.

A "regulatory estoppel" argument, in this context, is based on the idea that insurers secured state insurance commissioners' approval for the "Virus or Bacteria" exclusion under false pretenses. Regulatory estoppel has not been recognized in any reported Michigan decision. The argument is unlikely to gain traction in Michigan because the Michigan Supreme court has held that estoppel "will not be applied to broaden the coverage of a policy to protect the insured against risks that were not included in the policy or that were expressly excluded from the policy." *Kirschner v Process Design Assocs, Inc,* 459 Mich 587, 594; 592 NW2d 707 (1999). The argument has not been particularly successful outside of Michigan either. See *Sher v Allstate Ins Co,* 947 F Supp 2d 370, 389 (SD NY, 2013) ("The theory of regulatory estoppel ... has received almost universal disapproval. It has been consistently rejected by federal and state authorities across the country.").

Drew W. Broaddus is a partner at Secrest Wardle's Grand Rapids office and chair of the firm's Appellate and Insurance Coverage practice groups. He has been named to Super Lawyers Magazine's list of Rising Stars for 2012–2017. He has received an AV Preeminent® Peer Review Rating by Martindale-Hubbell and is a member of the State Bar's Appellate Practice Section Council. He can be reached at dbroaddus@secrestwardle.com.

Judge Leitman's treatment of the "Virus or Bacteria" exclusion could be instructive in many cases because the policies in *Dye Salon* and *Stanford Dental* contained standard Insurance Services Office ("ISO") exclusion forms. This form was specifically crafted to address both the direct and indirect economic consequences flowing from the outbreak of contagious diseases like COVID-19. See White & Breen, *The Impact of the Global COVID-19 Pandemic on the Insurance Industry,* 62 No. 4 DRI For Def. 22, 31 (April 2020). "Significantly, when ISO submitted the exclusion to state regulators … its circular LI-CF-2006-175 expressly identified SARS – **the virus from which COVID-19 mutated** – as a type of virus that the exclusion is designed to address." *Id.* (emphasis in original). "The ISO circular stated: [e]xamples of viral and bacterial contaminants are rotavirus, SARS, influenza (such as avian flu), legionella, and anthrax. The universe of disease-causing organisms is always in evolution." *Id.* See also Biser, et al., *COVID-19: Construction Contracts and Potential Claims Under Business Interruption, Civil Authority, and Other Insurance Policies and Endorsements,* Practical Law Practice Note w-025-0046 (Westlaw 2020), noting that such exclusions were "written in response to the 2003 worldwide spread of SARS (see ISO Form CP0140 (0706)…." "These exclusions began appearing in BI policies to avoid coverage for something like COVID-19." *Id.*

As of our editorial deadline, neither insured had filed a Notice of Appeal to the Sixth Circuit, although some time remained for them to do so. So we may be revisiting one or both of these cases in a few months.

***Council v Allstate Vehicle & Prop Ins & Hickman Agency*, unpublished opinion per curiam of the Court of Appeals, issued February 18, 2021 (Docket No. 351676).**

While it may not always seem like it, there continues to be coverage litigation unrelated to COVID-19. *Council* involved an old-fashioned fire loss claim under a homeowner's policy. The fire loss itself was unremarkable. However, in the course of investigating it, Allstate learned that when he applied for the policy, the insured inflated the home's purchase price by a factor of 7 ½ (he paid $10,000 but claimed $75,000 in the application). *Council,* unpub op at 1. Allstate deemed this a material misrepresentation – as the home was grossly over-insured – and rescinded the policy. The insured sued Allstate,[2] challenging the rescission, and also due the agent who allegedly filled out the application for him. The trial court granted summary disposition to all of the defendants, finding that the insured was solely responsible for all of the statements in the application because he signed it. See *Montgomery v Fidelity & Guaranty Life Ins Co,* 269 Mich App 126, 128-130; 713 NW2d 801 (2005). The Court of Appeals affirmed.

In March of 2014, the insured in this case paid $10,000 cash to purchase a home in Flint. *Council,* unpub op at 1. On March 8, 2017, he went to the defendant agency to talk about obtaining a policy for the home. *Id.* According to the insured, the agent asked him typical questions to fill out the application for insurance. *Id.* However, "the completed application contained several inaccurate statements," the most significant being that "the application listed that the purchase price and current market value of the home was $75,000." *Id.*

The insured claimed "that he did not know where the agent came up with that answer because he did not tell him that number." *Id.* However, the insured agreed "that he was given the application to read and sign" and that "his initials were on the page that contained the misstated purchase price…." *Id.* Moreover, he signed directly below the following statement: "To the best of my knowledge the statements made on this application, including any attachments, are true. I request the Company, in reliance on these statements, to issue the insurance applied for. The Company may recompute the premium shown if the statements made herein are not true. **In the event of any misrepresentation or concealment made by me or with my knowledge in connection with this application, the Company may deem this binder and any policy issued pursuant to this application, void from its inception**. This means that the company will not be liable for any claims or damages which would otherwise be covered." *Council,* unpub op at 1-2 (emphasis added).

On October 18, 2017, a fire damaged the home. When the plaintiff submitted a claim to Allstate for the replacement value of the home, Allstate voided the policy based on the aforementioned purchase price discrepancy. *Id.* at 2. The rescission letter stated that if Allstate had been "aware of the actual cash amount you paid for the property this policy would not have been issued." *Id.* Allstate refunded the premium. *Id.*

The insured filed suit, alleging breach of contract against Allstate, the agent, and the agency. The insured also brought a claim of negligence against the agent and agency, "arguing, in part, that the agent had breached his duty of loyalty to plaintiff by misrepresenting the nature of the coverage and failing to inform plaintiff about the changes to the application." *Council,* unpub op at 2. All defendants moved for summary disposition, which the trial court granted because under the undisputed facts, the insured "was responsible for the contents of the application after he signed the application and acknowledged that the information contained within was true." *Id.*

> In this case, the insured moved for summary judgment, arguing for a determination that the duty to defend was owed as a matter of law.

As to the claims against the agent, the Court of Appeals found that "[t]he facts of this case are almost identical to those in *Montgomery*." *Council,* unpub op at 3. "Plaintiff argues that the agent made the material misrepresentation in the policy and plaintiff did not read the application." *Id.* "However, just like in *Montgomery* … plaintiff signed the authorization stating that he had read the answers in the application and that the information was true." *Id.* "Further, plaintiff initialed the page on which the incorrect payment price for his home was listed, and plaintiff agreed that he was given the contract to read and approve." *Council,* unpub op at 3. For these reasons, the panel found that "the question of who came up with the misstatements was not a genuine issue of material fact because regardless, plaintiff

was responsible for the misrepresentations when he was given an opportunity to read the application and authorized that … it was true and accurate." *Id.*

As to Allstate, the insured's main argument was that rescission should not have been allowed because the misrepresentations were not material. *Council,* unpub op at 6. According to the insured, "Allstate would not have rejected the policy had it known the correct facts." The insured admittedly failed to raise this issue in the trial court, but asked the Court of Appeals to consider it under a "plain error" standard. *Id.* The panel found no plain error; citing Allstate's rescission letter and underwriter's affidavit, the panel found that "the misstatement regarding the purchase price of the home was material because Allstate would not have authorized the policy had it known the true purchase price of the home." *Id.* at 6-7.

Although the insured did not develop the argument very well in *Council*, this opinion serves as a useful reminder to coverage practitioners that not every misrepresentation will support rescission. Only a **material** misrepresentation will support voiding a policy. *Council,* unpub op at 6. "The Michigan Supreme Court has held that a misrepresentation is a false statement of fact, and that a fact is material if communication of it would have had the effect of substantially increasing the chances of loss insured against so as to bring about a rejection of the risk or the charging of an increased premium." *Axis Ins Co v Innovation Ventures, LLC*, 737 F Supp 2d 685, 689–690 (ED Mich, 2010). In other words, "the proper materiality question … is whether 'the' contract issued, at the specific premium rate agreed upon, would have been issued notwithstanding the misrepresented facts." *Id.* at 690. "The focus of inquiry" for "materiality" is whether "a reasonable underwriter would have" – if "given the correct information" – "rejected the risk or charged an increased premium." *Id.*

***Ric-Man Constr, Inc v Pioneer Special Risk Ins,* opinion of the U.S. District Court for the Eastern District of Michigan, issued February 26, 2021 (Docket No. 19-13374).**

No quarterly coverage report is complete without some discussion of the duty to defend. In this case, the insured moved for summary judgment, arguing for a determination that the duty to defend was owed as a matter of law. The court held that questions of fact made any such determination premature.

The insured sought a defense from Pioneer in state court litigation over "a troubled water drainage construction project…." *Ric-Man Constr, supra* at *1. The policy provided coverage for any "professional claims" made against the insured by any entity alleging deficiency of its work as a commercial construction contractor. The multi-party litigation that resulted from the "troubled" project included several claims and cross-claims. Pioneer argued that it owed no duty to defend Ric-Man because the policy provided "claims made" coverage,[3] and the original complaint that started the state court litigation was filed before the coverage period.

> In particular, we looked at several business interruption suits relating to the pandemic. In the months since, dozens of decisions have been issued in such cases across the county – most finding no coverage either because of the lack of direct physical loss or because of a virus exclusion.

After determining that Michigan law controlled,[4] Judge David Lawson noted that the "claims made" status of the policy was not disputed; the question was when the operative "claim" was made. *Ric-Man Constr, supra* at *6. The parties agreed that certain allegations in a cross-claim filed against Ric-Man within the policy period arguably included a "Professional Claim," as Pioneer's policy defined that term. Ric-Man insisted that this parties' agreement on these points established a duty to defend and that no further inquiry was proper. *Id.*

Judge Lawson disagreed. While noting that "Michigan courts take an expansive view of the duty to defend," that duty "cannot be limited by the precise language of the pleadings," because "the insurer has the duty to look behind the third party's allegations to analyze whether coverage is possible." *Ric-Man Constr, supra* at *6, citing *Am Bumper & Mfg Co v Hartford Fire Ins Co,* 452 Mich 440, 450; 550 NW2d 475 (1996). Looking closer at the various pleadings in the underlying case, Judge Lawson saw an earlier claim had been asserted against Ric-Man, prior to the policy period, which *could have been construed* as being one for "Professional Services." *Ric-Man Constr, supra* at *6. So the inquiry turned on whether this earlier claim (1) was for "Professional Services" and (2) was part of the same "single claim" as the later-filed crossclaim.

The Pioneer policy language defined the term "Professional Claim" in a way that contemplated that various claims for relief against an insured would be regarded as a "single claim" where they all "aris[e] out of a series of acts, errors, omissions or incidents [that are] related to each other." *Ric-Man Constr, supra* at *7. The policy further stated that "[a] ll such claims, whenever made, shall be considered first made during the Policy Period as of the date the earliest claim was first made." *Id.* Per this language, a "claim" was not limited to a lawsuit; it could be "any demand ... received by an Insured seeking Damages or correction of Professional Services and alleging liability or responsibility on the Insured's part." *Id.*

The insured asserted that it never was made aware of any "defective design" claim until the crossclaim. *Ric-Man Constr, supra* at *7. But Judge Lawson found that both the earlier filed (pre-policy period) complaint and the crossclaim "allege numerous breaches of Ric-Man's obligations under the contract that apparently relate to duties that include the 'design' of the ground well system." *Id.* "Both pleadings also allege other performance failures by Ric-Man." *Id.* The District Court found it "fair to say that the" earlier filed pleading "also includes a claim for defective 'Professional Services.'" *Id.* "And because a lawsuit frequently is not the first step in addressing business disputes," discovery was needed to determine "if Ric-Man received any other pre-policy demand to correct its defective Professional Service." *Id.*

Therefore, even though "Michigan law generously recognizes an insurer's

duty to defend the insured from suit," the insured's request for summary judgment was premature. *Id.* The "policy's definitional language suggests the possibility – even the likelihood – that the allegations in both pleadings in the underlying litigation may be construed according to a reasonable reading of the policy language as a 'single claim,' which first was presented before coverage commenced." *Ric-Man Constr, supra* at *7. "If that is proven, then coverage is barred, and if coverage is barred, then no duty to defend was triggered." *Id.*

Michigan has been described as a "four corners" state, i.e., "the duty to defend must be determined solely by comparing the policy language with the allegations of the" complaint. *Upjohn Co v Aetna Cas & Sur Co*, 768 F Supp 1186, 1195-1196 (WD Mich, 1990). While *Ric-Man Constr* seems to go against that at first blush, upon closer review, the opinion seems to be saying that when a "claim" is set forth in multiple documents (pleadings or pre-suit correspondences), the four corners *of each of those documents* must be compared to the policy language, in order to determine whether the claim was first raised during the policy period.

Endnotes

1 The author's firm was local counsel for the insurer in this case.

2 The author's firm represented Allstate in the trial court and on appeal.

3 "[A] claims made policy is one which indemnity is provided no matter when the alleged error or omission or act of negligence occurred, provided the misdeed complained of is discovered and the claim for indemnity is made … during the policy period." *Stine v Continental Casualty Co,* 419 Mich 89, 97; 349 NW2d 127 (1984). This is in contrast to "occurrence-based" coverage. See *Med Protective Co v Kim,* 507 F3d 1076, 1082 (CA 7, 2007) ("Claims-made and occurrence-based insurance policies insure different risks. In the occurrence policy, the risk is the occurrence itself. In the claims made policy, the risk insured is the claim brought by a third party against the insured.").

4 The insured argued that New York law controlled based on a choice-of-law clause in the policy. However, that clause was deleted by an endorsement. "[W]hen an endorsement deletes language from a policy, a court must not consider the deleted language in its interpretation of the remaining agreement." *Valassis Communications v Aetna Cas & Sur Co,* 97 F3d 870, 873 (CA 6, 1996) (applying Michigan law in diversity).

Legal Malpractice Update

By: Michael J. Sullivan and David C. Anderson, *Collins Einhorn Farrell, P.C.*[1]
michael.sullivan@ceflawyers.com; david.anderson@ceflawyers.com

Protecting Your Right to a Referral Fee

***Law Offices of Sherbow, PC v Fieger & Fieger, PC*, __ Mich __; __ NW2d __ 2021) (Docket No. 159450)**

Facts and Procedural History:

In 2011, Mr. Sherbow, an attorney and sole proprietor of the plaintiff law firm, consulted with Charles Rice on some matters concerning Rice's nonprofit organization. Before their next scheduled meeting in 2012, Rice was involved in a fatal accident. Also injured in the accident were Mervie Rice, Phillip Hill, and Dorothy Dixon – Rice's partner and the mother of his son, Dion Rice.

After the accident, Dion contacted Rice's nonprofit organization requesting Sherbow's information. A representative from the organization called Sherbow, informing him of the accident and that Dion wanted to speak with him. Sherbow contacted Dion and the two had several conversations and an in-person meeting. Sherbow contacted defendant, the Fieger firm, and notified their intake attorney of the potential case. Dion told Sherbow that he contacted the Fieger firm himself, and that he intended to use them. Mervie Rice also independently contacted the Fieger firm.

A few weeks later, Dion and Mervie met with Sherbow and an attorney from the Fieger firm at the Fieger firm's office. Hill did not attend the meeting, and neither did Dixon, who was in a coma. Dion signed a retainer agreement with the Fieger firm on behalf of Rice's estate, and agreed to the Fieger firm's representation of his mother, Dixon. Mervie also signed a retainer agreement. The retainer agreements did not include a referral agreement. There was conflicting testimony as to whether Dion and Mervie were told that Sherbow would receive a referral fee. The attorney from the Fieger firm later met with Hill and obtained a signed retainer agreement.

In 2015, the Fieger firm won an award of $10.2 million for the accident victims, with the contingency attorney fee totaling $3.4 million. When the Fieger firm refused to pay Sherbow his percentage of that fee, plaintiff law firm filed suit, asserting breach of contract.

The Fieger firm sought partial summary disposition, arguing that the referral agreement violated MRPC 1.5(e). The trial court denied the motion, holding that MRPC 1.5(e) did not require the referring attorney to have a written agreement with the client in order to split a fee. It further held that the Fieger firm's claim that the agreement was against public policy was an affirmative defense for which the firm carried the burden. Despite this ruling, at trial, the court instructed the jury that Sherbow had to prove that each accident victim was his client in order to recover a fee for referring that client. The jury found that only Dion, who was acting on behalf of Rice's estate, was Sherbow's client.

Sherbow appealed. In a published opinion, the Court of Appeals affirmed in part, reversed in part, vacated in part, and remanded for new trial. The Court held that: (1) MRPC 1.5(e) does not require an attorney-client relationship for recovery of a referral fee, and (2) the Fieger firm's public-policy argument was an affirmative defense, for which it carried the burden of proof. The Michigan Supreme Court granted leave to address both issues.

Holding:

The Supreme Court first held that for a referral agreement to be valid under MRPC 1.5(e), there must be an attorney-client relationship between the referring attorney and the individual he or she refers. The Court explained that MRPC 1.5(e) requires

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

the attorney to participate **as an attorney** when seeking a referral fee, and exercise some professional judgment in referring the case. This, in turn, requires that the attorney establish a professional relationship with the client, which can be accomplished by a direct or indirect consultation. If the parties intend, the consultation and referral can form the basis for the entire attorney-client relationship. There's no further rule that the attorney do anything other than refer the client and follow the other requirements of MRPC 1.5(e).

Next, the Court agreed that the Fieger firm's argument that the referral agreement was void constituted an affirmative defense. Therefore, the Court held that a party opposing a referral agreement on the basis that it violates MRPC 1.5(e) carries the burden of demonstrating the violation.

Though the trial court erred in instructing the jury that Sherbow carried the burden of proof, that error was only prejudicial as to Sherbow's claim for referring Dixon. There was no question that Sherbow didn't speak with Dixon before the "referral" occurred. But that was because she was in a coma during the relevant period. Moreover, Dion agreed that when he met with Sherbow, he was looking for guidance as it related to his family. Given the fact that the jury found Dion's interactions enough to create an attorney-client relationship with regard to Rice's estate, the Court couldn't say with certainty that a properly instructed jury would find those same interactions with Dion insufficient to establish an attorney-client relationship with Dixon. The Court therefore remanded for a new trial as to Sherbow's claim regarding a referral fee for Dixon.

Practice Note:

To guarantee your right to a referral fee, you must have formed an attorney-client relationship before the referral. This only requires consulting with the individual to seek the services of another attorney, and forming an agreement with the individual that your relationship is limited to this purpose. Also, it is best to confirm the referral understanding in writing at the outset, in order to avoid a *post hac* dispute.

Endnotes

1 The authors would like to thank Fawzeih Daher for her significant contribution to this article.

MDTC Legislative Report

By: Richard K. Joppich, *Kitch, Drutchas, Wagner, Valitutti & Sherbrook P.C.*
Richard.Joppich@kitch.com

At the outset, I would like to personally thank Graham Crabtree for authoring this segment of the Quarterly for so long. As I try and put my first article together, I realize how much guidance and insight he provided us concerning the capitol activities and directions, the key public acts that came out of them, and the legislation introduced to be considered by our legislative representatives.

Having said that, and while I cannot fill his shoes completely, I will endeavor to provide everyone with some thoughtful information on what I see happening with legislation that may impact our practices and clients. I do not presume to know all of your needs or interests, so if you have a particular bill or act that you think should be discussed for the good of all or even for a specific practice area in our organization, I invite you to e-mail me your thoughts at Richard.joppich@kitch.com.

Other key focus areas so far this year appear to be elections, marijuana, water supply standards, and many others.

As this is a beginning for me, and the end of the first quarter of the new legislative session following the elections is approaching, the makeup of our highest promulgating entities is as good a starting point as any. The Senate has seated twenty-two Republicans and sixteen Democrats for this election cycle. The House has fifty-eight Republicans and fifty-two Democrats. These majorities are balanced out by our Governor, a Democrat, with veto powers. I do not profess to be a government expert, but I recently read that the levels of Republicans in our Legislature are not sufficient to override the veto (sometimes referred to as a "Supermajority").

For the status of legislative efforts in the first two months and one week of the session, as of my writing, the House had enrolled four hundred and fifty-two bills and the Senate two hundred and seven. I had a lot of homework to do in reviewing these to try and pare down to a few to mention below. However, just for some perspective, last year in whole, two hundred and forty-eight bills were passed into law.

With the concerns over our pandemic and appropriate responses to efforts to manage its impact, it may come as no surprise that the very first bill of 2021, SB 0001, would institute a twenty-eight day duration of an epidemic emergency order from the MDHHS unless both houses of the Legislature approve an extension. The bill has passed roll call of the Senate on March 3rd. Other bills in both the House and Senate have focused much attention on COVID in varying aspects, but statistical data seemed to be central. Interestingly, high-school sports also are getting attention. We like our Friday night lights, I guess. Other key focus areas so far this year appear to be elections, marijuana, water supply standards, and many others.

Looking to litigation and court topics, a bill has been introduced addressing premises liability for gun-free zones. HB 4027 proposes that a person (defined to include any legal entity) who owns or occupies real property designated as a gun or weapon-free zone is responsible for the safety of persons who enter and is liable civilly for damages from injuries if there was a failure to provide adequate security.

Addressing the Court of Claims, HB 4222 would have the Supreme Court assign circuit court judges, rather than court of appeals judges, to the seats and allows for the assignment of more than four judges to the court of claims. The clerk of the circuit where the judge sits would be the clerk of the court of claims for that judge. Perhaps a differing perspective on court of claims litigation using the trial courts as the pool of judges for such actions.

Richard K. Joppich is a Detroit Catholic Central High School graduate, Mr. Joppich obtained a Bachelor of Arts in both Political Science and Communications from Bowling Green State University in Ohio in 1982. He obtained his Juris Doctorate from the Detroit College of Law (now Michigan State University College of Law) in 1988. He is a Principal Attorney and Marketing Director with Kitch, Drutchas, Wagner, Valitutti and Sherbrook P.C., headquartered in Detroit Michigan.

For over thirty years, he has been a trial attorney representing clients in complex malpractice and general personal injury suits throughout the State and Federal Courts in Michigan. He is admitted to practice in the U.S. District Courts for the Eastern and Western Districts of Michigan, the U.S. 6th Circuit Court of Appeals, and the United States Supreme Court.

Mr. Joppich also provides services in Medicare, Medicaid, and private health insurance law, liens, audits, and claim reporting compliance. He has assisted insurers, healthcare providers, courts, and attorneys in policy generation, negotiations, lien resolution, and settlement services. Stemming from this experience he has been instrumental in resolving and formalizing complex settlements and has been called upon to assist parties by mediating disputes. He has completed his formal training as a Michigan General Civil Mediator with additional training in Probate matters and virtual mediation.

The authority of magistrate judges in district court is proposed to be expanded and reorganized in HB 4184 to address civil infractions and fines associated with the Medical Marijuana Act and the Michigan Regulation and Taxation of Marijuana Act.

In addressing worker's compensation claims, HB 4171 would set a presumption of causation for cancer for fire and rescue personnel associated with fire response.

To ease some costs for attorneys, HB 4164 would mandate that a court must allow an attorney access, through a website, to the register of actions, and a digital image of all documents filed in any case in the court without charge for accessing the website.

The Senate bills that caught my eye as a healthcare attorney included many healthcare issues relating to nurse staffing, certificates of need, and dispensing of prescriptions for out-of-state prescribers. The House also has its attention on healthcare issues as well with bills on mental health restraints expansion, nurse and physical therapy agreements with other states for some degree of reciprocity in practices, expansion of CRNA scope of practice, and addition of physician assistants and nurse practitioners to the mental health code.

While I have mentioned only a few of the key bills, the Legislature's work is extraordinarily broad ranging early in the new session. I can only hope that I have given everyone a sense of the upcoming issues and will promise to keep an eye on the capitol and ear to the heartbeat of our government as we move further into 2021.

With the concerns over our pandemic and appropriate responses to efforts to manage its impact, it may come as no surprise that the very first bill of 2021, SB 0001, would institute a twenty-eight day duration of an epidemic emergency order from the MDHHS unless both houses of the Legislature approve an extension.

Medical Malpractice Report

By Paul M. Indyk, *Kerr, Russell and Weber, PLC*

Introduction

The COVID-19 pandemic has had far reaching and long-lasting impacts on virtually every aspect of our lives. When restrictions related to the pandemic began in March 2020, many of us were faced with adapting our once normal routines to deal with a time of great uncertainty. In response to the pandemic, the Michigan Supreme Court issued administrative orders to help ensure access to the courts remained open and available to all litigants. Among these orders were two that addressed an issue affecting every lawsuit: the timely commencement of an action. The AOs created an "exclusion period" that extended deadlines to initiate a civil or probate actions, as well as the time to for filing responses to initial pleadings. However, the wording of the AOs is confusing and inconsistent. This may potentially lead to an argument for "stacking" of tolling periods that could allow an otherwise untimely case to proceed, contrary to the intentions of the Supreme Court. This article will present several scenarios to consider when analyzing whether a medical-malpractice action was properly commenced in light of the COVID-19 administrative orders.

Statute of Limitations Applicable to Medical-Malpractice Actions

A plaintiff in a medical-malpractice action must file a complaint within two years from the date the cause of action accrued. MCL 600.5805(6). A claim for medical malpractice "accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time plaintiff discovers or otherwise has knowledge of the claim." MCL 600.5838a. The wrongful-death "savings provision" in MCL 600.5852 provides that if a person dies before the period of limitations has run, or less than thirty days after the period of limitations has expired, an action may be commenced within two years after a personal representative of the estate is appointed, but not more than three years after the period of limitations would otherwise have run.

Prerequisite Statutory Notice of Intent Requirements for Medical-Malpractice Actions

A plaintiff cannot file a medical-malpractice lawsuit without first providing the required statutory notice of intent. MCL 600.2912b(1) provides that a medical-malpractice action shall not be commenced unless a notice of intent to file a claim has been mailed to the last known address of each potential defendant 182 days before filing. MCL 600.5856(c) provides that the two-year period of limitations for medical-malpractice actions is tolled during the notice period if notice is given in compliance with MCL 600.2912b. The statute further states that "the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given." MCL 600.5856(c). As an example, if a NOI is provided with five days remaining on the statute of limitations, the plaintiff will have five days after the 182 day notice period expires to timely file a complaint.

COVID-19 Michigan Supreme Court Administrative Orders

On March 10, 20220, Governor Gretchen Whitmer declared a state of emergency in Michigan after the first two COVID-19 cases were identified. On March 23, 2020, the Michigan Supreme Court issued Administrative Order No. 2020-3, which stated that:

> In light of the continuing COVID-19 pandemic and to ensure continued access to courts, the Court orders that:

Paul M. Indyk's experience includes representing physicians, hospitals and other health care providers in medical malpractice litigation, including cases involving general surgery, cardiothoracic surgery, colon and rectal surgery, OB/GYN, pediatrics, and neurology. Paul has familiarity with all phases of litigation, from pre-suit investigation to post-trial work. He has served as second chair counsel in several jury trials in state and federal court.

Paul also has experience representing attorneys in claims of legal malpractice in cases arising out of bankruptcy, family law, product liability, and trusts & estates. In addition, his practice involves representing municipalities in matters involving claims of police misconduct, malicious prosecution, equal protection, and due process. Paul also has extensive experience in first and third party automobile claims, as well as cases involving premises liability and other general negligence matters.

Paul obtained his law degree from Wayne State University Law School and his undergraduate degree from the University of Michigan, Ann Arbor.

Paul can be reached at pindyk@kerr-russell.com or 313-961-0200

> For all deadlines applicable to the commencement of all civil and probate case- types, including but not limited to the deadline for the initial filing of a pleading under MCR 2.110 or a motion raising a defense or an objection to an initial pleading under MCR 2.116, and any statutory prerequisites to the filing of such a pleading or motion, any day that falls during the state of emergency declared by the Governor related to COVID-19 is not included for purposes of MCR 1.108(1).

The language in the AOs may leave room for certain plaintiffs to argue for a "stacking" of the normal medical-malpractice tolling periods with the pandemic related period. It is not hard to imagine a scenario where a plaintiff argues for an interpretation allowing for multiple tolling periods to gain additional time to file.

The AO states that the purpose of the order is to "extend all deadlines pertaining to case initiation … during the state of emergency declared by the governor related to COVID-19." The AO references Michigan Court Rule 1.108, titled Computation of Time, which provides litigants with direction on how to determine proper timing for filing under court rules, court orders, or statutes. Specifically, MCR 1.108(1) states that certain dates, such as the date of an act, an event, a default, a Saturday, a Sunday, a legal holiday, or date the court is closed, are not included in the computation of time, and the period will run until the next date that is not one of the aforementioned dates. The reference to MCR 1.108 indicates that the Supreme Court intended the dates during which the order was effective to not count when performing a calculation of a filing deadline. Essentially, this time period should be treated as a weekend or holiday.

However, AO 2020-3 was amended several weeks later on May 1, 2020 to add an additional wrinkle to the mix. The amended AO clarified that the order "does not suspend or toll any time period that must elapse before the commencement of an action or proceeding." The staff comment to the amendment states that it was "intended to make the order more consistent with Executive Order 2020-58." That EO states:

1. Consistent with Michigan Supreme Court Administrative Order No. 2020-3, all deadlines applicable to the commencement of all civil and probate actions and proceedings, including but not limited to any deadline for the **filing of an initial pleading and any statutory notice provision or other prerequisite related to the deadline for filing of such a pleading**, are suspended as of March 10, 2020 and shall be tolled until the end of the declared states of disaster and emergency.
2. Consistent with Michigan Supreme Court Administrative Order No. 2020-3, this order does not prohibit or restrict a litigant from commencing an action or proceeding whenever the litigant may choose, **nor does it suspend or toll any time period that must elapse before the commencement of an action or proceeding**. [Emphasis added].

This language appears to consider two different issues: (1) the deadline for "filing" of an initial pleading, statutory notice, or other prerequisite to a filing; and (2) the suspension or tolling of a time period.

The Supreme Court then rescinded AO 2020-3 when it issued AO 2020-18 on 06/08/2020. It held as follows:

> Effective Saturday, June 20, 2020, that administrative order is rescinded, and the computation of time for those filings shall resume. For time periods that started before Administrative Order No. 2020-3 took effect, the filers shall have the same number of days to submit their filings on June 20, 2020, as they had when the exclusion went into effect on March 23, 2020. For filings with time periods that did not begin to run because of the exclusion period, the filers shall have the full periods for filing beginning on June 20, 2020.

The staff comment further notes that "the practical effect of Administrative Order No. 2020-3 was to enable filers to exclude days beginning March 10, 2020." This effectively makes the exclusion 102 days long.[1]

The question is how to determine the correct statute-of-limitations deadlines, as well as notice-of-intent tolling periods, in light of the "exclusion period" provided by the AO.

Examples of Time Calculations Under Different Scenarios

The following are several scenarios that may arise from the application of administrative orders to the calculation of different time periods.

The reference to MCR 1.108 indicates that the Supreme Court intended the dates during which the order was effective to not count when performing a calculation of a filing deadline. Essentially, this time period should be treated as a weekend or holiday.

Normal Time Period with No Additional Time Added

In the first scenario, a plaintiff suffers an injury that gives rise to a potential medical-malpractice action with an accrual date of March 9, 2018. The statute of limitations would expire on March 9, 2020. The plaintiff's counsel filed the NOI on March 1, 2020, which tolled the limitation period with 8 days remaining. The 182-day notice period under the NOI would expire on August 31, 2020 and the plaintiff would have until September 8, 2020 (because 09/07/20 was Labor Day) to timely file the lawsuit. The

NOI period would not be tolled, and the plaintiff would not receive any additional time, since it was filed before the effective date of the AO exclusion period and was not tolled by amended AO 2020-3. Further, on March 10, 2020, the plaintiff would have had 8 days left to file (after the expiration of the NOI) period, and therefore they continued to have the same 8 days remaining after the termination of the exclusion period.

Additional Time to File Under AO

In the second scenario, the plaintiff suffered an injury with an accrual date of December 11, 2017. The NOI was filed on December 9, 2019, with 2 days remaining on the SOL. Since the 182-day notice period started to run before the AO went into effect on March 10, 2020, it continued to run during the exclusion period and would expire on June 8, 2020. Under normal circumstances the plaintiff would need to file the complaint by June 10, 2020 to be timely. However, due to AO 2020-03 the statute of limitations was tolled and under AO 2020-18 the time computation did not resume until June 20, 2020. The plaintiff had two days remaining, so the complaint would need to be filed no later than June 22, 2020 to be timely.

Additional Time to File Under AO and NOI Time Tolling Periods

The third scenario considers a potential medical-malpractice action with an accrual date of March 12, 2018. In this situation the plaintiff would need to file the NOI no later than March 12, 2020 before commencing the lawsuit. However, under amended AO 2020-3 and EO 2020-58, both the NOI and limitation-period filing deadlines were tolled until June 20, 2020. Since the plaintiff still had two days to file the NOI, it can be argued that those two days did not begin to run until Monday, June 20, 2020 (the same amount of time as when the exclusion period went into effect). The plaintiff could then file the NOI on June 22, 2020, and the limitation period would continue to be tolled 182 days until December 21, 2020. As a result of these orders, the plaintiff would end up with an additional 102 days of time to properly commence an action.

Another version of this scenario could involve a medical-malpractice action with an accrual date of June 19, 2018. The plaintiff would have had until June 19, 2020 to file the NOI, and then a complaint 182 days later. However, since the exclusionary period tolled the both the NOI and limitation period, the plaintiff would have 101 days additional days (the same amount they had when the period began) to file once time resumed on June 20, 2020. Therefore, the plaintiff would have until September 29, 2020 to file the NOI, then the 182 day notice period would expire on March 30, 2021 and the complaint could be timely filed on March 31, 2021. Under normal circumstances the complaint would need to have been filed by December 18, 2020.

Accrual Date After Exclusion Period Began

In the final scenario, the medical-malpractice action accrued on March 11, 2020. This date is after the exclusion period started and, under AO 2020-18, "filings with time periods that did not begin to run because of the exclusion period, the filers **shall have the full periods for filing beginning on June 20, 2020.**" The statute of limitations would not start to run until June 20, 2020, and from there the plaintiff would have until June 20, 2022 to file the required NOI. If the NOI is filed on the last possible date, June 20, 2022, the 182-day notice period would expire on December 19, 2022. Under this scenario, the plaintiff would again have the benefit of the additional 102 days from the exclusion period.

Conclusion

At the time of this article, there have been no appellate court decisions analyzing the application of the AOs to any of the scenarios described above. Indeed, there are additional situations not covered in this article that may give rise to arguments regarding whether a medical-malpractice action was timely filed, including certain scenarios involving the wrongful-death savings period. The language in the AOs may leave room for certain plaintiffs to argue for a "stacking" of the normal medical-malpractice tolling periods with the pandemic related period. It is not hard to imagine a scenario where a plaintiff argues for an interpretation allowing for multiple tolling periods to gain additional time to file. The uncertainty may be compounded by judicial analysis from trial courts and may lead to actions being allowed to proceed when they would normally be time barred without pandemic related complications. The issues arising from these orders will likely stretch into the beginning of 2023 with possible appellate finality not occurring until even later.

Endnotes

1 There is a conflict between the text of AO 2020-18, which notes an 89 day exclusion period, and the staff comment to the order, which notes the 102 day exclusion period. This is yet another wrinkle in the picture that may need to be ironed out by the Supreme Court. For purposes of this article it is assumed that the more lenient 102-day period will apply. However, the language of the AO leaves room for an alternative interpretation.

No-Fault Report

Ronald M. Sangster, Jr., *The Law Offices of Ronald M. Sangster PLLC*
rsangster@sangster-law.com

Caught in Limbo – Who Pays Benefits for "Strangers to the Insurance Contract," for Losses Occurring After June 11, 2019?

We have passed the two-year anniversary of the passage of the 2019 no-fault act reform amendments, which made significant changes to Michigan's unique no-fault system. The author has been critical of many of these reform amendments, based primarily on the fact that the bills were drafted at a "midnight drafting session," with no ability for any interested parties to comment on the final product.

One of the most significant changes dealt with the priority provisions for what I term "strangers to the insurance contract;" that is, those individuals who are occupying someone else's automobile or non-occupants involved in accidents with motor vehicles, who have no insurance of their own – whether individually or through a spouse or domiciled relative. Under the former provision of MCL 500.3114(4), occupants of motor vehicles, who did not have insurance of their own, would turn to the insurer of the owner, registrant or operator of the motor vehicle occupied for payment of their benefits. See MCL 500.3114(a) and (b). For non-occupants of motor vehicles, the former provisions of MCL 500.3115(1) provided that these individuals would turn to the insurer of the owner, registrant, or operator of the motor vehicles involved in the accident. See MCL 500.3115(1)(a) and (b). The 2019 reform amendments now provide that these individuals will receive their benefits through the Michigan Automobile Insurance Placement Facility (MAIPF), which operates the Michigan Assigned Claims Plan (MACP). These amendments took effect on June 11, 2019, but it was not at all clear when the changes to the priority scheme would take effect. If the statutory amendment took precedence over the old form policy language (discussed more fully below), these "strangers to the insurance contract" would turn to the MACP for payment of their benefits. If the old-form policy language controlled over the amended statute, the insurer of the owner, registrant, or operator of motor vehicle occupied by the injured claimant, or involved in the accident with the injured non-occupant, would provide the benefits under the old policy forms.

> The response from DIFS to the MAIPF threatens policy insurers with "administrative action" if they fail to comply with the terms of DIFS Order 19-048-M and attempt to refer these "strangers to the insurance contract" claims over to the MAIPF/MACP, as noted in the MAIPF/MACP Bulletin of late December 2020.

The issue of who pays is certainly of consequence, particularly with regard to serious or catastrophic injuries. "Allowable expense" payments under the MACP are capped at $250,000.00, except in certain circumstances not relevant here. The issue of whether or not this $250,000.00 cap applies for losses occurring between June 11, 2019, and July 2, 2020, is currently being litigated in the Court of Appeals. See *Michigan Automobile Insurance Placement Facility v Dep't of Financial and Insurance Services*, Court of Appeals Docket No. 355331. For losses occurring after July 2, 2020, there is no dispute but

Ron Sangster concentrates his practice on insurance law, with a focus on Michigan no-fault insurance. In addition to teaching Michigan no-fault law at Thomas J. Cooley Law School, Ron is a highly sought after speaker on Michigan insurance law topics. His e-mail address is rsangster@sangster-law.com.

that the MACP "allowable expense" cap of $250,000.00 will apply. However, if the insurer of the owner, registrant, or operator of the motor vehicle occupied by the injured claimant, or involved in the accident with the injured non-occupant had in effect the old policy forms, the injured claimant could conceivably be entitled to lifetime, unlimited benefits. This article will discuss the current conflict between the MAIPF/MACP and the Department of Insurance and Financial Services (DIFS) over which insurer would be responsible for paying first-party, no-fault insurance benefits to these "strangers to the insurance contract." Unfortunately, there are no clear answers, which leaves these "strangers to the insurance contract" in limbo regarding which insurer will ultimately pay their no-fault benefits and, with regard to catastrophic losses, the extent of those benefit payments.

Typical Insurance Policy Language Regarding Who Is an "Insured"

Most old-form insurance policies include language that defines which individuals qualify as an "insured" under the policy. These individuals can include "strangers to the insurance contract." For example, a typical old-form insurance policy will contain the following insuring agreement:

INSURING AGREEMENT

A. We will pay Personal Injury Protection benefits to or for an insured who sustains bodily injury. The bodily injury must:
    1. be caused by the accident; and
    2. result from the ownership, maintenance, or use of an auto as an auto.

B. These benefits are subject to the provisions of the Michigan Insurance Code. Subject to the limits shown in the Schedule or Declarations, Personal Injury Protection benefits consist of the following:
    1. Medical expenses. Reasonable and necessary medical expenses incurred for an insured's:
        a. care;
        b. recovery; or
        c. rehabilitation.

The typical old-form insurance policy language will also define the term "insured" to include "anyone … injured in an auto accident … while occupying your covered auto" or, if a non-occupant, "involved in an accident with your covered auto." These policies will also contain an exclusion, which preclude coverage in those situations where the insured is either the named insured or a spouse or family member of a "named insured" on another no-fault policy. These exclusions were designed to effectuate the purposes behind the former provisions of MCL 500.3114(4) and MCL 500.3115(1), which was to make the injured person's household insurer (whether individually or through a spouse or domiciled relative) as the highest priority insurer. The question, of course, is whether this contractual language regarding these "strangers to the insurance contract" remains in effect, or whether the policy provisions were supplanted by the no-fault act reform amendments.

In order to illustrate the quandary these "strangers to the insurance contract" find themselves in, consider the following scenarios:

1. Anne is seriously injured in an accident while occupying her boyfriend Brian's automobile on February 1, 2020. Brian had a no-fault policy in effect with ZZZ Insurance Company, with an effective date of January 1, 2020, and a scheduled expiration date of January 1, 2021. Because the policy was not issued or renewed on or after July 2, 2020, this old-form policy still provided for lifetime, unlimited benefits, which would theoretically include Anne, who is clearly a "stranger to the insurance contract."

2. Cathy is seriously injured in an automobile accident on August 1, 2020, after the PIP choice provisions took effect. She was occupying a motor vehicle operated by her boyfriend, David. David's automobile was insured under a one-year policy of insurance issued by ABC Insurance Company on May 1, 2020, with an expiration date of May 1, 2021. However, because the policy was issued prior to July 2, 2020, the policy issued by ABC Insurance Company still contains the old-form language regarding who qualifies as an "insured" and still provides for payment of lifetime, unlimited benefits.

Again, assume that both Anne and Cathy are catastrophically injured, and both Anne and Cathy have incurred medical expenses well in excess of $250,000.00 during their in-patient hospital stays. We will return to Anne and Cathy later in this article

Legal Analysis

As previously noted, the 2019 no-fault act reform amendments dramatically altered the no-fault priority scheme, particularly with regard to PIP claims filed by "strangers to the insurance contract," that is, occupants and non-occupants of motor vehicles, involved in the accident, who do not have insurance of their own, whether individually or through a spouse or domiciled relative. Again, prior to June 11, 2019, those individuals would turn to the insurer of the owner or registrant of the motor vehicle occupied, or the insurer of the owner or registrant of the motor vehicle involved in the accident, pursuant to MCL 500.3114(4)(a) and MCL 500.3115(1), respectively. As amended, MCL 500.3114(4), dealing with occupants of a motor vehicle, now provides that such individuals "shall claim personal protection insurance benefits under the Assigned Claims Plan under sections 3171 to 3175." Unfortunately, the statutory amendments did not specify precisely when the change in priority was to take place. For the next few months after the no-fault act reform amendments took effect on June 11, 2019, there was a dispute as to whether or not the statutory amendment took precedence over the policy language, or whether the policy language would control over the statutory amendment.

> This Bulletin invited policy insurers who were handling claims of "strangers to the insurance contract," who were injured in motor-vehicle accidents occurring after June 11, 2019, to refer those claims over to the MAIPF/MACP for further handling.

After three months of uncertainty, the Insurance Director, Anita Fox, stepped into the fray and issued DIFS Order 19-048-M on September 20, 2019. This order essentially provided that until

the insurance companies revised their policy forms to reflect the new priority provisions (and lowered premiums to reflect the lowered exposure), the old priority provisions reflected in the old policy forms would remain in effect. Furthermore, this order provided that insurance companies had to obtain approval from DIFS before they could implement any new policy forms, so that the Insurance Director could ensure that the appropriate premium savings were incorporated into the new filings. To put it another way, the status quo was to be maintained until the new policy forms could be issued, and for many carriers, they chose to implement the new policy forms in conjunction with the new PIP choice provisions, which would be applied to policies issued or renewed on or after July 2, 2020.

> The question, of course, is whether this contractual language regarding these "strangers to the insurance contract" remains in effect, or whether the policy provisions were supplanted by the no-fault act reform amendments.

Prior to the issuance of DIFS Order 19-048-M, whenever a policy insurer attempted to refer a claim involving a "stranger to the insurance contract" to the MAIPF/MACP, the MAIPF/MACP would demand a certified copy of the underlying insurance policy in order to determine if the policy language would provide greater coverage for the injured person than the new statutory amendment. Obviously, this meant a lot of work for the MAIPF and the servicing insurers. The MAIPF initially challenged the constitutionality of DIFS Order 19-048-M in the Michigan Court of Claims, which seemed unusual, given the fact that DIFS Order 19-048-M actually made it easier for the MACP and its servicing insurers and their adjusters to do their job, by shifting such claims back to the policy insurers! In other words, they no longer had to scrutinize each and every policy form involving these "strangers to the insurance contract." In reality, the reason why DIFS challenged Order 19-048-M was because it really focused its sight on DIFS Order 19-049-M, issued four days later on September 24, 2019, which required the MAIPF/MACP to continue providing lifetime, unlimited no-fault benefits to claimants who were injured in auto accidents occurring on or before July 2, 2020.

DIFS Order 19-049 was issued in response to an article that appeared in the Detroit Free Press on Sunday, September 22, 2019. In that article, Mitch Album described the plight of a three-year-old girl, who was struck by an uninsured motor vehicle as she was running across the street. The parents did not have insurance of their own in their household. As a result, they filed a claim for no-fault benefits with the MAIPF/MACP. The problem was that this accident took place after the effective date of the No-Fault Reform Amendments — June 11, 2019 — which reduced the "allowable expense" coverage under the MACP to $250,000.00. The girl and her family incurred medical expenses from Children's Hospital totaling $140,000.00, which meant that there was only $110,000.00 available to the girl and her family to cover any remaining PIP claims. After that, they would have to obtain health coverage through Medicaid. The Insurance Director, Anita Fox, remedied the situation on September 24, 2019 by issuing DIFS Order 19-049-M, which delayed the effective date of the $250,000.00 "allowable expense" cap to July 2, 2020.

The MAIPF subsequently instituted suit against the Insurance Director in the Michigan Court of Claims, and in the original complaint, the MAIPF referenced both DIFS Order 19-048 (regarding changes to the priority scheme) and DIFS Order 19-049 (regarding the imposition of the $250,000.00 "allowable expense" cap). The MAIPF was broadly challenging the Insurance Director's authority to issue these orders. She was, in essence, "making law" when that prerogative is reserved for the legislative branch. The MAIPF subsequently abandoned its challenge to DIFS Order 19-048-M by way of an amended complaint and focused its attention solely on the constitutionality of the DIFS Order 19-049-M pertaining to the $250,000.00 statutory cap on benefits. Court of Claims Judge Michael J. Kelly subsequently upheld DIFS Order 19-048-M, and his decision is currently under review by the Court of Appeals (Docket No. 355331). As matters now stand, the $250,000.00 "allowable expense" cap applies only to MACP claims arising on or after July 2, 2020.

Most of us in the no-fault world believed that the issue was now resolved, except for USAA Casualty Insurance Company. USAA was sued by two "strangers to the insurance contract" who were involved in separate, unrelated motor-vehicle accidents. Specifically, one John Thomas filed suit against USAA Casualty Insurance Company and the Michigan Automobile Insurance Placement Facility in Wayne County Circuit Court. This lawsuit was given docket number 20-006497-NF and was assigned to the Honorable Leslie Kim Smith. The MAIPF filed a motion for summary disposition, presumably based upon the provisions of DIFS Order 19-048-M and the language of the USAA Casualty Insurance Company contract. Pursuant to an order dated September 28, 2020, Judge Smith denied the MAIPF's motion and further indicated that: "Defendant Michigan Automobile Insurance Placement Facility, is first in the order of priority pursuant to the Revised No-Fault Act."

Another lawsuit was filed by one Donnie Walker against USAA Casualty Insurance Company and the MAIPF's servicing insurer, AAA. Plaintiff Donnie Walker was an occupant of a motor vehicle whose owner was insured with USAA. The accident itself occurred in August 2019. USAA filed its motion for summary disposition, arguing that pursuant to the no-fault act reform amendments, which took effect on June 11, 2019, "coverage can be obtained only by applying to the [MAIPF]." AAA responded to the motion and relied upon DIFS Order 19-048-M. The court refused to follow DIFS Order 19-048-M, concluding that the change in priority did not effect "the scope of coverage required to be provided under automobile policies." As stated by Judge Craig Strong, in his October 21, 2020 opinion, granting USAA's motion:

> The remaining parties oppose

> the motion by focusing on the provisions of the order preventing 'implementation' of the amendments 'until automobile insurers have submitted revised forms and rates for the Director's review and approval.' According to these respondents, the accident at issue occurred before USAA submitted such forms, so that the amended provisions of the No-Fault Act do not apply to Plaintiff's claim. The problem with this argument is that the 'revised forms' provisions of the DIFS Order apply only to amendments that affect 'the scope of coverage required to be provided under automobile policies.' The amendments at issue in this motion, however, do not involve the scope of coverage, but the priority for payment of benefits when the Claimant is otherwise uninsured. Thus, even if USAA had not submitted its revised forms, this fact would not preclude USAA from invoking the new amendments.

Judge Strong concluded his opinion as follows:

> In light of the foregoing, the Court agrees that the amendments to MCL 500.3114 regarding priority for otherwise uninsured vehicle occupants took effect on June 11, 2019 and applied to the August 2019 accident at issue in this case. Thus, Plaintiff can recover against USAA only if MAIPF assigns it to handle coverage for the August 2019 accident. And as it is undisputed that MAIPF has made no such assignment, USAA is therefore entitled to dismissal of the claims asserted against it in this case.

No appeals were filed from the Judge Smith's or Judge Strong's rulings.

Based upon these two rulings, the MAIPF/MACP issued a Bulletin in late December 2020, which marked a dramatic shift in the MAIPF/MACP's position regarding which insurer was responsible for paying these claims. This Bulletin invited policy insurers who were handling claims of "strangers to the insurance contract," who were injured in motor-vehicle accidents occurring after June 11, 2019, to refer those claims over to the MAIPF/MACP for further handling. As noted in this Bulletin:

> As insurers are likely aware, based on court ruling indicating that the No-Fault Statute did not support the Department of Insurance and Financial Services Director's Order requiring the MAIPF to only accept claims for which filings had been approved, the MAIPF is notifying the Director that it will no longer be denying claims incurred post June 11, 2019, at 3:22 pm for which the owner and/or driver's insurance was in effect on the date of loss, but the insurer had not received approval for revised filings. Therefore, each insurer must now determine if it is in its best interest to send those qualifying claims to the MAIPF for handling.

Court of Claims Judge Michael J. Kelly subsequently upheld DIFS Order 19-048-M, and his decision is currently under review by the Court of Appeals (Docket No. 355331). As matters now stand, the $250,000.00 "allowable expense" cap applies only to MACP claims arising on or after July 2, 2020.

The Bulletin then sets forth the procedures to be followed by the insurer that wishes to refer such claims to the MAIPF for further handling. In the FAQ section, the MAIPF indicates that DIFS has not approved this change in position, but "they have been advised as to the position taken by the MAIPF."

The MAIPF/MACP Bulletin also makes it clear that for purposes of transferring matters involving these "strangers to the insurance contract" over to the MAIPF/MACP, the MAIPF/MACP will be waiving the one-year-notice requirement, set forth in MCL 500.3145(1), as well as the one-year-back rule set forth in MCL 500.3145(2). The MAIPF/MACP has also agreed to utilize the application for benefits forms utilized by the policy insurer, even though that form is nowhere near as detailed as the MAIPF/MACP application. However, the Bulletin also makes it clear that some type of application for benefits must be filled out by the injured claimant, as "this is a required document pursuant to MCL 500.3172 et seq."

The MAIPF/MACP Bulletin also indicates that the MAIPF/MACP would reimburse the policy insurer for all benefits paid by the policy insurer, although the details regarding the reimbursement procedures were still being worked out.

Fallout From the MAIPF/MACP Bulletin

As noted by Judge Strong in his opinion, the DIFS Order 19-048 applies only to policy amendments that affect "the scope of coverage required to be provided under automobile policies." In most cases, the "scope of coverage" is not affected by which insurer is paying the benefits — the policy insurer or the MAIPF. If the damages sustained by the injured claimant are less than $250,000.00, it makes no difference as to which insurer is actually paying those benefits.

> However, the "scope of coverage required to be provided under automobile policies" may come into play if the claims exceed $250,000.00, as is the case with Anne and Cathy, in the two scenarios referenced above. With regard to the Court of Claims' lawsuit, challenging the validity of DIFS Order 19-049, regarding the $250,000.00 cap on allowable expense coverage, the MAIPF has already lost in the Michigan Court of Claims. In that case, Court of Claims Judge Michael Kelly ruled that consistent with other provisions of the no-fault act reform amendments, DIFS was within its rights to order the MAIPF to delay implementation of the $250,000.00 cap to accidents occurring on or after July 2, 2020. That decision is now being reviewed in the Michigan Court of Appeals, but we do not

> anticipate a resolution of that issue, at the Court of Appeals level, until sometime in late 2021. In the FAQ section of the MAIPF Bulletin, the MAIPF indicates that if a claim in excess of $250,000.00 is being transferred to the MAIPF for further handling, any reimbursement to the policy insurer exceeding the $250,000.00 allowable expense limit "will be paid under a Reservation of Rights." Specifically, the MAIPF indicates the following:

However, the MAIPF will be accepting all eligible claims for which the insurer provides on the form, regardless if they are in litigation or if the allowable expenses will exceed $250,000.00. Please note, it is the MAIPF's position that claims with dates of loss post-June 11, 2019, 3:22 pm are subject to the $250,000.00 allowable expense limit, however, that position continues to be litigated and claims are not being subjected to the $250,000.00 allowable expense limit at this time. Payments exceeding the $250,000.00 allowable expense limit will be paid under Reservation of Rights.

If the MAIPF prevails on this issue, the author foresees a situation where if the MAIPF has issued a reimbursement payment to a policy insurer in excess of $250,000.00, the MAIPF will be asking the policy insurer to reimburse the MAIPF for any amounts above $250,000.00.

DIFS Response

Two months after the MAIPF/MACP released its Bulletin, inviting policy insurers to refer their "strangers to the insurance contract" claims to the MAIPF/MACP, DIFS finally responded and notified the MAIPF/MACP that DIFS Order 19-048-M (which essentially preserved the former priority provisions in policies with the old-form policy language) remains in effect except for the parties who were directly involved in the *John Thomas v USAA Casualty Ins Co* litigation (Wayne County Circuit Court Docket No. 20-006497) and the *Donnie Walker v USAA Casualty Ins Co* litigation (Wayne County Circuit Court Docket No. 19-008892-NF). The response from DIFS to the MAIPF threatens policy insurers with "administrative action" if they fail to comply with the terms of DIFS Order 19-048-M and attempt to refer these "strangers to the insurance contract" claims over to the MAIPF/MACP, as noted in the MAIPF/MACP Bulletin of late December 2020.

> The issue of who pays is certainly of consequence, particularly with regard to serious or catastrophic injuries.

This threat of possible "administrative action" should not be taken lightly. One may ask who would possibly complain over transferring a file from the policy insurer to the MAIPF/MACP. Certainly not the policy insurer, as they are able to get a claim off of their books. Certainly not the MAIPF/MACP, since it has invited policy insurers to refer such claims to them, pursuant to its Bulletin issued in late December 2020. However, the injured claimant may very well complain if they feel that they are being bounced around like a Ping-Pong ball, from insurer to insurer, for payment of their benefits.

To see how this plays out, consider the plight of Anne, in Scenario #1. Again, she was injured during the "window period" between June 11, 2019, and July 2, 2020, during which time the MAIPF was ordered to pay lifetime, unlimited benefits to MACP claimants pursuant to DIFS Order 19-049. If Judge Kelly's decision upholding this Order 19-049 is affirmed on appeal, Anne may not care which insurer is paying her benefits – the policy insurer or the MAIPF/MACP. She is still receiving lifetime, unlimited no-fault benefits. If, however, Judge Kelly's decision is reversed by the Court of Appeals, and the MAIPF/MACP is permitted to impose the $250,000.00 "allowable expense" cap, Anne may very well end up filing a DIFS complaint if the MAIPF/MACP decides to pursue her or her medical providers for reimbursement of "allowable expense" payments made above $250,000.00. After all, if Anne had been covered by the policy insurer, she would have been entitled to lifetime, unlimited benefits.

This situation is even more pronounced in the case of Cathy, under Scenario #2. Because her accident occurred after July 2, 2020, there is no doubt but that her benefits through the MAIPF/MACP are capped at $250,000.00. However, if she is allowed to claim through the policy insurer, she is entitled to recover lifetime, unlimited benefits. A complaint by Cathy to DIFS over a referral of her claim by the policy insurer to the MAIPF/MACP would almost certainly provoke "administrative action" against the policy insurer, notwithstanding the MAIPF's invitation to refer such claims over to it, as her benefits are undoubtedly being reduced from lifetime, unlimited coverage to a $250,000.00 "allowable expenses" cap.

Maybe all this is academic. Maybe there are no "Annes" or "Cathys" in Michigan who find themselves in this quandary. The author suspects that, in fact, there may be quite a few "Annes" or "Cathys" out there, and in the next few months, the issues raised in this article will be played out in the courts.

In conclusion, one might simply throw up their hands and say, "Let the courts sort it out." Frankly, it would have been better for everyone involved in the process – claimants, their providers, and insurers alike – if members of the Legislature and the Governor had taken the time to actually read the bill, understand what's in it, and consult with knowledgeable practitioners on both the plaintiff and defense side over the impact these provisions. The version of SB 1 that was voted on should have been treated as a working draft- not a final product. If they had done so, the uncertainty that all parties find themselves in, regarding not only these issues but others as well, almost certainly could have been avoided.

Supreme Court Update

By: Stephanie Romeo, *Clark Hill PLC*
sromeo@clarkhill.com

Supreme Court Clarifies Fourth Amendment Principles Regarding Search Warrants and the Particularity Requirement in a Case Involving the Review of Cell-Phone Data

Surprisingly, the Michigan Supreme Court began 2021 without issuing a single opinion in the year's first quarter. However, the Court decided two cases in late December 2020 within one day of each other. In one of these opinions, the Court analyzed the particularity requirement embodied in the Fourth Amendment to determine whether police are permitted to search digital data from a cell phone for evidence of multiple crimes without obtaining multiple search warrants for each crime. While the opinion is based in criminal law, it provides helpful guidance to both criminal and civil attorneys, particularly given society's current, heavy reliance on technology in light of the ongoing COVID-19 Pandemic. *People v Hughes*, 506 Mich 512, 958 NW2d 98 (2020).

Facts: In August 2016, Ronald Stites invited Lisa Weber to spend the night at his home after meeting her earlier that day. This same night, Weber called a drug dealer known as "K-1" or "Killer" to obtain drugs and asked him to come to Stites' residence. A man arrived at Stites' home, sold them crack cocaine, and departed. However, later that night, the man returned to the residence with a gun and stole a safe located in Stites' bedroom. Weber later identified the man as defendant Kristopher A. Hughes, but Stites could not identify him.

After the robbery occurred, a detective submitted a warrant affidavit to search Hughes's property for evidence related to separate allegations of drug trafficking. The warrant did not refer to the armed robbery at Stites' residence. The district court concluded that there was sufficient probable cause to support a search warrant and authorized a warrant to search three properties and a vehicle connected with Hughes.

While executing a search at one of the addresses identified in the warrant, the police detained Hughes and seized a cell phone found on his person. Another detective performed a forensic examination of the phone and extracted all of the phone's data. The extraction software separated the data into categories, including photographs, call logs, and text messages. According to the detective, the extraction software enabled the police to search the data for search terms or specific phone numbers. About a month after the data was extracted, the prosecutor in the separate armed robbery case against Hughes asked the detective to conduct a second search of Hughes's cell phone data for contacts with the phone numbers of Stites and Weber, for the names "Lisa," "Kris," or "Kristopher," and for the word "killer." These searches revealed several calls and text messages between Hughes and Weber on the night Stites was robbed, including text messages from Weber indicating where Stites lived and that the home was unlocked. Following a jury trial, Hughes was convicted of armed robbery (MCL 750.529) and was sentenced as a fourth-offense habitual offender to 25 to 60 years in prison.

Hughes appealed his conviction, arguing that the phone records should have been excluded from the trial because the warrant that authorized the search of his phone's data permitted officers to search for evidence of drug trafficking only, not armed robbery. Hughes also argued that trial counsel was ineffective for failing to object to the admission of the cell phone evidence on Fourth Amendment grounds. The Court

Stephanie V. Romeo is an associate attorney in the Labor and Employment practice group in Clark Hill PLC's Detroit office. She focuses her practice on representing and advising management on a wide variety of labor and employment law matters, including claims involving discrimination, harassment, retaliation, family/medical leave, and disability accommodation. Stephanie also participates in conducting sensitive workplace investigations dealing with complex employment issues. She can be reached at sromeo@clarkhill.com or at (313) 309-4279.

of Appeals rejected these arguments and affirmed Hughes's conviction. Hughes sought leave to appeal in the Michigan Supreme Court.

Ruling: In a unanimous opinion, the Michigan Supreme Court reversed the judgments of the lower courts and held in favor of Hughes in lieu of granting leave to appeal. The Court explained that while warrants are not always required before a search or seizure, there is a strong preference for searches conducted pursuant to a warrant, and the general rule is that officers must obtain a warrant for a search to be reasonable under the Fourth Amendment. These general Fourth Amendment principles apply with equal force to searches of cell-phone data. While the prosecutor argued that Hughes lost his reasonable expectation of privacy in his cell-phone data when the phone was seized and the data was searched pursuant to the drug trafficking warrant, this argument conflicts with *Riley v California*, 573 US 373 (2014), which holds that citizens generally maintain a reasonable expectation of privacy in their cell-phone data that is not extinguished merely because a phone is seized during a lawful arrest.

Further, under Fourth Amendment principles, a warrant authorizing the police to seize and search cell-phone data allows officers to examine the seized data only to the extent reasonably consistent with the scope of the warrant. Any search that is directed instead toward finding evidence of other, unrelated criminal activity is beyond the scope of the warrant as the Fourth Amendment requires warrants to state with particularity not only the items to be searched and seized, but also the alleged criminal activity justifying the warrant. Here, the warrant authorized a search of Hughes's cell-phone data for evidence of drug trafficking, not armed robbery. The affidavit for the warrant did not even mention the armed robbery. Thus, the detective's search of the data for terms pertaining to the armed robbery was inappropriate as this search was not reasonably directed towards obtaining evidence of drug trafficking. In fact, there was no evidence that a search for these terms would uncover any evidence relating to Hughes's drug-trafficking activity, particularly as this review was conducted well after the initial extraction of data. The Court remanded the case to the Court of Appeals to reconsider Hughes's claim of ineffective assistance of counsel as the search exceeded the scope of the warrant.

Practice Pointer: The Court's decision reminds attorneys to avoid taking shortcuts while litigating. Here, while Hughes's wrongdoing was readily apparent from the review of his cell phone data based on the detective's implementation of search terms, this review was completed in connection with a warrantless search. The prosecutor's decision to rely on the original warrant seeking evidence of drug trafficking in an attempt to obtain evidence of the armed robbery created glaringly obvious Fourth Amendment concerns. Although it may have taken additional time to secure a second warrant specifically pertaining to the armed robbery, the extra time and effort would have resulted in a fair jury trial and clear "victory" for the prosecutor. As electronic data becomes more easily accessible and provides significant support for a party's claims or defenses, attorneys must be careful in how they obtain it. This case highlights how one hasty decision can have much larger consequences on the ultimate outcome of a case.

"The views expressed are those of the author and not necessarily of Clark Hill PLC."

Amicus Report

By: Lindsey Peck, *Collins Einhorn Farrell PC*
Lindsey.Peck@Ceflawyers.com

Since the last update, the MDTC filed amicus-curiae briefs in two cases. The MDTC also voted in favor of filing amicus-curiae briefs in two other cases in which the Supreme Court ordered a MOAA.

Cyr v Ford Motor Company

In *Cyr v Ford Motor Company*, thousands of consumers from across the country sued the auto manufacturer for breach of warranty and fraud in connection with certain transmission systems. A claim for violation of the Michigan Consumer Protection Act (MCPA), which carries an award of attorney fees if successful, was also among their claims. The MCPA exempts from liability "transactions or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." MCL 445.904(1). The exemption, colloquially referred to as the "regulated product" exemption, generally means that if the product is subject to regulation or supervision, a claim under the MCPA can't be sustained.

The manufacturer took the position that because motor vehicles are highly regulated, the consumers' MCPA claim should be dismissed. The trial court disagreed. The Court of Appeals granted immediate review and reversed. The consumers filed an application for leave to appeal, which the Supreme Court denied with a standard one-liner.

Meanwhile, courts rejected MCPA claims in many other cases against auto manufacturers.

The consumers moved for reconsideration. A short time later, the political makeup of the Supreme Court changed. And with that change came a wave of motions for leave to file amicus-curiae briefs in support of the consumers' position—one from Public Justice and the National Consumer Law Center, one from the Michigan Association for Justice, one from the Michigan Attorney General, and one from the Prosecuting Attorneys of Washtenaw County, Alger County, Chippewa County, Genesee County, Ingham County, and Marquette County.

Given the speed and weight of support for the consumers, the MDTC voted in favor of submitting an amicus-curiae brief in support of the auto manufacturer. **David Porter** of Kienbaum Hardy Viviano Pelton & Forrest PLC authored the MDTC's *amicus-curiae* brief.

"What's changed?," asked the MDTC. "It's not the facts. . . . It's not the law, either. . . . The only difference between then and now is the composition of the Court." The MDTC observed that by all appearances, from the timing of their involvement to the presentation in their briefing, that's the change on which the consumers and their amici rely in urging the Court to reach a different result. Noting that the consumers and their amici barely acknowledged the procedural posture of the case and instead raised merits-based arguments, the MDTC stressed that the question before the Court isn't whether to grant leave. To be sure, the Court already declined to do so. The question, rather, is whether a palpable error misled the Court and, if so, whether correction of the error would result in a different disposition. After canvassing the history that led to the Court's adoption of the palpable-error standard in MCR 7.311 and MCR 2.119(F)(3), the MDTC urged the Court to reject the invitation to "roll back its reconsideration practice to a time when a change in court composition was enough to rewrite a decision."

While the consumers' failure to satisfy the palpable-error standard was enough reason to deny reconsideration, the MDTC didn't want to rest there and give the impression that there's something to the arguments advanced by the consumers and their amici.

Lindsey Peck's well-rounded and versatile skill set has enabled her to wear many hats throughout her career—litigator, trial attorney, and appellate practitioner. She has litigated countless cases that resulted in summary disposition or summary judgment in favor of her clients. She has also tried multiple cases, all of which resulted in defense verdicts in favor of her clients. For the past few years, she has focused on appellate practice. Her eye for detail and penchant for writing have been the key to her success in both state and federal appellate courts.

In addition to her experience in general liability and personal injury defense, Lindsey has extensive experience in municipal law. She has defended municipal agencies, departments, appointed and elected officials, officers, and employees against a broad spectrum of claims, including statutory claims, civil rights claims, tort claims, zoning and land use claims, employment claims, and contract claims arising out of public works infrastructure projects and improvements. She has also advised boards, commissions, councils, departments, and other levels of government on a wide array of issues that arise in the context of municipal governance.

Lindsey has also handled legal matters on behalf of public utility companies. She has litigated contract claims arising out of indemnity provisions and release agreements, as well as tort and personal injury claims.

Lindsey can be reachd at lindsey.peck@ceflawyers.com or 248-663-7710.

Turning to the merits, the MDTC argued that there's no reason to disturb the Court's 1999 decision in *Smith v Globe Life Insurance Company*, which, according to the consumers and their amici, conflicted with the Court's 1982 decision in *Attorney General v Diamond Mortgage* and essentially gutted consumer-protection law in Michigan.

In *Diamond Mortgage,* the Court held that a mortgage company's possession of a real-estate broker's license didn't exempt the company from the MCPA because the license didn't specifically authorize the transaction at issue: mortgage writing. In *Smith*, the Court concluded that the exemption applied to the sale of credit life insurance, which is expressly authorized by laws administered by the insurance commissioner.

The MDTC argued that although the consumers and their amici tried to drive a wedge between *Smith* and *Diamond Mortgage,* the reality is that they took the same approach to the MCPA. That they reached a different outcome is merely a testament to the fact-specific nature of the inquiry into whether the exemption applies.

The MDTC stressed that rescission is determined not on a claimant-by-claimant basis, but on a case-by-case basis. Where a policy is rescinded, the policy doesn't exist and coverage isn't available—for anyone.

The MDTC also encouraged the Court to consider the numbers. Consumer-protection statistics put to rest the argument that *Smith* eviscerated consumer protection and turned the MCPA into a "paper tiger" (in the words of the National Consumer Law Center) or a "mere shell" (in the words of the Attorney General).

The Attorney General's statistics don't show, in the wake of *Smith,* a sharp decrease in either the number of consumer complaints or the amount of money that the Attorney General recovered in connection with consumer complaints. To the contrary, the statistics show that both the number of consumer complaints and the amount of money recovered concerning consumer complaints increased.

The State Court Administrative Office's statistics on private actions tell a similar story. Following *Smith*, the percentage of plaintiff-favorable outcomes increased, and the percentage of defendant-favorable outcomes decreased.

El-Achkar v Sentinel Insurance Company

El-Achkar v Sentinel Insurance Company is a companion case to *Bazzi v Sentinel Insurance Company*, which the Supreme Court decided in 2018. *Bazzi* involved the driver of the vehicle (owned by his mother), and *El-Achkar* involves the passenger of the vehicle. Both sought PIP benefits from the carrier that insured the vehicle under a commercial-automobile policy.

Recall that in *Bazzi*, the insurer filed a third-party complaint against the driver's mother and sister, seeking to rescind the policy based on fraud in the application. After the trial court entered a default judgment against the driver's mother and sister, the insurer sought summary disposition of the driver's claim for PIP benefits based on the rescission of the policy. Relying on the innocent third-party doctrine, the trial court denied summary disposition. The Court of Appeals reversed, holding that *Titan Insurance Company v. Hyten* abrogated the innocent third-party doctrine. The Supreme Court agreed but held that the Court of Appeals erred in holding that the insurer was automatically entitled to rescission. The Supreme Court affirmed in part, reversed in part, and remanded to the trial court to determine whether rescission was available under a "balancing of the equities" approach. On remand, the trial court conducted the equitable balancing directed by the Supreme Court. The trial court concluded that rescission was available and that the insurer was not responsible for the driver's claims.

In *El-Achkar*, on the other hand, the trial court held that the equities weighed against the insurer and that insurer was responsible for the passenger's claims. The insurer appealed. The insurer argued that because the policy was rescinded based on fraudulent procurement, the policy was void ab initio for all claimants for PIP benefits. The insurer took the position that a balancing of the equities wasn't required as between the insurer and the passenger. Alternatively, the insurer argued that if a balancing of the equities was required, the trial court erred in holding that the equities favored the passenger such that the rescission didn't apply to him.

"What's changed?," asked the MDTC. "It's not the facts. . . . It's not the law, either. . . . The only difference between then and now is the composition of the Court."

The Court of Appeals disagreed and affirmed the trial court's judgment in an unpublished, per-curiam opinion. The court applied the five-factor test set forth in Justice Markman's concurrence in *Farm Bureau General Insurance Company v ACE American Insurance Company*, which the Court adopted in *Pioneer State Mutual Insurance Company v Wright*:

(1) the extent to which the insurer could have uncovered the subject matter of the fraud before the innocent third party was injured;

(2) the relationship between the fraudulent insured and the innocent third party to determine if the third party had some knowledge of the fraud;

(3) the nature of the innocent third party's conduct, whether reckless or negligent, in the injury-causing event;

(4) he availability of an alternate avenue for recovery if the insurance policy is not enforced; and

(5) a determination of whether policy enforcement only serves to relieve the fraudulent insured of what would otherwise be the fraudulent insured's personal liability to the innocent third party.

The court found that the first factor didn't weigh for or against rescission. The insurer could've done more to discover the fraud, but the driver's mother and sister may have been able to conceal the fraud. The court found that the second factor

weighed against rescission because the passenger didn't have a relationship with the driver's mother or sister and didn't know about the fraud. The court found that the third factor weighed against rescission because the passenger didn't cause the accident or have any control over the events that led to the accident. The court found that the fourth factor weighed against rescission because the passenger didn't have any other policy under which he could've sought PIP benefits. The court rejected the insurer's argument that recovery through the MACP should be considered. According to the court, "the fact that an injured third person can seek PIP benefits from the MACP as a last resort should not and cannot be factored into the equities balancing test's fourth-factor inquiry because that factor would be rendered nugatory since the availability of coverage under the MACP if considered would always require concluding that the factor favors rescission." Finally, the court found that the fifth factor weighed against rescission because enforcement of the policy wouldn't transfer the driver's tort liability to the passenger from the insured to the innocent insurer. In sum, the court found that a balancing of the equities weighed against rescission.

The insurer applied for leave to the Supreme Court. **John Hohmeier** of Scarfone & Geen PC authored the MDTC's amicus-curiae brief. The MDTC argued that the Court of Appeals displaced the traditional meaning of "rescission" and essentially revived the innocent-third-party doctrine under the guise of equitable balancing. By holding that the policy is void as to one claimant but valid as to another, the court conflated rescission with reformation, which begged the question: how can the court reform a contract mandated and guided by statute? The MDTC stressed that rescission is determined not on a **claimant-by-claimant** basis, but on a **case-by-case** basis. Where a policy is rescinded, the policy doesn't exist and coverage isn't available—for anyone.

The MDTC also emphasized Michigan's longstanding public policy against fraud in general and insurance fraud in particular. The MDTC pointed out that the no-fault reform legislation enacted in 2019 went so far as to create a new anti-fraud unit within the Department of Insurance and Financial Services. Equally telling is what **didn't happen** when the Legislature overhauled the no-fault act.

> The question, rather, is whether a palpable error misled the Court and, if so, whether correction of the error would result in a different disposition.

For example, in response to *Covenant Medical Center v State Farm Mutual Auto Insurance Company*, the Legislature paved the way for a healthcare provider to assert a direct cause of action against an insurer. MCL 500.3112. By contrast, the Legislature took no action in response to *Titan Insurance Company v Hyten.* Nothing in the reform legislation breathes life back into or expresses favor toward the innocent-third-party doctrine.

Lastly, the MDTC pointed out that the passenger has a remedy: the MACP. "If this case is about equity, what could be more equitable than the 650 No Fault insurers proportionally spreading out the cost of [the passenger's] $120,000.00 settlement with [the assigned-claims carrier] instead of just one carrier…having to bear the entire cost of the claim because of the fraudulent misrepresentations made by the [driver's mother and sister]? That is not fair. That is not equitable."

Mecosta County v Metropolitan Group

Mecosta County v Metropolitan Group involves the issue of privity. Specifically, it involves whether an injured party/assignor is in privity with a medical provider/assignee for purposes of res judicata and collateral estoppel. A majority of the Court of Appeals held that an injured party isn't in privity with a medical provider, seemingly by virtue of the assignment itself. Chief Judge Murray issued a dissent.

The Supreme Court granted MOAA and invited interested groups to move for permission to file an amicus-curiae brief. The MDTC voted in favor of participation. **John Hohmeier** of Scarfone & Geen PC volunteered to author the MDTC's brief.

Rowland v Independence Village of Oxford

Rowland v Independence Village of Oxford involves two basic but sometimes complex negligence principles: foreseeability (in the context of duty) and special relationship. The Court of Appeals held that a senior independent-living facility didn't owe a resident, who died after wandering outside and suffering from hypothermia, a common-law duty to monitor and secure the side entrances and exits to the facility. The Court reasoned that the harm wasn't foreseeable. The Court further held that the facility didn't have a special relationship with the resident so as to implicate the exception to the general rule that one doesn't have a duty to aid or protect another.

The Supreme Court granted MOAA and invited the MDTC, among others, to file an amicus-curiae brief. MDTC voted in favor of participation. **Carson Tucker** of Lex Fori volunteered to author MDTC's amicus-curiae brief.

For a more thorough understanding of the facts and issues in these cases, members can access MDTC's amicus-curiae briefs in the brief bank on MDTC's website.

Court Rules Report

By: Sandra Lake, *Hall Matson PLC*
slake@hallmatson.law

PROPOSED AMENDMENTS

2020-26 – Protection of personal identifying information submitted to courts

Rules affected:	MCR 1.109 and MCR 8.119
Issued:	October 28, 2020
Comment Period:	February 1, 2021
Public hearing:	March 24, 2021

These amendments provide SCAO with flexibility in protecting a person's personal identifying information and clarify when a court is and is not supposed to redact personal identifying information.

2019-48 – Required Signature by Attorney of Record

Rules affected:	MCR 1.109
Issued:	September 16, 2020
Comment Period:	January 1, 2021
Public hearing:	March 24, 2021

This amendment would require a signature from an attorney of record on documents filed by represented parties. This language was inadvertently eliminated when MCR 2.114(C) was relocated to MCR 1.109.

2020-19 – Requirement that audio and video trial exhibits be transcribed

Rule affected:	MCR 2.302
Issued:	November 18, 2020
Comment Period:	March 1, 2021
Public hearing:	March 24, 2021

The proposed amendment would require transcripts of audio and video recordings intended to be introduced as an exhibit at trial to be transcribed.

2020-20 – Process of service on limited liability companies

Rule affected:	MCR 2.105
Issued:	November 18, 2020
Comment Period:	March 1, 2021
Public hearing:	March 24, 2021

The proposed amendment establishes a procedure for service of process on limited liability companies.

ADOPTED AMENDMENTS

2020-11 – Timeframe for responsive pleading after motion for more definite statement is denied

Rule affected:	MCR 2.108
Issued:	January 20, 2021
Effective:	May 1, 2021

This amendment establishes a deadline for a party's responsive pleading after denial of a motion for a more definite statement.

Sandra Lake is a 1998 graduate of Thomas M. Cooley Law School. She is Of Counsel at Hall Matson, PLC in East Lansing, specializing in appellate practice, medical malpractice defense, insurance coverage, and general liability defense. She is also the Vice President of the Ingham County Bar Association and previously served as Chair of its Litigation Section. She may be reached atslake@hallmatson.law.

Michigan Defense Trial Counsel, Inc.
The Statewide Association of Attorneys Representing the Defense in Civil Litigation

MEMBER-TO-MEMBER SERVICES

Be a part of a forum, exclusively for members, in which you can make your expertise available to other MDTC members!

1. ***Who can place a notice?***

Because this is a members-only benefit, only MDTC members can place a notice. Notices must identify an individual who is a member of MDTC and cannot solely identify a law firm.

2. ***What does it cost?***

Only $75 for a single entry and $200 for four consecutive entries.

3. ***Format:***

The format is reflected in the sample to the right. You will have to use 11 point Times New Roman font and set your margins to equal the size of the box.

4. ***Artwork***

Photos are allowed in digital format.

INDEMNITY AND INSURANCE ISSUES

Author of numerous articles on indemnity and coverage issues and chapter in ICLE book *Insurance Law in Michigan*, veteran of many declaratory judgement actions, is available to consult on cases involving complex issues of insurance and indemnity or to serve as mediator or facilitator.

MDTC
Info@mdtc.org
PO Box 66
Grand Ledge MI 4887
517-627-3745

Please send notices and any suggestions to Michael Cook, Editor, at info@mdtc.org. Checks should be made payable to "Michigan Defense Trial Counsel."

MEMBER-TO-MEMBER SERVICES

___Yes, we would like to reserve space. ___Single Entry $75 ___Four Consecutive Entries $200

Name:_____

Company Name:_____

Address:_____

City/ State /Zip:_____

Phone:_____ Fax: _____ E-Mail: _____

___I am enclosing a check. ___A check will be mailed.

O Visa O Mastercard #_____

Authorized Signature:_____ Exp. Date:_____

Please complete form and mail to: MDTC / PO Box 66 / Grand Ledge, MI 48837 / (517) 627-3745 Fax 517-627-3950

MEMBER NEWS

Work, Life, and All that Matters

Collins Einhorn Farrell PC Celebrates 50 Years of Legal Excellence

Southfield, Mich., March 2, 2021 – Collins Einhorn Farrell PC, a civil defense litigation law firm based in Southfield, Michigan, is celebrating its 50th anniversary this year. The firm will begin the commemoration of this milestone in April, the month in 1971 when Brian Einhorn joined Mort Collins, and they officially opened the doors of their new firm. Since that day, the firm has focused on two equally critical missions: providing the highest quality legal representation and service to its clients, and creating and fostering a collegial, diverse, and welcoming work environment for its employees.

Before his death in 2018, Mort perfectly summarized the reason for the firm's longstanding success: "Throughout our existence, we have constantly endeavored to bolster our stature in the community by employing, at all positions, top-notch personnel and utilizing management skills capitalizing on our collective talents." The firm continues to live up to Mort's vision, prioritizing its employees' satisfaction and success, as exemplified by the firm's recent collection of awards for workplace excellence, such as The Detroit Free Press Top Workplaces (2016, 2020) and Crain's Detroit Business Cool Places to Work (2018).

CEF's reputation for legal excellence is exemplified by the fact that year after year the firm and its attorneys receive many notable legal industry accolades. In just the past year, 19 CEF attorneys were named 2021 Best Lawyers®, including five attorneys who were awarded the prestigious 2021 Best Lawyers® "Lawyer of the Year" designation. Sixteen attorneys were listed as 2021 "Top Lawyers" by DBusiness, and 23 attorneys were recognized by Super Lawyers® 2020. The firm's practice areas were recognized in Best Lawyers® "Best Law Firms" in 10 categories in 2021. Several attorneys from CEF have served in top leadership roles over the years in both the state and local bar associations

The firm has enjoyed steady growth over its 50 years. From its modest beginning in the early 1970s, when the firm was comprised of Mort, Brian, Clay Farrell, and a small support staff, the firm has grown to over 110 employees, including 60 attorneys. The firm's attorneys practice in 11 different industry groups.

Dan Collins, President of the firm that bears his father's name, reflects on the firm's anniversary: "The culture of our workplace has been a point of pride since day one. As we reflect on 50 years, it really has always been about teamwork. During an unprecedented time, our culture and teamwork were on full display as CEF successfully navigated the remote-work demands brought on by the global pandemic."

Theresa Asoklis, CEO of Collins Einhorn Farrell, thanked the firm's clients: "50 years of legal excellence would not be possible without the support of our loyal clients, to whom we express our sincerest gratitude. The future of our firm is bright, and we look forward to continuing our tradition of excellence in service to our clients for many years to come."

The firm will celebrate its golden anniversary throughout the year with various events and charitable initiatives.

Member News *is a member-to-member exchange of news of* ***work*** *(a good verdict, a promotion, or a move to a new firm),* ***life*** *(a new member of the family, an engagement, or a death) and* ***all that matters*** *(a ski trip to Colorado, a hole in one, or excellent food at a local restaurant). Send your member news item to Michael Cook (Michael.Cook@ceflawyers.com).*

MDTC Schedule of Events

2021

Friday, August 6	Virtual Trials #2 – Zoom
Wednesday, August 25	Young Lawyers Series – Zoom – The King Can do No Wrong
Friday, September 10	Golf Outing – Mystic Creek, Milford, MI
Thursday, September 23	Board Meeting – Zoom
Wednesday, October 27	Young Lawyers Series – Zoom – Public Policy / Trial Attorney
Thursday, November 4	Board Meeting – Sheraton Detroit Novi Hotel, Novi, MI
Friday, November 5	Winter Meeting & Conference – Sheraton Detroit Novi Hotel, Novi, MI
Wednesday, December 8	Young Lawyers Series – Zoom – Reptile Tactics

2022

Friday, January 7	ADR Part 2 – Zoom
Wednesday, January 26	Young Lawyers Series – Zoom – Civility / Professionalism
Wednesday, February 23	Young Lawyers Series – Zoom – Stand out Associate
Thursday, March 17	6th Annual Legal Excellence Awards – The Gem Theatre
Thursday, June 16 – Friday, June 17	Annual Meeting & Conference – Tree Tops, Gaylord

2023

Thursday, June 15 – Friday, June 16	Annual Meeting & Conference – Tree Tops, Gaylord

2024

Thursday, June 13 – Friday, 14	Annual Meeting & Conference – H Hotel, Midland

MDTC LEADER CONTACT INFORMATION

Officers

Terence P. Durkin
President
Kitch Drutchas Wagner Valitutti & Sherbrook
1 Woodward Ave Suite. 2400
Detroit, MI 48226
313-965-6971 • 313-965-7403
terence.durkin@kitch.com

Deborah L. Brouwer
Vice President
Nemeth Law PC
200 Talon Centre Drive Suite 200
Detroit, MI 48207-5199
313-567-5921 • 313-567-5928
dbrouwer@nemethlawpc.com

John Mucha, III
Treasurer
Dawda, Mann, Mulcahy & Sadler PLC
39533 Woodward Avenue Suite 200
Bloomfield Hills, MI 48304
248-642-3700 • 248-642-7791
jmucha@dmms.com

Michael J. Jolet
Secretary
Hewson & Van Hellemont PC
25900 Greenfield Rd Suite 650
Oak Park, MI 48237
248-968-5200 • 248-968-5270
mjolet@vanhewpc.com

Irene Bruce Hathaway
Immediate Past President
1056 Worthington
Birmingham, MI 48009
248-330-7069 • 313- 496-8453
ibhathaway1@gmail.com

Madelyne C. Lawry
Executive Director
MDTC
P.O. Box 66
Grand Ledge, MI 48837
517-627-3745 • 517-627-3950
info@mdtc.org

Board

Lisa A. Anderson
Rosati Schultz Joppich & Amtsbuechler PC
27555 Executive Drive Suite 250
Farmington Hills, MI 48331-3550
248-489-4100 • 248-489-1726
landerson@rsjalaw.com

Victoria L. Convertino
Michigan Dept Health & Human Services
333 S Grand Ave
Lansing, MI, 48933
victoria.convertino@gmail.com

Daniel Cortez
Foley Baron Metzger & Juip PLLC
38777 6 Mile Road Suite 300
Livonia MI 48152-2660
734-742-1819 • 734-521-2379
dcortez@fbmjlaw.com

Michael J. Cook
Collins Einhorn Farrell PC
4000 Tpwm Center Suite 909
Southfield, MI 48075
248-351-5437 • 248-351-5469
michael.cook@ceflawyers.com

David Hansma
Seyburn Kahn PC
200 Town Center Suite 1500
Southfield, MI 48075
248-353-7620 • 248-353-3727
dhansma@seyburn.com

John C.W. Hohmeier
Scarfone & Geen, P.C.
30680 Montpelier Drive
Madison Heights, MI 48071
248-291-6184 • 248-291-6487
jhohmeier@scarfone-geen.com

Veronica R. Ibrahim
Kent E. Gorsuch & Associates
20750 Civic Center Drive Suite 400
Southfield, MI 48076
248-945-3838 • 855-847-1378
veronica.ibrahim@gmail.com

Richard J. Joppich
Kitch Drutchas Wagner Valitutti & Sherbrook
2379 Woodlake Drive Suite 400
Okemos, MI 48864
517-381-7182 • 517-381-4427
richard.joppich@kitch.com

Frederick V. Livingston
Novara Tesija & Catenacci PLLC
888 W Big Beaver Road Suite 150
Troy, MI 48084-4736
248-354-0380 • 248-354-0393
fvl@ntclaw.com

Edward P. Perdue
Perdue Law Group
447 Madison Ave., SE
Grand Rapids, MI 49503
616-888-2960 • 616-516-6284
eperdue@perduelawgroup.com

Dale A. Robinson
Rutledge Manion Rabaut Terry & Thomas PC
333 W. Fort Street Suite 1600
Detroit, MI 48226
313-965-6100 • 313-965-6558
drobinson@rmrtt.com

A. Tony Taweel
Ottenwess, Taweel & Schenk, PLC
535 Griswold Street Suite 850
Detroit, MI 48226
313-965-2121 • 313-965-7680
ttaweel@ottenwesslaw.com

MDTC Welcomes New Members!

Brandon Ayers, *Allstate Insurance Company*
Laura Baucus, *Dykema Gossett PLLC*
Kathryn Burkhart, *Garan Lucow Miller PC*
Robert Carr, *Ward Anderson*
Michelle Crockett, *Miller Canfield*
Brendan Dennis, *Hackney Grover PLC*
Morgan Esters, *Miller Canfield*
Christen Fox, *Ruggirello, Velardo, Burke, Reizen & Fox, P.C.*
Jaimee Gerrie, *UPvision Consulting, LLC*
Christian Graziani, *Vandeveer Garzia PC*
Andrea Malinowski, *Ward Anderson Porritt Bryant Lord & Zachary*
Saulius Polteraitis, *Janes Van Camp Moffatt & Selzer PC*
Ashleigh Russett, *Hewson & Van Hellemont*
Ryan Tactac, *Secrest Wardle*
Jay Yelton, *Warner Norcross & Judd*

MDTC LEADER CONTACT INFORMATION

Regional Chairs

Flint: Megan R. Mulder
Cline, Cline & Griffin, P.C.
503 Saginaw Street, Suite 1000
Flint, MI 48502
810.232.3141 • 810.232.1079
mmulder@ccglawyers.com

Grand Rapids: Mark J. Magyar
Dykema Gossett PLLC
300 Ottawa Ave NW Suite 700
Grand Rapids, MI 49503
616-776-7523 • 855-259-7088
mmagyar@dykema.com

Lansing: Michael J. Pattwell
Clark Hill PLC
212 E. Cesar Chavez Avenue
Lansing, MI 48906
517-318-3043 • 517-318-3082
mpattwell@clarkhill.com

Marquette: Jeremy S. Pickens
O'Dea Nordeen and Burink PC
122 W. Spring Street
Marquette, MI 48955
906-225-1770 • 906-225-1764
jpickens@marquettelawpc.com

Petoskey: Matthew W. Cross
Plunkett Cooney PC
406 Bay Street Ste 300
Petoskey, MI 49770-2428
231-248-6430
mcross@plunkettcooney.com

Saginaw: Robert Andrew Jordan
O'Neill, Wallace & Doyle P.C.
300 Street Andrews Road Suite 302
Saginaw, MI 48638
989-790-0960
djordan@owdpc.com

Southeast Michigan: Joseph E. Richotte
Butzel Long PC
41000 Woodward Avenue
Bloomfield Hills, MI 48304
248-258-1407 • 248-258-1439
richotte@butzel.com

Traverse City: Gregory R. Grant
Cummings McClorey Davis & Acho PLC
310 W. Front Street Suite 221
Traverse City, MI 49684
231-922-1888 • 231-922-9888
ggrant@cmda-law.com

MDTC 2020–2021 Committees

Meet The Judges
Beth Wittman, Chair
Amber Girbach
Daniel Cortez

Golf Committee
John Hohmeier, Co-Chair
Dale Robinson, Co-Chair
Mike Patwell
Eric Conn

Past Presidents Society
Hilary Ballentine
Lee Khachaturian
Ed Kronk
Rick Paul
Irene Hathaway

Legal Excellence Awards
Beth Wittman, Chair
Stephen Madej
Brandon Schumacher
Irene Bruce Hathaway
Daniel Cortez

Amicus
Lindsey A. Peck, Chair
Stephanie L. Arndt
Daniel G. Beyer
Drew W. Broaddus
Irene Bruce Hathaway
John C.W. Hohmeier
Grant O. Jaskulski
Robert G. Kamenec
Jonathan B. Koch
David Porter
Nathan S. Scherbarth
Carson J. Tucker

Winter Meeting 2020
Ed Perdue - Chair
Mark Magyar
Scott Pawlak

Regional Chair Liaison
Dale Robinson
Victoria Convertino

Section Chair Liaison
Tony Taweel
Lisa Anderson

Sponsors (vendors/firm)
Deborah Brouwer
Mike Jolet
Terry Durkin
John Mucha

Nominating Committee
Irene Hathaway

Government Relations
Richard Joppich
Mike Watza

Membership
Jeremy Pickens, Co-chair
Scott Pawlak
Clifford Hammond
Mike Conlon
Frederick Livingston
Veronica Ibrahim

Awards
Paul Vance, Chair
David Ottenwess
Robyn Brooks
Kevin Lesperance
Beth Wittmann

Annual Meeting 2021
Richard Joppich
Mike Cook
Traverse City / Petoskey support:
David Glancy, *Running Wise & Ford PLC*
Greg Grant, *Cummings McClorey Davis & Acho PLC*
Matt Cross, *Plunkett Cooney*
Joe VanHorn, *Willigham Cote'*
Maurice Borden, *Sondee Racine & Doren PLC*

E-Newsletter Committee
Nathan Scherbarth
Amber Girbach

Future Planning 2021
Deborah Brower

Social Media
Kari Melkonian

Quarterly Support Editor:
Michael J. Cook

Associate Editors:
Thomas Isaacs
Matthew Brooks
Katharine Gostek
Victoria L. Convertino

Committee Members:
Matt Zalewski – Municipal Law
Sandra Lake – Court Rule Updates
Drew Broaddus – Insurance Coverage Report
Mike Sullivan & David Anderson – Legal Malpractice Update
Richard Joppich & Mike Watza – Legislative Report
Ron Sangster – No-Fault Report
Daniel Krawiec – Supreme Court Update
Daniel Ferris & Derek Boyde – Med-mal
Phil DeRosier & Trent Collier – Appellate

Veterans Committee:
Ed Perdue
Carson Tucker
Larry Donaldson

Annual 2022
David Hansma Co-Chair
Veronica Ibrahim Co-Chair
Tony Taweel
Nathan Scherbarth

MDTC LEADER CONTACT INFORMATION

Section Chairs

Appellate Practice
Nathan Scherbarth
Zausmer, August & Caldwell, P.C.
32255 Northwestern Highway, Suite 225
Farmington Hills, MI 48334
248-851-4111 • 248-851-0100
NScherbarth@zacfirm.com

Appellate Practice
Beth Wittmann
The Kitch Firm
One Woodward Ave Suite . 2400
Detroit, MI 48226
313-965-7405 • 313-965-7403
beth.wittmann@kitch.com

Commercial Litigation
David Hansma
Seyburn Kahn
2000 Town Center, Suite 1500
Southfield, MI 48075
248-353-7620 • 248-353-3727
dhansman@seyburn.com

Commercial Litigation
Myles J. Baker
Dickinson Wright PLLC
500 Woodward Ave Ste 4000
Detroit, MI, 48226-5403
313-223-3132 • 844-670-6009
MBaker@dickinsonwright.com

General Liability
Shaina Reed
Fraser Trebilcock Davis & Dunlap PC
124 W. Allegan St Suite 1000
Lansing MI 48933
517-482-5800 • 517-482-0887
sreed@fraserlawfirm.com

General Liability
Anthony Pignotti
Foley Baron Metzger & Juip PLLC
38777 6 Mile Road Suite 300
Livonia, MI 48152
734-742-1800 • 734-521-2379
apignotti@fbmjlaw.com

Immigration Law
Julianne Cassin Sharp
Miller Canfield Paddock & Stone PC
150 W. Jefferson Ave Suite 2500
Detroit, MI 48226-4415
313-496-7667 • 313-496-7500
sharp@millercanfield.com

Immigration Law
Ahndia Mansoori
Kitch Law Firm
1 Woodward Ave Suite 2400
Detroit, MI 48226-5485
313-965-6730 • 313-965-7403
ahndia.mansoori@kitch.com

In House Counsel
Lee Khachaturian
The Hartford Financial Services Group, Inc
5445 Corporate Drive Suite 360
Troy, MI 48098
248-822-6461 • 248-822-6470
diana.khachaturian@thehartford.com

Insurance Law
Stephen C. Madej
Scarfone & Geen PC
30680 Montpelier Drive
Madison Heights, MI, 48071-1802
248-291-6184 • 248-291-6487
smadej@scarfone-geen.com

Insurance Law
Olivia Paglia
Plunkett Cooney
38505 Woodward Ave Suite 2000
Bloomfield Hills, MI 48304
248-901-4058 • 248-901-4040
opaglia@plunkettcooney.com

Labor and Employment
Nicholas Huguelet
Ogletree Deakins Nash Smoak & Stewart PLLC
34977 Woodward Ave Suite 300
Birmingham, MI 48009
248.723.6164 • 248.593.2603
nicholas.huguelet@ogletree.com

Labor and Employment
Clifford Hammond
Foster Swift Collins & Smith PC
28411 Northwestern Hwy Suite 500
Southfield, MI 48034
248-538-6324 • 248-200-0252
chammond@fosterswift.com

Law Practice Management
Fred Fresard
Dykema Gossett PLLC
39577 Woodward Ave Suite 300
Bloomfield Hills, MI 48304
248-203-0593 • 248-203-0763
ffresard@dykema.com

Law Practice Management:
Richard J. Joppich
Kitch Drutchas Wagner Valitutti & Sherbrook
2379 Woodlake Drive, Suite 400
Okemos, MI 48864
517-381-7182 • 517-381-4427
richard.joppich@kitch.com

Municipal & Government Liability
Robyn Brooks
City of Detroit Law Dept
2 Woodward Ave Suite 500
Detroit, MI 48226
313-237-3049 • 313-224-5505
broor@detroitmi.gov

Municipal & Government Liability
Matthew J. Zalewski
Rosati Schultz Joppich & Amtsbuechler PC
27555 Executive Drive Suite 250
Farmington Hills, MI 48331-3550
248-489-4100 • 248-489-1726
mzalewski@rsjalaw.com

Professional Liability & Health Care
Kevin Lesperance
Henn Lesperance PLC
40 Pearl Street NW Suite 1040
Grand Rapids, MI 49503
616-551-1611 • 616-323-3658
kml@hennlesperance.com

Professional Liability & Health Care
Daniel John Ferris
Kerr, Russell and Weber, PLC
500 Woodward Ave Suite 2500
Detroit, MI 48226
313-961-0200 • 313-961-0388
dferris@kerr-russell.com

Trial Practice
David Ottenwess
Ottenwess, Taweel & Schenk, PLC
535 Griswold St Suite 850
Detroit, MI 48226
313-965-2121 • 313-965-7680
dottenwess@ottenwesslaw.com

Trial Practice
Javon R. David
Butzel Long
41000 Woodward Ave
Stoneridge West Building
Bloomfield Hills, MI 48304
248-258-1415 • 248-258-1439
davidj@butzel.com

Young Lawyers
Amber Girbach
Hewson & Van Hellemont PC
25900 Greenfield Road Suite 650
Oak Park, MI 48237
248-968-5200 • 248-968-5270
agirbach@vanhewpc.com

Young Lawyers
Brandon M.H. Schumacher
Foster Swift Collins & Smith P.C.
313 S. Washington Square
Lansing, MI 48933
517-371-8255
bschumacher@fosterswift.com

MDTC
P.O. Box 66
Grand Ledge, MI 48837

PRST STD
US POSTAGE
PAID
LANSING, MI
PERMIT NO. 1096

MDTC is an association of the leading lawyers in the State of Michigan dedicated to representing individuals and corporations in civil litigation. As the State's premier organization of civil litigators, the impact of MDTC Members is felt through its Amicus Briefs, often filed by express invitation of the Supreme Court, through its far-reaching and well-respected Quarterly publication and through its timely and well received seminars. Membership in MDTC not only provides exceptional opportunities for networking with fellow lawyers, but also with potential clients and members of the judiciary.