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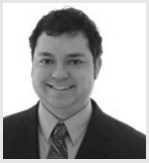

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President's Corner

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Deborah 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.

The headlines have not been very kind to our profession lately:
Lawyers ordered to pay $175,000 to Detroit, State
Michigan attorney suspended after charging for 'free' service
Oakland County attorney convicted of federal bribery, conspiracy
Out of state insurance attorneys disqualified, referred to AGC

The conduct behind those reports is varied – filing lawsuits alleging claims based on affidavits that the attorneys who signed the pleadings did not verify or even examine closely; advertising free credit repair services and enticing clients to sign engagement agreements requiring payment of attorney fees; providing free legal services and cash bribes to assist a client in winning a municipal garbage contract; engaging in substantive discussions with a defendant during a deposition, outside the presence of the defendant's counsel (and subsequently denying that such conversations had occurred). While I am not suggesting that our profession is falling into an abyss, those headlines are pretty discouraging to see. Perhaps some self-reflection is in order.

The world has become quite a stressful place, with lots of pressure to succeed, to make money, to become famous (hello, TikTok!), to do a lot in less time and sometimes with less effort. And that list does not even speak to the political divisiveness that seems to color every issue, even simple questions about protecting ones' self, family, and friends from a deadly virus. It is times like this, I think, that can cause anyone – including attorneys – to take steps that in lighter times, might not be taken. The task for us is to rise above the hard times and the stress, and strive to be better than the times may warrant. I cannot help but think back on the months following the 2020 election, when the cries of fraud and election theft were so noisy and noxious– and it was the judicial system that provided the voice of reason and calm, reviewing, assessing, and deciding claims without reference to politics. It made me be proud to be an attorney, in contrast to those headlines opening this report.

It was with these thoughts in mind that I found the Lawyer's Oath that I took when I was admitted, many years ago. I do not believe that I have looked at it since then, something I am somewhat embarrassed to write. But I am glad that I looked now, and I encourage you to do the same. You may think it clichéd, but I think it provides a recipe for our personal and professional success.

I will support the Constitution of the United States and the Constitution of the State of Michigan;
I will maintain the respect due to courts of justice and judicial officers;
I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;
I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;
I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with my client's business except with my client's knowledge and approval;
I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;
I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any cause for lucre or malice;
I will in all other respects conduct myself personally and professionally in conformity with the high standards of conduct imposed upon members of the bar as conditions for the privilege to practice law in this State.

Says it all, doesn't it?

The MDTC is excited to announce its annual Best Article Award! Starting with volume 38, the MDTC will select an article from each volume of *Michigan Defense Quarterly* to recognize as the best.

The editors and judges will consider the following criteria when selecting finalists and the award recipient:

- **Timeliness**—Does the article address a novel issue or developing area of the law?
- **Originality**—Does the article offer a unique perspective on an issue?
- **Organization**—Does the article follow a logical progression?
- **Writing Style**—Is the writing clear, succinct, and understandable? Is it engaging?

The award will be announced in September and presented at the Past Presidents Dinner. Judges will be invited to attend and recognized at the Past Presidents Dinner. The award recipient will also be recognized in the Member News section of the October issue and on the MDTC's social media pages.

Common Law Fraud: A Sea Shanty Worth Reviving?

By: Dan Campbell and John Hohmeier, *Scarfone & Geen*

Dan Campbell joined Scarfone & Geen, P.C. in January of 2021 as a law clerk, and later as an attorney in December of 2021. Mr. Campbell graduated Summa Cum Laude from Ferris State University with a Bachelor of Science. He went on to get his Juris Doctorate, graduating Magna Cum Laude, from WMU-Cooley Law School in May 2021.

While in law school, Mr. Campbell interned for the Honorable Joseph. J. Farah in the 7th Judicial Circuit Court for Genesee County. He also externed for the Genesee County Prosecutor's Office. Additionally, Mr. Campbell served as a Senior Associate Editor of the WMU-Cooley Law Review, and he competed on WMU-Cooley's inaugural Duberstein National Bankruptcy Moot Court Team in New York City. His email address is dcampbell@scarfone-geen.com

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

What is a Shanty?

Unlike the bothersome barnacles scarring a wooden schooner's hull, Sea Shanties seemed to have faded away into obscurity, ne'er to be mentioned by even the most skilled of pen. But recently, our pandemic's strange tide seems to have become a catalyst for reviving things long forgotten: sourdough starters, jigsaw puzzles, bikes, pantries stocked with non-perishables. Why not Sea Shanties?

So, Sea Shanties have gone viral. And, thanks to Tik-Tok, they have even gained fame on the Billboard Charts. Riding their wave of notoriety, U.K. artist Nathan Evans' "Wellerman (sea shanty)" gained over 69 million views and counting since its posting on YouTube back on January 22, 2021. Despite their new-found popularity, Sea Shanties got their start in the 1400's as maritime work songs.

Since their inception more than a half millennia ago, "sea shanties became somewhat static in history, as their performance decreased with fewer ships in use during the rise of industry." But, Sea Shanties were such a part of maritime life that Herman Melville, of *Moby Dick* fame, once wrote:

> It is a great thing in a sailor to know how to sing well, for he gets a great name by it from the officers, and a good deal of popularity among his shipmates. Some sea-captains, before shipping a man, always ask him whether he can sing out a rope.

So why are Sea Shanties appearing in a commentary about no-fault PIP fraud defense? In a raw version of their own new Sea Shanty, the Plaintiff bar is relying almost exclusively on *Haydaw v Farm Bureau Ins Co*, *Meemic Ins Co v Fortson*, and *Williams v Farm Bureau* to argue that fraud defenses are not even available to no-fault carriers anymore. Wrong! Why? Hold your course: we'll get you there, matey.

Common Law Isn't Just for Brits.

We all know no-fault policies are contracts, to which common-law defenses are available. Michigan's Supreme Court emphasized this in *Titan Ins Co v Hyten*:

> Common-law defenses may be invoked to avoid enforcement of an insurance policy, unless those defenses are prohibited by statute. . . . [C]ommon-law defenses include duress, waiver, estoppel, fraud, and unconscionability."

Although *Titan* involved a fraud defense regarding the procurement, the Court's opinion did not expressly state whether it "applied only to procurement fraud."

The same can be said with *Bazzi v Sentinel Ins Co*. Pointedly, the Supreme Court's holding in *Bazzi* enabled insurers to raise this defense to mandatory coverage claims

under no-fault. In fact, the myriad of footnotes in *Meemic* mutter a caution: it's almost as if the *Meemic* Court goes out of its way to reassure insurance carriers that they may still be able to deny and defend a claim for fraud. If *Meemic* has a cautious tone, it is one that plaintiffs should heed to, because, despite the plaintiff bar's incessant chanting, *Meemic* does not say that a no-fault carrier is barred from defending a case based on fraud, savvy?

Before *Meemic*, the Supreme Court reassured insurers that when confronted with a fraudulent claim "[a]n insurer can reject fraudulent claims without rescinding the entire policy[,] . . . [a]nd, in certain narrow circumstances, an insurer can seek to cancel the policy under MCL 500.3220." Even the Court in *Titan* indicated that insurers are not "precluded from pursuing traditional legal and equitable remedies in response." This again was reiterated in *Meemic*.

Meemic: *Caught Between the Devil and the Deep Blue Sea*.

For a fraud defense to pass muster these days, it must be "available under the no-fault act or the common law." But a policy's fraud provision cannot contain language that expressly conflicts with the no-fault act – like the automatic rescission language in the policy at issue in *Meemic*. Simple. In *Meemic*, the Supreme Court took issue with a concealment and fraud provision that operated to automatically rescind or void a policy. Specifically, the provision in question stated "[t]his entire Policy is void if …."

Certainly, *Meemic* can be read to say that a fraud or concealment provision conflicts with the no-fault act **only** when the carrier attempts to rescind or "void" the policy of insurance *ab initio* based on the fraud provision in the policy. After all, Meemic based its fraud defense off one in contract, it "fail[ed] because it is not the type of common-law fraud that would allow for a rescission." Thus, *Meemic* is clearly distinguishable from the previous *Titan* and *Bazzi* decisions, because Meemic tried to rescind the policy because of fraud committed post-procurement, not because of fraud in the procurement.

Moreover, the new case law, including *Meemic*, does not apply to such a provision when fraudulent misrepresentations are made during the claims process before litigation. Such a fraud exclusion policy gives a contractual defense, but this defense is grounded in the common law. Importantly, such a fraud exclusion policy might not face a trial court's scrutiny like the one mentioned above from *Meemic*.

Shelton v Auto-Owners: Brang a Spring Upon'er

Frankly, the old salts penning this dithyramb blame all this fraud blimey on the 2017 *Shelton v Auto Owners* decision that fractured the traditional meaning of coverage and bastardized the tradition of applying policy exclusions to people claiming benefits under a policy. Even still, *Shelton* left common-law fraud untouched, availing insurance companies a defense where policy defenses cannot be asserted against an injured person. Pointedly, the Court of Appeals in *Shelton* remarked:

> As always, if an insurer concludes that a claim is fraudulent, it may deny the claim. Should the claimant file suit, the burden is on the claimant to provide that he is entitled to his claimed benefits, a burden that is highly unlikely to be met if the factfinder concludes that the claim is fraudulent.

Shelton left common-law defenses for fraud untouched. And, since insurance policies are contracts, such a defense may be invoked to avoid a policy's enforcement. As a general rule, common-law fraud consists of the following elements:

> (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage.

Yo ho ho! Word to the wise these days is that while a trial court may still rule that a policy's fraud provision is void, pleading both the contractual fraud provision **and** common-law fraud is just good for business.

Captain Ahab, some barnacles, and no-fault fraud.

Back to our nonsensical theme, the Sea Shanty. Let's say your client's policy holder is a cavalier sea fairer who answers to the name of Captain Ahab. Although the sea is his home, Ahab looks forward to sailing home so he can take his prized 1987 Pontiac Fiero GT out for a drive. Now, Ahab has been around barnacles most of his life, so he's learned a thing or two about gaming the no-fault system.

One day, while enjoying his ration of rum and singing a Sea Shanty or two, Ahab gets an idea: why just make a sailor's wages when no-fault can pay me too? Ahab goes out and stages an accident, lies about needing wage loss and replacement services, and then goes to the usual barnacle providers and gets paid, free meds, the whole kit and caboodle – Ahab is basically cracking Jenny's teacup out there.

The insurer suspects the accident is staged and Ahab is making material misrepresentations during the claims process (they have good surveillance too). So the carrier requests an EUO. Now, any no-fault lawyer reading this knows that most of the usual suspects on the plaintiff side would rather cleave a person to their brisket before producing their client for an EUO, so Ahab fails to appear for several EUOs.

The case then goes into litigation and Ahab lies about staging the accident – fraud, clearly. This is where the plaintiff's bar uses *Haydaw v Farm Bureau* to avoid being dismissed for fraud, throwing their hands up and declaring, "whoa ho ho, these statements were made in litigation,

so the fraud provision cannot apply." However, Ahab's situation is eerily similar to the plaintiff's in *Fashho v Liberty Mut Ins Co*.

Fashho got into an accident in 2017, with Liberty paying benefits, including wage loss. Liberty reviewed Fashho's continued claim, and eventually got surveillance footage of Fashho working unrestricted at his auto-repair shop. In January 2018, Liberty terminated benefits. In return, Fashho sued Liberty. During discovery, Fashho testified that he was unable to perform normal work duties for months after the accident.

Obviously, Fashho's testimony was contrary to the surveillance footage, so Liberty moved for summary disposition because of its policy's fraud exclusion provision. The court granted Liberty's motion, and Fashho appealed. The Court of Appeals held that Liberty's motion for summary disposition was proper — the alleged fraud, and Fashho's claims for wage-loss took place before litigation started.

Even though the Plaintiff bar argues that *Haydaw* held that fraud provisions do not apply when an insured makes misrepresentations after litigation begins, the Court of Appeals distinguished *Fashho's* facts from *Haydaw*:

> [A] plaintiff-insured only commences suit after the defendant-insurer denies the plaintiff's claim, and that denial cannot possibly be based on an event that has yet taken place. This does not mean that a defendant cannot rely on evidence of fraud obtained after litigation commences. It simply means that the evidence must relate to fraud that took place before the proceedings began.

Anyways, we have reached the word limit on this voyage, but don't hang the jib just yet. Let's heave-ho, hit the chase gun, and clap some final thunder.

Common-Law Fraud: a defense worth reviving.

Sea Shanties have always been there, just like the defense of common-law fraud. With the recent no-fault reforms, and the ever-growing body of "interesting" fraud decisions coming out of the appellate courts, common-law defenses have lied in wait. Sea Shanties may likely be swept away by a new tide of social-media whims, but we cannot let the defense of common-law fraud be sweat out to sea.

Common-law fraud is a bastion, standing unfazed by the recent storm of No-Fault reforms and certain appellate panels ordering traditional notions of fraud to walk the plank. So the next time you see two landlubber's swabbing each other's poop deck hollering that "fraud is not available to insurance carriers," blow the man down and hit 'em with the common-law fraud defense. Hold fast.

Endnotes

1 "Shanty or Chanty: noun (1): a song sung by sailors in rhythm with their work; noun (2) a small crudely built dwelling or shelter usually off wood." *The Merriam-Webster's Dictionary* (5th ed).

2 Barnacles have long since been a plight on No-Fault, and they were the focus of a previous article penned in Michigan Defense Quarterly's Volume 35, No. 1 in 2018.

3 Eric Frankenberg, Billboard, *Nathan Evans' Sea Shanty 'Wellerman' Sails Onto Billboard Global Charts* <https://www.billboard.com/articles/business/chart-beat/9521920/nathan-evans-wellerman-sails-global-charts/> (accessed February 23, 2021).

4 Nathan Evens, *Wellerman* <https://www.youtube.com/watch?v=qP-7GNoDJ5c> (accessed December 1, 2021).

5 Roisin O'Connor, The Independent, *The History of Sea Shanties — and Why They're Such a Hit in 2021* <https://www.independent.co.uk/arts-entertainment/music/features/sea-shanties-tiktok-history-the-longest-johns-b1789952.html> (accessed January 26, 2021).

6 Jordana Qi, Washington College Review, *Sounds and Songs of Sailing: A Historical and Theoretical Perspective on the Performance and Content of Sea Shanties* < https://washcollreview.com/2017/05/16/sounds-and-songs-of-sailing-a-historical-and-theoretical-perspective-on-the-performance-and-content-of-sea-shanties/> (accessed January 26, 2021).

7 Herman Melville, *Redburn: His First Voyage* (Boston: The Botolph Society, 1924), ch IX, p 45.

8 Certainly, there is a distinction to be made regarding fraud int eh procurement and post-procurement fraud, but any distinction would outstrip the narrative of this article.

9 *Titan Ins Co v Hyten*, 491 Mich 547, 554-55; 817 NW2d 562 (2012).

10 *Meemic Ins Co v Fortson*, 506 Mich 287, 314, n 22; 954 NW2d 115 (2020).

11 *Id*.

12 *Bazzi v Sentinel Ins Co*, 502 Mich 390, 400-01; 919 NW2d 20 (2018).

13 *Id*.

14 *Id*.

15 *Meemic,* 506 Mich at 304, n 11.

16 *Id*. at 311-12.

17 *Meemic,* 506 Mich at 318 (Zahra, K., concurring).

18 *Id*. at 310.

19 *Shelton v Auto-Owners Ins Co*, 318 Mich App 648, 655; 899 NW2d 744 (2017).

20 *Meemic*, 506 Mich at 304-05.

21 *M&D, Inc v WB McConkey*, 231 Mich App 22, 27; 585 NW2d 33 (1998), citing *Hi-Way Motor Co v Int'l Harvester Co,* 398 Mich 330, 336; 247 NW2d 813 (1976); *Irwin v Carlton,* 369 Mich 92, 94; 119 NW 2d 617 (1963); *Candler v Heigho,* 208 Mich 115, 121; 175 NW 141 (1919).

22 After all, he'd always wanted to go on leave and sit behind the helm of his dream car, a 1967 Corvette Stingray Split-Window Coupe.

23 *Fasho v Liberty Mut Ins Co*, 333 Mich App 612; 963 NW2d 695 (2020).

24 *Fashho*, 333 Mich App at 621-22.

25 *Id*. at 619.

26 Common Law fraud's efficacy in defending fraudulent no-fault claims has yet to be tested in appellate courts.

Appellate Practice Report

By: Phillip J. DeRosier and Trent B. Collier

Pitfalls in Questions Presented

The Michigan Supreme Court and Court of Appeals may decline to consider an issue that a party omits from their "Question Presented" section. This rule has been around for some time, yet it continues to snare the unwary. This article summarizes the basic rule and offers some practice guidelines for its application.

The Basic Rule

Michigan Court Rule 7.212(C)(5) states that an appellant's brief must contain, among other things, "A statement of questions involved, stating concisely and without repetition the questions involved in the appeal. Each question must be expressed and numbered separately and be followed by the trial court's answer to it or the statement that the trial court failed to answer it and the appellant's answer to it.'" MCR 7.212(C)(5).

Michigan's appellate courts have concluded that the mandatory phrasing of this rule means that failure to raise an issue in the Questions Presented section results in waiver. *English v Blue Cross Blue Shield of Mich,* 263 Mich App 449, 459; 688 NW2d 523 (2004); *Grand Rapids Employees Independent Union v Grand Rapids,* 235 Mich App 398, 409-410; 597 NW2d 284 (1999).

Ad Hoc Exceptions

An appellate panel may sometimes conclude that it **could** skip an argument because it wasn't raised in the Questions Presented but consider the argument anyway. This practice rarely offers appellants much comfort; most opinions considering waived issues hold that the waived arguments lack merit in any event. See, e.g., *Copeland v Genoa Tp,* unpublished per curiam opinion of the Court of Appeals, issued June 30, 2011 (Docket No. 301442); *In re Hawkins,* unpublished per curiam opinion of the Court of Appeals, issued January 25, 2005 (Docket No. 255172); *People v Scott*, unpublished per curiam opinion of the Court of Appeals, issued April 19, 2002 (Docket No. 225944).

A panel may also look past an appellant's failure to raise an issue in its Questions Presented if the proper resolution of the case hinges on that question. See, e.g., *Tolbert v Isham,* unpublished per curiam opinion of the Court of Appeals, issued May 29, 2003 (Docket No. 231424); see also *Feyen v Grede II, LLC,* unpublished per curiam opinion of the Court of Appeals, issued April 19, 2012 (Docket No. 304137) ("Nevertheless, we overlook the presentation deficiency in the case at bar because a resolution of the issue is necessary for a proper determination of the outcome of the case.").

For example, in *Tolbert,* the trial court entered a default judgment against the defendant in an auto-negligence case. The defendant's attorney was unable to appear for trial because he had another trial scheduled that day and was unable to adjourn either proceeding. The primary issue on appeal was whether the trial court abused its discretion in entering a default judgment when the defense attorney wasn't at fault for his inability to appear at trial.

In their briefs and at oral argument, the parties also disputed whether the plaintiff had a "serious impairment of bodily function" sufficient to maintain an action for non-economic loss under Michigan's no-fault law. *Tolbert,* unpub op at 4. The appellant's Questions Presented didn't raise this issue. But after holding that the trial court abused its discretion in entering a default judgment, the Court of Appeals considered whether the plaintiff had a cause of action in the first place. The panel explained that it was appropriate to reach this question, despite its absence from the appellant's Questions

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Presented, because it was a question of law and the parties briefed and argued it. (Presiding Judge Cooper dissented in part because she saw no need to consider an issue that didn't appear in the Questions Presented).

Advocacy Questions

Is it advisable to argue that an opposing party raised an issue in the body of their brief without also citing that issue in its Questions Presented? The Court of Appeals has noted and agreed with parties' criticisms of opposing parties' Questions Presented. *Russo v Shurbet Partners, Inc,* unpublished per curiam opinion of the Court of Appeals, issued October 6, 2011 (Docket No. 298090) ("We agree with defendant that plaintiffs have not raised any appealable issue in their brief. An issue not raised in an appellant's questions-presented section is considered waived on appeal."). So it appears that there's no rule against challenging an opposing party's Questions Presented, even if this issue is typically one that the court itself raises.

The more difficult advocacy question is how to avoid waiving issues by omitting them from the Questions Presented. Although there are no hard and fast rules, a review of the relevant case law suggests three key practices.

First, make sure that your Questions Presented section addresses every order from which your client is seeking relief. *See United Elec Supply Co, Inc v Terhorst & Rinzema Const Co,* unpublished per curiam opinion of the Court of Appeals, issued March 13, 2008 (Docket No. 276290) (declining to consider order granting a motion for summary disposition where the Questions Presented focused only on a motion to reconsider). In other words, you need to consider not just the relevant legal issues but also the context in which they arose.

Second, consider including a separate "question presented" for each discrete legal error or basis for reversal. It may be tempting to combine related issues into a single question—for example, "Should this Court reverse the $2 million verdict and remand for further proceedings where the trial court admitted numerous statements in violation of the Michigan Rules of Evidence?" That kind of statement may have the virtue of efficiency but it has little else to offer. It doesn't identify any specific errors and therefore creates a risk that a panel will conclude that you've waived certain claims of evidentiary error.

Third, don't miss an opportunity to address the underlying merits when an appeal focuses—at least at first blush—on a procedural issue. *Tolbert* highlights the importance of addressing both threshold legal issues (in *Tolbert,* whether the trial court abused its discretion in entering a default judgment) **and** dispositive legal issues (in *Tolbert,* whether the plaintiff stated a tenable no-fault claim at all).

The more difficult advocacy question is how to avoid waiving issues by omitting them from the Questions Presented

More Isn't Always Merrier

There's one final consideration for appellants: the risk of raising **too many** issues. Adding another Question Presented is not costless. Most experienced appellate lawyers know that the more questions an appellant raises, the weaker each question looks. Even the United States Supreme Court observed that additional questions have a way of diluting the strength of other questions: "Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible or at most on a few key issues." *Jones v Barnes,* 463 US 745, 751-52 (1983). As Justice Robert Jackson put it, "…[R]eceptiveness declines as the number of assigned errors increases." Jackson, *Advocacy Before the Supreme Court,* 25 Temple L.Q. 115, 119 (1951), quoted in *Jones,* 463 US at 752.

Every new question makes the other questions a little weaker. So it's a bad idea to adopt a "better safe than sorry" theory and include a lengthy list of every possible question the court might consider. With the diluting effect of each new question, that strategy may hurt your client more than help. The raise-or-waive rule leaves appellate attorneys with the same basic tasks: figuring out the best arguments, making sure they appear in the Question Presented section, and getting a client's permission to drop the weak arguments.

Lawyers are awfully fond of sports metaphors but music might provide a better one here. If you don't know which instruments your audience prefers, you might write a piece that has a little of everything: piano, tuba, accordion, kazoo, and a beat from a Roland TR-808 drum machine. The result is likely to be an annoying racket. Better to be selective and pick the instruments that work best for your composition.

And sometimes—just sometimes—you might be lucky enough to have a single compelling, dispositive issue. In those cases, you might take a page from Bach's unaccompanied cello suites and let that instrument sing alone.

Effect of a Stipulated Dismissal "Without Prejudice" on Appellate Jurisdiction

On occasion, a plaintiff faced with te dismissal of one or more, but not all, of its claims may wish to pursue an immediate appeal without losing the ability to pursue its remaining claims later on. A similar situation arises when a court dismisses a plaintiffs' claims in their entirety, but the defendant has counterclaims that remain pending. Since an order dismissing less than all of the claims of all of the parties is not "final" for the purpose of bringing an appeal as of right in either the Michigan Court of Appeals or the Sixth Circuit, it is tempting to consider stipulating to the dismissal of the remaining claims or counterclaims "without prejudice" or with some other language preserving the ability to reinstate those claims in the event of an appellate reversal. It would be wise to resist that temptation.

State Court

The Michigan Court of Appeals has repeatedly cautioned against dismissing claims "without prejudice" in order to try and achieve finality. As the court explained in *City of Detroit v Michigan*, 262 Mich App 542, 545; 686 NW2d 514 (2004), voluntarily dismissing claims without prejudice creates the possibility of "piecemeal" appeals, which the court rules are designed to prevent:

> The parties' stipulation to dismiss the remaining claims without prejudice is not a final order that may be appealed as of right; it does not resolve the merits of the remaining claims and, as such, those claims are "not barred from being resurrected on that docket at some future date." *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 136; 624 NW2d 197 (2000). The parties' stipulation to dismiss the remaining claims was clearly designed to circumvent trial procedures and court rules and obtain appellate review of one of the trial court's initial determinations without precluding further substantive proceedings on the remaining claims. This method of appealing trial court decisions piecemeal is exactly what our Supreme Court attempted to eliminate through the "final judgment" rule.

In *MLive Media Group v City of Grand Rapids*, 321 Mich App 263; 909 NW2d 282 (2017), the Court of Appeals found *City of Detroit* to be distinguishable because the dismissal without prejudice at issue in *MLive* was involuntary. *Id.* at 268. But the court reiterated Michigan's firmly established rule that "[p]arties cannot create a final order by stipulating the dismissal of remaining claims without prejudice after a trial court enters an order denying a motion for summary disposition addressing only some of the parties' claims." *Id.*

Federal Court

The Sixth Circuit likewise views attempts to manufacture finality with disfavor. In fact, the court just recently addressed the issue in *Rowland v Southern Health Partners, Inc*, 4 F4th 422 (CA 6, 2021). After the district court granted partial summary judgment to the defendants on the plaintiff's federal claims, leaving her state-law claims remaining, the parties told the district court that their "preferred method of moving forward" was dismissal of the plaintiff's remaining state-law claims "without prejudice" so that the plaintiff could pursue an appeal on her federal claims and have her dismissed state-law claims reinstated if she prevailed on appeal. *Id.* at 424. The Sixth Circuit held that the maneuver deprived it of jurisdiction over the plaintiff's appeal.

The court explained that, with limited exceptions, "the finality requirement establishes a one-case, one-appeal rule." *Id.* at 425. Because the plaintiff's state-law claims could "spring back to life" if summary judgment were reversed on any of her federal claims, this "contravene[d] purpose of the finality requirement, which is intended to prevent parties from pausing the litigation, appealing, then resuming the litigation on a 'half-abandoned claim if the case returns.'" *Id.* at 426 (citation omitted). See also *Page Plus of Atlanta, Inc v Owl Wireless, LLC*, 733 F3d 658, 659-660 (CA 6, 2013) (dismissing an appeal for lack of jurisdiction where the parties—after the district court granted summary judgment to the defendant on the plaintiff's claims as well as on the defendant's counterclaim (except as to damages)—stipulated to an order dismissing the entire case on condition that the defendant could re-raise its counterclaim if the order granting summary judgment on the plaintiff's claims was reversed).

One noteworthy aspect of the Sixth Circuit's approach to finality is that the court does appear to recognize two potential rationales that might establish finality notwithstanding a stipulated dismissal being "without prejudice." One is that "the voluntary dismissal comes at a cost," with the party "assum[ing] the risk that the statute of limitations, any applicable preclusion rules or any other defenses might bar recovery on the claim." *Id.* at 427 (citation and internal quotations omitted). The other is if the "claim voluntarily dismissed without prejudice must be re-filed in a separate action," in which case there would be "no risk that the same case will produce multiple appeals raising different issues." *Id.* at 427-428 (citation and internal quotations omitted).

Conclusion

Although it appears theoretically possible to construct a voluntary dismissal without prejudice that meets the Sixth Circuit's view of finality, it should be approached with extreme caution. As far as Michigan goes, the practice should be avoided completely, or else face the very real—if not likely—prospect of the appeal being dismissed.

MDTC Insurance Coverage Report

By: Drew W. Broaddus, *Secrest Wardle*
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Not many notable coverage decisions were issued this quarter, making this a good time to review a familiar yet not always well-understood issue: bad faith. More specifically, what it is, and what it is not. More than thirty years after *Commercial Union Ins Co v Liberty Mut Ins Co*, 426 Mich 127; 393 NW2d 161 (1986), confusion still persists as to when an insurer's conduct constitutes "bad faith" and what remedies are available. Frequently, the term "bad faith" is used to describe any denial of benefits by an insurer that a claimant considers improper.[1] But of course, "not every disagreement or claim denial supports a cause of action for insurance bad faith."[2] Under Michigan law, the term has a specific meaning, although the precise contours of "bad faith" can vary depending upon the context.

In almost every state, the law implies a duty of good faith and fair dealing in all insurance policies.[3] But under Michigan law, this implied duty "is not itself a cause of action"; it cannot "override express contract terms" and "does not apply when the parties have clearly expressed their respective rights and obligations."[4] So, the cause of action delineated in *Commercial Union* [5]is somewhat of an anomaly under Michigan jurisprudence, as it is one of only a handful of recognized theories that "straddle the sometimes elusive boundary between tort and contract."[6]

Commercial Union involved an insurer's handling of a liability suit brought by a third-party against the insured.[7] However, when attorneys say an insurance claim has been denied in "bad faith," they may also be referring to first-party claims,[8] claims by third-party tort claimants against a tortfeasor's insurer,[9] and – although less frequently described as such – claims under the No-Fault Act.[10] Therefore, this section will take a broader view of "bad faith" than what is defined in *Commercial Union,* so as to include these other situations where an insurer can be ordered to pay something above and beyond the value of the claim.

Liability claims. In *Commercial Union*, an excess insurer (Commercial Union) filed suit under an equitable subrogation theory[11] against a primary insurer (Liberty Mutual). Commercial Union alleged that Liberty Mutual's failure to negotiate a settlement in a case against their mutual insured constituted bad faith, thereby causing Commercial Union's excess policy to be exposed. The jury found no cause of action against Liberty Mutual, but the Court of Appeals reversed, ordering a new trial and finding that the trial court's bad faith instructions were, in part, prejudicial and erroneous. *Commercial Union*, 426 Mich at 131. The Supreme Court affirmed the Court of Appeals and, instructing the trial court on remand, explained that "bad faith should not be used interchangeably with either 'negligence' or 'fraud.'" *Id.* at 136. The Court defined "bad faith" for the purposes of instructing the jury on remand as "arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty." *Id.* "Good-faith denials, offers of compromise, or other honest errors of judgment are not sufficient to establish bad faith." *Id.* at 136-137. "Further, claims of bad faith cannot be based upon negligence or bad judgment, so long as the actions were made honestly and without concealment." *Id.* But because "bad faith is a state of mind," the Court noted that "there can be bad faith without actual dishonesty or fraud." *Id.* "If the insurer is motivated by selfish purpose or by a desire to protect its own interests at the expense of its insured's interest, bad faith exists, even though the insurer's actions were not actually dishonest or fraudulent." *Id.*

The *Commercial Union* Court went on to identify the following twelve "supplemental factors which may be considered in determining whether liability exists for bad faith":[12] (1) failure to keep the insured fully informed of all developments in the claim or suit that could reasonably affect the interests of the insured, (2) failure to inform the insured of all settlement offers that do not fall within the policy limits, (3) failure

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to solicit a settlement offer or initiate settlement negotiations when warranted under the circumstances, (4) failure to accept a reasonable compromise offer of settlement when the facts of the case or claim indicate obvious liability and serious injury, (5) rejection of a reasonable offer of settlement within the policy limits, (6) undue delay in accepting a reasonable offer to settle a potentially dangerous case within the policy limits where the verdict potential is high, (7) an attempt by the insurer to coerce or obtain an involuntary contribution from the insured in order to settle within the policy limits, (8) failure to investigate the claim properly before refusing an offer of settlement within the policy limits, (9) disregarding advice or recommendations of an adjuster or attorney, (10) serious and recurrent negligence by the insurer, (11) refusal to settle a case within the policy limits following in excess of verdict when the chances of reversal on appeal are slight or doubtful, and (12) failure to take an appeal following a verdict in excess of the policy limits where there are reasonable grounds for such an appeal (especially where trial counsel so recommended).[13] The Court noted that these "factors are not exclusive" and "[n]o single factor shall be decisive."[14]

The *Commercial Union* Court was not the first to recognize bad faith in the insurance setting; the concept appears in Michigan jurisprudence at least far back as *City of Wakefield v Globe Indemnity Co,* 246 Mich 645; 225 NW 643 (1929). But *Commercial Union* was and remains the seminal decision defining the concept, at least in the context of liability claims.

A sub-issue presented by *Commercial Union,* which still sometimes causes confusion today, relates to the duty owed to an excess carrier by a primary carrier. More specifically, why is any duty owed at all, where the primary and excess carriers have no contract between each other? The Supreme Court addressed this in another decision issued on the same day, *Commercial Union Ins Co v Medical Protective Co*.[15] Here, the Court explained that generally, a primary insurer owes no *direct* duty to an excess insurer to act in good faith and settle a claim within policy limits. However, an excess insurer may maintain a cause of action against a primary insurer for the primary insurer's bad-faith failure to settle within policy limits under an equitable subrogation theory. "Since the insured would have been able to recover from the primary carrier for a judgment in excess of policy limits caused by the carrier's wrongful refusal to settle, the excess carrier, who discharged the insured's liability as a result of this tort, stands in the shoes of the insured and should be permitted to assert all claims against the primary carrier which the insured himself could have asserted."[16]

Although the lead opinion suggested in footnote five that a primary insurer *might* owe a direct duty to an excess insurer in certain situations, four Justices wrote separately to dispel that possibility and confirm that any such cause of action could *only* be pursued through equitable subrogation.[17] Those four Justices otherwise concurred in the lead opinion. In other words, this was a 7-0 decision except for the narrow question about whether a direct duty could conceivably exist under other facts, which four Justices emphatically said no to.[18]

Four years later, in *Frankenmuth Mutual Ins Co v Keeley (On Rehearing),* 436 Mich 372; 461 NW2d 666 (1990), the Court clarified that an insurer's liability for bad faith failure to settle is limited by the collectability of its insured. The Court did so by adopting Justice Levin's dissent in *Frankenmuth Mutual Ins Co v Keeley*, 433 Mich 525; 447 NW2d 691 (1989). The approach adopted by the Court on rehearing was described as a compromise between the "prepayment rule" – which required an insured to have made some payment on the judgment[19] – and the "judgment rule" – which required an insurer to pay an excess judgment in instances of bad faith, regardless of the insured's solvency or ability to pay any part of the judgment.[20] The compromise proposed by Justice Levin, and later adopted by the Court, was to "accept the essence of the judgment rule by eliminating the need to show partial payment, but provide protection for insurers along the lines of the prepayment rule by precluding collection on the judgment from the insurer beyond what is or would actually be collectable from the insured."[21]

This approach, dubbed "the Michigan Rule," has been described as a "minority view" and has been criticized on the grounds that:

> …[t]he injury to the insured is the continuing existence of the excess judgment. The cost of the cure of that injury is the amount required to satisfy the judgment. Payment of an amount measured by the probability of recovery from the insured personally, if less than the entire excess, does not eliminate the injury. The judgment holder is not restricted in executing on the judgment at any time by the probable assets of the debtor, determined at the time the judgment in the failure to settle case is entered against the insurer.…[22]

But regardless of its popularity elsewhere, the compromise approach adopted on rehearing in *Keeley* has not been questioned in subsequent Michigan case law.[23]

First-party claims. Unlike some states, particularly California, Michigan has not recognized a claim for bad faith breach of an insurance contract in the first-party context. And, Michigan courts do not seem to be poised to recognize any such tort-like first-party theories in the near future.[24] For example, *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 604 n 7; 374 NW2d 905 (1985) noted that the "mere denial of liability or refusal to pay, even [if] unreasonable and in bad faith, is not deemed outrageous" so as to support a claim for intentional infliction of emotional distress. Later, *Runions v Auto-Owners Ins Co,* 197 Mich App 105, 110; 495 NW2d 166 (1992) reiterated that the refusal to pay a claim could not, as a matter of law, constitute extreme and outrageous conduct.[25] And in *Kewin*, 409 Mich at 419 the Court rejected a claim for "mental anguish" allegedly resulting from an insurer's breach of contract.[26]

However, insureds whose first-party claims are unreasonably drawn out are not without a remedy. Under MCL 500.2006(4), "[i]f benefits are not paid on a timely basis, the benefits paid bear simple interest from a date 60 days after satisfactory proof of loss was received by the insurer at the rate of 12% per annum if the claimant is the insured or a person directly entitled to benefits under the insured's insurance contract."

MCL 500.2006(4) "divides insurance claims 'not paid on a timely basis' into

two categories." *Stryker,* 735 F3d at 359-360. "For cases where 'the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance,' the interest rate is 12% per annum." *Id.* "However, for 'third party tort claimant[s],' the interest rate is 12% per annum 'if the liability of the insurer for the claim is not reasonably in dispute, the insurer has refused payment in bad faith and the bad faith was determined by a court of law.'" *Id.* The distinction is important because if "the claimant is the insured or an individual or entity directly entitled to benefits under the insured's contract of insurance, and benefits are not paid on a timely basis, the claimant is entitled to 12 percent interest*, irrespective of whether the claim is reasonably in dispute*."[27]

Although I usually don't discuss automobile cases here – leaving them for the No-Fault Report – this point overlaps with the now-resolved controversy over whether a claim for underinsured motorist ("UIM") benefits is more analogous to a first-party claim or a third-party tort claim, within the meaning of § 2006(4). In *Nickola v MIC Gen Ins Co,* the Court of Appeals refused to impose 12% interest on an arbitration award in a UIM case because the insurer's liability was reasonably in dispute.[28] The panel found that "while plaintiff is seeking UIM benefits that are provided under the policy, he is doing more than merely making a simple first-party claim…." *Nickola,* 312 Mich App at 374. "In order for plaintiff to succeed on his UIM claim, he essentially has to allege a third-party tort claim against his own insurer…." *Id.* "In other words, plaintiff's UIM claim is tied to a third-party tort claim for damages that, in many respects, is 'fundamentally' different from a typical first-party claim." *Id.* But the Supreme Court reversed, *Nickola v MIC General Insurance Company*, 500 Mich 115, 126-127; 894 NW2d 552 (2017), finding that the claimants:

> …were parties to the insurance contract. The Nickolas chose to pay higher insurance premiums in order to obtain protection from underinsured motorists. The Nickolas were insureds, not third-party tort claimants. Therefore, the first sentence of [§] 2006(4) is applicable, and the "reasonably in dispute" language contained in the second sentence does not apply to plaintiff's claim for UIM benefits.
>
> The Court of Appeals … erroneously focused on the nature of a UIM claim. … Yet the plain language of [§] 2006(4) distinguishes only the identity of the claimant, not the nature of the claim. The proofs required for a UIM claim do not transform "the insured" into a "third party tort claimant" when seeking to enforce the insured's own insurance contract. The insured by definition is a party to the insurance contract, not a third party. Simply because the Nickolas' UIM coverage requires a particular set of proofs in order to recover UIM benefits does not transform plaintiff's claim for benefits under the insurance policy into a tort claim. In sum, the Nickolas were insureds who made a claim for benefits under their policy of insurance….

[C]onfusion still persists as to when an insurer's conduct constitutes "bad faith" and what remedies are available.

The Court also reiterated: "if the claimant is the insured and benefits are not paid on a timely basis, the claimant is entitled to 12% penalty interest per annum irrespective of whether the claim is reasonably in dispute." *Nickola,* 500 Mich at 131. "[A]n insured making a claim under his or her own insurance policy for UIM benefits cannot be considered a 'third party tort claimant' under [§] 2006(4)" per the plain language of the statute. *Id.* at 118.

Third-party tort claimants. In certain situations, a third-party tort claimant may pursue a claim directly against a tortfeasor's insurer. However, a judgment against the insured is generally a precondition to any such claim. This is because MCL 500.3030 otherwise bars direct actions by an allegedly injured party, against an alleged tortfeasor's insurance company.[29] But in *Security Ins Co of Hartford v Daniels,* 70 Mich App 100; 245 NW2d 418 (1976), the panel indicated that an action by the injured person against a tortfeasor's insurer could be brought, once there has been a determination of liability in the underlying suit. The panel noted that "[a]lthough Daniels was barred from joining the insurance companies in the original action, if he were to succeed in that action, he would be entitled to litigate the coverage issue in a subsequent action against the insurance companies."[30] While that decision is not precedentially binding,[31] the Supreme Court later cited it as "instructive" in explaining that "an injured person's interest in the resolution of the policy coverage question stems from the availability of a postjudgment garnishment action against the insurer in which the coverage question would be litigated."[32]

Once the third-party has standing, as noted above § 2006(4) only allows third-party tort claimants to recover 12% interest "if the liability of the insurer for the claim is not reasonably in dispute, the insurer has refused payment in bad faith and the bad faith was determined by a court of law." *Stryker,* 735 F3d at 359-360. The Court of Appeals has noted that under the second sentence of § 2006(4), "[i]t is immediately apparent that four elements must coexist in order for this provision to apply [to a third-party tort claimant]: (1) that satisfactory proof of loss be received by the insurer; (2) that the liability of the insurer for the claim not be reasonably in dispute; (3) that the insurer refused payment of the claim; and (4) that the refusal to pay was in bad faith."[33]

No-Fault claims. While again giving due deference to our No-Fault Report, no discussion of "bad faith" is complete without at least mentioning the No-Fault Act. Like first-party claims under the first sentence of § 2006(4), an insurer's delay in handling a first-party no-fault claim is dealt with through a 12% penalty interest provision. MCL 500.3142(2) states that "[p]ersonal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained," and MCL 500.3142(3) states that "[a]n overdue payment bears simple interest at the rate of 12% per annum." Also, like §

2006(4)'s first sentence, § 3142(3) is not truly a "bad faith" provision; the Court of Appeals has held that 12% interest can be imposed under the No-Fault Act "irrespective of the insurer's good faith in not promptly paying the benefits" if the "insurer refused to pay benefits and is later determined to be liable, irrespective of the insurer's good faith in not promptly paying the benefits."[34] "[A]n insurer's good faith in withholding payment of benefits is relevant in awarding attorney fees under the act, but is irrelevant to liability under the penalty interest statute."[35]

The only relief non-prevailing insurers have obtained, in terms of avoiding no-fault penalty interest, has come in cases where there was some problem with the sufficiency of the proof of the loss sustained.[36] For example, if an expense is otherwise compensable but not factually supported until some point during litigation, interest awards can be reduced or denied.[37] In *English v Home Ins Co,* 112 Mich App 468, 476; 316 NW2d 463 (1982), a prevailing plaintiff was denied penalty interest because the insurer "was justified in making a thorough investigation to determine if plaintiff's losses were related to the automobile accident." "The trial court found, in effect, that plaintiff failed to present reasonable proof of the fact and amount of benefits to which he is entitled," and since "the trial court's findings of fact are not clearly erroneous," the panel held that "interest under § 3142 was properly denied." *English,* 112 Mich App at 476.

As noted above, insurers' delays under the No-Fault Act are also remedied through the fee-shifting language of MCL 500.3148(1). This subpart is more akin to a "bad faith"-type of provision, as the claimant must show not only that benefits are "overdue" under § 3142(2), but also that the insurer "unreasonably refused to pay the claim or unreasonably delayed in making proper payment."[38] "[W]hether the defendant's denial of benefits is reasonable under the particular facts of the case is a question of fact."[39] "[W]hen considering whether attorney fees are warranted under the no-fault act, the inquiry is not whether coverage is ultimately determined to exist, but whether the insurer's initial refusal to pay was reasonable. … [A] delay is not unreasonable if it is based on a legitimate question of statutory construction, constitutional law, or factual uncertainty."[40] Even after the claimant has prevailed, before awarding attorney fees, the trial court must still "examine the circumstances as they existed at the time the insurer made the decision, and decide whether that decision was reasonable at that time."[41]

A situation even more akin to "bad faith" that can arise under the No-Fault Act – albeit very rarely – involves misleading statements by an insurance adjuster regarding what benefits are available. When this happens, the claimant *may* have a fraud claim against the no-fault carrier per *Cooper v Auto Club Ins Ass'n,* 481 Mich 399; 751 NW2d 443 (2008). But the Court in *Cooper* went to great lengths to explain, among things, (1) that such claims "must be pleaded with particularity" and proved "by clear, satisfactory and convincing" evidence, (2) that the reliance element of fraud will be particularly difficult to establish given the "obvious adversarial position" of the adjuster during the claims handling process, and (3) that courts must be careful to "distinguish between misrepresentations of fact, i.e., false statements of past or existing facts, and mere negotiation of benefits, i.e., the mutual discussion and bargaining preceding an agreement to pay PIP benefits."[42]

In summary, the phrase "bad faith" is often used colloquially to describe any decision by an insurance company with which a claimant or their attorney disagrees. But the phrase has a specific meaning in insurance law, developed primarily in the liability coverage setting. Outside of that context, there are multiple situations where insurers can face extra-contractual exposure short of – but sometimes confused with – bad faith. A clearer understanding of what is (and what is not) bad faith can streamline settlement discussions, reduce unnecessary motion practice, and generally benefit both sides of the bar.

Endnotes

1 See, for example, *State Farm Lloyds v Nicolau,* 951 SW2d 444, 454 (Tex 1997) (Hecht, J., dissenting).

2 Cross, *Returning to "Go" (but Not Collecting $200) : Reexamining Insurance Bad Faith in Light of Modern California Law on Summary Judgment, and the Genuine Dispute Doctrine,* 40 Tort Trial & Ins Prac LJ 1051, 1054 (2005).

3 Richmond, *Insurance Bad Faith and Insurers' Duty to Communicate with Insureds Regarding Settlement*, 49 Tort Trial & Ins Prac LJ 499 (2014). The duty of good faith and fair dealing requires that neither party to a contract do anything to injure the other party's right to receive the benefits of their agreement. *Id.*

4 Pappas et al, Michigan Business Torts (ICLE 2d ed 2003), § 10.1.

5

6 *Id.* Generally, an insurance policy is treated "in the same manner as any other species of contract." *DeFrain v State Farm Mut Auto Ins Co,* 491 Mich 359, 367; 817 NW2d 504 (2012). A breach of a contract – even in bad faith – typically does not give rise to a tort claim. *Rinaldo's Const Corp v Michigan Bell Telephone Co,* 454 Mich 65, 84-85; 559 NW2d 647 (1997). See also *Kewin v Massachusetts Mut Life Ins C.,* 409 Mich 401, 419; 295 NW2d 50 (1980). Yet "there is a persistent tort-like quality to third-party bad faith claims." *Schwartz v Twin City Fire Ins Co,* 492 F Supp 2d 308, 327 (SD NY, 2007).

7 See *Great Am Ins Co v E.L. Bailey & Co, Inc,* 841 F3d 439, 446 (CA 6, 2016).

8 See *Stryker Corp v XL Ins Am,* 735 F3d 349, 359-360 (CA 6, 2012), discussing MCL 500.2006(4).

9 *Stryker,* 735 F3d at 359-360; MCL 500.2006(4).

10 MCL 500.3142(3); MCL 500.3148(1).

11 Equitable subrogation "is a legal fiction through which a person who pays a debt for which another is primarily responsible is substituted or subrogated to all the rights and remedies of the other." *Esurance Prop & Cas Ins Co v Michigan Assigned Claims Plan*, __ Mich __; __ NW2d __ (2021) (Docket No. 160592); slip op at 8-9. "[W]hen an insurer pays a claim that another insurer may be liable for," it may invoke this doctrine against the insurer that theoretically should have paid. *Id.* at __; slip op at 9-10.

12 *Commercial Union*, 426 Mich at 138-139. These factors have not been significantly modified by Michigan Courts in the thirty years since. See *Great Am Ins Co*, 841 F3d at 446.

13 *Commercial Union*, 426 Mich at 138-139.

14 *Id.* at 137.

15 426 Mich 109, 118; 393 NW2d 479 (1986).

16 *Id.*

17 *Id.* at 126 (Boyle, J., concurring).

18 *Id.* See also *Keeley,* 433 Mich at 561 (Levin, J, dissenting).

19 "The underlying rationale" of the prepayment rule "is that where an insured does not pay any money in satisfaction of an excess judgment, the insured is not harmed and thus may not collect damages." *Econ Fire & Cas Co v Collins,* 643 NE2d 382, 385 (Ind App 1994).

20 *Keeley,* 433 Mich at 553-565 (Levin, J., dissenting). The "judgment rule" was and remains the majority rule. See *Miller v Kenny,* 180 Wash App 772, 799; 325 P3d 278 (2014).

21 *Keeley,* 433 Mich at 565 (Levin, J., dissenting).

22 *Med Mut Liab Ins Soc of Maryland v Evans*, 330 Md 1, 25; 622 A2d 103 (1993).

23 See *Tibble v Am Physicians Capital, Inc,* unpublished opinion per curiam of the Court of Appeals, issued October 28, 2014 (Docket No. 306964).

24 Pappas, Michigan Business Torts at § 10.10, citing *Kewin,* 409 Mich at 401.

25 See also *Wendt v Auto-Owners Ins Co,* 156 Mich App 19, 25; 401 NW2d 375 (1986).

26 "[A] disability income protection insurance policy contract is a commercial contract, the mere breach of which does not give rise to a right to recover damages for mental distress. The damages recoverable are those damages that arise naturally from the breach, or which can reasonably be said to have been in contemplation of the parties at the time the contract was made. Absent proof of such contemplation, the damages recoverable do not include compensation for mental anguish." *Kewin,* 409 Mich at 419.--

27 *Nickola v MIC Gen Ins Co,* 312 Mich App 374; 878 NW2d 480, 486 (2015) (emphasis added).

28 *Id.* See also Heller & Mayer, *Time to Reconsider Strict Liability Penalty Interest in Coverage Disputes Arising under Third Party Liability Policies,* 9 Journal of Insurance & Indemnity Law 2 (No. 1, Jan 2016).

29 MCL 500.3030 states: "In the original action brought by the injured person, or his or her personal representative in case death results from the accident, as mentioned in section 3006, *the insurer shall not be made or joined as a party defendant,* nor, except as otherwise provided by law, shall any reference whatever be made to such insurer or to the question of carrying of such insurance during the course of trial." (Emphasis added.)

30 *Security Ins Co,* 70 Mich App at 105.

31 The Court of Appeals is not bound to follow its own published decisions issued before November 1, 1990. MCR 7.215(J)(1).

32 *Allstate Ins Co v Hayes,* 442 Mich 56, 69 n 13; 499 NW2d 743 (1993).

33 *Medley v Canady,* 126 Mich App 739, 743; 337 NW2d 909 (1983).

34 *Morales v State Farm Mut Auto Ins Co,* 279 Mich App 720, 730; 761 NW2d 454 (2008), quoting *Williams v AAA Michigan,* 250 Mich App 249, 265; 646 NW2d 476 (2002).

35 *Davis v Citizens Ins Co of America,* 195 Mich App 323, 329; 489 NW2d 214 (1992).

36 See *Shields v Government Employees Hosp Ass'n, Inc,* 490 F3d 511, 518-519 (6th Cir 2007).

37 See *Id.* See also *Moore v Secura Ins,* 482 Mich 507, 518-519; 759 NW2d 833 (2008), where the jury found that work loss benefits were compensable and overdue but only awarded one week of penalty interest.

38 *Moore,* 482 Mich at 517.

39 *Ross v Auto Club Group,* 481 Mich 1, 7; 748 NW2d 552 (2008).

40 *Bonkowski v Allstate Ins Co,* 281 Mich App 154, 171; 761 NW2d 784 (2008), quoting *Shanafelt v Allstate Ins Co,* 217 Mich App 625, 635; 552 NW2d 671 (1996). "[A]n insurer's initial refusal to pay no-fault benefits can be deemed reasonable even if it is later determined that the insurer was required to pay those benefits." *Tinnin v Farmers Ins Exch,* 287 Mich App 511, 516; 791 NW2d 747 (2010).

41 *Brown v Home-Owners Ins Co,* 298 Mich App 678, 691; 828 NW2d 400 (2012).

42 *Cooper,* 481 Mich at 414–416 (citations omitted).

MEMBER NEWS

Work, Life, and All that Matters

After a success-filled 44 years of practicing law, **Michael J. Hutchinson,** former managing partner of Hutchinson Cannatella P.C., retired in 2021. The MDTC wishes him the best in all of his pursuits during retirement.

Congratulations to **Allison Reuter,** who was recently promoted to Supervising Counsel of Legal-HR at Amway. Allison has been in-house at Amway for over 6 years and has been practicing management-side employment law for over 20 years.

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).

Legal Malpractice Update

By: David C. Anderson and Jim J. Hunter

***Alamat v Attorney Defendants*, unpublished per curiam opinion of the Court of Appeals, issued July 15, 2021 (Docket No. 353465); 2021 WL 3011981**

Facts

Plaintiff, an oral surgeon and former shareholder of a practice group corporation, sued the attorneys of his former practice group alleging breach of fiduciary and fraud. Defendant attorneys were hired by the corporation to review and investigate plaintiff's alleged practice of having medical assistants administer intravenous sedatives without plaintiff being present. During the investigation, plaintiff met with the attorney defendants, sought to convince them his practice was legal, and even attempted to terminate the attorneys as corporate counsel. Defendant attorneys concluded their investigation and issued a compliance report recommending the immediate cessation of this practice by plaintiff. Shortly thereafter, the corporation terminated plaintiff from the practice.

Plaintiff sued the defendant attorneys alleging breach of fiduciary duty and that defendants committed fraud when they issued their report to the corporation. In support of his claim, plaintiff relied on *Fassihi v Sommers, Schwartz, Silver, Schwartz & Tyler, PC*, 107 Mich App 509 (1981) to argue that **even if** a shareholder is not the direct client of a corporation's attorney, the attorney may still owe a fiduciary duty to the individual shareholder if the shareholder reposes faith, confident, and trust in another's judgment and advice. The trial court granted summary disposition in favor of the attorney defendants, holding that plaintiff could not have reasonably placed trust and confidence in defendants because their interests were adverse. Plaintiff appealed.

Ruling

On appeal, plaintiff argued his interests and the interests of attorney defendants were not adverse because all parties "wanted a fair and complete investigation." Thus, plaintiff argued, he was entitled to place trust and confidence in defendants.

The Court of Appeals disagreed, upholding the trial court's dismissal of plaintiff's claims. The court held that there was a potentially adverse relationship between plaintiff and attorney defendants from "the moment [plaintiff] learned of the investigation." Citing *Kern v Kern-Koskela*, 320 Mich App 212 (2017) and *Prentis Family Foundation v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39 (2005), the court held that when a potentially adverse situation arises, it is unreasonable as a matter of law for a shareholder to place trust and confidence in the attorney.

Practice Note:

While *Fassihi* stands for the general proposition that a fiduciary relationship can exist between a corporate attorney and shareholder, that case did not address the issue of whether a potential fiduciary duty continues to exist in the context of a potential adversary relationship. Later cases like *Kern* and *Prentis Family Foundation* therefore refined the holding in *Fassihi*.

***Taylor v Attorney Defendants*, unpublished per curiam opinion of the Court of Appeals, issued August 12, 2021 (Docket No. 352902); 2021 WL 3573444**

Facts

This legal-malpractice case arose from underlying medical-malpractice litigation, in which attorney defendants represented plaintiff. Plaintiff underwent surgery in 2011 and claims to have suffered a broken jaw as a result of negligent intubation by the

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nurse anesthetist who was responsible for her anesthesia. In the underlying case, plaintiff provided an affidavit of merit from another nurse, stating that the defendant nurse anesthetist used excessive force when intubating plaintiff, causing the fracture. But testimony from medical doctors did not identify the cause of the fracture within a reasonable degree of medical certainty. And defendants argued that nurses are not permitted to make medical diagnoses, which automatically precludes them from testifying regarding the cause of a plaintiff's injury. Plaintiff argued instead that non-speculative circumstantial evidence of causation should suffice and did not address defendant's argument that the nurse was not qualified to present expert testimony on causation.

In *Charles Reinhart Co v Winiemko,* the Supreme Court explained that a plaintiff in a legal-malpractice claim is faced with the difficult task of proving two cases in a single proceeding.

The trial court dismissed plaintiff's claims on defendant's summary-disposition motion, holding that circumstantial evidence regarding causation did not suffice to defeat the underlying defendant's motion. Plaintiff appealed and the Court of Appeals affirmed, holding that plaintiff "failed to preserve this challenge to the trial court's ruling" by failing to cite in the trial court "any testimony offered by [the nurse] in support of her proximate causation claim."

Plaintiff then sued her former attorneys, alleging that they committed malpractice by failing to know the law and failing to retain a qualified expert witness regarding causation. The legal-malpractice case proceeded to a bench trial, in which expert testimony from an anesthesiologist hired by plaintiff was presented. Plaintiff's expert, however, only testified speculatively as to causation.

On the attorney-defendants' motion, the trial court applied the case-within-a-case analysis and held that the expert's testimony was not enough to establish that **but for** the alleged malpractice, plaintiff would have been successful in the underlying case. The trial court granted the attorney defendants' motion.

Plaintiff's counsel also moved to disqualify the trial court judge, based on the trial court judge's historical employment with the attorney-defendant firm. The trial court judge (and, subsequently, the chief judge) denied the motion. Plaintiff appealed both decisions.

Ruling:

The Court of Appeals upheld the trial court's decision, holding that plaintiff's expert's proximate-cause opinion "was based upon multiple layers of assumption and speculation." In *Charles Reinhart Co v Winiemko*, the Supreme Court explained that a plaintiff in a legal-malpractice claim is faced with the difficult task of proving two cases in a single proceeding. In a medical-malpractice case, a plaintiff must establish specific facts that would support a reasonable inference of a logical sequence of cause and effect. Here, the Court of Appeals noted that plaintiff's expert first "assumed" that the injury to plaintiff's mouth was caused by the intubation, and further speculated that if the underlying treaters noticed the injury and treated it, "it is very possible some of this would not have happened." Citing *Skinner v Square D Co*, 445 Mich 153 (1994) and *Craig v Oakwood Hosp*, 471 Mich 67 (2004), the Court of Appeals emphasized that these statements were merely speculative and that a mere possibility does not suffice to establish proximate cause.

Because plaintiff did not establish proximate cause through expert testimony, plaintiff could not prove that, but for the allegedly negligent representation, she would have prevailed in the underlying medical-malpractice case.

The Court of Appeals also upheld the trial court's decision not to disqualify the judge on the basis of his prior employment with attorney defendants, noting that MCR 2.003(C)(1)(e) provides that disqualification is warranted if a judge was a member of a firm representing a party within the two years preceding a case. That wasn't the case here, and plaintiff did not show anything beyond the mere fact of the trial judge's previous employment that would raise the appearance of impropriety.

Practice Note:

Except in rare circumstances, expert testimony is required to prove the requisite standard of care, breach of that standard, and causation in a legal-malpractice case. Proving causation and "case-within-a-case" is generally the most difficult element for a plaintiff in a legal-malpractice case. While the case-within-a-case concept is not triggered in every lawsuit, when it does apply, it is a powerful defense for attorneys faced with a malpractice claim.

No-Fault Report

By: Ronald M. Sangster Jr.

Finally Some Finality—DIFS and the MAIPF Reach an Agreement Regarding Claims of "Strangers to the Insurance Contract" for Losses Occurring After June 11, 2019

In my last article, I discussed the uncertainty brought about as a result of the 2019 reform amendments, as applied to "strangers to the insurance contract." These individuals include occupants of insured motor vehicles who did not have a policy of no-fault insurance of their own, whether individually or through a spouse or domiciled relative. These "strangers to the insurance contract" also included non-occupants of motor vehicles (such as pedestrians, bicyclists, moped operators, etc.) who likewise did not have insurance of their own, whether individually or through a spouse or domiciled relative. The article also discussed, at some length, the ongoing litigation between the Department of Insurance and Financial Services (DIFS) and the Michigan Automobile Insurance Placement Facility (MAIPF), which operates the Michigan Assigned Claims Plan (MACP), regarding which insurer should be covering losses involving these "strangers to the insurance contract" occurring on or after June 11, 2019, the date that the no-fault reform amendments were filed with the Michigan Secretary of State.

To recap, the dispute between DIFS and the MAIPF/MACP pertains to the statutory changes set forth in MCL 500.3114(4) and MCL 500.3115(1), and the specific issue is when these changes took effect – June 11, 2019, when the no-fault reform amendments became law, or some later date, depending on the language in any given insurance policy. It was DIFS's position that to the extent the insurance policy referenced the old No-Fault priority scheme, the policy insurer was obligated to pay no-fault benefits to those injured claimants. Beginning in December 2020, the MAIPF/MACP maintained that those "stranger to the insurance contract" claims would shift over to the MAIPF/MACP. Following publication of the initial article, which appeared in the April 2021 Quarterly Newsletter, high level discussions took place between DIFS and the MAIPF over how to resolve the issues identified in the prior article. After months of discussions, DIFS and the MAIPF reached an agreement to resolve their dispute and policy insurers are now free to refer these "stranger to the insurance contract" claims for losses occurring on or after June 11, 2019, at 3:22 pm, to the MAIPF/MACP for further handling. Alternatively, the policy insurers can continue handling the claim and be reimbursed by the MAIPF for the benefits paid thus far and benefits to be paid in the future. In addition, a policy insurer electing this latter option will be entitled to receive payment from the MAIPF for the time spent adjusting the claims of these "stranger to the insurance contract." The details regarding the agreement reached between DIFS and the MAIPF are described more fully below.

Resolution of the DIFS Versus MAIPF Issue

In late July 2021, DIFS and the MAIPF reached a settlement agreement regarding their ongoing dispute pertaining to the claims of these "strangers to the insurance contract" and the application of the $250,000.00 cap on "allowable expenses," for claims arising between June 11, 2019 and July 2, 2020. The details regarding the settlement are discussed more fully below. However, they can be briefly summarized in the following bullet points:

- DIFS has agreed to withdraw all Notices of Potential Violations of DIFS Order No. 19048M, which have been issued to policy insurers in response to attempts to shift the handling of these "strangers to the insurance contract" claims over to the MAIPF/MACP;
- DIFS has agreed to rescind DIFS Order No. 19-048-M, which had required policy

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insurers to apply the old priority systems set forth in their insurance contracts, notwithstanding the change in the law that took effect on June 11, 2019;

- The MAIPF has agreed that it will continue to provide lifetime, unlimited no-fault benefits for these "strangers to the insurance contract" claims, so long as the accident occurred on or before July 1, 2020; for losses occurring after that date, the $250,000.00 "allowable expense" cap will apply.
- That policy insurers have the option of (a) directly referring these "strangers to the insurance contract" claims to the MAIPF/MACP and its servicing insurers, or (b) continue handling these claims, and then getting reimbursed by the MAIPF/MACP.

These bullet points will be discussed more fully below.

Essentially, the key holding in Titan Ins Co v American Country Ins Co, 312 Mich App 291, 876 NW2d 853 (2015) has now been abrogated by virtue of the amendment to MCL 500.3114(4).

Part 1 – Repeal of DIFS Order No. 19-048-M.

As noted in my Article entitled "Caught in Limbo," which appeared in the April 2021 issue of Michigan Defense Quarterly, DIFS Order No. 19-048-M essentially preserved the old priority system in cases where the loss occurred on or after June 11, 2019, but the insurance policy that was in effect still reflected the old priority provisions. USAA Casualty Insurance Company had successfully challenged DIFS Order No. 19-048-M in two separate lawsuits, and it was the USAA victories that prompted the MAIPF to issue its bulletin in late December, 2020, accepting the claims of these "strangers to the insurance contract." However, DIFS pushed back in late February 2021 and began threating policy insurers with administrative action if they attempted to refer the claims of these "strangers to the insurance contract" over to the MAIPF/MACP, in violation of DIFS Order No. 19-048-M. The settlement agreement provides that DIFS would issue a Rescission Memorandum formally rescinding DIFS Order No. 19-048-M, and would also be issuing a No-Action Letter to the insurers that had received a Notice of Potential Violation. **This action provides the "green light" for policy insurers to refer these "stranger to the insurance contract" claims to the MAIPF/MACP for further handling.**

Part 2 – Application of "Allowable Expense" caps.

As noted in my "Caught in Limbo" Article, a lawsuit between DIFS and the MAIPF was pending in the Court of Appeals, on the issue of whether or not the $250,000.00 "allowable expense" cap would apply to accidents occurring between June 11, 2019 and July 1, 2020. The Court of Appeals entered an Order dismissing this lawsuit on July 19, 2021, pursuant to a stipulation signed by the parties. Although it does not affect policy insurers, we now have a "bright line" rule regarding the amount of "allowable expense" coverage available to any given claimant. If the loss occurred between June 11, 2019 and July 1, 2020, the injured claimant will recover lifetime, unlimited "allowable expense" coverage. If the loss occurs on or after July 2, 2020, the injured claimant will receive $250,000 in "allowable expense" coverage. Given this agreement, if the policy insurer does find itself in a position whereby it wishes to refer, say, a catastrophic loss to the MAIPF and one of its servicing insurers, it can assure the injured claimant that he or she will continue to receive lifetime, unlimited benefits, so long as the accident occurred on or before July 1, 2020. The only change involves who is paying on the claim.

Part 3 – Procedure Going Forward.

According to the MAIPF bulletin from July 2021, the MAIPF is offering policy insurers two options for handling these claims involving "strangers to the insurance contract" that accrued on or after June 11, 2019. If there is an open claim, it can be transitioned to the MAIPF pursuant to the procedure outlined in the December 2020 industry bulletin. The policy insurer would need to request a "one-time final payment" for reimbursement of all expenses incurred, including medical expenses, wage loss benefits, household replacement service expenses, legal fees, IME fees, and the like. **However, loss adjustment expenses (meaning the amount of time spent by the adjuster handling the claim) will not be reimbursed.** Reimbursement will be made after 2022 industry assessment for any amounts over $100,000.00 on any individual claim. Payments for any amount under $100,000.00 would be made within 4 to 6 months from receipt of the required documentation. The MAIPF has pledged to "work with each insurer to establish a detailed reimbursement plan."

In late July 2021, DIFS and the MAIPF reached a settlement agreement regarding their ongoing dispute pertaining to the claims of these "strangers to the insurance contract" and the application of the $250,000.00 cap on "allowable expenses," for claims arising between June 11, 2019 and July 2, 2020.

The second option is for the policy insurer to continue handling the open claim for the injured party. The MAIPF will reimburse the insurer for no-fault benefits paid by the policy insurer, together with certain other expenses such as legal fees and IME fees. The initial reimbursement payment will not include loss adjustment expenses. Again, the first reimbursement will be made after the next industry assessment for any amounts over $100,000.00 for an individual claim. Payments for amounts under $100,000.00 will be made within 4 to 6 months after MAIPF receives the required documentation.

Going forward, though, the policy insurer, which elects this option, should begin to track the time spent handling the claim, and the MAIPF will then reimburse the policy insurer annually for the benefits and expenses paid out, plus the time to handle the claim at the hourly rate currently being paid to MACP servicing insurers. **Essentially, the policy insurer becomes a quasi MAIPF/MACP servicing insurer, but only with**

regard to claims that it was originally handling under its policy. The MAIPF is encouraging policy insurers to consider the second option, as it minimizes the impact on injured claimants who are forced to deal with different claims adjusters, and it eases the burden of the six servicing insurers for the MAIPF/MACP which, after all, "do not have unlimited capacity to handle new claims."

Consistent with the information contained in the MAIPF/MACP bulletin of December 2020, the MAIPF has agreed to waive the one-year-notice provision set forth in MCL 500.3145 and MCL 500.3174, for tendering an Order of Priority Claim to the MAIPF. The MAIPF will accept an Application for Benefits from the policy insurer, in lieu of requiring the injured claimant to complete the more-detailed MAIPF's standard application for benefits. **In an important change from the December 2020 bulletin, the MAIPF has also agreed to accept "other information obtained by the applicable insurer which was determined by the insurer as adequate to initiate a claim."** The MAIPF has also agreed to withdraw any reservation of rights with regard to the potential cap on allowable expenses for losses occurring between June 11, 2019 and July 1, 2020, given the fact that the MAIPF/MACP has agreed to accept those claims for lifetime, unlimited benefits, pursuant to DIFS Order No. 19-049-M.

Finally, with regard to any currently pending litigation between an injured claimant, a policy insurer and the MAIPF/MACP or its servicing insurer, counsel for the MAIPF/MACP or its servicing insurer have been instructed to "stipulate to the entry of orders accepting priority for payment of claims and litigation," but only if they involve a priority dispute, and for which the amended versions of MCL 500.3114(4) and MCL 500.3115(1) clearly indicate that the MAIPF/MACP would be first in priority for payment of these benefits. However, this stipulation does not apply if there are issues regarding the person's eligibility for no-fault benefits, or other priority issues.

Part 4 – What this Agreement Does Not Apply to.

By its terms, the agreement between DIFS and the MAIPF/MACP does not apply to claims arising under MCL 500.3114(2), regarding vehicles being operated in the business of transporting passengers. For example, if a policy insurer insures, say, a non-emergency medical transportation vehicle and one of the passengers in that vehicle was injured in a motor vehicle accident, the policy insurer would continue to occupy the highest order of priority pursuant to MCL 500.3114(2), as none of the enumerated exceptions to this higher priority provision would apply to non-emergency medical transportation vehicles.

MCL 500.3114(2) has an interesting history. When the no-fault act was originally drafted in 1972, the commercial insurer always occupied the highest order of priority for payment of no-fault benefits, regardless of whether or not the injured claimant had a policy of no-fault insurance of his or her own, whether individually or through a spouse or domiciled relative. Over the years, various special interests were successful in lobbying the Legislature to exempt passengers in certain motor vehicles from recovering benefits from the commercial insurer, under this "super priority" provision, if they had insurance of their own. As of the date that the reform amendments became law, passengers in the following types of vehicles had to look to their own insurer first for payment of benefits:

- Passengers in school buses providing transportation not prohibited by law;
- Buses operated by a common carrier passenger certified by the Department of Transportation, which would include charter buses and the like;
- A bus operating under a government sponsor transportation program, such as the Detroit Department of Transportation, SMART, Flint's Mass Transit Authority (MTA) and the like;
- A bus operated by or providing service to a nonprofit organization;
- Taxicabs;
- Buses operated by a canoe, watercraft, bicycle, or horse livery service;
- A transportation network company vehicle, such as UBER, LYFT and the like

For passengers in these specifically enumerated vehicles, they will turn first to their own household insurer. If there is no insurance in the household, they will then obtain benefits from the insurer of the specific vehicle they are occupying at the time of the accident.

This action provides the "green light" for policy insurers to refer these "stranger to the insurance contract" claims to the MAIPF/MACP for further handling.

So what happens if the specific commercial motor vehicle itself, occupied by the injured claimant, was not insured, but the owner of that vehicle owned other commercial motor vehicles that were insured? How are they affected by the no-fault reform amendments? Don't think that happens? Think again! In *Titan Ins Co v American Country Ins Co*, 312 Mich App 291, 876 NW2d 853 (2015), two occupants of two different commercial vehicles were injured in two unrelated motor vehicle accidents – one occurring in Detroit and the other occurring in Kalamazoo. Although the specific vehicles occupied by the injured claimants were uninsured, the owner of those vehicles had other commercial vehicles that were insured through defendant American County Insurance Company. A plain reading of MCL 500.3114(2) ties the obligation to afford benefits to the insurer of the **specific vehicle** occupied by the injured claimant. By contrast, the former provisions of MCL 500.3114(4) provided that the insurer of the owner of the motor vehicle occupied by the injured claimant would be responsible for paying benefits. In the Wayne County Circuit Court case, the court ruled that Titan Insurance Company, as assignee of the MAIPF/MACP, was responsible for payment of the benefits at issue. In the Kalamazoo case, the Kalamazoo County Circuit Court ruled just the opposite, and determined that American Country Insurance Company would be responsible for payment benefits, as the insurer of the owner of the otherwise uninsured motor vehicle involved in the accident, pursuant to the former provisions of MCL 500.3114(4). The Court of Appeals resolved the conflict by adopting the rationale of the Kalamazoo

County Circuit Court, and holding that, in cases where the specific commercial vehicle is uninsured, but the owner of that vehicle has other vehicles that are insured, the insurer of those vehicles occupies a higher order of priority for payment of the benefits at issue under the former provisions of MCL 500.3114(4). **Given the amendment to MCL 500.3114(4) and the agreement reached between DIFS and the MAIPF/MACP, an occupant of an uninsured motor vehicle used in the business of transporting passengers now receives his or her benefits from the MAIPF/MACP, pursuant to the amendment to MCL 500.3114(4).**

To recap, the following rules seem to emerge from cases involving vehicles used in the business of transporting passengers, under MCL 500.3114(2):

- All **employees** of businesses operating vehicles utilized to transport passengers shall claim benefits from the insurer of the specific vehicle occupied;
- Passengers which are not subject to the enumerated exceptions, such as passengers in limousines, party buses, ambulances, airport shuttles, and the like shall claim their benefits first from the insurer of the commercial vehicle they are occupying, and if for some reason that specific vehicle is uninsured, these individuals will turn to their own household insurers; if they have no insurance of their own in their household, they will then turn to the MAIPF/MACP;
- Passengers in the motor vehicles referenced in the enumerated exceptions referenced above shall claim benefits first from their own household insurer; if they have no insurance in their household, they will then turn to the insurer of the specific commercial vehicle they are occupying for payment of their benefits;
- Occupants of uninsured commercial vehicles, regardless of whether they fall within the enumerated exceptions or not, shall claim benefits first from their own household insurer, and if they have no insurance of their own, they will turn to the MAIPF/MACP for payment of their benefits.

Essentially, the key holding in *Titan Ins Co v American Country Ins Co*, 312 Mich App 291, 876 NW2d 853 (2015) has now been abrogated by virtue of the amendment to MCL 500.3114(4).

This agreement also does not apply to injuries to employees or their family members who are injured while occupying employer-furnished vehicles, under MCL 500.3114(3). Again, if the policy insurer insures an employer-furnished motor vehicle, and an employee is injured while occupying same, the policy insurer still occupies the highest order of priority under MCL 500.03114(3), even though the employee may have auto insurance of their own.

Finally, this agreement does not apply to motorcyclists who are involved in an accident with a motor vehicle. The policy insurer would still occupy the highest order of priority for the payment of benefits to the injured motorcyclists pursuant to MCL 500.3114(5)(a), as the insurer of the owner of the motor vehicle involved in the accident. Again, this is true even though the motorcyclist may have his own automobile no-fault policy in affect.

Conclusion

It took over two years for the interested parties to finally arrive at an agreement over how to handle the claims of these "strangers to the insurance contract" – two years of profound uncertainty, with injured claimants being shifted back and forth between the MAIPF/MACP and the policy insurer, over which insurer should be paying their no-fault benefits. In other words, we finally have some finality, although as noted in my prior article, all this could have been avoided if, two years ago, the Representatives and Senators had treated the bill as a working draft, and not a final product, and had the Governor bothered to read the bill before she signed it. Now that this issue has finally been resolved, those of who play in the no-fault sandbox can now turn our attention to other matters, including the imposition of the fee schedule set forth in MCL 500.3157, including what I call the "45 percent haircut" that providers need to take on their charges for billing codes that are not subject to Medicare reimbursement. Although this "45 percent haircut" is undoubtedly draconian, and will force many providers out of business, actuarial studies have shown that imposition of the fee schedule was the only way to lower the PIP premiums by the amounts decreed by the Legislature. At the very least, we can now close the chapter of the no-fault reform era involving "strangers to the insurance contract" and move on to other problems which have arisen due to the fact that, once again, no one read the bill before they voted on it, and the Governor clearly did not read the bill before she signed it.

Supreme Court Update

By: Stephanie Romeo, *Clark Hill PLC*
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The Michigan Supreme Court had another busy summer, releasing over ten opinions this past quarter. Particularly noteworthy was the Court's opinion regarding procedures utilized by Michigan's Unemployment Insurance Agency ("UIA") to address unemployment fraud and restitution. While the unemployment rate has begun to decline in recent months, the rate as of July 2021 remains above pre-pandemic levels. In describing the proper procedure that the UIA must follow when it seeks to establish that a claimant received benefits to which they were not entitled (an overpayment), where the UIA had been skipping a critical step in the unemployment benefits process, this case broadly reminds attorneys to remain diligent and focused while representing their clients. As we navigate a "new normal" with new pressures placed upon attorneys, attorneys must be mindful of moving carefully through their case files and avoid acting too hastily. *Dep't of Licensing & Regul Affs/Unemployment Ins Agency v Lucente and Dept' of Talent and Econ Dev/Unemployment Ins Agency v Herzog*, __ Mich __; __ NW2d __; 2021 WL 3236344 (July 30, 2021) (Docket No. 160843).

Facts: Frank Lucente and Michael Herzog improperly received unemployment benefits after becoming employed full-time and providing inaccurate responses to certification questions concerning their new employment. After the UIA discovered the overpayments and suspected fraud, it issued documents entitled "Notice of Redetermination" to each claimant, one of which described the claimant's new employment, explaining that it made him ineligible to receive the already-paid benefits. The other notice explained that the claimant intentionally concealed his new employment from the UIA based on the inaccurate answers he provided while certifying. The notices explained that claimants had the right to appeal these "redeterminations" under MCL 421.33 and provided instructions on how to do so. The UIA also mailed each claimant a separate document that stated their repayment obligations: restitution for the overpayment and financial penalties for the fraud. The claimants appealed these "redeterminations."

In *Lucente*, the ALJ affirmed both of the UIA's redeterminations, but the Michigan Compensation Appellate Commission ("MCAC") reversed. The MCAC concluded that the redetermination was not valid unless the payment of benefits was considered an original determination that Lucente was unemployed for those weeks. It further reasoned that the "redetermination" had not been issued within 30 days of any benefit check, and no good cause was shown. In a separate opinion that addressed the alleged fraud, the MCAC similarly concluded that the UIA's failure to issue an original determination on the issue of fraud as grounds for setting aside the "redetermination." Similarly, in *Herzog*, the MCAC affirmed the ALJ's finding and conclusions of law that it was appropriate to set aside the "redeterminations" because the UIA failed to issue original determinations on eligibility and fraud. The UIA appealed the MCAC's decisions applicable to each claimant in the Macomb and Wayne County Circuit courts, respectively, which affirmed the MCAC's decisions. The UIA next appealed the decisions to the Michigan Court of Appeals, which held that the circuit courts had not applied the correct legal principles when they affirmed the MCAC's decisions. The Court of Appeals held that the UIA's identifications of its decisions as "redeterminations" as opposed to "determinations" were not grounds for setting aside the decisions.

Ruling: In an opinion by Chief Justice McCormack, joined by four of the six other Supreme Court justices, the Court held in favor of the claimants finding that while the Michigan Employment Security Act ("MESA"), particularly MCL 421.62, authorizes the UIA to issue original fraud and restitution determinations that are not subject to the time constraints of MCL 421.32(a), the Court of Appeals erred by concluding that the UIA's decision to issue "redeterminations" in these cases was of no substantive

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effect. Instead, the UIA should have issued an original determination alleging fraud, and its failure to do so was grounds for invalidating the "redeterminations" issued to both claimants in this case. The actual payment of benefits cannot serve as an original "determination" on the alleged fraud (absent an employer's protest regarding the eligibility of the claimant as to that period of time and the payment of those benefits), and the UIA's issuance of "redeterminations" without a previously issued "determination" deprives claimants of their right to protest. Thus, when a UIA-initiated review of past-paid benefits results in a decision that the claimant received benefits during a period of ineligibility or disqualification and owes restitution as a result, the UIA must begin the restitution process by issuing an original "determination." This holding is supported by MESA's description of "determinations" and "redeterminations" as distinct decision-making steps where a "redetermination" may affirm, modify, or reverse the prior determination.

Practice Pointer: The Court's opinion describes the proper process the UIA must follow when it seeks to establish that a claimant received benefits to which they were not entitled. While this case's specific holding applies to a narrow realm of case law, the general principles behind his holding provide takeaways that can apply to attorneys in any area of practice. Here, the UIA missed a "distinct decision-making step" by issuing redeterminations before determinations on the issue. As the world continues to "re-open" and Courts and Administrative Agencies work to correct a backlog of cases and charges that have built up over the past year and a half, attorneys may feel pressured to move through their cases more quickly than ever before. In our work, we must remember to still focus on the details and nuances of our cases, determine and implement the proper procedural processes where applicable, and refrain from skipping key steps for the sake of efficiency and speed. As the old saying goes, "slow and steady wins the race."

The views and opinions expressed in the article represent the view of the author and not necessarily the official view of Clark Hill PLC. Nothing in this article constitutes professional legal advice, nor is intended to be a substitute for professional legal advice.

Amicus Report

By: Lindsey Peck, *Collins Einhorn Farrell PC*
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Since the last update, MDTC voted in favor of providing amicus support in *Bryant v Serv Emp Int'l Union,* which involves the general rule that one doesn't owe a duty to protect another from harm in the absence of a special relationship. **Nathan Scherbarth** of Zausmer, PC, volunteered to author the amicus brief on behalf of MDTC.

The basic facts are that an attendee at a rally suffered injuries at the hands of a third party and sued the rally host, among others, for negligence. The rally host moved for summary disposition, arguing that under *Dykema v Gus Macker Enter,* 196 Mich App 6 (1992), an event organizer doesn't owe a duty to protect an event attendee from harm in the absence of a special relationship.

In *Dykema,* the Court of Appeals held that a sponsor of an outdoor basketball tournament owed no duty to warn a spectator about inclement weather. The Court found no invitor-invitee relationship between the sponsor and the attendee, who didn't pay a fee to watch the tournament or otherwise have a business dealing with the sponsor. And the Court found no other special relationship, either, because the spectator didn't entrust himself to the control and protection of the sponsor. (The Court also noted that, as a practical matter, the sponsor wouldn't owe a duty to protect the attendee even if a special relationship existed because the approach of a thunderstorm is readily apparent to a reasonably prudent person.)

After the trial court denied the rally host's motion for summary disposition, the Court of Appeals denied the rally host's application for leave to appeal. The rally host is asking the Supreme Court to take up the issue or remand to the Court of Appeals for consideration of the issue as on leave granted. The rally host believes that unless *Dykema* is deemed to apply to event organizers of all kinds, the exception will swallow the rule. And the result, needless to say, will have a chilling effect on the ability to hold events.

In other news, the Supreme Court denied leave in *Cyr v Ford Motor Company*. In that case, you may recall, thousands of consumers across the country sued the auto manufacturer for breach of warranty and fraud in connection with specific 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.

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 briefs in support of the consumers' position. Given the speed and weight of support for the consumers, MDTC voted to provide amicus support for the auto manufacturer. **David Porter** of Kienbaum Hardy Viviano Pelton & Forrest PLC authored MDTC's amicus brief.

While MDTC addressed the merits, MDTC placed more focus on the procedural posture of the case and the palpable-error standard for reconsideration. MDTC urged the Supreme Court to reject the invitation to reconsider the decision to deny leave

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.

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based on nothing more than a change in court composition.

MDTC's position prevailed. But Justice Welch, joined by Justice Bernstein, indicated that the days of *Smith v Globe Life Ins Co*, 460 Mich 446 (1999) and *Liss v Lewiston-Richards, Inc*, 478 Mich 203 (2007) might be numbered. Accordingly, they expressed the belief that the decisions should be revisited to determine whether the Supreme Court properly interpreted the exemption in the MCPA.

Lastly, MDTC filed an amicus brief in *Mecosta County v Metropolitan Group*, which involves the issue of privity in the no-fault context. Specifically, the issue is whether a medical provider/assignee is in privity with an injured person/assignor for purposes of res judicata and collateral estoppel.

A majority of the Court of Appeals held that a medical provider/assignee isn't in privity with an injured party/assignor, seemingly by virtue of the assignment itself—once an assignment takes place, privity no longer exists. In other words, a medical provider/assignee is in privity with an injured party/assignor "only up to the time of the assignment." To hold otherwise, the Court reasoned, would extinguish a medical provider/assignee's rights without an opportunity to be heard.

Chief Judge Murray issued a dissent. In his view, binding precedent—*TBCI, PC v State Farm Mut Auto Ins Co*, 289 Mich App 39 (2010)—required a determination that because a medical provider stands in the shoes of an injured party, a medical provider is in privity with and bound by a judgment against an injured person.

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

MDTC advanced the position that an injured party and a medical provider are privies for purposes of collateral estoppel and res judicata. MDTC took a deep dive into the legislative history of the No-Fault Act, as well as the genesis of and model for the No-Fault Act—the Uniform Motor Vehicle Accident Reparations. MDTC also canvassed Michigan jurisprudence involving medical-provider litigation. MDTC argued that both the legislative history and the case law compel the conclusion that in the context of an assignment, a medical provider's claim is dependent on and derivative of an injured person's eligibility for and entitlement to benefits. If an injured party can't recover benefits, neither can a medical provider. To hold otherwise, MDTC continued, would give a medical provider greater rights than an injured person. MDTC urged the Supreme Court to find that a medical provider is in privity with and bound by a judgment against an injured person.

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

Court Rules Report

By: Sandra Lake, *Hall Matson PLC*
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PROPOSED AMENDMENTS

2002-37 – Modification of Electronic Filing Rules

Rule affected: MCR 1.109
Issued: March 10, 2021
Comment Period: July 1, 2021
Public hearing: Set for September 22, 2021

The proposed amendment requires an e-filing authorized user to provide written notice to the court and the other authorized users in a case regarding any change to the users' authorized account, including a change in email address. The amendment would also provide that if electronic service is made using a party's known email address but is returned as undeliverable, service will still be considered proper, and neither the filer nor the court will need to take any further action. (Update: after comments to the proposal were submitted, this matter was set for a public hearing, which will take place after the submission of this update).

ADOPTED AMENDMENTS

Rescission of Numerous Administrative Orders and Incorporating some COVID-19-Era Orders into the Court Rules

Rule affected: Numerous
Issued: July 26, 2021
Effective: Immediately
Comment Period: November 1, 2021
Public hearing: Not set

These amendments rescind all remaining active administrative orders entered during the pandemic except for the order regarding procedures specific to landlord/tenant actions (AO No. 2020-17, which is slightly modified) and the order establishing an entirely online procedure for those taking the Michigan Bar Examination in July 2021 (AO No. 2021-2). Fourteen court rules are proposed to be amended to require email/electronic transmission of documents and requiring the court to use video or two-way technology, rather than in-person court appearances, to the greatest extent possible. See e.g., MCR 2.407(G). Although this amendment has an immediate effective date, it is still open to public comment.

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.

MDTC Schedule of Events

2022

Thursday, January 13	Board Meeting – Zoom
Wednesday, January 26	Young Lawyers Series – Zoom – Civility / Professionalism
Friday, February 11	Future Planning – Soaring Eagle Casino
Saturday, February 12	Board Meeting – Soaring Eagle Casino
Wednesday, February 23	Young Lawyers Series – Zoom – Stand out Associate
Thursday, March 10	Municipal Law Section – Zoom – Municipal Law – TBA
Thursday, March 17	6th Annual Legal Excellence Awards – The Gem Theatre
Thursday, April 28	Board Meeting – Detroit Golf Club
Thursday, April 28	Past President Rec – Detroit Golf Club
Thursday, June 16 – Friday, June 17	Annual Meeting & Conference – Tree Tops, Gaylord
Thursday, October 13	Meet the Judge's – Detroit Golf Club

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

Vendor Profile

LCS RECORD RETRIEVAL

Nate Kadau
Account Manager
3280 N. Evergreen Drive N.E.
Grand Rapids, MI 49525
(877) 949-1119
nkadau@teamlcs.com

1. **Where are you originally from?**
   Grand Rapids, Michigan

2. **What was your motivation for your profession?**
   To provide personalized, innovative, and cost-effective record retrieval services geared toward legal, medical, and insurance communities.

3. **What is your educational background?**
   Bachelors of Business Administration, Western Michigan University

4. **How long have you been with your current company and what is the nature of your business?**
   I have been with LCS Record Retrieval (LCS) for twelve years. We offer nationwide record retrieval with personalized service to our clients.

5. **What are some of the greatest challenges/rewards in your business?**
   The most rewarding aspect of our business is the ability to provide services customized to meet the needs of each client. Providing these personalized services, as well as being able to deliver the information requested promptly, is truly gratifying. One of the biggest challenges we face involves working with non-responsive facilities when following up on record requests. We rely on relationships that we have built with the various healthcare providers to resolve these situations when they occur and to keep these occurrences to a minimum.

6. **Describe some of the most significant accomplishments of your career:**
   I have been fortunate enough to be a part of LCS for an extended period. Throughout my career with LCS, I have worked in almost every department. This time has also allowed me to build a thorough understanding of the record retrieval industry. I wanted to utilize my knowledge and experience in more impactful ways for the growth and excellence of LCS.

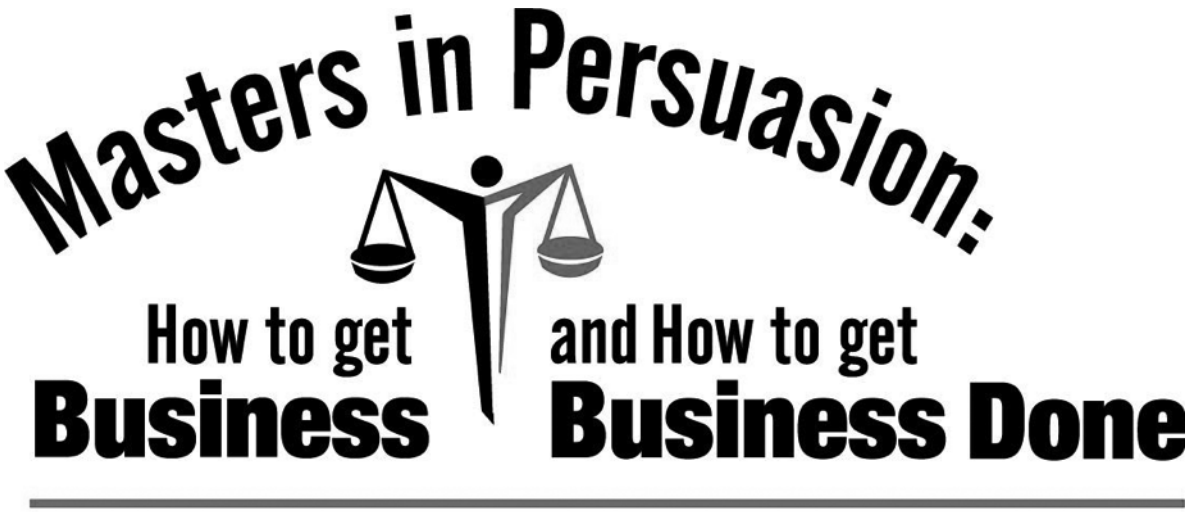
7. **How did you become involved with the MDTC ?**
   LCS Record Retrieval has been a partner with the MDTC for many years. As my role grew within LCS, I became the liaison who would represent our company at the different MDTC outings and functions.

8. **What do you feel the MDTC provides to Michigan lawyers?**
   The MDTC is an exceptional organization for attorneys to network and share best practices. It also provides numerous educational opportunities for its members to stay up to date on current events within the industry.

9. **What do you feel the greatest benefit has been to you in becoming involved with the MDTC ?**
   The most significant benefit to me has been the relationships that I have been able to build with our clients and other vendors within the industry. Partnering with these prestigious groups allows me additional opportunities to learn how LCS can continue to grow and excel in our services.

10. **Why would you encourage others to become involved with MDTC?**
    Being involved with the MDTC is an excellent opportunity to connect with others within the legal community and learn the newest information litigating within the State of Michigan.

11. **What are some of your hobbies and interests outside of work?**
    I enjoy spending time with my family. When the weather allows it, I enjoy golfing, fishing, and being outdoors. I am also a big sports fan and follow all the major Detroit teams each season.



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Held on Friday, November 5, 2021, at the Sheraton Detroit Novi Hotel.

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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.

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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.

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MICHIGAN DEFENSE
QUARTERLY

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

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