Negligence Law Section E-NEWS

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Message from the Chair

David E. Christensen
Gursten, Koltonow, Gursten, Christensen & Raitt PC


David Christensen

The attack on the civil justice system is intensifying in Lansing. This column should be a clarion call to all Michigan negligence lawyers who enjoy what they do. After reading it, I hope each of you will be alarmed enough to get even more involved in battling the forces that want to destroy the right to jury trial.

If you have not yet heard, many members of Michigan's legislature have plans to further gut Michigan's constitutional right to jury trial, and bail out the highly profitable insurance industry and other special interests with taxpayer dollars. Bills that grant special interests immunity for their unlawful negligent conduct that maims or kills innocent people have been flooding into the Senate and House at alarming rates.

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The Murky Waters of ERISA Preemption: The Evolving Status of Public Employees

Troy W. Haney


Troy Haney

As of the present writing, one of the most heated debates in American domestic politics involves the extent to which public employees will be called upon to bear a substantial disproportionate burden of the broad and financial difficulties of state governments. The battle has been most directly joined in Wisconsin, where large numbers of demonstrators have for weeks now ringed the capitol building in to protest the efforts of the new Republican governor to eliminate the collective

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bargaining rights of public workers. However the struggle shakes out politically, it is likely that the courts will be the final arbiter of many of the issues presented. Moreover, this political struggle is likely to collaterally inform broader issues involving public employees, possibly including their rights to benefits under the Employee Retirement Income Security Act of 1974 (ERISA). Practitioners in this complex area of federal statutory law who are representing disability claimants who are public employees must remain aware of the salient issues surrounding such claims.

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Internet Jurisdiction

Kevin L. Moffatt
Martin, Bacon & Martin PC


Kevin Moffatt

Introduction

If you never explored a website or shopped online, then I doubtyou own or have access to a computer. If so, it is time to replace your rotary dial telephone with a desktop, laptop, tablet, smartphoneor other programmable device that will allow you to search the Internet. ComScore, Inc., a global leader in measuring the digital world, recently reported that online retailers sold $142.491 billion worth of merchandise in 2010, up from $129.797 billion in 2009.# With the advent of the Internet, e-retail has become a significant business market while e-commerce continues to grow. Companiescan sell their products and services worldwide with a click of a mouse. What does e-commerce have to do with your practice and how may it affect your clients? Two words: Internet jurisdiction.

Personal Jurisdiction

The Internet is an interstate and international network connecting millions of computers. E-tailers and retailers alike, through their websites, have a presence on the World Wide Web. However, does a website alone subject its proprietor to personal jurisdiction in courts where the cite is accessible? More specifically, can Internet activity constitute sufficient contacts for personal jurisdiction in Michigan?

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This award is presented in recognition of superb skills as a judge/attorney in the field of negligence law and dispute resolution.

It shall be the purpose of this organization:

- To preserve the jury system and promote the fair and just administration of negligence law.
- To advance professional and ethical standards on the part of negligence law practitioners.
- To preserve and promote trial advocacy skills in the

Brian D. Einhorn, 2011 Earl J. Cline Award Recipient

practice of negligence law.
- To encourage attorneys to enter the field of negligence law.
- To recognize by way of awards and scholarships excellence in tort law and outstanding contribution to the practice of the profession.

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2011—Brian D. Einhorn

Attorney Conducted Voir Dire: Where Oh Where Have You Gone?

Ven Johnson
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Ven Johnson

In the last few years I have had the pleasure of trying cases in the States of Arizona, California and Indiana, as well as numerous cases throughout the State of Michigan including in Calhoun, Eaton, Ingham, Macomb, Monroe, Oakland, St. Clair and Wayne Counties. The only judges who prevented the parties from conducting their own voir dire were from the Detroit Metropolitan Counties. Practitioners on both sides of the "v" are virtually in unanimous agreement that attorney-conducted voir dire is not only preferable but also necessary to obtain a fair trial. Paul Manion and Matt Thomas of the Rutledge, Manion, Rabaut, Terry & Thomas PC, wrote an excellent voir dire article last year that appeared in Michigan Lawyers Weekly in the November 29, 2010 issue. They conclude, as I do, that attorney-conducted voir dire is the best and perhaps ONLY way for the parties to ensure that they have a jury that is truly "fair and impartial" and whose deep-down prejudices, explicit and implicit, have been thoroughly probed, examined and hopefully exposed.

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Brian Einhorn

Brian is a defense lawyer who has tried so many cases that his count can only be estimated as being "in the hundreds." In the last twenty-five years of his practice, many of the cases he has tried have been in defense of fellow lawyers. For the most part, any defense lawyer can win the cases that are meant to be won. But Brian is known for also winning the cases that he wasn't "supposed" to win.

Brian is skilled at developing a case through the pre-trial phase. He is so skilled at trials (and so willing to try cases) that this often enables him to secure very favorable settlements for his clients. And because of his trial skills, he is regularly retained by insurers or clients in the very few weeks before a case will be tried.

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Lansing Free for All

Todd Tennis
Captiol Services, Inc.

After several years of partisan gridlock in Lansing which made it next to impossible to pass any legislation dealing with negligence or torts, the Republican sweep of 2010 has given them solid control

Amy Tripp
Author of the Special Needs Chapter of ICLE's *Advising the Older Client or Client with a Disability*, Fourth Edition and selected as a Rising Star in both 2008 and 2009 by *Super Lawyers Magazine*.

Insurance Coverage ADVISOR

Hal O. Carroll

Hal O. Carroll
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The Contractual Liability Exclusion

In the last issue, we discussed the intentional act ("expected or intended injury") exclusion, which is exclusion number 1 in most general liability policies, and serves the obvious purpose of carving out events that are by their nature not supposed to be insured or insurable. The purpose of the contractual liability exclusion, which is usually exclusion 2, is not quite as clear.

It begins broadly by excluding coverage for bodily injury or property damage "for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement." That's simple enough and it's pretty broad, but it is followed by a peculiar exception where the contract obligation is created by an "insured contract," and that is where the real work is done. "Insured contract" is a defined term, and the definition goes on for half a page, with its own set of conditions and exceptions.

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Photos
On February 16, 2011 Justice Brian Zahra attended the Negligence Council Meeting.

of every branch of Michigan government. This philosophical shift in state government is most notably being reflected in tax policy, state spending issues and collective bargaining rights. However, while we have yet to see truly sweeping legislation introduced in the negligence law area, several bills are moving through the legislature that will each have an impact on section members.

There is a rash of bills seeking to expand limits on liability for a variety of settings. House Bill 4111 (Rendon, R-Lake City) would extend governmental immunity to volunteers who do service for the Department of Natural Resources. Thanks to an amendment by Representative Matt Huuki (R-Atlantic Mine), those volunteers can now also be armed. Senate Bill 230 (Marleau, R-Lake Orion) would grant immunity from liability for any damages to a passenger arising from the negligence of a volunteer driver working for a non-profit agency unless the negligence constituted willful and wanton conduct. House Bill 4350 (Haines, R-Waterford) would extend the current limitations on liability granted to volunteer physicians in free clinics to physicians who are being paid to work in free clinics. None of these bills have passed the Legislature yet, but they may well have by the time this article goes to print.

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David Christensen, Justice Brian Zahra, Steven Galbraith, Paul Manion

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Attack on the Civil Justice System
David E. Christensen

The attack on the civil justice system is intensifying in Lansing. This column should be a clarion call to all Michigan negligence lawyers who enjoy what they do. After reading it, I hope each of you will be alarmed enough to get even more involved in battling the forces that want to destroy the right to jury trial.

If you have not yet heard, many members of Michigan's legislature have plans to further gut Michigan's constitutional right to jury trial, and bail out the highly profitable insurance industry and other special interests with taxpayer dollars. Bills that grant special interests immunity for their unlawful negligent conduct that maims or kills innocent people have been flooding into the Senate and House at alarming rates.

In just one week we have seen bills introduced that would: grant immunity for the ordinary negligence of insured and salaried doctors when they treat poor people in free clinics.

HB 4350
http://www.legislature.mi.gov/(S(surhf155zonhxjbgnkgk0rjs))/mileg.aspx?page=GetObject&objectname=2011-HB-4350 ; Immunity for people who injure or kill other people through ordinary negligence while volunteering for the D.N.R., (and the bill allows them to carry guns).

HB 4111
http://www.legislature.mi.gov/(S(cfs1son4exnsd145s3lflu55))/mileg.aspx?page=GetObject&objectname=2011-HB-4111 .

In fact, an amendment requiring the DNR to be sure that the armed volunteers knew how to handle a gun safely was soundly defeated! SB230 would grant immunity to volunteers that drive senior citizens, and leave the public unprotected from their negligence.

SB230
http://www.legislature.mi.gov/(S(gn5gi3mrtgqspv45o2xypnqe))/mileg.aspx?page=GetObject&objectname=2011-SB-0230

There was also a bill that would reduce contingent fees that lawyers can charge for personal injury cases. Fortunately, this bill lacked support to pass through the committee, so it was withdrawn… for now. Clearly the attack is on.

A major problem in fighting these bills is that the DNR and malpractice bills leave intact actions for gross negligence. Many legislators that lack a legal background seriously misunderstand the legal definition of gross negligence.

As negligence lawyers, we know that the standard for proving gross negligence is nearly unattainable, as it requires conduct that says the tortfeasor simply doesn't

care if the victim gets hurt. But, many of our legislators, like much of the public, believes gross negligence is a far lower standard than it actually is.

In the hearings there were very lively discussions between lawyers attempting to define gross negligence for the legislators and their staff. Some of the Legislators on the Health Policy Committee simply refuse to believe that the standard is as high as we know it to be. There seems to be a refusal to believe this truth among those pushing these bills, and they have made it clear that they are not likely to believe lawyers on this subject. This is unfortunate because it is likely some of them might not support such extreme bills if they understood how far this immunity actually goes.

Michigan law defines gross negligence as: "Conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." The definition focuses on evidence of the actor's mental state: not caring about whether they injure someone. Obviously, this standard is nearly impossible to meet in any malpractice case. It seems inconceivable that one can prove that a doctor acted with that level of disregard for their patient's health. It is unlikely that any of these cases would actually get to a jury as the trial or appellate judges would simply dispose of them.

For example, the common example of medical mistake that outrages most folks is amputating the wrong limb. But, would this medical error ever be gross negligence in Michigan? Almost certainly not, unless, perhaps, the physician knew he couldn't remember which leg was supposed to be amputated, and flipped a coin to decide which one was coming off. But simply making a mistake about which limb is to come off would not be gross negligence in Michigan. Again, the focus is not on the "gross" or "outrageous" outcome, but the law focuses on the evidence of the doctor's mental state, i.e., substantial lack of concern for whether an injury results.

Hospital Immunity Proposal: Possibly the most important bill we anticipate would provide nearly blanket immunity for ordinary negligence committed by health care providers in most hospital settings. We have seen this bill in past sessions sponsored by Senator Kahn, a physician from Saginaw (517-373-1760). His district includes Saginaw and Gratiot counties.

Dr. Kahn's proposal would eliminate all claims for ordinary negligence for errors made in emergency department, or for patients admitted to the hospital through an emergency department, including childbirth, cardiac catheterization labs, radiology services, and so on. An excellent discussion of this proposal by Chad Engelhardt and Steven Goethel can be found in the previous issue of this publication.

http://sharedresources.us/neglaw/Immunity.pdf

This hospital immunity proposal would eliminate all claims of ordinary negligence, and require (a) clear and convincing proof of (b) gross negligence. Apparently, proving the impossible (gross negligence) by the traditional standard of preponderance of the evidence would not be protective enough of this special interest group.

In this job I talk to a lot of lawyers. I have not found a malpractice lawyer who does not believe that this bill will effectively immunize all hospitals with emergency rooms from civil suits for hospital malpractice, in all but the few cases where patients are not admitted through the emergency department. and the claimed negligence does not arise from a covered hospital service, lab, or clinic. The slippery slope may well materialize over time to fill these very small residual loopholes.

In the end, Senator Kahn's proposal will ban all constituents from recovering their damages, lost earnings and out-of-pocket medical expenses caused by serious medical errors, and shift the burden onto the Michigan taxpayers. *Eliminating the right to have a lawsuit does not eliminate the cost to society and the victim. It is just a question of who is going to pay for the mistake.*

These immunity bills are nothing less than a taxpayer-funded bail out for a favored special interest. Consider the following cases:

- A 35 year old working father of three, ages 2,4 and 7, earning $95,000, is permanently paralyzed when a resident working in his 75th hour that week injected the patient with a lethal dose of the wrong drug in an emergency room. This man will spend his life as a quadriplegic, will never work again, and will require millions of dollars of medical care over his lifetime. Senator Kahn's bill protects the doctor and hospital from any lawsuit to pay those medical expenses. Medicaid and Medicare will pay millions in medical bills over his lifetime. The family will be plunged into poverty and live on government assistance, as he cannot recover his lost earnings from the at-fault provider under this bill. The taxpayers will pay for the mistake and the hospital and doctor will pay nothing.

- A 61-year-old patient experiencing TIAs for two days seeks help in the emergency room, and is admitted to the hospital. Thereafter, he is not seen by a physician or given medication for 18 hours. Essentially, he is ignored. He is discovered in the morning to have suffered a full-blown stroke and can no longer walk or talk. Consequently, this patient will require hundreds of thousands of dollars in medical care over the remainder of his life. The doctor and hospital are immune from suit to pay those medical expenses under Senator Kahn's bill. The taxpayers will pay for the mistake, and the hospital will pay nothing.

- An obstetrician and a nurse misreads a fetal heart rate monitor and, as a result, fails to see that the baby is in deep distress. The baby lacks oxygen for an extended period and is born with severe brain damage due to this error. The resulting medical care expenses will exceed ten million dollars over his lifetime. The doctor and hospital are immune from suit to pay those medical expenses under Senator Kahn's bill. The taxpayers will pay for the health care providers mistake, and the providers pay nothing.

<u>Immunity Is A Bailout With Taxpayer Dollars:</u> Under Senator Kahn's bill, the lawsuit stops, but the injury and associated costs continues. That patient ends up on Medicaid and/or Medicare, and other government assistance. Families cannot

recover lost earnings caused by the provider's errors, and are plunged into poverty. The at-fault providers have no responsibility for their errors, that burden is handed to the taxpayers.

That is not consistent with any conservatism with which I am familiar.

Other Bills On The Horizon: We may see the resurrection of a bill to adopt a loser pays system. Plaintiffs that lose their case would be forced to pay for the defendant's expenses. This chilling threat of financial ruin will slam the courthouse door shut on a very large number of legitimate cases. The jury system is far from scientific. It can indeed be a crapshoot, even with the strongest cases. It would be hard to disagree with a sage old trial lawyer who believed that the strongest case of his career would have lost at trial at least four of ten times. That's the extremely risky nature of the jury system. This proposal would do more harm to the civil justice system than any other tort reform measure, in my humble opinion.

There are stirrings of bills to cap damages across the board, and another bill to "correct" a Supreme Court ruling on lost opportunity to survive. Please recall, we are very early in the legislative cycle.

It is amazing to me that a legislature can spend far more time in guaranteeing that dangerous health care providers remain dangerous by removing the only meaningful incentives to reduce medical errors and safeguard the public. These incentives are provided by the civil justice system, and nothing else.

What Can Be Done: Well, it seems clear that many in the legislature lack an understanding of how difficult and expensive it is to bring a lawsuit in Michigan. Earlier versions of tort reform have severely limited the damages that a victim can recover, and have presented difficult procedural hurdles in the path of a plaintiff. Attorneys risk tens and even hundreds of thousands of dollars on cases, and one loss can mean personal ruin for many of them. The insurance industry and other special interests have convinced many in the public that lawyers can simply file lawsuits willy-nilly and earn a living. Nothing is further from the truth, especially in Michigan where tort reform has been in place for decades and has made it extremely difficult for legitimately injured victims to recover their losses.

I am calling upon each of you to contact your legislator and share your experience and opinions. There are only a small number of attorneys in the legislature, and many lawmakers are seriously misinformed about our civil justice system. We will need all hands on deck to weather the storm for the citizens of Michigan and the constitutional right to a jury trial.

As you may have seen, we have instituted an email update system to keep you informed of these developments as they occur. I received several responses from members offering to speak to their legislator after seeing the email blast we sent out concerning some of these bills. I look forward to hearing from you.

We will be seeking members to testify at House and Senate Committee hearings as these bills are introduced. There is frequently less than 24 hours advance notice for

hearings involving extremely important issues affecting millions of Michiganders. Don't be surprised if you get a call from me soon!

Other News: On other fronts, I am happy to report that Justice Brian Zahra visited the February meeting of the Negligence Section Council. Justice Zahra shared insights into his judicial philosophy and hopes for the Court. Justice Zahra has attended many Negligence Section functions over the years. We deeply appreciate his friendship, and congratulate him on his appointment to the high court. It is always good to see former trial judges rise to the Supreme Court as they have experience with real people's struggles, and know how cases are really litigated in our courts.

The Section will continue to build relationships with the key members of the Judiciary, the Legislature, and the Executive branches of state government as we navigate the treacherous waters ahead.

The Negligence Section Seminar is taking place in New Orleans this year. We encourage all of you to take a long weekend and spend it with your colleagues in this fun city. These seminars are not only very educational, but I have found that getting to know my opposing counsel in a social setting has done wonders for my practice, and turned professional acquaintances into personal friends. As an added bonus, Jazz Fest will be taking place that weekend, which boasts an unparalleled lineup of musical stars. http://lineup.nojazzfest.com/

I encourage all members of the Negligence Section to take a new interest in our activities and needs. Our profession is coming under severe attack that could have huge impact on the right to jury trial. Because the Negligence Section consists of members from the plaintiff and defense bars, we have a unique credibility that can help to stem the onslaught that is certainly coming. I ask each of you to take an interest, respond when asked to help, and speak out to your legislators and other influential people.

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The Murky Waters of ERISA Preemption:
The Evolving Status of Public Employees

by

Troy W. Haney, Esq.

As of the present writing, one of the most heated debates in American domestic politics involves the extent to which public employees will be called upon to bear a substantial disproportionate burden of the broad and financial difficulties of state governments. The battle has been most directly joined in Wisconsin, where large numbers of demonstrators have for weeks now ringed the capitol building in to protest the efforts of the new Republican governor to eliminate the collective bargaining rights of public workers. However the struggle shakes out politically, it is likely that the courts will be the final arbiter of many of the issues presented. Moreover, this political struggle is likely to collaterally inform broader issues involving public employees, possibly including their rights to benefits under the Employee Retirement Income Security Act of 1974 (ERISA). Practitioners in this complex area of federal statutory law who are representing disability claimants who are public employees must remain aware of the salient issues surrounding such claims.

The first question in ERISA analysis is whether the claimant is covered under "a plan" that falls under the act. In its Section 2, 29 U.S.C. § 1002, ERISA broadly states the act's intention to apply each and any "employee welfare benefit plan" that is "established or maintained" by "an employer . . . or employee organization" or both, "to the extent" that the plan is maintained for the "purpose of providing for its participants. . . through the purchase of insurance or otherwise. . . medical, surgical or hospital" benefits arising out of "sickness, accident, disability [or] death. . .". In addition to such obvious retirement vessels as pensions and annuities, every federal circuit has applied the act with virtually equal breadth to long-term disability, health insurance and life insurance benefit claims, which, although not "retirement" vessels expressly, fall equally within the above-recited statutory definition.

After most broadly defining the criteria for a qualifying plan, ERISA then immediately turns via its Section 3, 29 U.S.C. § 1003(b), (typically referred to by the courts as the "safe harbor" provision), to listing five specific exceptions where the act does not apply, by far the most important of which—relative to numbers of potential claimants—is where the subject plan at issue is "a governmental plan". Those plans that qualify as governmental plans are specifically defined in subsection 32 of Section 2 (29 U.S.C. § 1002(32), as any "plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing". This article will undertake to examine the factors germane to whether a given plan is or is not a "governmental plan" that, on the one hand, falls under ERISA, or that, on the other hand falls within the "safe harbor" outside of ERISA.

This examination is best done not in a vacuum but by reference to a "real-world" entity that is a primary player in Michigan's field of public employee benefits. Anyone practicing primarily on behalf of ERISA claimants in Michigan, the undersigned included, will surely be periodically consulted by persons employed in the state's education sector and thus members of the Michigan Education Association (MEA), who presently, according to its website, represents "157,000 teachers, faculty and support staff" in the state. Reaching back to 1937, one of the early and primary goals of the MEA was to provide group insurance benefits for its members. In 1960, the MEA "spun-off" the Michigan Education Special Services Association (MESSA) to pursue group medical, disability, life and related benefits for its members. In 1965, passage of the Public Employees Relations Act (PERA) granted collective bargaining rights to school employees. During the battleground decade of the 1970s, tough bargaining between MESSA and school districts, abetted by teacher strikes for benefits, lead to the present reality that MESSA, with a present membership of nearly 100,000, is now the bargaining agent for teachers against virtually every school district in the state, and has negotiated employee benefit plans that are characteristically underwritten by insurance policies through national and international providers such as CIGNA. I will now address a hypothetical yet typical context where MESSA and the "Hometown" School District negotiated a long-term disability plan, which was underwritten by CIGNA via a policy issued to MESSA as the enumerated policyholder.

When evaluating whether a given plan is or is not a "governmental" plan falling outside of ERISA, four essential questions have to be asked: (1) Who established the plan?; (2) Who is paying the benefits?; (3) Who is getting the benefits?; (4) Is their participation in the plan mandatory?

The first question is largely answered by the above-quoted reference in ERISA's Section 2 to plans established "by an employer. . . or ***employee organization***" (emphasis added). While it may be counterintuitive that a plan can be "established" by, say, MESSA, rather than by Hometown School District, ERISA, enacted in 1974, was well aware of the evolving situation "on the ground" relative to public employee negotiations and obviously opted to embrace within the act our hypothetical context of a negotiated plan underwritten by insurance issued to the "employee organization" itself. Hence, question "1" tilts in favor of ERISA governance.

Questions (2) and (3) were expressly addressed by a Department of Labor, Pension and Welfare Benefits Administration Advisory Opinion (95-25A), authored by Robert J. Doyle, Director of Regulations and Interpretations, and addressing an attorney's inquiry about whether benefits plans promulgated by the Los Angeles Police Relief Association (LAPRA), an entity functionally equivalent to MESSA, are excluded from ERISA as governmental plans under 1002(32). Based on the fact that LAPRA is an "employee organization" as defined by the statute above, the further fact that LAPRA's members are "exclusively" LAPD officers, and thus manifestly governmental employees, and based on the third fact that the LAPD "provides substantial funding for the Plans", Director Doyle opined that the LAPRA plans were governmental plans not subject to ERISA.

Thereafter, an administrative regulation adopted pursuant to the authority of ERISA, 29 CFR 2510.3-1, “Employee welfare benefit plan”, addressed all four of the salient questions in its subsection (j) as follows:

> (j) Certain group or group-type insurance programs. For purposes of title I of the Act [ERISA] and this chapter, the terms employee welfare benefit plan and welfare plan shall ***not*** include a group or group-type insurance program offered by an insurer to employees or members of an employee organization [e.g., MESSA], under which (1) No contributions are made by an employer [e.g., Hometown] or employee organization; (2) Participation in the program is completely voluntary for employees or members; (3) The sole functions of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues checkoffs and to remit them to the insurer; and (4) The employer or employee organization receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit for administrative services actually rendered in connection with payroll deductions or dues checkoffs.

In short summary, the checklist in the regulation recites the criteria under which a given plan would fall within the Safe Harbor exclusion from ERISA as a “governmental plan”, although that term is not therein mentioned. Prudent practitioners will assess each of these elements in a given case, and each of them will vary from case to case. For example, some plans are voluntary participation and some are not; some plans involve employer contributions and some do not; some plans involve public employees only and some may include other beneficiaries.

In the usual case it is likely that the courts will be called upon to weigh in on the preliminary question of whether a given plan is ERISA-controlled and thus falling within the sole jurisdiction of the federal courts, or whether the plan falls outside of ERISA and thus presents a state law contract claim. It is generally recommended that in cases where ERISA jurisdiction is at least arguable, the matter be initiated in federal court due to the superior protections afforded claimants by the act, and the decision be left to the defendant(s) to decide whether they wish to challenge jurisdiction.

Unfortunately, it is likely that the waters in this area of the law will get murkier before they become clarified, if only because of increasingly incendiary politics that may spawn initiatives to possibly attack the benefits afforded the American worker under ERISA.

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Internet Jurisdiction

By: Kevin L. Moffatt

Introduction

If you never explored a website or shopped online, then I doubt you own or have access to a computer. If so, it is time to replace your rotary dial telephone with a desktop, laptop, tablet, smartphone or other programmable device that will allow you to search the Internet. ComScore, Inc., a global leader in measuring the digital world, recently reported that online retailers sold $142.491 billion worth of merchandise in 2010, up from $129.797 billion in 2009.[1] With the advent of the Internet, e-retail has become a significant business market while e-commerce continues to grow. Companies can sell their products and services worldwide with a click of a mouse. What does e-commerce have to do with your practice and how may it affect your clients? Two words: Internet jurisdiction.

Personal Jurisdiction

The Internet is an interstate and international network connecting millions of computers. E-tailers and retailers alike, through their websites, have a presence on the World Wide Web. However, does a website alone subject its proprietor to personal jurisdiction in courts where the cite is accessible? More specifically, can Internet activity constitute sufficient contacts for personal jurisdiction in Michigan?

Personal jurisdiction in Michigan is governed by both state statutes and the United States Constitution. A court's exercise of personal jurisdiction must satisfy two requirements: (1) it must be authorized by one of Michigan's long-arm jurisdictional statutes; and (2) it must be consistent with the requirements of the Due Process Clause of the Fourteenth Amendment.[2]

Michigan's long-arm statutes require the existence of certain relationships between either individuals or corporations and this state to enable courts to exercise personal jurisdiction.

"General" and "limited" personal jurisdiction over individuals is contained in MCL 600.701 and MCL 600.705, respectively. As for corporations, the requirements for general and limited personal jurisdiction can be found at MCL 600.711 and MCL 600.715.

Although Michigan's long-arm statutes for individuals and corporations are distinct, they do have similarities. The transaction of any business within the state does enable Michigan courts to exercise limited personal jurisdiction over both individuals and corporations.[3] Michigan courts can also exert general personal jurisdiction over corporations which carry on a continuous and systematic part of their general business within the state.[4]

This article does not discuss the Due Process Clause of the Fourteenth Amendment but is limited to whether an individual or corporation may have a sufficient "Internet" connection with Michigan to require a constitutional inquiry.

Applicable Law

In the unpublished case, *Clapper v Freeman Marine Equipment, Inc.*,[5] the majority cautiously provided a perfunctory analysis of Internet jurisdiction for fear that any ruling on this issue based only on hypothetical fact situations would constitute pure dicta unlikely to be of any benefit to the bench and bar.[6] To the contrary, Judge Saad wrote separately, and in his concurring opinion, provided a thorough analysis of this significant and novel issue in Michigan jurisprudence. Although no Michigan court since *Clapper* has addressed the Internet issue in the form of a published opinion, Judge Saad's analysis, referred to by his colleagues as a "scholarly dissertation," is instructive and provides guidance for trial courts and litigants.[7]

In *Clapper*, plaintiffs brought suit in Michigan against defendant Freeman, an Oregon corporation doing business in Oregon, alleging that it provided defective doors, hatches, and other components for use in the construction of their yacht. Freeman moved for summary

disposition and asserted that it did not conduct sufficient business in Michigan to give the state's courts general or limited personal jurisdiction over it. In response, plaintiffs argued that Freeman could have foreseen that its products would be used in Michigan. For example, plaintiffs stressed that Freeman advertised in national magazines that are circulated in Michigan and maintained an Internet website that Michigan residents could access. The Court ultimately found that Freeman did not carry on a continuous and systematic part of its business in Michigan. However, the majority didn't address the effect of Internet activity other than broadly stating that simply maintaining a website does not constitute a minimum contact with Michigan:

> In sum, defendant's contacts with Michigan consist of national advertising not specifically targeted in Michigan, *maintenance of an Internet Web site providing product information and the means to obtain catalogs*, sales of the component parts to companies that sold their finished products in Michigan, and a modest volume of sales directly to Michigan. In their totality, these do not establish the continuous and systematic business activity necessary to establish jurisdiction under Michigan's long-arm statute for general jurisdiction.[8]

Judge Saad felt compelled to thoroughly analyze plaintiffs' argument that defendant's website created a constant presence in the state of Michigan, sufficient to establish general personal jurisdiction. He adjured the Court to carefully review the large body of Internet case law from other states and deduce the essential principles for deciding when a defendant's web activity constitutes the requisite minimum contacts for the assertion of personal jurisdiction: an issue of first impression in Michigan.[9] Judge Saad's analysis focused on whether Michigan could properly assert general jurisdiction because defendant directed its business activity at Michigan by making its website accessible to Michigan residents; using that website to offer Michigan residents a sales catalog; and providing Michigan residents with the company's telephone and fax numbers.

Passive-Interactive Website Distinction

Cases which have considered the Internet issue in other jurisdictions have primarily relied upon the analysis provided in *Zippo Mfg. Co. v Zippo Dot Com, Inc.*[10] The *Zippo* "sliding scale" analysis distinguishes websites as either "passive" or "interactive." A passive website simply makes information available to interested viewers. An interactive website permits communication between the proprietor and user for the purpose of soliciting business.

Applying the *Zippo* analysis, courts have refused to exercise general personal jurisdiction where the website is purely passive by only providing advertising or making information available for browsing.

At the other end of the spectrum, *Zippo* would find interactive websites, which facilitate business over the Internet, to be sufficient for a court to exercise personal jurisdiction. Judge Saad agreed, but indicated that an interactive website would only warrant personal jurisdiction if it garners sufficient business in the foreign state. In other words, a website that invites users to e-mail a purchase order will not warrant jurisdiction if the site fails to attract customers. Although a website may have the ability to generate business, it can become interactive only when computer users take advantage of its features. Indeed, if sufficient business is generated, an interactive website can serve as the basis for limited, and in some cases, general jurisdiction.

The refined *Zippo* analysis adopted by Judge Saad presents the most practical method in determining whether Internet activity provides a sufficient basis for exercising personal jurisdiction. Certainly, purely passive websites that do not permit communication between the proprietor and user cannot form the basis for general jurisdiction. If, however, an interactive website is designed to permit a user to exchange information with the host computer, further analysis is necessary. The Court would need to consider whether sufficient business was

generated by the interactive website to satisfy the requisite minimum contacts for the assertion of personal jurisdiction. This approach is consistent with the line of cases following the *Zippo* sliding scale analysis and passive/interactive/middle classification of websites.

In *Clapper*, defendant's website was not passive because it permitted communication between the company and viewers. However, the only interactive feature of the website was an electronic form that allowed visitors to use e-mail to request a copy of defendant's mail order catalog. The website did not enable visitors to place direct orders and generate revenue for defendant. After applying his analysis, Judge Saad concluded that defendant's website was at the passive end of the *Zippo* sliding scale. Without the ability to place direct orders online, defendant did not generate revenue from internet sales. Thus, Judge Saad found that plaintiff could not predicate personal jurisdiction on the basis of defendant's Internet presence.

Conclusion

At present, no Michigan court has addressed Internet jurisdiction in a published opinion. If it is necessary to address this issue, the analysis provided by Judge Saad in C*lapper* should be considered. Passive websites, which only make information available to viewers, will not be sufficient to establish personal jurisdiction. Interactive websites, on the other hand, may allow Michigan courts to exercise personal jurisdiction. If the website generates sufficient business in the form of Internet revenue through direct online sales, it can serve as the basis for limited, and in some cases, general jurisdiction. Although no bright-line test exists for determining when a website is sufficient for Michigan courts to exercise personal jurisdiction, the analysis should begin with the passive-interactive distinction.

Endnotes

[1] Press Release, comScore, Inc. (February 4, 2011).

[2] *Aaronson v Lindsay & Hauer Int'l LTD*, 235 Mich App 259, 262 (1999).

[3] MCL 600.705(1); MCL 600.715(1).

[4] MCL 600.711(3).
[5] *Clapper v Freeman Marine Equipment, Inc*, unpublished opinion per curiam of the Court of Appeals, issued June 16, 2000 (Docket No. 211139), lv den 463 Mich 981 (2001).
[6] *Id.*, p 5.
[7] *Id.*, p 5.
[8] *Id.*, p 6 (Emphasis added).
[9] *Id.*, p 6.
[10] *Zippo Manufacturing Company v Zippo Dot Com, Inc*, 952 F Supp 1119 (WD Pa, 1997).

Brian Einhorn

Brian is a defense lawyer who has tried so many cases that his count can only be estimated as being "in the hundreds." In the last twenty-five years of his practice, many of the cases he has tried have been in defense of fellow lawyers. For the most part, any defense lawyer can win the cases that are meant to be won. But Brian is known for also winning the cases that he wasn't "supposed" to win.

Brian is skilled at developing a case through the pre-trial phase. He is so skilled at trials (and so willing to try cases) that this often enables him to secure very favorable settlements for his clients. And because of his trial skills, he is regularly retained by insurers or clients in the very few weeks before a case will be tried. For example, he substituted in to a Fieger case just before trial and won a "no cause" that was affirmed on appeal. Brian's caseload includes legal malpractice, judicial tenure matters, complex insurance coverage cases and catastrophic personal injury cases of all types.

In addition to representing lawyer clients, Brian frequently represents judges as well. This representation often brings him to the Supreme Court to argue the judges' cases. He was instrumental in having the Supreme Court recognize that a judge's campaign literature is protected by First Amendment rights. *In Re Chmura*, 461 Mich 517 (2000) (declaring a judicial canon pertaining to campaign speech facially unconstitutional); *In Re Chmura (after remand)*, 464 Mich 58 (2001) (rejecting the JTC's recommendation of discipline and declaring the judge's campaign literature to be substantially true and/or mere rhetorical hyperbole protected by the First Amendment). In fact, with two members of the firm's appellate department, Brian received Cooley's 2001 Distinguished Brief Award for the *Chmura I* brief.

Brian handles complex, difficult cases with intelligence, creativity, fearlessness and a sense of humor. He fights hard, but fair- and always with civility toward his opposition and with candor toward the court.

Brian has served various bar groups both in high profile leadership positions and in committee work requiring many hours of behind the scene service. He is currently sits on the Executive Committee of the State Bar Board of Commissioners. For 2007-2008, Brian is the State Bar liaison to the Negligence Law section. He is a past president of the Association of Defense Trial Counsel (ADTC). He has served on the judicial qualifications committees of the Detroit Metropolitan Bar Association (DMBA) and the Oakland County Bar Association (OCBA). For three years he served on the DMBA Board. Brian is also a past chair of the OCBA circuit court committee. For five years (1994-1999) he served on the Board of Directors of the Wayne County Mediation Tribunal Association.

Brian is a "Master of the Bench" and mentors young lawyers as part of the Oakland County "Inns of Court." At local bar association meetings around the state, he is a frequent lecturer on avoiding legal malpractice.

Within Collins, Einhorn, Farrell & Ulanoff, Brian is one of the attorneys whose door is always open to others at the firm. When we need to have "the fog" cleared on a problem file, or guidance on how to handle a witness, or a closing argument, Brian is generous in his advice. We trust his judgment. So do his clients.

Attorney Conducted Voir Dire: Where Oh Where Have You Gone?

By Ven Johnson

In the last few years I have had the pleasure of trying cases in the States of Arizona, California and Indiana, as well as numerous cases throughout the State of Michigan including in Calhoun, Eaton, Ingham, Macomb, Monroe, Oakland, St. Clair and Wayne Counties. The only judges who prevented the parties from conducting their own *voir dire* were from the Detroit Metropolitan Counties. Practitioners on both sides of the "v" are virtually in unanimous agreement that attorney-conducted voir dire is not only preferable but also necessary to obtain a fair trial. Paul Manion and Matt Thomas of the Rutledge, Manion, Rabaut, Terry & Thomas, P.C., wrote an excellent *voir dire* article last year that appeared in Michigan Lawyers Weekly in the November 29, 2010 issue. They conclude, as I do, that attorney-conducted *voir dire* is the best and perhaps ONLY way for the parties to ensure that they have a jury that is truly "fair and impartial" and whose deep-down prejudices, explicit and implicit, have been thoroughly probed, examined and hopefully exposed.

MCR 2.511(C) Examination of Jurors provides, "The Court may conduct the examination of prospective jurors or may permit the attorneys to do so." Luckily, no judge has yet to strictly interpret this rule to mean only one or the other must occur. The overwhelming majority of trial judges in our state, as well as in our sister states, do both, which is the preferred method by most, if not all, practitioners. Nevertheless, more and more trial judges in our state, but especially in our geographical area, exercise the above discretion so as to prevent trial counsel from freely asking questions of the prospective jurors. This, I respectfully suggest, is a mistake and denies the parties a fair trial.

6 Mich. Pl. and Pr. (2d ed) 38:51 Examination by Counsel, states in part:

"After its examination, the court may still permit counsel to conduct the full common law range of voir dire examination. In fact, a fair range of latitude in examining jurors, or in putting questions to jurors at the suggestion of counsel, must be allowed under the constitutional guaranty of jury trial and common law principles governing the right of trial by jury. Intelligent exercise of the right to make peremptory challenges, as well as those for cause, requires fair questioning to determine how they would tend to decide the case if the evidence were evenly balanced." (emphasis added, citation omitted)

If civil trial practitioners, plaintiff and defense agree on this topic, and if the highly accepted Michigan trial practice guides conclude the same thing, how is it that many trial courts don't allow attorney voir dire questioning? Most judges who don't allow it believe that it takes "too much time" and that they don't want the parties to "try the issues of their case during voir dire." First, if attorney conducted voir dire takes longer than court dominated *voir dire*, that is perhaps the best evidence that more information is learned from the jurors in the former, hence even more reason to allow the attorneys to do it. Secondly, if the parties can't ask questions to the jurors that involved the issues of the case, how will they ever truly know if the jurors are tainted as it pertains to the case before the court? Therefore, both of these concerns make attorney-conducted *voir dire* even more necessary and important.

Challenges for Cause: Almost Nonexistent without Attorney Conducted Voir Dire

MCR 2.511(D) provides for challenges for cause during the of *voir dire* process. The court rule provides 11 examples for challenges for cause and trial practitioners utilize this rule, most commonly arguing: (2) bias; (3) state of mind that will prevent the person from rendering a just verdict; (4) opinions or consciences scruples that would properly influence the person's verdict; and/or (11) financial interest. When the trial judge conducts *voir dire,* fewer challenges for cause are made or granted.

Challenges for cause are granted at the discretion of the trial judge but are designed to eliminate jurors who, for the purposes of that particular trial, appear to be unfit to sit as an objective juror. Most often, the trial court grants challenges for cause on blatantly obvious biases otherwise referred to as "explicit bias" (e.g. "I think all people who sue other people for 'accidents' are greedy, scum of the earth, freeloaders."). However, the more difficult task in *voir dire* is to elicit and expose "implicit bias." Implicit bias arises out of deeply rooted, subconscious thoughts, feelings, perceptions, fears, and even stereotypes. Social scientists believe these biases are formed by repeated, negative associations such as assigning a particular trait to particular people based on race, gender, looks, etc. (e.g., my girlfriend, Jane, was mean to me – this woman reminds me of my girlfriend, Jane, based on her looks, hair color, the sound of her voice.).

Implicit biases within people, but especially jurors, lay beneath the exterior layers and are much more difficult to probe and expose. Social scientists have known and reported for years that it is these biases that often control many of our actions but especially how we view a particular issue, vote for a particular side or candidate, etc. Therefore, it is imperative that the *voir dire* process exposes and explores these biases so the parties can see who these people really are. Typically, the trial judge will not wish to be as personal or probing in this regard and that is highly understandable especially when a prospective juror expresses a belief that would be highly prejudicial to only one party in the lawsuit. The trial court would not want any of the members of the potential jury to think that it is favoring one party's side at the outset of jury selection. Hence, the piercing questions exposing implicit bias are generally not forthcoming when they come from the trial judge. Moreover, jurors respond differently to the judge then they do the attorneys, and are often less intimidated and more expressive to the attorneys. If there is

no attorney-conducted *voir dire* many of these implicit biases will remain unexposed; and hence, the parties will never really know who is on their jury until after the fact. Think about this: what juror would ever want to tell the judge that, "I can't be fair and impartial in this case."

In an excellent article on the importance of exposing implicit biases in *voir dire* authored by Federal District Court Judge Mark Bennett, ("*Implicit Bias*", Voir Dire Magazine, American Board of Trial Advocates, Volume 17, Issue 2, Summer 2010, (see, www.abota.org), later renamed "Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated *Voir Dire*, the Failed Promise of Batson, and Proposed Solutions") Judge Bennett stated:

> I have come to the conclusion that present methods of addressing bias in the legal system – particularly in jury selection – which are directed primarily at explicit bias, may only worsen implicit bias. Specifically, judge-dominated *voir dire* and the *Batson* challenge process are well-intentioned methods of attempting to eradicate bias from the judicial process, but they actually perpetuate legal fictions that allow implicit bias to flourish. At the beginning of the jury selection process, judge-dominated *voir dire*, with little or no attorney involvement, prevents attorneys from using informed strikes to eliminate biased jurors. For a variety of reasons, judges are in a weaker position than lawyers to anticipate implicit biases in jurors and determine how those biases might affect the case. Thus, permitting judges to dominate the initial jury selection causes more biased jurors to remain on a case and exacerbates the role of implicit bias in jury trials. *Id* at pp. 5-6.

Over the past few years I have repeatedly made unsuccessful challenges for cause on jurors who not only expressed overt, explicit bias, (e.g. "I don't like medical malpractice cases because I think that too many of them are frivolous, it unfairly punishes the doctor, and it increases my health care costs."). Yet, when I have been allowed to further question this individual, often the implicit biases come pouring out (e.g. "I think there are too many lawsuits in general, the verdicts that come out of these courts are 'ridiculous' and I think that there should be damage caps or limitations."). To allow a juror who expresses such opinions to sit on a medical malpractice case and deny plaintiff's challenge for cause because the prospective juror

said he could set aside these feelings and be "fair and impartial" is highly improper. On the flip side, any honest plaintiff lawyer would agree that a prospective juror who says, "I believe that doctors and hospitals commit malpractice every day and then they lie, cheat and cover it up all the time;" even if he attempt to rehabilitate himself by saying he can "set that aside and be fair and impartial" is likewise ludicrous. Hence, such prospective jurors should be excused for cause. Since when does it no longer matter that a prospective juror expresses direct bias and prejudice against the particular type of case involved before the Court? If that person states that irrespective of those opinions, "I can set that aside and be fair and impartial to both sides," who in their right mind would ever believe that? Imagine in a racial discrimination case filed by an African American, if a prospective juror said that she didn't like black people, but for the purposes of this case could set that aside and be fair and impartial. No judge would ever let that juror be on that jury, and for very good reason.

Michigan law clearly holds that such statements should result in a challenge for cause being sustained by the trial court. In *Poet v Traverse City Osteopathic Hospital*, 433 Mich. 228 (1989), a medical malpractice case, a prospective juror, Primo, was questioned and revealed that she was a registered nurse at Munson Medical Center and worked in the utilization management area reviewing "neonatal intensive care unit for quality care issues." Primo denied that her work at the hospital would cause her to be biased towards any party in the lawsuit. She admitted that she might have different feelings about the element of compensation referring to her opinion that there should be damage caps on civil lawsuits. Plaintiff's counsel challenged her for cause and the trial court denied that request stating that Primo said she could be "fair and impartial." Consequently, the plaintiff counsel had to utilize his third and last peremptory challenge on Primo. After Primo was excused, prospective juror Bennett came into the box.

Bennett was a medical-surgical supply salesman who sold some of his products to the defendant hospital as well as several of the witnesses that were listed by the court. Plaintiff counsel again challenged Bennett for cause and the trial court again denied the challenge since Bennett indicated that he could be "fair and impartial." It probably won't surprise you to know that Bennett not only remained on the jury; he also became the foreman and returned a verdict of no cause for action.

In *Poet*, The Michigan Supreme Court was called upon to interpret MCR 2.511(D)(4)-(13). It held that if a prospective juror fit one of the categories enumerated under the court rule, "…a trial court is required to excuse such juror for cause. This showing is equivalent to proving a biased or prejudicial state of mind" *(Id* at 236) (citations omitted).

The *Poet* court explained the serious consequences of the trial court's balancing act under MCR 2.511 (D):

> In addressing the present circumstance, where a venire person has expressed a strong opinion, yet has resolved that she could be impartial, we believe the trial court's discretionary function should be balanced against its obligation to fulfill each litigant's right to a fair trial. By achieving this balance in each case, the act of a trial judge in granting or denying a request to remove a potential juror should represent a decision ever mindful of the constitutional seriousness involved. *Id* at 237

The *Poet* court affirmed the Michigan Court of Appeals' reversal of the trial court and ordered a new trial. It stated:

> We agree that a trial judge's exercise of discretion in ruling on challenges for cause should be made with regard for both the parties and their respective claims. When balancing discretionary power with a litigant's right to a fair trial, a trial judge should, in cases where apprehension is reasonable, err on the side of the moving party. For our purposes, apprehension is 'reasonable' when a venire person, either in answer to a question posed on *voir dire* or upon his own initiative affirmatively articulates a particularly biased opinion which may have a direct effect upon the person's ability to render an unaffected decision. *Id* at 238 (emphasis added)

The *Poet* Court believed that there were too many otherwise unbiased and qualified potential jurors to sit on a potential jury to justify a, "…quibble over persons who have voluntarily articulated a grave potential for bias." *Id* at 238-9. The *Poet* court cited *Blades v DeFoe*, 704 P.2d 317, 324(Colo., 1985):

> "Where there is a sufficient reason to believe that at the beginning of the trial the prospective juror is not indifferent, but favors one of the litigants over the other *or* may be unconsciously influenced by considerations in addition to the evidence presented at trial and the instructions of law, the juror must be dismissed for cause." (*Id* at page 239)

Ladies and gentleman, *Poet* is still good law!

Conclusion

The best and most efficient way to obtain a truly fair jury trial is to allow the parties' attorneys to question the prospective jurors after the trial court has finished its initial inquiry. The only way to explore a prospective juror's explicit - and even more difficult to expose - implicit biases and prejudices, is to allow the attorneys to examine the prospective jurors but especially about issues involved in the trial presently before the court. A juror who expresses an opinion or an ideal that would likely negatively impact one of the parties in the type of action presently before the court must be dismissed for cause irrespective of a blanket statement that he/she can, "set it aside and can be fair and impartial to both sides." *Poet* clearly establishes that Michigan trial judges should grant challenges for cause, from either party, when a prospective juror is obviously not indifferent, but appears to favor one side over the other, before the admission of one shred of evidence. Simply answering: "I can set my (negative) opinions aside and be fair" does not eliminate the potential taint and unfairness of one sided comments or opinions. Jurors are more likely to reveal these biases in response to lawyer-conducted voir dire than judge-dominated *voir dire*. Hence, Michigan trial courts should uniformly allow attorney-

conducted *voir dire*. Moreover, to clarify this issue, our new Michigan Supreme Court should amend MCR 2.511(C) to expressly require both judge and attorney-conducted *voir dire*.

Lansing Free for All

After several years of partisan gridlock in Lansing which made it next to impossible to pass any legislation dealing with negligence or torts, the Republican sweep of 2010 has given them solid control of every branch of Michigan government. This philosophical shift in state government is most notably being reflected in tax policy, state spending issues and collective bargaining rights. However, while we have yet to see truly sweeping legislation introduced in the negligence law area, several bills are moving through the legislature that will each have an impact on section members.

There is a rash of bills seeking to expand limits on liability for a variety of settings. House Bill 4111 (Rendon, R-Lake City) would extend governmental immunity to volunteers who do service for the Department of Natural Resources. Thanks to an amendment by Representative Matt Huuki (R-Atlantic Mine), those volunteers can now also be armed. Senate Bill 230 (Marleau, R-Lake Orion) would grant immunity from liability for any damages to a passenger arising from the negligence of a volunteer driver working for a non-profit agency unless the negligence constituted willful and wanton conduct. House Bill 4350 (Haines, R-Waterford) would extend the current limitations on liability granted to volunteer physicians in free clinics to physicians who are being paid to work in free clinics. None of these bills have passed the Legislature yet, but they may well have by the time this article goes to print.

Bills to expand liability limits are not the only type of legislation affecting tort law currently moving in the Michigan House and Senate. Senate Bill 191 (Caswell, R-Hillsdale) seeks to place caps on the percentage of an award a plaintiff's attorney may take as a contingency fee. It received a hearing in the Senate Judiciary Committee, but as of this writing, there does not appear to be the votes on the committee to pass it. Conversely, Senate Bill 77 (Schuitmaker, R-Lawton), which would limit the statute of limitations on malpractice cases involving architects and engineers to 2 years has already passed the Senate. Another bill sponsored by Senator Schuitmaker – Senate Bill 201 – would set forth that a vertical defect in a municipal sidewalk of less than 2 inches creates a rebuttable presumption that the municipality maintained the sidewalk in reasonable repair. SB 201 received a hearing in the Senate Judiciary Committee and may receive a vote soon.

Not all of the legislation affecting negligence law introduced so far this year is problematic. Senate Bill 53 (Marleau, R-Lake Orion) is colloquially known as the "I'm Sorry Bill" and would make expressions of sympathy by physicians inadmissible as evidence in a malpractice case. House Bill 4231 (Walsh, R-Livonia) would ensure that parents could sign waivers to limit liability for injuries for their children that arise from the inherent risk of an activity, but that the waivers would not limit liability for negligence. Both of these bills are working their way through the Legislature with virtually unanimous support.

A bill that certainly will not receive unanimous support is House Bill 4440 (Brown, D-West Bloomfield). This bill would repeal Michigan's law granting strict limitations on liability to pharmaceutical companies. Known as the "FDA Immunity Law," the statute has prevented thousands of Michigan citizens injured by such drugs as Vioxx and Bextra from receiving compensation available to residents of every other state. Moreover, it has prevented the Michigan Department of Community Health from recouping millions of

dollars in Medicaid costs from drug manufacturers found guilty of negligence. It is highly unlikely that this bill will see the light of day during the current legislative session.

"Gross Negligence" Grossly Misunderstood

As we have worked on negligence law issues in the Legislature this year, one thing has become very obvious: the vast majority of Michigan's lawmakers have a very poor understanding of the term "gross negligence." In discussion after discussion, it is clear that for most legislators, "gross negligence" simply means "very bad negligence." Even some policy staffers who should have a good understanding of the issue continue to insist that gross negligence has more to do with the severity of the damages than the actions of the defendant. This lack of understanding has made our task all the more difficult.

For example, during debate on House Bill 4350 which would extend immunity from any malpractice not arising to the level to gross negligence to physicians being paid to work in free clinics, several members of the House Health Policy Committee maintained that the bill would not prevent malpractice victims from filing claims for truly bad outcomes. One member insisted that if a patient lost their arm due to an improperly administered vaccination that such a case would rise to the level of gross negligence. Another refused to believe that a physician practicing under the influence of alcohol could not be sued for gross negligence. Even after a great deal of explanation as to how the courts have interpreted the term, the fact is that most state legislators still fail to understand that requiring a gross negligence standard to be met in order to file a lawsuit is virtually the same as granting blanket immunity.

Some of this confusion comes from a lack of understanding of the judiciary process (and a startling lack of attorney-legislators in the current Michigan Legislature). However, much of it comes from misinformation being spread by proponents of these various pieces of legislation who wish to allay fears that the bills will bar meritorious lawsuits. The Negligence Section is working hard to set the record straight with our lawmakers, but with 61 new members of the Michigan House, we have a long way to go. And the clock is ticking.

Todd Tennis
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Spring Newsletter, Negligence Law Section
April 2011

INSURANCE COVERAGE ADVISOR

THE CONTRACTUAL LIABILITY EXCLUSION

By Hal O. Carroll

In the last issue, we discussed the intentional act ("expected or intended injury") exclusion, which is exclusion number 1 in most general liability (GL) policies, and serves the obvious purpose of carving out events that are by their nature not supposed to be insured or insurable. The purpose of the contractual liability exclusion, which is usually exclusion 2, is not quite as clear.

It begins broadly by excluding coverage for bodily injury or property damage "for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement." That's simple enough and it's pretty broad, but it is followed by a peculiar exception where the contract obligation is created by an "insured contract," and that is where the real work is done. "Insured contract" is a defined term, and the definition goes on for half a page, with its own set of conditions and exceptions.

The exception that most often comes into play is the definition of an insured contract as the part of "any contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for bodily injury or property damage to a third person or organization." This is a reference to an indemnity clause. The clause may be and often is in a subcontractor's contract, but may also be in an equipment lease or a contract for services.

It is often thought that this definition of "insured contract" is in fact a grant of coverage, but that is not true. It is an exception to an exclusion, so it cancels the effect of the exclusion, but it cannot grant coverage. The exception enables the insured contract to be covered *if* the clause creates an obligation to indemnify for a tort claim and *if* that tort claim is for bodily injury or property damage (both of which are also defined in the policy).

This will cover most indemnity obligations, but not all of them. For example, suppose a subcontractor has a contract that requires it to indemnify the general for tort liability and for any indemnity that the general owes to the owner. In that situation the policy would then insure the subcontractor's contractual obligation to indemnify the general for its tort liability, but would not insure the subcontractor's obligation to reimburse the general when the general indemnifies the owner because the general is performing a contract obligation, not discharging its "tort liability." The same situation could exist where the subcontractor has its own sub.

That limitation still leaves a broad scope of coverage for "insured contracts." Most indemnity obligations that arise in the context of construction site injuries, for example, will be insured contracts. What exactly, does that mean, though? One thing it does *not* mean is that the general contractor in our hypothetical is now an insured under the subcontractor's policy. That status depends entirely on other policy provisions, and probably an endorsement (which is the subject of this column in the next issue).

The obligation of the insurer in our hypothetical is still only to its insured, the subcontractor. As far as the sub's indemnity obligation is concerned, the insurer is the funding entity. At least that is the theory. The practical reality is that if the insurer's money is on the line, it will want to be an active player in the defense of its insured's indemnitee, *i.e.*, the general contractor.

That theoretical distinction between being an additional insured and being an "indemnitee with an underlying policy to fund the obligation still plays a part in tender though. Our hypothetical general contractor will very likely be an "additional insured" (see the next issue). This gives him or her a dual status – indemnitee and insured. That means that the general should plan on making separate tenders. An insurer's obligation to defend and indemnity and an indemnitor's contractual obligations as well require a request for performance in the form of a tender.

But it often happens that the tender is not done properly. The general contractor sends a single letter to the subcontractor, forwarding the complaint, referring to the policy and demanding a defense. Is this a tender to invoke the sub's obligation to indemnify? If it is a tender to the insurer as an additional insured, then it went to the wrong person. The two obligations are separate and each should have a separate tender.

After all, the sub's insurer's obligation to the general as an additional insured is far different from the obligation to its own named insured. The sub's indemnity obligation may or may not exist, depending on the language of the indemnity clause. And the subs insurer may have a duty to defend its sub from the indemnity claim.

The practicalities of litigation and these intersecting obligations are such that sloppy tenders often slide by with no problem, but if you represent the client seeking indemnity and/or additional insurance, there is no benefit to doing it wrong, and doing it the right way will at least simplify matters as the case goes forward.

Next time, we'll get into the "additional insured" situation in more detail. If you have any issues that you would like to see addressed in a future issue, send them to one of the email addresses below.

Hal Carroll is a founder and the first chairperson of the Insurance and Indemnity Law Section of the State Bar of Michigan. He represents insureds and policyholders in insurance coverage disputes. He is a chapter author of Michigan Insurance Law and Practice, *published by ICLE, and has lectured and written many articles in the areas of insurance coverage and indemnity. He can be reached at hcarroll@VGpcLAW.com or hcarroll@chartermi.net, or (248) 312-2909.*

Negligence Law Section E-NEWS

Issue No. 3 **April 2011**

Message from the Chair

David E. Christensen
Gursten, Koltonow, Gursten, Christensen & Raitt PC


David Christensen

The attack on the civil justice system is intensifying in Lansing. This column should be a clarion call to all Michigan negligence lawyers who enjoy what they do. After reading it, I hope each of you will be alarmed enough to get even more involved in battling the forces that want to destroy the right to jury trial.

If you have not yet heard, many members of Michigan's legislature have plans to further gut Michigan's constitutional right to jury trial, and bail out the highly profitable insurance industry and other special interests with taxpayer dollars. Bills that grant special interests immunity for their unlawful negligent conduct that maims or kills innocent people have been flooding into the Senate and House at alarming rates.

Read More Below

The Murky Waters of ERISA Preemption: The Evolving Status of Public Employees

Troy W. Haney


Troy Haney

As of the present writing, one of the most heated debates in American domestic politics involves the extent to which public employees will be called upon to bear a substantial disproportionate burden of the broad and financial difficulties of state governments. The battle has been most directly joined in Wisconsin, where large numbers of demonstrators have for weeks now ringed the capitol building in to protest the efforts of the new Republican governor to eliminate the collective

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bargaining rights of public workers. However the struggle shakes out politically, it is likely that the courts will be the final arbiter of many of the issues presented. Moreover, this political struggle is likely to collaterally inform broader issues involving public employees, possibly including their rights to benefits under the Employee Retirement Income Security Act of 1974 (ERISA). Practitioners in this complex area of federal statutory law who are representing disability claimants who are public employees must remain aware of the salient issues surrounding such claims.

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Internet Jurisdiction

Kevin L. Moffatt
Martin, Bacon & Martin PC


Kevin Moffatt

Introduction

If you never explored a website or shopped online, then I doubtyou own or have access to a computer. If so, it is time to replace your rotary dial telephone with a desktop, laptop, tablet, smartphoneor other programmable device that will allow you to search the Internet. ComScore, Inc., a global leader in measuring the digital world, recently reported that online retailers sold $142.491 billion worth of merchandise in 2010, up from $129.797 billion in 2009.# With the advent of the Internet, e-retail has become a significant business market while e-commerce continues to grow. Companiescan sell their products and services worldwide with a click of a mouse. What does e-commerce have to do with your practice and how may it affect your clients? Two words: Internet jurisdiction.

Personal Jurisdiction

The Internet is an interstate and international network connecting millions of computers. E-tailers and retailers alike, through their websites, have a presence on the World Wide Web. However, does a website alone subject its proprietor to personal jurisdiction in courts where the cite is accessible? More specifically, can Internet activity constitute sufficient contacts for personal jurisdiction in Michigan?

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Earl J. Cline Award

This award is presented in recognition of superb skills as a judge/attorney in the field of negligence law and dispute resolution.

It shall be the purpose of this organization:

- To preserve the jury system and promote the fair and just administration of negligence law.
- To advance professional and ethical standards on the part of negligence law practitioners.
- To preserve and promote trial advocacy skills in the

Brian D. Einhorn, 2011 Earl J. Cline Award Recipient

practice of negligence law.
- To encourage attorneys to enter the field of negligence law.
- To recognize by way of awards and scholarships excellence in tort law and outstanding contribution to the practice of the profession.

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Attorney Conducted Voir Dire: Where Oh Where Have You Gone?

Ven Johnson
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Ven Johnson

In the last few years I have had the pleasure of trying cases in the States of Arizona, California and Indiana, as well as numerous cases throughout the State of Michigan including in Calhoun, Eaton, Ingham, Macomb, Monroe, Oakland, St. Clair and Wayne Counties. The only judges who prevented the parties from conducting their own voir dire were from the Detroit Metropolitan Counties. Practitioners on both sides of the "v" are virtually in unanimous agreement that attorney-conducted voir dire is not only preferable but also necessary to obtain a fair trial. Paul Manion and Matt Thomas of the Rutledge, Manion, Rabaut, Terry & Thomas PC, wrote an excellent voir dire article last year that appeared in Michigan Lawyers Weekly in the November 29, 2010 issue. They conclude, as I do, that attorney-conducted voir dire is the best and perhaps ONLY way for the parties to ensure that they have a jury that is truly "fair and impartial" and whose deep-down prejudices, explicit and implicit, have been thoroughly probed, examined and hopefully exposed.

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Brian Einhorn

Brian is a defense lawyer who has tried so many cases that his count can only be estimated as being "in the hundreds." In the last twenty-five years of his practice, many of the cases he has tried have been in defense of fellow lawyers. For the most part, any defense lawyer can win the cases that are meant to be won. But Brian is known for also winning the cases that he wasn't "supposed" to win.

Brian is skilled at developing a case through the pre-trial phase. He is so skilled at trials (and so willing to try cases) that this often enables him to secure very favorable settlements for his clients. And because of his trial skills, he is regularly retained by insurers or clients in the very few weeks before a case will be tried.

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Lansing Free for All

Todd Tennis
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After several years of partisan gridlock in Lansing which made it next to impossible to pass any legislation dealing with negligence or torts, the Republican sweep of 2010 has given them solid control

Amy Tripp
Author of the Special Needs Chapter of ICLE's *Advising the Older Client or Client with a Disability*, Fourth Edition and selected as a Rising Star in both 2008 and 2009 by *Super Lawyers Magazine*.

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Vandeveer Garzia PC

The Contractual Liability Exclusion

In the last issue, we discussed the intentional act ("expected or intended injury") exclusion, which is exclusion number 1 in most general liability policies, and serves the obvious purpose of carving out events that are by their nature not supposed to be insured or insurable. The purpose of the contractual liability exclusion, which is usually exclusion 2, is not quite as clear.

It begins broadly by excluding coverage for bodily injury or property damage "for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement." That's simple enough and it's pretty broad, but it is followed by a peculiar exception where the contract obligation is created by an "insured contract," and that is where the real work is done. "Insured contract" is a defined term, and the definition goes on for half a page, with its own set of conditions and exceptions.

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Photos
On February 16, 2011 Justice Brian Zahra attended the Negligence Council Meeting.

of every branch of Michigan government. This philosophical shift in state government is most notably being reflected in tax policy, state spending issues and collective bargaining rights. However, while we have yet to see truly sweeping legislation introduced in the negligence law area, several bills are moving through the legislature that will each have an impact on section members.

There is a rash of bills seeking to expand limits on liability for a variety of settings. House Bill 4111 (Rendon, R-Lake City) would extend governmental immunity to volunteers who do service for the Department of Natural Resources. Thanks to an amendment by Representative Matt Huuki (R-Atlantic Mine), those volunteers can now also be armed. Senate Bill 230 (Marleau, R-Lake Orion) would grant immunity from liability for any damages to a passenger arising from the negligence of a volunteer driver working for a non-profit agency unless the negligence constituted willful and wanton conduct. House Bill 4350 (Haines, R-Waterford) would extend the current limitations on liability granted to volunteer physicians in free clinics to physicians who are being paid to work in free clinics. None of these bills have passed the Legislature yet, but they may well have by the time this article goes to print.

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David Christensen, Justice Brian Zahra, Steven Galbraith, Paul Manion

Michael Sullivan, Tom Waun, Anne Randall, Justice Brian Zahra, David S. Mittleman

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