Negligence Law Section E-NEWS

Issue 5 Volume 3 **Spring 2014**

Message from the Chair

Steven Galbraith

No Fault, Disclosure and Politics

"Healthy citizens are the greatest asset any country can have."
- Winston Churchill

To say there is never a dull moment in the Legislature is an understatement. Current attention is focused on raw politics and efforts to force No Fault reform legislation into law. The issue is HB 4612 (H 3), the latest No Fault "reform" bill and efforts to force it through the legislature. Speaker Jase Bolger (R), together with Representative Pete Lund (R), is playing hard ball to get this bill passed.

Read Article Below

Revisiting Liability of Non-manufacturing Sellers and Importers

Wolfgang Mueller

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products under Michigan's product liability statutes.

Read Article Below

Wolfgang Mueller is a partner at Olsman Mueller Wallace & MacKenzie, PC in Berkley, Michigan. A former automotive engineer, with Bachelor and Master's degrees in mechanical engineering, Mr. Mueller specializes in product liability personal injury cases. He has litigated product liability cases throughout the country.

Insurance Coverage ADVISOR

The Reservation of Rights Letter and the Declination Letter

Hal O. Carroll

Whether you are the plaintiff or the defendant in a tort case, you can count on being on the receiving end of a reservation of rights letter in some cases and a declination of coverage letter in others. Each of these has the magical effect of making adversaries into allies, as both the defendant and the plaintiff seek to confirm coverage. The new-found allies' reasons are different, but their goal is the same.

Read Article Below

Hal Carroll is a founder and the first chair 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. His website is www.HalOCarrollEsq.com and he can be reached at HOC@HalOCarrollEsq.com or (734) 645-1404.

The **Michigan Association for Justice** in cooperation with The Michigan Defense Trial Counsel offer their membership and the public this first time opportunity to purchase: Motor Vehicle No-Fault Law in Michigan 2011 Edition

Michigan Lawyers Weekly wants to hear about your verdicts & settlements. Please submit recent civil cases (within the past six months) where you prevailed—whether in a jury verdict or a settlement—so they may publish them. Questions about Lawyers Weekly's Verdicts and Settlements policy may be directed to the editor at (800) 678-5297 or editor@mi.lawyersweekly.com

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Legislative Update

Todd Tennis

Will Mandatory Bar Dues be a Lame Duck Issue?

Conventional wisdom in politics is that it is impossible to pass controversial legislation in an election year. One of the reasons there was so much pressure to pass issues like transportation funding (i.e. gas tax hike), telecommunication reform (i.e. land-line modification), and no-fault auto insurance reform before the end of 2013 was this notion of the dreaded election year.

This year may be somewhat different, however. Pressure to pass sweeping changes to Michigan's no-fault auto law continues unabated (see Chairman Galbraith's column), and lobbyists at AT&T were recently successful in winning passage of their "land-line" bill over the objection of groups like the AARP, and the Michigan Sheriff's Association. Even road funding, with the possibility of raising taxes (gasp!) might see movement this year since it won't be long before everyone in Michigan has lost a tire to potholes.

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2014 Outstanding Achievement Award

Peter L. Dunlap

The Negligence Law Section proudly confers this Outstanding Achievement Award upon Peter L. Dunlap for his distinguished service to the legal community.

Mr. Dunlap will be recognized on Thursday, August 14, 2014, at the Country Club of Lansing. Please contact us if you are interested in attending the reception to honor him.

Prior Recipients

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

Encourage Members of Your Firm and Colleagues to Join!

Jennifer Grieco

Would you spend $40 per year to protect the practice of negligence law in the State of Michigan?

By joining the State Bar of Michigan's Negligence Law Section, you will be doing just that: joining the Section's efforts to stop the onslaught of legislation intent on frustrating an individual's ability to bring a negligence claim.

We need your help and support!

Please act NOW by completing the attached form and sending in $40 to join the Negligence Section and increase our strength and ability to monitor, oppose and advocate against such legislation in 2014 and beyond.

Membership News Update:

The Negligence Council has approved offering free membership to the Negligence Section to newly admitted lawyers in accordance with the State Bar of Michigan's policy (SBM Bylaws Article VII, section 5) permitting newly

admitted lawyers to select one (1) free membership for two (2) years in a section of their choice, in addition to their free membership in the Young Lawyers Section. This free membership will permit newly admitted lawyers to attend our membership events and to receive the informative Negligence Law Section E-News. We hope that you will encourage newly admitted lawyers in your firms and/or that you interact with to take advantage of the two years of free membership in the Negligence Section.

More Information Below

Thank you.
Jennifer Grieco
Membership Chair

Attended the February 26, 2014 Negligence Council Meeting.

Rep. Phil Cavanagh

State Representative Phil Cavanagh is serving his second term in the Michigan House of Representatives, representing District 10, which comprises Redford Township and a portion of the city of Detroit.

Before coming to the House, Cavanagh served four terms as a Wayne County commissioner, where he worked to improve the delivery of mental health services throughout the county, especially focusing on services provided to children. He served as an appointee to the Detroit-Wayne County Community Mental Health Agency, where he helped balance the agency's budget. Cavanagh was also a member of the commission's Committee on Health and Human Services, which is responsible for oversight of public health services throughout the county, and the Committee on Ways and Means, which is responsible for oversight of the county budget. Cavanagh also served as an appointee to the Wayne County Land Bank Authority, which focused on economic development.

Cavanagh earned a bachelor's in business administration and a bachelor's in accounting from Aquinas College, and a master's in business administration and a law degree from the University of Detroit Mercy. Cavanagh also completed the Michigan Political Leadership Program (MPLP) and the Program for Senior Executives in State and Local Government at Harvard's John F. Kennedy School of Government.

Cavanagh is a practicing attorney and has won numerous awards for his service to the community, including "Child Advocate of the Year" in 2008 from Vista Maria, Michigan's largest nonprofit residential and community-based treatment agency for abused and neglected girls.

Cavanagh is the proud father of twin daughters, Erin and Veronica, who graduated from the University of Michigan in Ann Arbor, and Mary, who is a senior at Wayne State

University.

NO FAULT, DISCLOSURE, and POLITICS

"Healthy citizens are the greatest asset any country can have."
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From your Chair:

To say there is never a dull moment in the Legislature is an understatement. Current attention is focused on raw politics and efforts to force No Fault reform legislation into law. The issue is HB 4612 (H 3), the latest No Fault "reform" bill and efforts to force it through the legislature. Speaker Jase Bolger (R), together with Representative Pete Lund (R), is playing hard ball to get this bill passed.

On Monday, March 3, 2014, County Executives L. Brooks Patterson, Mark Hackel, and Robert Ficano held a press conference, to express opposition to the reform bill. Push back was immediate with suggestions from Macomb Representative Pete Lund that there might be retribution to Macomb County. Reportedly, Lund inferred Macomb County might suffer politically given Hackel's opposition to the bill. Still, the press conference went forward, making headline news. Patterson described the bill as: "a death sentence for individuals recovering from catastrophic injuries."

An unusual alliance (though usual in the No Fault world) of injured individuals, Plaintiff lawyers, and the health care industry are up in arms and fighting back. Recently, the HICA fund has been held hostage, attempting to dampen support from the health care industry. The Health Insurance Claims Assessment (HICA) Act has been used to provide financial support to hospitals who treat injured indigent individuals and who would otherwise go unpaid for their services. The HICA funding bill is stalled while the substitute bill (H 3) also includes a $25 annual Medicaid tax on every auto insurance policy to cover the shortfall in HICA. That HICA funding is being held hostage in Lansing as a weapon to force the health care industry to back off of its opposition to No Fault reform.

Some of the opposition to No Fault reform originates with the MCCA, which has been stonewalling disclosure for years. It simply refuses to tell us (or the Legislature) how our money is being spent and why the fund will go broke unless reform is passed. "The lack of transparency by the MCCA is astounding," Patterson said. "Until we see the books and actuarial tables, we cannot have a serious discussion on how to improve auto no-fault in Michigan."

Recently, your Council met with Representative Phil Cavanagh (D) and discussed HB 4551, which would amend the Insurance Code, MCL 500.134 and 500.3104, to provide disclosure of the MCCA by compelling it to comply with the Open Meetings Act, FOIA requests, and to appoint an independent CPA to audit and report to the Senate and House annually (see Sections 23-25). HB 4551 has bi-partisan support and appears to be a major reason why No-Fault reform is stalled.

SC TASK FORCE REQUEST

The Task Force appointed by our SC in response to the request by the SBM has issued its own request to Bar members for input in an email sent to all SBM members March 7th. Please recall how this all started:

- 9/11/13: SBM requests Declaratory Ruling on judicial campaign disclosure.
- 11/14/13: SOS Johnson releases Proposed Response to SBM; holds press conference offering to support legislation for transparency in disclosure.
- 11/14/13: Senate Committee on Government Relations (Chair Meekhof) amends SB 661, passes out of Committee, and passes full Senate with "Dark Money" provision statutorily endorsing issue ads the same day.
- SB 661 assigned to House Elections and Ethics Committee.
- 12/11/13: House passes SB 661.
- 12/26/13: Governor Snyder signs SB 661 into law.
- 1/23/14: Senate Committee on Government Relations (Chair Meekhof) introduces SB 743 to disband the State Bar of Michigan.
- 2/13/14: At the request of the SBM, the Supreme Court enacts Administrative Order No. 2014-5 establishing a Task Force to evaluate the future of the SBM as a mandatory bar and to consider its political guidelines.

Chairman Al Butzbaugh has requested feedback from members and you are encouraged to do so. You can simply respond to his email (MI Supreme Court Task Force on SBM sbm-member-flash@mail.michbar.org) or write him by **Friday, March 28, 2014** at:

Al Butzbaugh, Chair
Task Force on the Role of the State Bar
C/O Nelson S. Leavitt, Reporter
Michigan Supreme Court
PO Box 30052
Lansing, MI 48909

While some may question the mandatory bar believing there will be no dues, be assured this is not so. Your Section Council strongly believes and supports the SBM and hope the status quo is maintained. The Bar provides many valuable services and programs, which can be found at: http://viewer.zmags.com/publication/4ff5a3ac#/4ff5a3ac/22

Please provide you comments to Chair Butzbaugh.

REVISITING LIABILITY OF NON-MANUFACTURING SELLERS AND IMPORTERS

By: Wolfgang Mueller

Olsman Mueller Wallace & MacKenzie, PC

The explosion of growth in Internet sales, as well as the high cost of manufacturing goods in the United States, has resulted in an overwhelming number of products, especially consumer products, being manufactured and imported from overseas, especially Asia. Many importers, in turn, place their labels on goods manufactured overseas by another entity, but these "apparent manufacturers" are simply importers, and not true manufacturers. As anyone who has tried to obtain service of process on a Chinese manufacturer can attest, it is a nearly impossible task in most instances.[1] This has made it increasingly difficult to hold foreign manufacturers, or anyone else in the chain of distribution, accountable for harm caused by defective products under Michigan's product liability statutes.

Under Michigan law, an injured consumer was traditionally not required to prove a non-manufacturing seller's negligence in order to recover for a breach of implied warranty of merchantability.[2] A plaintiff simply had to prove that the product was sold in a defective condition, and that the defect caused the plaintiff's injury.[3] In 1996, however, the Michigan legislature enacted sweeping "tort reform" that included major changes to Michigan's product liability landscape.[4] One of the most significant revisions was that a non-manufacturing seller could not be held liable for a defective product unless the plaintiff was able to show that "[t]he seller failed to exercise reasonable care, including breach of warranty, with respect to the product and that failure was a proximate cause

of the person's injuries."[5] In other words, the defendant must be "independently negligent."[6]

While the statutory language "failed to exercise reasonable care, including breach of warranty," initially caused some confusion as to whether these were independent claims, it is now settled that negligence and breach of implied warranty claims do not stand alone.[7]

It is interesting to note that the MPLA does not expressly define "manufacturer" or "seller." Courts, however, have assumed that a distributor falls within the definition of a non-manufacturing seller.[8]

The irony, of course, is that the Consumer Product Safety Commission ("CPSC"), the federal agency charged with protecting the public from unreasonable risks of serious injury or death from more than 15,000 types of consumer products, includes importers in its definition of "manufacturer." The Consumer Product Safety Act ("CPSA"), enacted in 1972, defines a "manufacturer" as "any person who manufactures or imports a consumer product."[9] In 1976, the CPSC issued a policy statement reiterating that "under the Act, importers are made subject to the same responsibilities as domestic manufacturers."[10]

Under current Michigan law, a manufacturer of a product that complies with a government regulation or standard promulgated by a federal or state agency responsible for reviewing the safety of the product, enjoys a rebuttable presumption that the product is not defective.[11] The conundrum is that many products that are regulated by the CPSC have strict standards for compliance imposed upon manufacturers

(including, by definition, importers), yet under Michigan law, an importer may be considered a nonmanufacturing seller.

The Theory of "Apparent Manufacturer" Liability

With so many consumer products being manufactured by non-descript foreign entities, yet labelled by domestic importers, it is time that Michigan courts adopt "apparent manufacturer"[12] liability in order to adjust to the realities of the global economy and allocate the risk of defective products to those entities most able to bear it.

Michigan courts have recognized that "the individual consumer's tort remedy for products liability . . . derives either from a duty imposed by law or from policy considerations which allocate the risk of dangerous and unsafe products to the manufacturer and seller rather than the consumer. Such a policy serves to encourage the design and production of safe products."[13] Our Supreme Court has recognized "the societal policy rationale that those injured by defective products should be compensated for their injuries[,]" and that "manufacturers can most effectively distribute the costs of injuries."[14] To date, however, Michigan courts have not recognized "apparent manufacturer" liability for an entity that labels a product as its own, even though it has been manufactured by another entity.

In *Seasword v. Hilti, Inc.*[15], the plaintiff was injured while using a drill manufactured by Hilti, A.G., a foreign company. The plaintiff sued the defendant, Hilti, Inc., on the theory that the defendant held itself out as the manufacturer of the product. The Supreme Court rejected the "holding out," or "apparent manufacturer," theory of liability, reasoning:

> We believe, however, that Michigan's existing theories of seller liability and related tort doctrines, including piercing the corporate veil and successor liability, as well as laws of agency, fraud, and misrepresentation, preclude the need for an apparent-manufacturer doctrine and diminish the doctrine's utility. Because nonmanufacturing sellers in Michigan continue to be answerable for design defects under existing tort theories, we find it unnecessary to adopt an *additional* theory under which nonmanufacturing sellers could be accountable for injuries caused by an allegedly defective product.[16]

The Court acknowledged the important policy reasons behind the "apparent manufacturer" doctrine, but held that the product liability laws, circa 1995, adequately protected the injured consumer:

> Accordingly, while the apparent-manufacturer doctrine serves important interests, not the least of which are accountability, protecting consumer expectations, and deterring abuse of corporate structures to evade tort liability, we believe that those objectives are adequately accomplished by existing laws and therefore do not necessitate an apparent-manufacturer doctrine. Thus, we decline to supplement our current products liability jurisprudence with the apparent-manufacturer doctrine.[17]

Seven months after the *Seasword* decision, the product liability laws experienced the seismic shift we live with today. Since the rationale for declining to adopt the apparent manufacturer doctrine has disappeared, and if accountability and protecting injured consumers' rights remain viable objectives[18], then it is time that the doctrine be revisited and adopted. Just as Michigan recognizes the "apparent agency" theory of liability in the principal-agent context[19], in order to protect the reasonable expectation of a third party, the injured consumer's expectation should be recognized, especially where an importer holds the product out as its own, despite being manufactured by another entity. Furthermore, in order to clarify its intent, the Legislature should expressly define "manufacturer" and "non-manufacturing seller" in the MPLA. Given that the

CPSA includes importers in its definition of "manufacturer," the Legislature should do likewise.

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[1] The author has had two cases in recent years where, after complying with the requirements of the Hague Convention, and waiting almost one year, the Chinese Embassy responded that service of process was not effectuated because "[t]he address [for the Defendant] is not sufficient enough." The address was the same address listed on the Chinese manufacturer's website and provided by the importer.

[2] *Piercefield v Remington Arms Co*, *Inc,* 375 Mich 85, 96; 133 NW2d 129 (1965).

[3] *Id.*

[4] *See* Michigan Product Liability Act ("MPLA"), MCL 600.2945, *et seq*.

[5] MCL 600.2947(6)(a). For example, where a retail seller assembles a bicycle for sale, which later causes injury, the seller may be liable for negligent assembly. The seller who simply sells a product in a box, which later causes injury due to a product defect, likely has no liability. The non-manufacturing seller can also be held liable for breach of express warranty, if the breach was a proximate cause of the injury. MCL 600.2947(6).

[6] Torts: Michigan Law and Practice § 8.1 (Linda Miller Atkinson et al. ed., 2000).

[7] *See Curry v Meijer Inc*, 286 Mich App 583, 593; 780 NW2d 603 (2009) (noting that "the language is about as clear and unambiguous as it could be," *Id*. at 592, the Court stated that "a breach of implied warranty claim is a type of, and not separate from, a breach of reasonable care claim.").

[8] *Dreyer v Exel Industries, SA*, 326 Fed Appx 353, 358, n.3, 2009 WL 1184846 (6th Cir (Mich)) ("We assume without deciding that a distributor, who is not the ultimate seller, falls within the scope of Mich. Comp. Law. § 600.2947's definition of 'seller.')." It seems likely that an importer would enjoy the same assumption.

[9] 15 USC §2502(11).

[10] 16 CFR 1009.3 (1976).

[11] MCL 600.2946(4).

[12] "Apparent manufacturer" liability is based on 2 Restatement of Torts, 2d, § 400, p. 337, which states: "One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were the manufacturer. . . . This theory simply permits a fact-finder to "transfer" the manufacturer's liability to that

separate entity holding itself out as the manufacturer. When the doctrine applies, the non-manufacturer is, in reality, substituted for the manufacturer."

[13] *Neibarger v Universal Coops Inc*, 439 Mich 512, 523; 486 NW2d 612 (1992).

[14] *Prentis v Yale Mfg Co*, 421 Mich 670, 682; 365 NW2d 176 (1984).

[15] 449 Mich 542; 537 NW2d 221 (1995).

[16] *Id*. at 546-47.(Emphasis in original).

[17] *Id*. at 547.

[18] *Id.*

[19] *James v Albert*, 464 Mich 12, 15; 626 NW2d 158 (2001) ("Apparent authority arises where the acts and appearances lead a third person reasonably to believe that an agency relationship exists.").

NEGLIGENCE LAW SECTION QUARTERLY

SPRING 2014

INSURANCE COVERAGE ADVISOR

THE RESERVATION OF RIGHTS LETTER

AND THE

DECLINATION LETTER

By Hal O. Carroll
www.HalOCarrollEsq.com

Whether you are the plaintiff or the defendant in a tort case, you can count on being on the receiving end of a reservation of rights letter in some cases and a declination of coverage letter in others. Each of these has the magical effect of making adversaries into allies, as both the defendant and the plaintiff seek to confirm coverage. The new-found allies' reasons are different, but their goal is the same.

The Reservation of Rights Letter

There are few hard and fast legal requirements that apply here. There is, as you would expect, a requirement of timeliness, but it's pretty lax. In one case, the insurer sent a letter within two weeks saying it was investigating, and then sent follow-up letters two weeks after that, 21 months later and 16 months after that. The Supreme Court held that this was adequate.[1]

Another case holds that a reservation of rights made one month after suit was timely.[2] It is noteworthy that the Supreme Court applied a "prejudice" standard where one of the grounds for reserving rights was not asserted initially.

> We hold that Allstate is not estopped from raising the motor vehicle exclusion because Allstate did not delay unreasonably in asserting the exclusion and the defendant has suffered no prejudice from the short delay.[3]

The basic question is "how long is too long?" On this question the Court of Appeals has said that "We feel that four months is, as a matter of law not an unreasonable length of time."[4]

On the other hand, the Court of Appeals has held that a two year delay between the initiation of the underlying action and a reservation of rights letter was too long.[5]

The content of the letter is also important, as it should be. The Supreme Court held that a generic reservation of right was insufficient, where it merely repeated a formula with no substantive content.

> [T]he Company in undertaking your defense, does so under a reservation of rights, and without prejudice, and subject to the conditions, limitations, exclusions and agreements of said policy, and subject to the express understanding that by so doing the Company does not waive any of its rights to rely upon the provisions of said policy, and does not waive any defense it may have to any claimed liability under said policy.[6]

On the other hand, where the letter said that it appeared that the claimant was not a resident of the policyholder's household and that the injury was not the result of an "accident," this was held sufficient.[7]

The principle that underlies these requirements is the basic one that the insurer owes a duty of good faith to its insured. There is an "implied covenant of good faith and fair dealing which arises from the contract between the insurer and the insured."[8] There is no relationship at all between the defendant's insurer and the tort claimant, so the insurer has no duty to advise the tort claimant of its position on coverage.[9]

That duty requires that "when an insurance company undertakes the defense of its insured, it has to give reasonable notice to the insured that it is proceeding under a reservation of rights, or the insurance company will be estopped from denying its liability."[10]

> The general rule is that an insurer which undertakes the defense of an insured while having actual or constructive knowledge of facts which would allow avoidance of liability will be deemed to have waived its right to avoid coverage unless reasonable notice is served to the insured of the possible disclaimer of liability.[11]

An insurer can satisfy the requirement that it advise the insured of grounds for denying coverage by filing a declaratory action.[12]

The Declination Letter

When the insurer takes the stronger position and declines to defend at all, the stakes are higher. Two things follow from an outright denial of coverage. First, the insured gains freedom to make his or her best deal, and if the settlement is "reasonable," the insurer is bound.

The insurer's duty to state its reasons for declining coverage is expressed in a statute, which provides:

> An insurer or agent, upon making a declination of insurance, shall inform the applicant of each specific reason for the declination. If the application or request for coverage was made in writing, the insurer or agent shall provide the explanation of reasons in writing. If the application or request for coverage was made orally, the insurer or agent may provide the applicant with an oral explanation instead of a written explanation, and shall offer to provide a written explanation if the applicant requests a written explanation within 90 days.[13]

Curiously, the statute has not played a significant role in the cases, which have proceeded on common law principles.

In any event, one result of the insured's freedom to make a reasonable settlement is that the insurer cannot deny coverage and then claim that an insurer who has reached a settlement has violated the obligation to cooperate with the insurer. When "an insurer breaches its own policy of insurance by refusing its duty to defend the insured [and] is bound by any reasonable settlement entered into in good faith between the insured and the third party."[14] The fact that the settlement includes a covenant to collect only from the insurance policy and not from the defendant, does not invalidate the settlement.[15]

It also follows that the insurer cannot deny coverage on the ground that the insured has violated the policy requirement that it cooperate with the insured. "An insured is released from any agreement not to settle without the insurer's consent where the insurer has denied liability and wrongfully refused to defend."[16]

The second principle that applies when the insurer declines coverage is that the insured is bound by the reasons it gives, but this principle is less strong than it appears.

In the cases, the rule comes with a significant caveat:

> Generally, once an insurance company has denied coverage to an insured and stated its defenses, the insurance company has waived or is estopped from raising new defenses. The application of waiver and estoppel is limited, and, usually, the doctrines will not be applied to broaden the coverage of a policy to protect the insured against risks that were not included in the policy or that were expressly excluded from the policy. This is because an insurance company should not be required to pay for a loss for which it has charged no premium.[17]

Obviously, this rule starts out strong but quickly loses much of its force. It is clear that when the insurer comes up with a new reason after the insured has suffered a judgment, it is too late.[18] Apart from that situation, which seems to be a per se rule, this one will require more strenuous, argument, with stress on the prejudicial effect of the declination on the insurer's defense.

Hal Carroll is a co-founder, first Chairperson and current Council Member of the Insurance and Indemnity Law Section, and a frequent contributor to the *Negligence Law Quarterly*. He is a chapter author of ICLE's *Michigan Insurance Law and Practice*, and was designated a Super Lawyer® again in 2013. He specializes in disputes over insurance coverage and indemnity obligations, and in general civil appeals. His email address is HOC@HalOCarrollEsq.com.

[1] *Kirschner v Process Design Associates,* 459 Mich 587, 590; 592 NW2d 707 (1999).
[2] *Allstate Ins v Keillor,* 450 Mich 412; 537 NW2d 589 (1995).
[3] *Allstate* at 416 note 2.
[4] *Fire Insurance Exchange v Fox,* 167 Mich App 710, 714; 423 NW2d 325 (1988).
[5] *Multistates Transport v Michigan Mutual Ins Co,* 154 Mich App 549; 398 NW2d 462 (1986).
[6] *Meirthew v Last,* 376 Mich 33; 135 NW2d 353 (1965).
[7] *Allstate v Harris,* unpublished Court of Appeals, no. 215264 (April 24, 2001), 2001 WL 672596.
[8] *Commercial Union Insurance Co v Medical Protective Co,* 426 Mich 109, 116; 393 NW2d 479 (1986).
[9] *Auto Club Group Ins Co v Rush,* unpublished Court of Appeals opinion, no. 257419 (Jan 24, 2006) 2006 WL 171494.
[10] *Kirschner, supra,* 459 Mich at 593.
[11] *Fire Ins Exchange v Fox,* 167 Mich App 710, 713-714; 423 NW2d 325 (1988).
[12] *Multi-States Transport, Inc v Michigan Mutual Ins Co,* 154 Mich App 549, 557; 398 NW2d 462 (1986).
[13] MCL 500.2122.
[14] *Alyas v Gillard,* 180 Mich App 154, 160; 446 NW2d 610 (1989). See also *Clay v American Continental Ins Co,* 209 Mich App 644, 647-650; 531 NW2d 829 (1995).
[15] *Clay v American Continental Ins Co,* 209 Mich App 644; 531 NW2d 829 (1995).
[16] *Alyas, supra,* 180 Mich App at 161.
[17] *Kirschner, supra,* 459 Mich at 593-594 (citations deleted).
[18] *Meirthew v Last, supra.*

Will Mandatory Bar Dues be a Lame Duck Issue?

Conventional wisdom in politics is that it is impossible to pass controversial legislation in an election year. One of the reasons there was so much pressure to pass issues like transportation funding (i.e. gas tax hike), telecommunication reform (i.e. land-line modification), and no-fault auto insurance reform before the end of 2013 was this notion of the dreaded election year.

This year may be somewhat different, however. Pressure to pass sweeping changes to Michigan's no-fault auto law continues unabated (see Chairman Galbraith's column), and lobbyists at AT&T were recently successful in winning passage of their "land-line" bill over the objection of groups like the AARP, and the Michigan Sheriff's Association. Even road funding, with the possibility of raising taxes (gasp!) might see movement this year since it won't be long before everyone in Michigan has lost a tire to potholes.

Nonetheless, tradition holds that sometime around the candidate filing deadline (April 22, this year), the willingness to do anything controversial dries up in the Michigan Legislature. Once election fever sets in, few things of consequence achieve passage in the Michigan House and Senate. Even the annual appropriations process, which in the past has led to major battles, seems headed this year for a rather ho-hum completion sometime in June. So what will happen to all of these controversial issues like no-fault reform or a voluntary State Bar? Two words: Lame Duck.

Since the No-Fault Insurance issue is being ably covered by Chairman Galbraith in this newsletter, this column will focus on the other potential Lame Duck issue facing members of the Negligence Law Section – and indeed every member of the Michigan State Bar.

Legislation was recently introduced that would allow attorneys to practice law in Michigan without having to pay dues to the Michigan State Bar. Senate Bill 743, sponsored by Senator Arlen Meekhof (R-Olive Twp.) was sent to the Senate Government Operations Committee in January and was initially thought to be on a fast track. Proponents of the bill claimed that the use of mandatory bar dues for legislative advocacy was a violation of the members' First Amendment rights. This issue was the subject of the landmark Keller v. State Bar of California decision of the U.S. Supreme Court that affirmed the right of State Bar associations to collect mandatory dues, but greatly restricted advocacy efforts.

Soon after the bill's introduction, the Michigan State Bar asked the Michigan Supreme Court to examine the matter of how the State Bar operates in terms of advocacy within the framework of the Keller decision. Chief Justice Robert Young subsequently appointed a task force to review the matter, and its report is expected sometime in June.

To understand the nature of the issue, it is important to know some of its history. The State Bar of Michigan has operated with very limited public policy advocacy since the Keller v. State Bar of California decision was handed down in 1990. The State Bar of Michigan's Public Policy Manual limits State Bar advocacy to the "Keller-permissible" areas of:

- The regulation and discipline of attorneys;
- The improvement of the functioning of the courts;

- The availability of legal services to society;
- The regulation of attorney trust accounts;
- The regulation of the legal profession, including the education, the ethics, the competency, and the integrity of the profession.

Voluntary Sections of the State Bar (like the Negligence Law Section) have no such restrictions on their advocacy. Indeed, in addition to the Negligence Law Section, several voluntary State Bar Sections such as the Probate Section, the Family Law Section, and the Elder Law and Disability Rights Section have retained lobbyists for the sole purpose of state-level public policy advocacy. However, in accordance with Supreme Court Administrative Order 2004-01, individual Sections must report public policy positions to the State Bar and use a State Bar-supplied cover letter when performing advocacy that clearly indicates that the opinion of the Section does not reflect the opinion of the State Bar.

Some have opined that SB 743 stems from confusion in the minds of Legislators pertaining to lobbying being performed by individual voluntary Sections. It may be possible that Legislators are improperly interpreting Section advocacy as being done on behalf of the State Bar itself, and therefore believing it to be in violation of the Keller decision. However, it should be noted that, while individual State Bar Sections have been performing individual lobbying for decades, SB 743 was introduced shortly after the State Bar weighed in on the issue of so-called "dark money" in judicial elections. The prevailing opinion in Lansing is that SB 743 was a shot across the bow at the State Bar for its support of increased transparency in judicial races.

If the latter is true, the warning shot has been immensely effective. Attention on campaign finance for judicial races has evaporated while the question of the State Bar of Michigan's very existence has come to the fore. Lansing is waiting expectantly for the Supreme Court's Task Force review to be delivered in June. Regardless of what comes from the task force report, however, Senate Bill 743 could remain on the legislative agenda. While it is unlikely that the Legislature will want to dive into the issue before the hotly anticipated November elections – much like the "Right to Work" battle in 2012 – "Right to Practice Law" could be the Lame Duck issue of 2014.