

# The Journal of Insurance & Indemnity Law

A quarterly publication of the State Bar of Michigan's Insurance and Indemnity Law Section

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## In this Issue

### Section News

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|   |    |
|---|----|
| From the Chair .....  | 2  |
| <i>Augustine O. Igwe</i>  |    |
| Editor's Note .....   | 3  |
| <i>Hal O. Carroll</i>   |    |
| January Program: Insuring Michigan Marijuana Businesses: Coverage, Availability, Issues, and Challenges ..... | 3  |
| Insurance & Indemnity Law Section 2018-2019 Officers and Council .....  | 20 |

### Feature Articles

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|  |    |
|--|----|
| Michigan Voters Approved Recreational Marijuana: What Does That Mean for Michigan Businesses and Residents? .....              | 5  |
| <i>By Rodney Martin</i>  |    |
| The Fifth Amendment Privilege Against Self-Incrimination and the Examination Under Oath in Property Insurance Policies .....   | 9  |
| <i>By Annie Earls</i>  |    |
| <i>Strauss v Kantola</i> , and the Necessary Joinder Rule – the <i>Catch 22</i> Regarding Underinsured Motorist Benefits ..... | 14 |
| <i>By Kevin Yaldao</i>   |    |

### Columns

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|   |    |
|---|----|
| Legislative Update: Back to the Beginning Again ..... | 12 |
| <i>By Patrick D. Crandell</i>                         |    |
| Selected Insurance Decisions.....                     | 17 |
| <i>Deborah A. Hebert and Amy Felder</i>               |    |

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Opinions expressed herein are those of the authors or the editor and do not necessarily reflect the opinions of the section council or the membership.

## From the Chair



Augustine O. Igwe,  
Kaufman, Payton &  
Chapa

Greetings to All!

I'm happy to report that our Section continues to grow. We added 7 new members since December last year, raising our membership count to 889. We are continuing our drive to coordinate with other sections and organizations to broaden the resources available to all our members. We are also enhancing our profile in the legal community with the recent improvements to our Scholarship

Program. The following are some of the activities the Council has undertaken or planning to undertake in the coming months.

### Program with the Marijuana Section

In January of this year, our Section *presented in conjunction with the Marijuana Law Section, a program featuring emerging issues relating to insurance coverage for the marijuana industry in Michigan.* It featured discussion on insurance issues pertaining to the availability and challenges facing the operation of businesses in the newly-legal marijuana industry. It was a resounding success.

### Student Scholarship

The ad hoc Scholarship Committee has finalized and published our revamped 2019 Annual \$5,000 Scholarship program. Any student currently enrolled in one of the Michigan's five law schools is eligible to participate by submitting an article. This year's topic is "Michigan's Automobile No-Fault Insurance System." We purposely made it broad to encourage creative and thoughtful feedback on the current issues facing the Michigan's No -Fault insurance system. The due date for submission is August 5, 2019.

### Bar Leadership Forum

Consistent with past practice, our Section plans to participate in the upcoming 2019 Bar Leadership Forum to be held in June in Mackinac Island. This event is organized by the State Bar of Michigan to provide an opportunity to learn, collaborate and network with leaders of other sections, bar associations, local and special purpose bar associations. We will circulate summary and key observations from the summit.

### Annual Meeting

The State Bar of Michigan has made significant changes to the activities surrounding the annual meetings. It has voted to reduce the Annual Meeting to its core elements, i.e. swearing in of new officers, the inaugural meetings of the Representative Assembly and Board of Commissioners, and the presentation of the State Bar's annual awards. Thus, the SBM's annual meeting will no longer feature the various sections' annual meetings, the Solo & Small Firm Institute, the vendor hall and receptions. This change will require us to amend our bylaws and come up with an alternative forum and template for our Section's annual meetings beginning this year. We will provide further information on this matter.

### Journal

Our Section's well-regarded quarterly *Journal of Insurance and Indemnity Law*, now in its twelfth year, features articles, case updates, analyses and opinions of interest pertaining to insurance and indemnity law. We encourage all our readers to be a part of the *Journal* by submitting an article or opinion piece to our editor for publication. You do not need to be a member of our section to submit an article.

Finally, we extend a warm welcome to all new members and thank you for joining our Section. To all our new members and existing members, please plan to participate actively by writing an article, joining a committee or the Council, or simply providing us with your thoughts or opinions on any matter of interest to our Section. ■

### Mission Statement of the Insurance and Indemnity Law Section

Issues arising out of insurance contracts and indemnity agreements affect a broad range of practice areas. In addition, insurance is a regulated industry, and state and federal regulations present specialized questions. The membership of the Insurance and Indemnity Law Section of the State Bar of Michigan consists of those who have expertise in this area of practice, as well as those whose expertise lies in other practice areas that are affected by insurance and indemnity issues. The mission of the Section is to provide a forum for an exchange of information, views and expertise from all perspectives on both insurance coverage issues and indemnity issues, and to provide information and assistance to other persons or organizations on matters relating to insurance and indemnity. Membership is open to all members of the State Bar of Michigan.

## Editor's Notes



By Hal O. Carroll  
[www.HalOCarrollEsq.com](http://www.HalOCarrollEsq.com)

The *Journal* – now in its twelfth year – is a forum for the exchange of information, analysis and opinions concerning insurance and indemnity law and practice from all perspectives. The *Journal* – like the Section itself – takes no position on any dispute between insurers and insureds, but we welcome all articles of analysis, opinion, or advocacy for any position.

All opinions expressed in contributions to the *Journal* are those of the author

Copies of the *Journal* are mailed to all state circuit court and appellate court judges, all federal district court judges, and the judges of the Sixth Circuit who are from Michigan. Copies are also sent to those legislators who are attorneys.

The *Journal* is published quarterly in January, April, July and October. Copy for each issue is due on the first of the preceding month (December 1, March 1, June 1 and September 1). Copy should be sent in editable format to the editor at HOC@HalOCarrollEsq.com. ■

## January Program

### Insuring Michigan Marijuana Businesses: Coverage, Availability, Issues, and Challenges

Our Section had our Annual Program on Tuesday, January 22, 2019 at the Eagle Eye Golf Club in Bath Township, MI in conjunction with the Marijuana Law Section. The panel discussion was titled “Insuring Michigan Marijuana Businesses: Coverage, Availability, Issues & Challenges,” concerning the intersection between insurance law and Michigan’s developing marijuana law.

*The following summary was prepared by Council member Renee VanderHagen*

*The panelists included:* Hon. Joseph Scoville, a former U.S. Magistrate for the Western District of Michigan, Kathleen Lopilato, VP in the Legal Department of Auto-Owners Insurance Company, Joseph Lyons from Conifer Insurance Company in Birmingham, MI, and Rodney Martin with Warner Norcross & Judd in Grand Rapids, MI. Moderating the panel was Attorney Craig Aronoff, who has been representing clients in this space for several years.

In his opening remarks, Bob Hendricks, Chair of the Marijuana Law Section, noted that Michigan is the only State Bar in the country that has sanctioned a Marijuana Law Section.

**Licenses.** The State of Michigan no allows for 5 different licenses relating to the growth and distribution of marijuana (recreational or



Robert Hendricks, Chair of the  
 Marijuana Law Section



Gus Igwe, Chair of the Insurance and  
 Indemnity Law Section

medicinal): grower, processor, secure transporter, dispensary, or safety compliance facility.

**Insurance coverage.** Availability of coverage for any of these purposes depends on which carrier is approached for coverage. Coverage varies from “robust” to “not so robust.” Some carriers are not in the space yet at all, and may never be in it. At this point, there is little actuarial data for insurers to base any rates, or develop underwriting standards, or manage the risk confidently.

**Banking issues.** There are questions in the banking industry regarding funds derived from the sale of marijuana. Is it a federal crime to receive money into an account? Will federal prosecutors seek forfeiture of assets from banks that accept deposits from dispensaries? The FDIC has not issued any statement regarding enforcement of any laws that would arguably relate to the legalized marijuana industry.

The panel agreed that “transparency” in relationships with carriers and banks is and will be critical going forward. Similarly, the diligence of the carrier when applications for coverage are presented will be equally important. Currently, if Conifer issues a cancellation of coverage in this area, the ability to cure whatever led to the cancellation remains



Rodney Martin of Warner Norcross + Judd, and Hon. Joseph G. Scoville, former United States Magistrate Judge for the Western District of Michigan



Kathleen Lopilato, Auto-Owners Insurance Company, and Joseph R. Lyons, Conifer Insurance Company

available to the insured. So, in some ways, it's considered 'business as usual' even when the insured is related to legalized marijuana.

**Wide range of implications of the new law.** But with the legalization of recreational and medicinal marijuana, health insurance carriers, workers compensation carriers, insurers of equipment, inventory, business interruption, property, premises, and homeowners (i.e. think of "social host" liability) are all potentially impacted. Answers to coverage questions will be inconsistent because they will often depend on the jurisdiction involved, and how the Courts are interpreting the laws in place. Consistent across the board appears to be the theme of "public safety" involving the regulation of marijuana use.

Some interesting questions/scenarios were posed:

- Would there be coverage for a business that offered on-site consumption, like "marijuana infused dinners?"
- Is there special immunity for cities that want to finance a growth business where other financing might not be available for that potential business?
- Is there coverage for any "diminished property value" that could result from a rental property that had been previously rented by a cultivator?

All we can say at this point is "stay tuned!" ■



Moderator Craig A. Aranoff of Aronoff Law

**Product liability issues?** Even when looking to what has developed in Colorado, two product liability case were filed, but settled without a trial. Rates are varied, and forms are manuscript. Conifer is an admitted carrier in this space in Colorado, although this is typically considered a space for Excess and Surplus carriers to consider, along with some wholesalers or MGA's.



# Michigan Voters Approved Recreational Marijuana: What Does that Mean for Michigan Businesses and Residents?

By Rodney Martin, Warner Norcross+Judd

*Editor's Note: Rodney D. Martin, of Warner Norcross+Judd was a panelist at January's program, presented jointly by our section and the marijuana Law Section. Rodney has prepared an introduction to the new marijuana law, in question and answer format, and we include it here with his permission.*

Michigan voters approved Proposal 1 enacting the Michigan Regulation and Taxation of Marijuana Act. Michigan is the first state in the Midwest to legalize recreational marijuana. Marijuana will be legal for broader use in Michigan under Michigan law; however, marijuana is still an illegal narcotic under federal law. Below are answers to important questions about marijuana under Michigan law after the passage of the Act.

## Q. Is marijuana now legal for all purposes in Michigan?

With the passage of Proposal 1, marijuana will be legal under Michigan law for both medical and recreational purposes. State law will limit the use, possession and cultivation of recreational marijuana and impose licensing requirements on businesses that want to enter the cannabis industry. In addition, as discussed below, local governments, employers, and property owners will be able to prohibit the use of marijuana in some circumstances.

Importantly, though, both medical and recreational marijuana remain illegal, with limited exceptions, under federal law. Proposal 1 only decriminalizes the recreational use and possession of marijuana under state law. Marijuana is regulated as a Schedule I substance under the Controlled Substances Act (21 U.S.C. § 811) — the same as cocaine and heroin. It is a violation of federal law to possess, grow, transport, distribute or prescribe cannabis, for medicinal or other purposes. The use of marijuana and conducting a marijuana business is illegal under federal law and such activity may be subject to federal prosecution. Persons and entities who engage in these activities are exposed to federal criminal, civil and administrative forfeiture actions.

The federal government does not need to pursue criminal prosecution for marijuana-related activities to seize, and seek the civil forfeiture of, real or personal property used to facilitate the sale of marijuana as well as the money or other proceeds resulting from those sales. Any assets used or money invested in marijuana-related activities is subject to potential seizure and forfeiture.

## Q. Does the change in Michigan law affect what the federal government can do regarding marijuana in Michigan?

No. In the past, the United States Department of Justice has exercised its discretion not to prosecute cases where the production, distribution or possession of marijuana complies with state law and certain priorities, such as prohibiting the sale of marijuana to minors, are met. Earlier this year, Attorney General Jeff Sessions stated that federal prosecutors will continue to use their discretion in enforcing federal law and will be guided by the Department of Justice's priorities, the seriousness of the crime, the deterrent effect of criminal prosecution, and the cumulative impact of violations on the community.

## Q. What is permitted under the new Michigan law?

The new law permits persons 21 years or older to possess, use, or, if licensed to do so, engage in the business of producing and selling marijuana in Michigan. Under the law, a person 21 years or older is permitted to possess up to 2.5 ounces of marijuana, except that not more than 15 grams may be in the form of a marijuana concentrate. In a person's residence, a person may store up to 10 ounces of marijuana, so long as any amount in excess of 2.5 ounces is stored in a locked container. Individuals are permitted to grow up to 12 plants for personal consumption. The new law also creates a state licensing system for businesses that grow and sell marijuana commercially.

## Q. When does the new Michigan law go into effect?

Under the Michigan Constitution, the new law takes effect 10 days after the official declaration of the results of the election. The commercial production and distribution of recreational marijuana will not become legal until the State of Michigan adopts regulations under the Act and licenses firms to engage in the recreational marijuana business.

**Q. May I prohibit the possession, use, or sale or marijuana on my property?**

Yes. The initiative allows a person to prohibit the consumption, cultivation, distribution, sale, or display of marijuana and marijuana accessories on property the person owns, occupies, or manages, except that a lease agreement may not prohibit a tenant from lawfully possessing and consuming marijuana by means other than smoking, such as edible marijuana products.

**Q. Must I allow my employees to possess marijuana at work? May I test employees for marijuana and fire those who test positive?**

The new state law does not require an employer to permit or accommodate marijuana at the workplace or on the employer's property. Employers may still use pre-employment drug tests and implement drug-free workplace policies, enforced through drug testing. Although employers may still maintain drug-free work policies, an employee who is terminated for using licensed medical marijuana may still be able to recover state unemployment benefits.

**Q. Will people be allowed to consume marijuana in public places under the new Michigan law?**

Marijuana must be consumed on private property or at a business zoned for marijuana use. Marijuana may not be consumed in a public place or on property where smoking marijuana is prohibited. Marijuana also may not be consumed on K-12 school grounds. Marijuana may not be consumed on federally-owned property.

**Q. Can a local government limit marijuana businesses?**

Yes. Municipalities, including cities, villages and townships, can ban recreational cannabis businesses and can cap the number of licenses. A municipality can charge an applicant up to \$5,000 in licensing fees. A municipality cannot ban the use of recreational marijuana.

**Q. The Act imposes a 10% excise tax on the sale of marijuana (plus 6% sales tax). Where will the tax proceeds go?**

Excise tax receipts go in the "marijuana regulation fund." Monies in the fund will be used to implement, administer and enforce the Act. In addition, for at least two years, the fund will provide \$20 million annually to certain clinical trials approved by the federal Food and Drug Administration. The remainder of the monies in the fund will be distributed 35% to K-12 education, 35% to the Michigan Transportation Fund for the repair and maintenance of roads and bridges, 15% to the cities, villages or townships that allow marijuana retailers

or marijuana microbusinesses in their communities, and 15% to counties where a marijuana retailer or marijuana microbusiness is located.

**Q. A lease cannot prohibit the possession of marijuana, but can a Michigan landlord restrict the use of marijuana?**

Yes and no. A Michigan landlord has the right under the Act to ban marijuana smoking on the property, but cannot prohibit the possession of marijuana or its consumption by means other than smoking. The commercial cultivation, distribution, processing and the sale of cannabis may be forbidden by a landlord.

**Q. What are the state law penalties for possessing marijuana in excess of the limits permitted under the new law?**

First and second violators are responsible for civil infractions and potential fines of not more than \$500 and \$1,000, plus marijuana forfeiture. A third violation renders a violator guilty of a misdemeanor with a possible fine of \$2,000, plus marijuana forfeiture.

**Q. Will marijuana be legal on college campuses?**

No. Students at Michigan colleges and universities that receive federal funds are not allowed to possess or use cannabis on campus. According to the Drug-Free Schools and Communities Act of 1989, any institution that receives federal funds must implement and enforce federal drug policies. Therefore, in order to continue receiving federal funds, even if a university wanted to amend its drug policy program to allow marijuana use, the university could lose funding. Currently, the University of Michigan and Michigan State University do not allow medical marijuana use under the Michigan Medical Marijuana Act.

**Q. What is required to engage in the business of growing, processing, distributing, or selling of recreational marijuana under the new law?**

Businesses that want to enter the recreational marijuana industry in Michigan must be licensed by the Michigan Department of Licensing and Regulatory Affairs. The Department of Licensing and Regulatory Affairs has up to 12 months from the effective date of the ballot initiative to develop rules to regulate recreational marijuana. In addition to obtaining a license from the State of Michigan, a business must receive approval from the local municipality in which the business desires to locate. The process is expected to be similar to the process the State of Michigan has adopted for medical marijuana, except that license applications will be reviewed by the

Department of Licensing and Regulatory Affairs rather than a separate licensing board. It is anticipated that this may speed the process of obtaining a recreational cannabis license.

**Q. How many plants can a commercial grower of recreational marijuana in Michigan have?**

The new law establishes three tiers of business licenses, scaled by the number of plants a license holder may cultivate:

- i. Class A business license allows up to 100 plants at one time;
- ii. Class B business license allows up to 500 plants at one time; and
- iii. Class C business license allows up to 2,000 plants at one time.

**Q. Must a person still apply for a medical marijuana card to buy marijuana?**

Yes, for now. The sale of recreational marijuana will not be permitted until after the state adopts regulations and issues licenses to businesses to engage in the recreational marijuana business. Once that occurs, patients could buy recreational marijuana without using their medical marijuana card. It is expected that obtaining a medical marijuana card will offer certain advantages to the holder when further regulations are implemented. Currently medical marijuana is subject to a 3% excise tax and 6% sales tax, while recreational marijuana would be subject to a 10% excise tax, plus 6% sales tax. Individuals 18 and older may apply for medical marijuana cards, but you must be 21 to purchase recreational marijuana under the new law.

**Q. May a person grow as many plants as they want for personal use?**

No. Under the new law, a person may cultivate up to 12 plants in his or her home. Plants must be grown in a secure, enclosed area, and may not be grown where visible from a public place.

**Q. May a person give marijuana to others under the new law?**

If the giver and the recipient are both over the age of 21, giving marijuana products as gifts is permitted under the Act. A person may not receive any payment for the gift and the gift may not contain more than 2.5 grams of marijuana.

**Q. May a gift of marijuana be sent through the mail?**

No. The U.S. Postal Service is an arm of the federal government, which still considers marijuana a controlled substance. Even if the package remains in Michigan, using the U.S. Postal Service would be illegal.

**Q. If a person was previously convicted of marijuana possession under Michigan law, will that past state conviction be expunged?**

No. The proposal is not retroactive. A previous conviction may not be expunged unless the person qualifies for expungement under existing state law. There is no expungement for federal convictions.

**Q. Can I drive after consuming marijuana?**

No. Similar to alcohol, it is illegal to operate a vehicle under the influence of marijuana. How police will enforce this is still uncertain, because there are no national standards to determine drugged driving. Additionally, tetrahydrocannabinol (THC), the active chemical ingredient in cannabis, remains in the body long after marijuana is ingested.

A 2013 Michigan Supreme Court case defined impaired driving under the influence of marijuana as having “a substantial and material effect on driving.” In that case, the individual was a medical marijuana patient. It is expected the same standard would apply to a recreational user. ■

***Author’s Disclaimer:** Warner routinely provides clients and contacts with our insights and updates concerning new laws. The following information is being shared for those who may be interested in or curious about an issue impacting businesses operating in the State of Michigan.*

*This alert is not intended to cover all aspects of Proposal 1, but instead highlights some of the more common questions and answers associated with the new law. If you have any questions, please contact your Warner attorney or contact Rodney Martin at [rmartin@wnj.com](mailto:rmartin@wnj.com) or Matt Johnson at [mjohnson@wnj.com](mailto:mjohnson@wnj.com).*

**SBM** | INSURANCE & INDEMNITY LAW SECTION**\$5,000 SCHOLARSHIP OPPORTUNITY**

Submissions due: Monday August 5, 2019  
Scholarship Awarded in September 2019

**Who is Eligible:**

Any student currently enrolled in one of Michigan's five law schools is eligible to apply for the Scholarship by submitting an *Article on the topic set forth below*;

**Award:**

The Scholarship is \$5,000 and awarded to one applicant only;

**Writing Topic:**

*"Michigan's Automobile No-Fault Insurance System"*

Consider, but don't be limited by, these subtopics. They are just suggestions:

- Public policy behind Michigan's No-Fault Insurance System;
- Legislative intent of the Michigan No-Fault System;
- Constitutionality of the Michigan No-Fault System;
- Alternatives to Michigan's current no-fault system;
- A comparison of Michigan's no-fault system to insurance systems in other states with or without a no-fault system;
- The economic impact of Michigan's no-fault system;
- The functionality of Michigan's no-fault system;

The writing topic is broadly stated to permit creative, thoughtful analysis of the issues relating to the current No-Fault insurance system in Michigan.

**Submission Details:**

Submit an article of original work, up to 2,500 words or 6-8 pages double – spaced, analyzing and advocating a position supported by appropriate legal authority, such as case law, statutes, legislative history, scholarly articles or other authoritative sources with proper citations.

**By August 5, 2019:**

Email your submission with a cover page containing your name, phone number, email address, Law School, anticipated year of graduation to [sbminsuranceindemnity@gmail.com](mailto:sbminsuranceindemnity@gmail.com).

Questions? email: [sbminsuranceindemnity@gmail.com](mailto:sbminsuranceindemnity@gmail.com)



## The Fifth Amendment Privilege Against Self-Incrimination and the Examination Under Oath in Property Insurance Policies

By Annie Earls, *Melamed, Dailey, Levitt & Milanowski, PC*

Property insurance policies typically provide an insurance company the right to conduct an Examination Under Oath (“EUO”). An EUO is a process by which a representative for the insurance company, usually a lawyer, compels an insured to appear before a court reporter, swear under oath, and answer questions. The questions presented during an EUO are typically wide-ranging and can be extremely invasive.

### The Insurer’s Contractual Right to Conduct an EUO

An insurance company can demand an EUO for any reason. It may demand an EUO when an insured is unable to document a loss, when an insured is accused of refusing to cooperate with an adjuster or representative of the insurance company, when it suspects a claim is fraudulent, or when an insured has submitted what the insurance company has determined is an incomplete proof of loss.<sup>1</sup> The purpose of the EUO, in theory, is to elicit the facts in order that the company may determine whether it will defend or adjust the claim.<sup>2</sup>

Michigan regards an EUO as a condition precedent to coverage.<sup>3</sup> Policy conditions requiring an insured to attend an EUO before the insured may bring an action on the policy are generally valid and enforceable.<sup>4</sup> Consequently, an insured’s willful refusal to submit to an EUO as part of a deliberate effort to withhold information or a pattern of noncooperation with the insurer, will almost always preclude the insured from maintaining an action on the policy.<sup>5</sup>

Because EUOs are conducted prior to litigation, neither the Michigan Rules of Evidence nor the Michigan Rules of Civil Procedure may be relied upon to determine the “rules of engagement” for an EUO. EUOs are a matter of contract, and the terms of that contract govern the EUO procedure.

### Does the Fifth Amendment Privilege Apply In An EUO?

It is not unusual for an insured, who is the subject of an EUO, to also be under suspicion by local authorities for a variety of crimes, such as, arson of an insured property, use of false pretenses with intent to defraud, or committing a fraudulent insurance act.<sup>6</sup> In theory, an insurance company’s investigation into a loss is separate from the police investigation, but it is more accurate to say they overlap. And, in fact, are fre-

quently conducted jointly between law enforcement agency and the property insurer.

Although an insurance contract is clearly a private matter between the parties to the contract, Michigan law requires insurance companies to provide information to law enforcement, upon request, and as otherwise required by law.<sup>7</sup> Consequently, an insured’s attorney is presented with a difficult dilemma; how to obtain insurance proceeds on behalf of the client, while not subjecting the client to criminal prosecution. This can prove to be complicated, and, at times, impossible to do.

Michigan recognizes the privilege against self-incrimination embodied by the Fifth Amendment of the United States Constitution. The privilege grants an individual the absolute right to decline to answer questions put to him in any proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.<sup>8</sup> The privilege may be invoked even if criminal proceedings have not been instituted or planned.<sup>9</sup> Because an EUO does not arise by virtue of the Constitution or by statute, but, rather, is a creature of the insurance contract, an insured’s invocation of the Fifth Amendment privilege at his or her EUO, may be construed as a refusal to cooperate and, thus, constitutes a basis for the insurance company to deny the insured’s claim.<sup>10</sup>

Michigan Courts have consistently and unforgivingly held that the pendency or possibility of criminal proceedings against an insured does not constitute proper cause for his or her refusal to attend an EUO.<sup>11</sup> Though an insured has a Fifth Amendment right to refuse to incriminate himself or herself at the EUO, the insured invokes that right at the peril of his or her claim.<sup>12</sup> Accordingly, an insured’s attorney should be wary before advising the insured to invoke the privilege at the EUO.

The insured can invoke the Fifth Amendment with regard to an EUO in one of two ways: (1) refuse to produce the insured for the EUO or (2) produce the insured, but refuse to answer certain specific questions that may incriminate the insured.<sup>13</sup>

### An Insured’s Refusal to Attend an EUO

An attorney should advise the insured to refuse to attend an EUO on Fifth Amendment grounds only with the unequivocal understanding that the insured’s claim will almost

certainly be denied. Moreover, the insured's attorney must understand that it will be extremely difficult to maintain a breach of contract action against the insurer where the insured willfully failed to appear at the EUO.<sup>14</sup>

The Michigan Court of Appeals, in *Allen v. Michigan Basic Property Insurance Company*,<sup>15</sup> addressed the consequences of an insured's willful failure to submit to an EUO on Fifth Amendment grounds. In *Allen*, the court held that the insured's failure to submit to an EUO and provide any documents requested under the claim of privilege constituted willful non-compliance, thereby precluding recovery under the policy. In support of its decision, the court reasoned that the "[insured] cannot avoid the policy requirements that she agreed to with defendant, which she herself triggered by filing her claim, by asserting her right not to be compelled to be a witness against herself."<sup>16</sup> Though the *Allen* court recognized the insured's right to refuse to comply with the insurer's requests on Fifth Amendment grounds, it very clearly cautioned that the insured did so at the peril of her claim.<sup>17</sup>

### The Insured Appears at the EUO, But Refuses to Answer Relevant Questions

Generally, the rationale above will apply whether the insured fails to appear for an EUO or appears but refuses to answer one or more of the questions. However, in the past, Michigan courts have treated this scenario a little differently in recognition of the rule of "substantial performance."<sup>18</sup> If the insured submits to an EUO, but is not entirely forthcoming, it must be determined whether the insured substantially performed under the contract.<sup>19</sup> A contract is substantially performed when all the essentials necessary to the full accomplishment of the purposes for which the thing contracted for has been substantially performed.<sup>20</sup>

With this standard in mind, Michigan courts have held that even where an insured invokes the Fifth Amendment privilege at the EUO, the insured's assertion of that right can survive summary disposition as long as the insured has substantially complied with the contractual duties under the policy.<sup>21</sup> The question of whether an insured has substantially performed under the contract hinges on the facts of the case and is for the jury to decide.<sup>22</sup>

Prior to invoking the privilege with regard to certain questions asked at the EUO, the insured's attorney should understand that such invocation often comes at a high price. This is because, in contrast to the criminal context, the finder of fact in a civil case may draw an adverse inference against the party or witness who declines to provide evidence based on the Fifth Amendment privilege. This is particularly true because it is the insured's burden to prove the condition precedent to coverage was met.<sup>23</sup>

### The Added Requirement of "Prejudice" in the Insurance Contract

The language in the controlling policy provision plays a critical role in a court's determination as to whether an insured's claim of privilege precludes recovery under the policy. Some property insurance policy provisions require an added element of "prejudice" to apply before the insurer can deny coverage under the policy for an insured's failure to cooperate.

In the Michigan Court of Appeals, unpublished decision, *Villarreal v IDS Property Casualty Insurance Co.*,<sup>24</sup> the court considered whether the insured's refusal to answer questions relating to her finances and events on the day of the fire until after her criminal proceeding was resolved, precluded coverage under the policy.<sup>25</sup> The court, unsurprisingly, determined that the insured's refusal to comply with the insurer's requests was evidence of the insured's willful non-compliance.<sup>26</sup> Notwithstanding the court's finding that the insured was willfully non-compliant because she deliberately withheld material information at her EUO, the insured was not precluded from recovering under the policy.<sup>27</sup>

The insured's willful non-compliance did not bar her claim, the court held, because the controlling policy provision provided that the insured's failure to comply with the policy's obligation to submit to an EUO, mandates denial of the claim only if that failure "is prejudicial to" the insurance company.<sup>28</sup> Therefore, in addition to determining if the insured was not compliant, the court was also required to consider whether the insured's willful non-compliance prejudiced the insurance carrier.<sup>29</sup> The court ultimately determined that because the insurance carrier failed to present evidence to support its claim of prejudice, it reversed the trial court's decision to grant summary disposition in favor of the insurer.<sup>30</sup>

The *Villarreal* decision is a prime example of why an insured's attorney must carefully examine and scrutinize the policy language in order to develop a full understanding of how the assertion of the Fifth Amendment right will be interpreted and applied under the policy. Often, if the attorney is not careful, these additional threshold requirements can be overlooked, as they are often hidden within common policy provisions. It is critical that the insured's attorney be fully advised as to the standard that must be met under the policy before the insurer may deny a claim on the basis of non-cooperation.

Although not a guaranteed cure, an insured's attorney would be well advised to speak with the insurance carrier's counsel in advance of the EUO. An agreement to limit the scope of the insured's examination may protect against a denial for failure to cooperate. Some defense counsel may agree simply to delay the EUO, in whole or in part, until any criminal issues are resolved. In addition, even if attempts to reach an agreement in this respect are futile, written evidence of the insured's attempts to comply will serve as the basis for a "substantial performance" argument.

## Conclusion

In summary, the Fifth Amendment privilege against self-incrimination generally will not excuse an insured from participating in an insurer's Examination Under Oath and should only be invoked when absolutely necessary to protect the insured from criminal prosecution. That is not to say, that in every situation, an insured's invocation of the Fifth Amendment privilege precludes recovery under the policy. To the contrary, where a claim of privilege is asserted and the insured can still prove he or she substantially complied with the duties under the policy, coverage may still be available. ■

## Endnotes

- 1 Curt A. Benson, Keeping Secrets: Privileges and the Examination Under Oath in Property Insurance Policies, 13 T.M. Cooley J. Prac. & Clinical L. 149, 151 (2010) citing Jeffery E. Thomas et al., 1-12 New Appleman Insurance Law Practice Guide 12 (LexisNexis 2007).
- 2 *Gordon v. St. Paul Fire & Marine Ins. Co.*, 197 Mich. 226, 230 (1917).
- 3 *Id.*
- 4 *Id.*
- 5 *Yeo v. State Farm Ins. Co.*, 219 Mich. App. 254, 257, 555 N.W.2d 893, 895 (1996).
- 6 Curt A. Benson, Keeping Secrets: Privileges and the Examination Under Oath in Property Insurance Policies, 13 T.M. Cooley J. Prac. & Clinical L. 149, 169 (2010).
- 7 MCL 29.4.
- 8 *Huntington Nat'l Bank v. Ristich*, 292 Mich.App. 376, 384; 808 NW2d 511 (2011).
- 9 *Id.*
- 10 *Thompson v State Farm Ins. Co.*, 232 Mich.App. 38, 592 NW2d 82 (1998).
- 11 *Allen v. Mich. Basic Prop Ins Co*, 249 Mich.App 66, 73-74; 640 NW2d 903 (2001).
- 12 *Id.*
- 13 Curt A. Benson, Keeping Secrets: Privileges and the Examination Under Oath in Property Insurance Policies, 13 T.M. Cooley J. Prac. & Clinical L. 149, 171 (2010).
- 14 *Id.*
- 15 *Allen*, 249 Mich. App. at 73-74.
- 16 *Id.* at 74.
- 17 *Id.* at 75.
- 18 See, *Villarreal v. IDS Prop. Cas. Ins. Co.*, No. 314891, 2014 WL 2218991, at \*2-3 (Mich. Ct. App. May 27, 2014); *Vertex Int'l Mgmt. Servs., L.L.C. v. State Farm Fire & Cas. Co.*, 120 F. Supp. 3d 658 (E.D. Mich. 2011).
- 19 *Gibson v Grp. Ins. Co.*, 369 N.W.2d 484, 486 (Mich. Ct. App. 1985).
- 20 *Id.*
- 21 *Id.*
- 22 *Id.*
- 23 *Allen*, 245 Mich.App. at 75. See also, MCL 500.2833.
- 24 *Villarreal v. IDS Prop. Cas. Ins. Co.*, No. 314891, 2014 WL 2218991, at \*2-3 (Mich. Ct. App. May 27, 2014).
- 25 *Id.* at \* 1.
- 26 *Id.* at \* 2.
- 27 *Id.* at \* 3.
- 28 *Id.*
- 29 *Id.*
- 30 *Id.*



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# Insurance Coverage Counsel

## Practice Attorney Spotlight

### Patrick D. Crandell

- Specializes in defending insurance coverage actions in both state and federal court
- Experienced in preparing coverage opinions and handling construction and contractual matters
- Author of "Legislative Update" published quarterly in *Insurance & Indemnity Law Journal*
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## Legislative Update: Back to the Beginning Again

By Patrick D. Crandell, *Collins, Einhorn, Farrell PC*

The 99<sup>th</sup> Legislature rested in December and the 100<sup>th</sup> Legislature now has gaveled into session. Democrats now hold the offices of Governor, Attorney General and Secretary of State, but the 110-member House and 38-member Senate still have Republican majorities.

As we now are in a new legislative session (January 2019 to December 2020) all bills from the last session expired and will need to be reintroduced. As I was writing my last column, the following bills still were in process – meaning, the Legislature had passed them but the Governor had not yet decided whether to sign them:

- **Insurer's Gifts to Customers** - HB 5609 raises the value of gifts that insurers can give to customers from \$10 to \$50 per calendar year. *Reported out of the House Insurance Committee on 3/1/18; Passed the House (107-2) on 3/13/18; Passed the Senate (38-0) on 12/18/18; Signed by the Governor on 12/17/18 (PA 542'18)*
- **Health Benefit Agency** - HB 6432 modifies the Health Benefit Agency Act to permit only "health benefit agents" (defined as a licensed insurance agent) to sell health benefits on behalf of a health benefit corporation (previously, employees of the health benefit corporation could sell benefits under certain circumstances). *Introduced on 10/4/18; Passed the House (107-1) on 12/4/18; Passed the Senate (38-0) on 12/12/18; Signed by the Governor on 12/19/18 (PA 430'18)*
- **Tort Liability for Property Damage** - HB 6484 amends the Insurance Code to create tort liability for property damage arising from a motor vehicle accident, but only when the damage exceeds the limit specified in Section 3121 (currently \$1 million) for which liability insurance required by federal statute or regulation is in effect; the exception is limited to the amount of applicable limits or \$4 million, whichever is less. *Introduced on 11/8/18; Passed the House (109-0) on 12/6/18; Passed the Senate (38-0) on 12/20/18; Signed by the Governor on 12/28/18 (PA 677'18)*
- **Data Security Requirements** - HB 6491 amends the Insurance Code by adding Chapter 5(A) (Data Security), which enacts new data security requirements for licensees that handle sensitive information. *Introduced on 11/8/18; Passed*

*the House (103-6) on 12/6/18; Passed the Senate (38-0) on 12/19/18; Signed by the Governor on 12/28/18 (PA 690'18)*

- **Insurer's Annual Disclosure** - HB 6520 creates a new chapter in the Insurance Code requiring all Michigan-domiciled insurers to annually write and submit a Corporate Governance Annual Disclosure – the Legislature incorporated the Corporate Governance Annual Disclosure Model Act from the National Association of Insurance Commissioners. *Introduced on 11/28/18; Passed the House (107-2) on 12/6/18; Passed the Senate (38-0) on 12/19/18; Signed by the Governor on 12/27/18 (PA 520'18)*
- **Auto Club Contracts** - SB 985 exempts an "automobile club contract" from the Michigan Insurance Code. *Reported out of the Senate Insurance Committee on 6/7/18; Passed the Senate (38-0) on 11/29/18; Passed the House (65-42) on 12/21/18; Vetoed by the Governor on 12/27/18*
- **Ambulance Transport for Police Dogs** - SB 1234 amends the Public Health Code to permit an ambulance to transport a police dog, injured in the line of duty, to a veterinary or similar clinic, as long as no individuals required transport at that time. *Introduced on 11/28/18; Passed the Senate (36-0) on 12/6/18; Passed the House (104-0) on 12/21/18; Signed by the Governor on 12/28/18 (PA 600'18)*

### New Legislature

And now, on to the new Legislature, which already is busy with 385 bill introductions in the House and 226 in the Senate. Committee structure is subject to change each new session, and this time we'll be monitoring three committees – two in the House (Insurance; Select Committee on Reducing Car Insurance Rates) and one in the Senate (Insurance and Banking). The Legislature has referred a number of insurance-related bills to these committees:

- **No-Fault Amendments** - HB 4024 amends the No-Fault Act in a number of ways, including permitting auto insurance policies with different levels of PIP limits, limiting physician reimbursement to the Worker's Compensation fee schedules and requiring insurers to charge premiums that reflect the anticipated savings from the other modifications

- **Felony and Licensing** - HB 4044 limits the effect of a felony on an insurance producer's licensing (only felonies involving dishonesty or breach of trust would impact a producer's license)
- **Worker Compensation Act**- HB 4063 amends the Workers Compensation Act to extend the presumption of causation for certain illnesses to part-time, paid-on-call and volunteer firefighters
- **HB 4079** – eliminates file and use for home and automobile insurance rates
- **MCCA Five-Year Audits** - HB 4080 requires an audit of the Michigan Catastrophic Claims Association (MCCA) every 5 years and requires the refund of all surplus premium collected
- **MCCA Annual Audit** - HB 4111 requires an annual audit of the MCCA
- **Potholes and Premium Hikes** - HB 4167 prohibits auto insurance premium increases based on a claim for damage due to potholes
- **New Fraud Authority** - HB 4202 creates the Michigan Automobile Insurance Fraud Authority and provides for its funding, authority and operations
- **FOIA applies to MCCA** - HB 4210 makes the MCCA subject to FOIA and requires the MCCA to publicly disclose its premium calculations
- **PIP Levels of Coverage** - HB 4211 permits auto insurance policies with different levels of PIP limits
- **Prescription Refills** - HB 4293 prohibits a health insurer from denying a request for 90-day prescription drug refill because the request is at the end of the calendar year, as long as insured has at least 90 days of insurance coverage remaining
- **Cranial Hair Coverage** - HB 4343 and HB 4344 require Medicaid to provide coverage for a cranial hair prosthesis if the person is under 19 years old and if the hair loss is due to treatment of a medical condition
- **Life Insurance and Suicide** - HB 4350 requires life insurance policies to provide coverage for reasonable burial expenses if the insured commits suicide
- **Intent Language in No-Fault** -SB 1 contains intent language in a shell bill for use in future No-Fault Act changes
- **MCCA Disclosure** - SB 4 requires the MCCA to publicly disclose its actuarial calculations used in setting rates
- **Insurance Fraud Authority** - SB 5 creates the Michigan Automobile Insurance Fraud Authority and provides for its funding, authority and operations
- **Insurance Verification** - SB 7-9– creates the vehicle insurance verification act, to provide for electronic vehicle insurance verification; allows for license suspension or revocation; modifies the requirements that insurers notify the Secretary of State regarding issuance and cancellation of policies
- **MCCA Excessive Premium Refund** - SB 11 requires the MCCA to refund excess collected premium
- **Premium Calculation Factors** - SB 88 limits the factors and weight that insurers can use when calculating auto insurance premiums
- **Disclosure of Private Policies** - SB 172 modifies the requirements for insurers to provide privacy policies to customers ■



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## *Strauss v Kantola*, and the Necessary Joinder Rule – the *Catch 22* Regarding Underinsured Motorist Benefits

By Kevin Yaldoo, *Hakim, Toma & Yaldoo, PC*

April marks the one-year anniversary of *Strauss v Kantola*,<sup>1</sup> an unpublished decision of the Michigan Court of Appeals that may alter the language used in insurance policies providing underinsured motorist benefits, where the clause conflicts with MCR 2.205's necessary joinder requirement.

Underinsured motorist coverage is currently provided to consumers by a majority of insurance companies. Underinsured motorist coverage is not required by statute and is governed purely by the terms of the contract.<sup>2</sup> The language of an insurance contract is read as a whole and construed to give effect to every word, clause and phrase.<sup>3</sup> Unless it is ambiguous, a contractual provision must be enforced "as written unless the provision would violate law or public policy."<sup>4</sup> The Michigan Supreme Court has held that "determination of Michigan's public policy is not merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law. In ascertaining the parameters of our public policy, we must look to policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law."<sup>5</sup>

In *Strauss*, the plaintiff was injured in a December 17, 2015 motor vehicle accident. On November 4, 2016, the plaintiff filed suit against the tortfeasor for damages based on negligence, and her own insurer, Farm Bureau General Insurance Company of Michigan, seeking underinsured motorist benefits. On January 17, 2017, Farm Bureau filed its motion for summary disposition claiming that the plaintiff was prohibited from filing suit for underinsured motorist benefits until the limits of the tortfeasor's policy were exhausted. In support, Farm Bureau cited the language in its policy which states:

7. b. Coverage under this endorsement shall be void if:

(1) an Insured agrees to settle a bodily injury claim without our permission[.]

\* \* \*

c. The following shall not occur until after the limits of liability under all other liability bonds or policies that apply at the time of the accident

have been exhausted by payment of judgments or settlements:

(1) No action by way of suit shall be brought against us[.]

The plaintiff argued that the two provisions upon which Farm Bureau relied when read together created ambiguity because subparagraph (b)(1) suggests that a plaintiff must include its insurer in litigation and subparagraph (c)(1) prohibits a plaintiff from bringing suit against the insurer until all other policy limits have been exhausted.<sup>6</sup> The trial court agreed with the plaintiff's argument and denied Farm Bureau's motion.

On appeal the court reviewed the language in question and held that the two subparagraphs do not irreconcilably conflict "because the plaintiff can comply with both provisions to maintain coverage."<sup>7</sup> The court found that while the policy language at issue may require a plaintiff to litigate the issue of liability and damages twice, "a mere judicial assessment of 'reasonableness' is an invalid basis upon which to refuse to enforce contractual provisions."<sup>8</sup> Interestingly, the Court of Appeals made no mention of MCR 2.205(a) (Necessary Joinder of Parties) in its opinion.

In the context of claims for underinsured motorist benefits, insurers commonly require that the insured seek the insurer's permission to settle a bodily injury claim. This requirement of consent is intended to protect the insurer's subrogation interests against the tortfeasor for any amounts the insurer pays in excess of the tortfeasor's bodily injury policy limits. This provision only becomes problematic when coupled with the second provision addressed in *Strauss*.

### Policy's barring of suit versus necessary joinder

The policy language in *Strauss* barred the filing of suit against the insurer for underinsured benefits until all other policies have been exhausted by payment of judgment or settlement creates a significant hurdle for plaintiffs. This language differs from other underinsured motorist benefits policies because the language in most other policies addresses the payment of underinsured motorist benefits rather than the filing of suit.<sup>9</sup> The *Strauss* court relied upon this restrictive language in granting summary disposition. However, the interests of the

insurer, as provider of underinsured motorist benefits, are so intertwined with those of both the plaintiff and the tortfeasor that their insurer's presence as a party in the cause of action is seemingly necessary. As such, the policy in *Strauss* should have been analyzed with consideration of MCR 2.205(a).

MCR 2.205 addresses necessary joinder of parties. More specifically, MCR 2.205(a) provides:

“.....persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interests.”<sup>10</sup>

Looking at the language of the court rule in the context of underinsured motorist benefits, an insurer's presence in the action is necessary because the insurer requires that the insured seek consent before entering settlement with the tortfeasor for the limits of the tortfeasor's bodily injury policy. Without joinder of all the parties, the presiding court cannot effectively engage the parties in pretrial conferences.<sup>11</sup>

### Settlement conferences and the absent insurer

Furthermore, enforcing a provision in an underinsured motorist policy requires consent to settle and bars the filing of suit until all other policies have been exhausted via payment of settlement or judgments. This puts the plaintiff in a precarious position in light of MCR 2.401(G) which requires that the parties' attorneys or other representatives attend a scheduled conference to “have information and authority adequate for responsible and effective participation in the conference for all purposes, including settlement.”<sup>12</sup> The court rule further provides the court with authority to dismiss the action should a party fail to attend such conference or lack such authority as required in the rule.

Because a plaintiff is precluded from settlement without consent from the insurer providing underinsured motorist benefits, the presence of the insurer is necessary to facilitate effective participation in the conference. Without the inclusion of the insurer in the action, and as such making it a party required to attend the conference, the plaintiff runs the risk of (a) waiving the insured's right to underinsured motorist benefits if the insured “effectively participates” in settlement discussion and resolve the claim, or (b) having the matter dismissed by the court because of the insured's inability to “effectively participate” in settlement discussion because of the requirement of consent to settle. Thus, the *Strauss* court's conclusion that “nothing requires that Farm Bureau be a party to the litigation”<sup>13</sup> to give plaintiff permission to settle is misleading, because the insurer is necessary or the plaintiff becomes a lame duck party as they have no authority.

### Case evaluation acceptance and the absent insurer

Additionally, the insurer's presence is necessary for case evaluation to be effective. Because the insurer's consent to settle is required, a plaintiff cannot effectively engage in case evaluation without a direct line of communication with their insurer's underinsured motorist benefits adjuster. Rather, the insured is faced with one of three options. First, the insured can reject the case evaluation award because the consent of the insurer is required; this option exposes the insured to potential case evaluation sanctions. Second, in the alternative, the insured can accept the award, and if there is mutual acceptance the case is settled, which in effect will waive the insured's right to underinsured motorist benefits because the insured settled the case without the insurer's consent.<sup>14</sup> Or, third, the insured can request that the case evaluation award be non-unanimous, but that in effect renders case evaluation a mere formality. All three scenarios reflect the need that the insurer be a party in litigation from that outset rather than after all other bodily injury policies have been exhausted (as the policy in *Strauss* requires).

While the *Strauss* court relied on strict interpretation of the policy language in dismissing the plaintiff's insurer, the issue of necessary joinder in the context of a party with subrogation interests, like the defendant providing underinsured motorist benefits in *Strauss*, is not a case of first impression. In *Gordon Food Service, Inc v Grand Rapids Material Handling Company*<sup>15</sup>, the plaintiff, who sustained significant damage when food storage racks in its warehouse collapsed filed a claim for property damage with its insurer, who adjusted and paid the claim. The plaintiff then filed suit against the company that constructed the storage racks seeking compensation for property damage and interruption of business. In finding that joinder of the plaintiff's insurer was necessary, the court held that:

Both insured and insurer are real parties in interest as to that which they own under the substantive law. Therefore, either may bring an action in his own right, but the defendant is protected against a multiplicity of actions by the rule governing required joinder of parties. That is, if either the insured or insurer brings an action against a defendant without joining the other, the defendant may protect himself by moving to have both plaintiffs joined as necessary parties under *MCR 2.205(A)*. Both are persons having such interest in the subject matter that their presence is essential to permit the court to render complete relief.<sup>16</sup>

Looking at the ruling in *Gordon* in the context of underinsured motorist benefits, the joinder of the defendant insurer in *Strauss* was necessary pursuant to MCR 2.205(A). The defendant insurer was a real party at interest as it had a subrogation

interests to the extent of any payment of underinsured motorist benefits to the plaintiff. In addition, if the insurer paid any amounts related to underinsured motorist benefits, the insurer could then bring its own action against the tortfeasor seeking the amount of benefits paid (similar to the situation in *Gordon*). Further, while the *Gordon* court found that the defendant may protect itself by moving to have both parties joined, MCR 2.205(A) is far more concise in that joinder is not optional, but mandatory. Specifically, the court rule requires that persons having such interest where the presence is necessary to render complete relief must be made parties and aligned as plaintiffs or defendants in accordance with their respective interest.<sup>17</sup> Thus, based on the language in the court rule, both the insurer in *Gordon* as well as the insurer in *Strauss* were required to be joined as parties in their respective actions because they were both real parties at interest and their inclusion was necessary to permit the court to grant complete relief.

Additionally, while the court in *Strauss* cites *Dawson v Farm Bureau*<sup>18</sup>, a published decision which addressed a similar policy providing underinsured motorist benefits, *Dawson* is distinguishable. In *Dawson*, the tortfeasor's policy limits were \$20,000.00 and the plaintiff had a policy of insurance providing \$100,000.00 underinsured motorist benefits.<sup>19</sup> The tortfeasor offered to settle the matter for an amount equal to the tortfeasor's bodily injury policy limit but the plaintiff's insurer refused to consent to settlement and the matter went to trial.<sup>20</sup> The trial consisted of minimal testimony and the tortfeasor stipulated to the amount of damages (\$100,000.00) the plaintiff sought. The trial court then entered an award in plaintiff's favor of \$100,000.00.<sup>21</sup>

Following the trial court's award, the plaintiff filed an action against defendant Farm Bureau seeking \$80,000.00, the difference between the trial court award and the tortfeasor's policy limit. The trial court then granted summary disposition based upon the plaintiff's claim that defendant was collaterally estopped from denying underinsured motorist benefits. On appeal, the court found the policy language was unambiguous and that the plaintiff could not hold the defendant liable for any prior judgment without defendant's express consent.<sup>22</sup> Interestingly, the *Dawson* court briefly cited the defendant's policy provision barring suit for underinsured motorist benefits until all other payments or judgments have been exhausted.<sup>23</sup> However, like the *Strauss* decision, there is no mention of MCR 2.205(A) and it seems unlikely that this provision was ever evaluated in light of the court rule regarding necessary joinder.

In *Strauss*, the court found that the language in the policy provisions providing underinsured motorist benefits "may create an unreasonable outcome where a plaintiff is forced to litigate twice the issues of liability and damages, 'a mere judicial assessment of 'reasonableness' is an invalid basis upon which to refuse to enforce contractual provisions."<sup>24</sup> However, the *Strauss* court failed to recognize the unique relationship be-

tween the parties in an underinsured action where their interests are so intertwined that the presence of the insured, their insurer, and the tortfeasor is necessary so that a settlement may not be entered regarding the underlying claim against the tortfeasor without the consent of the insurer. The language in *Strauss* regarding the possibility of litigating the same issues twice is exactly the type of situation that MCR 2.205(A) was adopted to address.

Interestingly, the Court of Appeals in *Strauss* never addressed the issue of bifurcation rather than dismissal. The court could have ordered separate trials, holding the trial against the tortfeasor first, and then, if the verdict in the first trial exceeded the tortfeasor's policy limits, requiring a second trial against the insurer. This approach would probably be more pragmatic than the path chosen in *Strauss* as the insurer is still a party to all aspects of litigation which would allow the insurer to effectively participate in all facets of litigation leading to trial.

## Summary

The language of MCR 2.205 in fact is in direct contrast to the *Strauss* court's opinion; if a party has such interest in the subject matter of an action that their presence is required to allow the court to render complete relief, they must be made a party to the action. While the interest in enforcing contracts is of great significance, the requirement that the courts protect public policy, which includes rules of procedure,<sup>25</sup> is paramount. Unfortunately, the *Strauss* court did not address the court rule, leaving practitioners in somewhat of a *Catch 22* when dealing with underinsured motorist provisions like that in *Strauss*. ■

## About the Author

**Kevin Yaldoo** is a partner at *Hakim, Toma & Yaldoo, PC*. He focuses his practice on representing people throughout Michigan who have been injured in automobile accidents, premises liability, and other personal injury claims. He has extensive experience in handling No-Fault claims, uninsured and underinsured motorist claims, automobile negligence claims, and general negligence claims. Kevin is a graduate of the University of Michigan and Case Western Reserve University's School of Law. His email address is [kyaldoo@hakimlaw.com](mailto:kyaldoo@hakimlaw.com).

## Endnotes

- 1 *Strauss v Kantola*, unpublished per curiam opinion of the Court of Appeals, issued April 10, 2018 (Docket No. 337812)
- 2 *Andreson v Progressive Marathon Ins Co*, 322 Mich App 76; 910 NW 2d 691 (2017)
- 3 *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 467; 663 NW2d 447 (2003)
- 4 *Rory, v Continental Ins Co*, 473 Mich 457, 470; 703 NW2d 23 (2005).

- 5 *Id.* at 471
- 6 *Strauss*, unpublished per curiam at P.2
- 7 *Id.* at P.4
- 8 *Id.* at P.5, citing *Rory* 473 Mich at 470.
- 9 For examples of insurers with policy language specifically addressing the payment of underinsured motorist benefits, see Allstate, Citizens (Hanover), State Farm, Westfield, Liberty Mutual, and Progressive
- 10 MCR 2.205(a).
- 11 See MCR 2.2401(C)(1) at a conference the court and the attorneys for the parties may consider any matters that will **facilitate fair and expeditious disposition of the action**, including.....
- (g) **the possibility of settlement**
- 12 MCR 2.401(G)
- 13 *Strauss*, unpublished per curiam at P.4
- 14 See *Craig v Larson*, unpublished per curiam opinion of the Court of Appeals, issued October 17, 2013 (Docket No. 311467 & 313333) finding that the mutual acceptance of a case evaluation award was a settlement under the language of the policy, and that plaintiff's failure to obtain defendant's consent prior to accepting that case evaluation award triggered a policy exclusion that barred any recovery by plaintiff
- 15 *Gordon Food Service, Inc v Grand Rapids Material Handling Company*, 183 Mich App 241; 454 NW2d 137 (1989)
- 16 *Id.* at 243-244
- 17 MCR 2.205(A).
- 18 *Dawson v Farm Bureau*, 293 Mich App 563; 810 NW2d 106 (2011)
- 19 *Id.* at 565-566
- 20 *Id.*
- 21 *Id.* at 566
- 22 *Id.* at 569
- 23 *Id.*
- 24 *Strauss*, unpublished per curiam at p.4, citing *Rory*, 473 Mich at 470.
- 25 See MCLS Const Art. VI §5 empowers the Supreme Court with the authority to promulgate rules of procedure; See also *McDougall v Schanz*, 461 Mich 15, 26; 597 NW2d 148 (1999)



## Selected Insurance Decisions

By Deborah A. Hebert, *Collins, Einhorn, Farrell PC*  
Amy Felder, *Atain Insurance Companies*

### Michigan Court of Appeals – Unpublished Decisions

Remand to determine whether insured is entitled to full roof replacement under ordinance and law coverage

*Murad Management, Inc. v  
Hastings Mutual Insurance Company*  
Docket No. 339206  
Released December 18, 2018

Insured discovered a roof leak in its building due to a broken water pipe and submitted a claim to insurer, who agreed to pay for the interior water damage. The insurer denied coverage for the roof damage based on several exclusions, including that the damage was due to “wear and tear”; “rust, or other corrosion, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself;” or “continuous or repeated seepage or leakage of water, or the presence or condensation of humidity, moisture or vapor, that occurs over a period of 14 days or more.” Despite the denial, the insured proceeded to replace the entire roof, all of the

trusses, and the roof-top air conditioning unit, and then sued defendant for breach of contract and demanded an appraisal.

The trial court granted summary judgment to the insurer finding that the roof damage fell within the “exclusion for deterioration and continuous or repeated seepage or leakage of water.” The trial court also found there was no evidence of a “collapse,” which the insured argued in the alternative.

The Court of Appeals found the insured was entitled to appraisal in light of the insurer's admission of liability for interior water damage and that the trial court erred by granting summary disposition as to the roof damage because there were conflicting expert reports. The Court of Appeals also noted that the trial court failed to address whether replacement of the undamaged portion of the roof fell within the Ordinance or Law coverage in the policy and that on remand, the trial court should determine whether a genuine issue of material fact exists concerning whether the insured is entitled to coverage for the full roof replacement under the terms of that coverage.

The Court of Appeals found the insured was entitled to appraisal in light of the insurer's admission of liability for interior water damage and that the trial court erred by granting summary disposition as to the roof damage because there were conflicting expert reports.

Summary disposition for insurer because home was not "residence premises"

*Kwan Yee, et al. v Memberselect Insurance Company, et al.*

Docket No. 341218

Released January 24, 2019

Plaintiffs owned a home in Milford, but moved in with their daughter in Novi in May 2012. In April 2015, plaintiffs were notified about a possible leak at the Milford home, and discovered widespread flooding. The leaks were caused by frozen and burst pipes and/or fittings, possibly due to corrosion. Defendant denied plaintiffs' property damage claim because the home was not their "residence premises" as required under the policy.

Plaintiffs never notified defendant of the change in occupancy, which substantially increased the potential for a loss. The trial court granted defendant's early motion for summary disposition because plaintiffs' failure to notify defendant of the change in occupancy violated a policy requirement and resulted in the loss of coverage. The Court of Appeals affirmed, concluding that further discovery would not likely to support a contrary ruling.

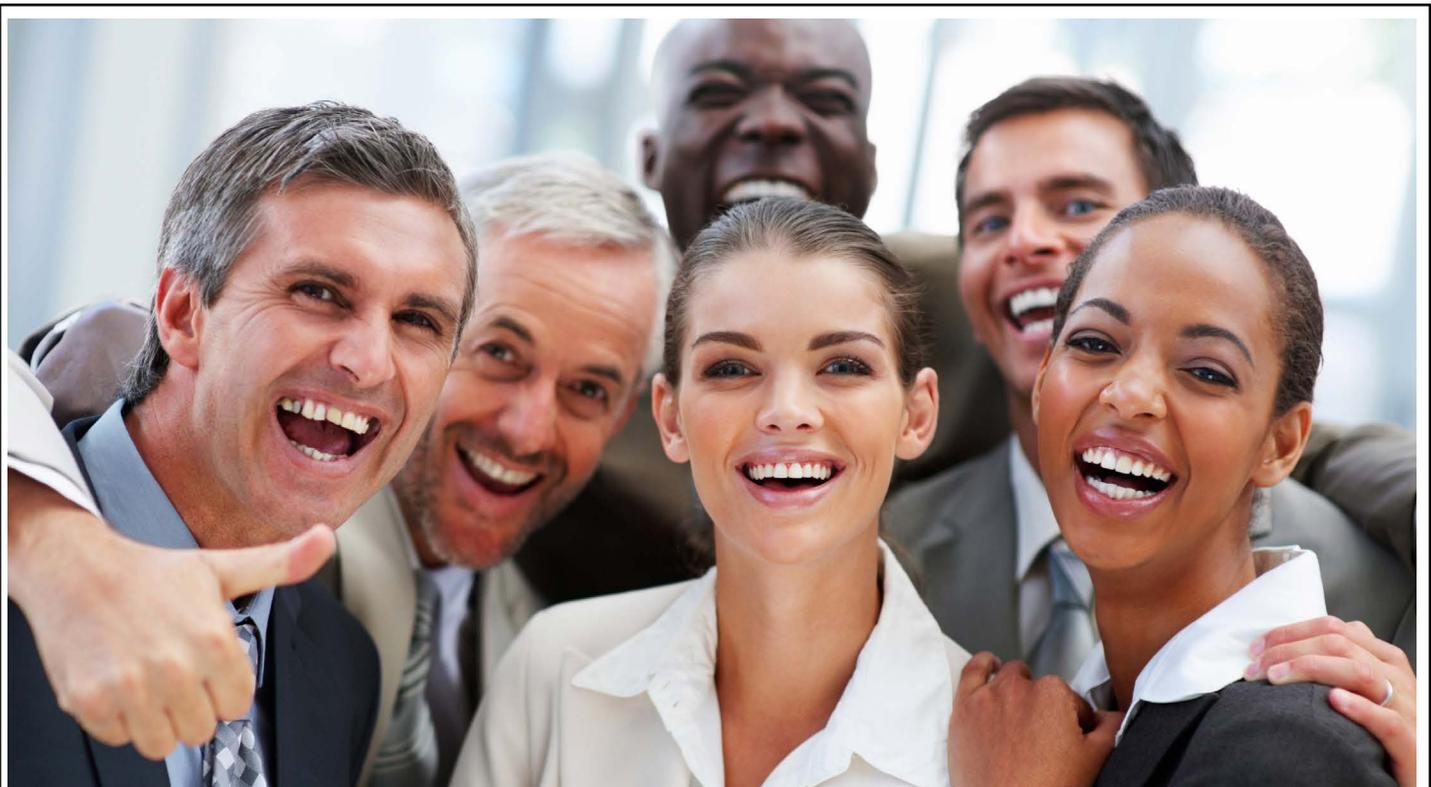
"Claims made and reported" coverage does not require report of earlier non-covered claims

*Illinois National Insurance Co v AlixPartners, LLP*

Docket No. 337564

Released February 26, 2019

After paying over \$18,000,000 to satisfy an arbitration award against its insured, plaintiff insurer determined that the claim wasn't covered under any of the three professional policies issued and, pursuant to its reservation of rights, sued to recover the sum paid. This opinion focuses on the "claims first made and reported" language in these policies, limiting coverage to claims that were both made and reported during a policy period or an extended reporting period.



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Both the trial court and the Court of Appeals agreed that the insurer was wrongly conflating earlier claims for an abatement of management fees (a non-covered claim) with the subsequent arbitration claim for damages caused by the insured's failure to exercise due diligence in recommending the purchase of a company that fell far short of meeting profitability projections (a covered claim). The insured had no obligation to report non-covered claims. When confronted with a covered claim, the insured reported that claim within the policy period covering that claim.

UM policy limits applied to an accident involving two different collisions

*Estate of Gomez v Farm Bureau General Insurance Company*  
Docket No. 341812  
Released March 19, 2019  
Motion for Rehearing pending

Plaintiffs were injured when the vehicle they were occupying was struck first by an uninsured vehicle and then by a second vehicle with liability coverage of \$100/300,000. Those policy limits were tendered. Plaintiff's own vehicle was insured with Farm Bureau under a policy that included UM coverage in the same amount as the liability policy. Farm Bureau moved for summary disposition on the lack of any UM coverage under its policy because the limits of UM coverage were to be reduced "by any amounts paid or payable for the same bodily injury . . . by or on behalf of any person . . . who may be legally liable for the bodily injury." The Court of Appeals found a question of fact about whether the injuries attributable to each collision were divisible. If so, plaintiffs could have a claim for UM coverage for injuries caused by the first collision and not by the second. The case was remanded for further proceedings.

Claims of defective construction are not covered

*Skanska USA Building v  
M.A.P. Mechanical Contractors and Amerisure*  
Docket No. 340871  
Released March 19, 2019

Relying on *Hawkeye-Security Ins Co v Vector Construction Co*, 185 Mich App 369 (1990) and its progeny, the Court of Appeals concluded that Amerisure had no duty to defend or indemnify a property owner's claim against the additional insured construction manager and the named insured subcontractor for the cost of repairing damage caused by either insured's work. Amerisure produced evidence "that all of the repair and replacement work was within the scope of plaintiff's original project" and plaintiff failed to produce any contrary evidence.

Unpublished Federal District Court Decisions

UM coverage for injuries caused by insured vehicle operated by non-permissive driver

*Sylvester v FCCI Insurance Company*  
E.D. Case No. 18-cv-10464  
Released January 24, 2019

Plaintiff was working on a construction site when he observed a thief stealing the work truck provided by his employer. Plaintiff attempted to stop the thief by jumping on the running board and reaching into the driver's side window to grab the keys. He fell off the running board and was injured when the truck ran over him. FCCI insured the truck. Because the truck was being operated by a non-permissive user, there was no owner liability for the accident and no coverage for the driver. Plaintiff therefore made a claim for UM benefits as an occupant of the covered vehicle. FCCI denied the claim because (1) the injuries did not arise out of an accident, (2) plaintiff was not an occupant of the covered vehicle, and (3) the vehicle that injured him was not an uninsured vehicle. The trial court rejected all three positions, finding instead that: (1) the incident was an accident from the standpoint of the insured because the injury was neither intended nor expected, (2) plaintiff was "occupying" the vehicle because that term is defined in the policy to include "getting in, out, or off" the insured vehicle, and (3) the vehicle was uninsured for this particular accident because of the exclusion of coverage for non-permissive drivers.

Genuine issues of material fact preclude summary judgment on claim for burst frozen pipes

*Tamika Keathley v Grange Insurance Company of Michigan*  
E.D. Case No. 15-cv-11888  
Released February 4, 2019  
Appeal pending

Insured sustained damage to her home as a result of burst frozen pipes. While there was no dispute that the policy covered a loss caused by frozen/burst pipes, defendant insurer did dispute 1) the timeliness of the notice of loss, 2) the property allegedly damaged, and 3) coverage for the mold condition allegedly known at the time coverage was bound. The main dispute was whether the insurer suffered material prejudice as a result of the plaintiff's delay in providing notice. The loss occurred sometime between January 28 and February 4, 2014, but plaintiff did not file a claim until April 4, 2014, after significant remediation and repair work had been completed. She submitted a claim for \$132,000 with no invoices, receipts or documented proof of payment. Defendant denied the claim after it was unable to determine the true date of loss, the true extent of damage, and the actual repairs made. The court found that the insurer did suffer significant prejudice as a result of the delayed notice and was entitled to summary judgment.



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