

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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If you have an article idea for the Journal, please contact the editor, Christine Caswell at christine@caswellpllc.com



Spring Has Sprung in Michigan!

Ann-Marie E. Earls

Melamed, Levitt, Milanowski & Earls, P.C.

Spring has officially arrived here in Michigan, bringing longer days and warmer weather. As we shake off the winter chill, there is unmistakable energy in the air, and we are excited for what lies ahead this season.

While the weather has just started to turn, the Insurance & Indemnity Law Section has been busy laying the groundwork for a productive and engaging year. On January 30, 2025, we kicked off the year with our first business meeting and mixer at DraftKings Sports & Social in Troy. We were thrilled with the great turnout and enjoyed an evening filled with camaraderie, trivia, delicious food, and lively conversation. It was a fantastic way to reconnect and set the tone for the year ahead.

Coming Up Next – April Meeting & Joint Program

Looking ahead, we're excited to announce our next business meeting and educational program, scheduled for **April 24, 2025 at The Iroquois Club, located at 43248 North Woodward Avenue, Bloomfield Hills.**

Following our business meeting, we will be partnering with the Alternative Dispute Resolution Section to present an educational program focused on **ADR during both pre-litigation and litigation stages.** The program will feature two engaging panels: one comprised of experienced attorneys and mediators—including Donn Fresard, Marcy Tayler, and Suzanne Stanzyk—and another featuring esteemed Judges Edward Ewell and Patricia Fresard. Each panel will present for approximately 30 to 40 minutes, sharing valuable insights and practical strategies.

As always, attendees will enjoy great food and beverages while connecting with colleagues and gaining fresh perspectives on the topic of ADR. Details for our upcoming events can be found on our Facebook, Instagram, LinkedIn and SBM Connect pages.

Exciting Changes to Our Student Scholarship Program

Our Scholarship Committee has also been hard at work refreshing the format of our annual law school scholarship competition. This year, in an effort to generate more interest and encourage broader participation, we will provide law students with multiple topics to choose from, instead of the traditional single-topic format. We think this will help spark more interest and give students the flexibility to pick a subject they're most passionate about. The final list of topics will be locked in at our April business meeting, so stay tuned!

Also new this year—we're shifting the submission deadline to early to mid-October (instead of late winter/early spring), giving students more time to research and prepare their submissions over the summer and into the fall semester. We'll vote on the winner of the \$5,000 scholarship right before our October annual meeting.

We're excited to see what fresh perspectives and ideas this new format will inspire.

Great Lakes Legal Conference

Our Section will be sending council members to attend the Great Lakes Legal Conference (GLLC) at the Grand Hotel on Mackinac Island on June 13-14, 2025. This event is organized by the State Bar of Michigan and the Institute of Continuing Legal Education to provide an opportunity to learn, collaborate and network with leaders of other sections, bar associations, and local and special purpose bar associations.

Journal

Our Section's well-regarded quarterly *The Journal of Insurance and Indemnity Law* features articles, case updates, analyses and opinions of interest pertaining to insurance and indemnity law. We encourage all of our readers to be 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, if you ever have any questions, comments or concerns about our Section, or just want to chat, please reach out to me at annieearls@mlmepc.com.



The Coinsurance Clause in Property Insurance Policies

By Rabih Hamawi, CPCU®, CIC, CRM, LIC, MSF

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Earlier this year, an attorney referred to me a case involving fire damage to a restaurant after the referring attorney couldn't get the claim paid without litigation. The fire had destroyed the building and business personal property of the referring attorney's client. After receiving and reviewing the entire file that the referring attorney sent me, including some of the emails between the referring attorney and the insurer's adjuster regarding the applicability of the coinsurance clause, I quickly determined that they had both misunderstood the coinsurance clause in the operative policy, so I decided to write this article.

I. What Is Coinsurance And Why Are Insurers Concerned With It?

Coinsurance is a condition that may be found in more than one type of policy, like commercial property, dwelling, homeowners, federal flood, health insurance, and at times, even directors and officers liability policies. But for now, I will keep it simple and will only focus on its applicability in property insurance policies.

Practically, coinsurance is a rating and underwriting concept that insurers use to encourage insureds to purchase an amount of insurance equal to the full value of the property being insured. Unfortunately, most policyholders are not even aware of the existence of a coinsurance clause in their policies, or how it applies, until after a loss occurs.¹

Whether a policy includes a coinsurance clause is usually reflected in the Declarations Page. Here is an example from a commercial property policy:

COMMERCIAL PROPERTY
CP DS 00 10 00

COMMERCIAL PROPERTY COVERAGE PART
DECLARATIONS PAGE

POLICY NO. _____ **EFFECTIVE DATE** ____/____/____ ☐ "X" If Supplemental
Declarations Is Attached

NAMED INSURED _____

DESCRIPTION OF PREMISES

Prem. No.	Bldg. No.	Location, Construction And Occupancy
--------------	--------------	--------------------------------------

COVERAGES PROVIDED Insurance At The Described Premises Applies Only For Coverages For Which
A Limit Of Insurance Is Shown

Prem. No.	Bldg. No.	Coverage	Limit Of Insurance	Covered Causes Of Loss	Coinsurance*	Rates
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Coinsurance requires the Named Insured to carry a certain percentage, often 80%, 90%, or 100%, of the property's total insurable value (TIV). The TIV is determined at the time of loss.

When insurance is carried in the amount required by the coinsurance percentage, the insurance company pays the entire loss, not to exceed the limit of insurance. Thus, if the limit of insurance is adequate to comply with this provision, no penalty applies. If the amount carried is less than the amount required, then the Named Insured is considered underinsured, and a penalty may apply.

For example, a property valued at \$250,000 at the time of a loss with an 80% coinsurance requirement would need to have a limit of insurance of at least \$200,000 to be in compliance with the coinsurance clause.² It is important to anticipate what the TIV of the property will be 12 months in the future, because the coinsurance penalty will be calculated at the time of the loss. This means that if the limit of insurance is calculated based on the value of the property at the policy inspection date, the Named Insured could face a coinsurance penalty if the value has increased by the time of the loss.

II. The Coinsurance Clause Formula And How It Works In Real Life

The following formula is used to determine the loss settlement amount for a property subject to the coinsurance provision. This is better understood as Did/Should x Loss:

AMOUNT
CARRIED
(Did)

×

LOSS

=

Recovery
minus
deductible
equals
settlement

AMOUNT
REQUIRED
(Should)

The following example illustrates how the formula is applied.

Example of Inadequate Limits (Underinsurance)	
Building Value (Determined at the time of loss)	\$ 100,000
Deductible	\$ 1,000
Insurance Amount Carried	\$ 40,000
Coinsurance clause (from the Declarations)	80%
Insurance Amount Required (\$100,000 x 80%)	\$ 80,000
A loss occurs and the building damage is \$10,000.	

\$40,000
(Did)

×

\$10,000
(Loss Amount)

=

\$5,000 *minus*
\$1,000 (deductible)
equals \$4,000

\$80,000
(Should)

The settlement is \$4,000. In other words, because the Named Insured carried a limit of insurance that was 50% of what was required, the Named Insured was penalized; incurred a coinsurance penalty; and only 50% of the \$10,000 loss is paid minus any existing deductible (\$1,000 in this case). Had the Named Insured carried the required amount of insurance—in this case, \$80,000—it would have received a settlement of \$9,000 (the full \$10,000 loss amount minus a \$1,000 deductible) as opposed to the \$4,000 that it eventually received with a limit of insurance of only \$40,000.

III. How to get around the coinsurance clause—Agreed Value

A Named Insured may resolve any uncertainty associated with the insured property’s TIV, and the coinsurance clause penalty, by simply requesting an endorsement (change) to the policy called an Agreed Value endorsement.

Agreed Value suspends the coinsurance clause and ensures full payment for a covered loss up to a pre-agreed value determined when the policy is issued, instead of at the time of loss. Activation of this optional coverage, and endorsing the policy, indicates the underwriter and the Named Insured agree that an adequate limit of insurance is being carried for underwriting eligibility, and as such, the coinsurance provision can be suspended for a time.

The Agreed Value option usually has an expiration date and will not last longer than the policy's initial term—usually 12 months. This expiration date means that the coinsurance provision is not waived or removed entirely but rather suspended for a period of time—in this case, up to 12 months. If the Named Insured reduces the limit of insurance during the policy period to an amount below the agreed value, the coinsurance provision will be reinstated.

Similarly, if the policy is renewed beyond the initial 12-month term, it is likely that the Agreed Value endorsement will be removed from future policy renewals unless specifically requested from the insurer, which usually requires an increase in the amount of the insurance limits agreed upon and additional premium.

This is it for now. In future articles, I will discuss the coinsurance clause when dealing with a business income claim.

About the Author

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Endnotes

- 1 For homeowners policies, this provision is often found in “Section I – Conditions; D. Loss Settlement; 2. B.” For commercial property, this provision is often found in “Additional Conditions: 1. Coinsurance.” For Business Owners Policies, this provision is often found in “E. Property Conditions: 5. Loss Payment: d.(1)(b).”
- 2 Industry studies have shown that as many as 75% of commercial buildings are underinsured. Kevin Kuntz and Elizabeth Casas Leano, “Three attributes of commercial properties that underwriters shouldn’t take for granted,” Versik, August 20, 2020, <https://www.verisk.com/insurance/visualize/three-attributes-of-commercial-properties-that-underwriters-shouldnt-take-for-granted/>



The Implied Covenant of Good Faith and Fair Dealing: Michigan Supreme Court to Address Its Scope in *Kircher v Boyne USA, Inc* - Part I

By Mitchell Zolton

I. Introduction

The Michigan Supreme Court stands at a crossroads in contract law interpretation as it prepares to address a fundamental question that has significant implications for businesses, insurers, and legal practitioners across the state: what is the proper scope and application of the implied covenant of good faith and fair dealing? The Court's upcoming decision in *Kircher v Boyne USA, Inc* will likely provide crucial guidance on whether this covenant serves merely as an interpretive tool for understanding express contractual terms or whether it can create independent obligations beyond those explicitly stated in a contract.¹

This question has profound implications for contract interpretation and enforcement across Michigan, particularly in cases involving discretionary contract provisions. The Court's decision could affect how businesses structure their agreements, how courts analyze claims of bad faith in contractual performance, and how parties exercise discretionary rights granted under contracts. The resolution of this issue will be especially significant for the insurance industry, where good faith obligations often intersect with contractual discretion in handling claims, determining coverage, and deciding settlements.

The timing of this case is particularly relevant given the evolving nature of business relationships and contractual arrangements in the modern economy. As businesses increasingly rely on complex, long-term contracts with discretionary elements, the need for clear guidance on the scope of good faith obligations becomes more pressing. The outcome of *Kircher* could influence everything from shareholder agreements and business succession plans to insurance policies, employment contracts, and licensing and franchise agreements.

II. The Facts of *Kircher*

The dispute in *Kircher* arose from a family-owned ski business, Boyne USA, Inc. (the "Company"), founded by Everett Kircher. The plaintiff, Kathryn Kircher, is a shareholder and the founder's daughter. Her brother, defendant Stephen Kircher, serves as the majority shareholder and CEO.² This family business context adds an additional layer of complexity to the case, as it implicates not only traditional contract principles but also the unique dynamics of family-owned businesses and succession planning.

The roots of the *Kircher* dispute trace back to 2010 when disagreements began to emerge within the family. These disagreements culminated in the termination of Kathryn Kircher's employment in 2012, leading to litigation and a subsequent settlement agreement in 2014.³ This settlement agreement contained detailed provisions regarding redemption of Kircher's shares in the Company, representing a significant portion of her net worth and her primary connection to the family business.

The 2014 settlement agreement established a specific framework for share redemption:

- From 2014 through 2017: Annual redemptions up to \$250,000 in value;
- From 2018 onward: Annual redemptions up to \$150,000 in value; and
- All redemptions were to continue "until such time as Plaintiff has redeemed all of her shares."⁴

Crucially, the settlement agreement tied the share value to the company's earnings before interest, taxes, depreciation, and amortization ("EBITDA"), minus total company debt. The formula was specifically defined as:

[(6.5 times an Average of EBITDA) minus the Total Company Debt] multiplied by 80% and then divided by the total number of outstanding shares to obtain a price per share.⁵

The agreement also allowed for alternative valuation methods if "otherwise agreed by the Parties." This discretionary element would later become central to the dispute.

Initially, the formula produced substantial share values. In fact, subsequent agreements in 2016 and 2019 established specific redemption prices that showed significant appreciation:

- 2015: \$360.23 per share
- 2016: \$324.00 per share
- 2017: \$401.81 per share
- 2018: \$773.00 per share⁶

However, in 2018, the Company made a strategic business decision that dramatically affected the share value produced by the formula. Rather than continue with its traditional model of operating with leased assets, the Company determined to purchase approximately \$300 million in real estate and assets it had previously leased. This transaction fundamentally altered the company's debt structure and, consequently, dramatically impacted the share values under the redemption formula.

While shares were valued at \$773 in 2018, the 2019 calculation under the formula (post-transaction) resulted in a negative value of \$2,164.94 per share.⁷ This precipitous decline effectively eliminated Kircher's ability to receive any value for her shares under the settlement agreement, despite the agreement's express contemplation that she would eventually be able to "redeem[] all her shares."

III. The Court of Appeals Decision and Supreme Court Grant

In *Kircher*, the Court of Appeals carefully analyzed how the Implied Covenant operates within Michigan's strong freedom-of-contract framework. The court affirmed the trial court's denial of defendants' motion for summary disposition, but its reasoning reveals Michigan courts' nuanced approach to good faith claims.⁸

A. The Two-Pronged Analysis

The Court of Appeals effectively divided Kircher's claims into two categories:

1. The Business Decision Claim: Whether the Company's decision to take on significant debt through the 2018 real estate transaction constituted a breach of the implied covenant.
2. The Alternative Formula Claim: Whether the Company's refusal to consider an alternative share valuation method, as permitted by the settlement agreement, violated the implied covenant.

The court reached different conclusions on these claims, highlighting the distinction between general business decisions and the exercise of contractual discretion.⁹

B. The Business Decision Analysis

On the first claim, the Court of Appeals agreed with defendants that the 2014 settlement agreement placed no restrictions on the Company's ability to take on debt or make business decisions. The court found that there was no underlying contractual term to which the implied covenant could attach regarding business operations.¹⁰ This analysis reflects Michigan's traditional reluctance to use the implied covenant to create obligations beyond those expressed in the contract.

C. The Discretionary Authority Analysis

However, the court found that Kircher had stated a viable claim regarding the Company's refusal to consider an alternative valuation method. The court emphasized that when a contract explicitly grants discretion to a party, that discretion must be exercised in good faith.¹¹ Recall the settlement agreement's statement that the formula for calculating the value of Kircher's redeemed shares would be that as set forth in the agreement, or as "otherwise agreed by the Parties."

D. The Supreme Court's Interest

The Michigan Supreme Court granted oral argument on April 12, 2024, directing the parties to address three specific questions:

1. Whether the implied covenant of good faith and fair dealing applies only as an interpretive tool to understand the express terms of a contract;

2. Whether the plaintiff stated a valid claim for breach of contract based on the 2018 real estate transaction; and
3. Whether the plaintiff stated a valid claim for breach of contract based on the defendants' refusal to negotiate an alternative formula.¹²

The Court specifically requested comparison between *Gorman v American Honda Motor Co, Inc*¹³ and *In re Vylene Enterprises, Inc*,¹⁴ suggesting interest in whether Michigan should maintain its current approach or consider adopting a broader view of the implied covenant's role.

IV. Overview of Relevant Case Law

The evolution of Michigan's approach to the implied covenant of good faith and fair dealing reflects a careful balance between preserving freedom of contract and preventing abuse of discretion in contractual relationships. An examination of the key precedents reveals how Michigan courts have developed a distinct framework for analyzing claims involving the implied covenant, particularly in cases involving discretionary contract provisions.

A. Michigan's Traditional Approach

The foundational principle of Michigan's approach to the implied covenant is that the state does not recognize an independent cause of action for its breach. As cited by the Court of Appeals in Kircher, *Belle Isle Grill Corp v City of Detroit* established that "Michigan does not recognize a claim for breach of an implied covenant of good faith and fair dealing."¹⁵ This precedent emerged from a case where the plaintiff alleged a breach of the implied covenant based on the defendant's "admittedly unfair treatment" of the plaintiff. In rejecting this claim, the *Belle Isle* court emphasized that contractual language must be enforced as written, reflecting Michigan's strong commitment to freedom of contract principles.

In *Gorman*, the Court of Appeals refined this understanding by explaining that the implied covenant is "not an independent duty, but rather a modifier that requires a subject to modify."¹⁶ The *Gorman* court elaborated that the covenant serves as "a principle by which contractual obligations or other statutory duties are to be measured and judged."¹⁷ Importantly, *Gorman* emphasized that "the obligation of good faith has no application apart from some other contractual obligation."¹⁸ This interpretation established that while the covenant exists within every contract, it cannot create new duties independent of the contract's express terms.

This approach was further reinforced in *Quality Products & Concepts Co v Nagel Precision, Inc*, where the Michigan Supreme Court addressed the mutuality requirement in contract modification and waiver. Though not analyzing a breach claim under the implied covenant, the court held that "mutuality is the centerpiece to waiving or modifying a contract, just as mutuality is the centerpiece to forming any contract."¹⁹ This mutuality requirement is satisfied only when there is clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to modify or waive the particular original contract. The *Quality Products* decision reaffirms the baseline principle to Michigan courts' application of the implied covenant: that courts should not rewrite contracts for parties but rather enforce their mutual agreements as expressed.

In *Rory v Continental Insurance Co*, the Michigan Supreme Court further emphasized the primacy of unambiguous contractual terms. The court held that "unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written."²⁰ The *Rory* court specifically rejected judicial determinations of "reasonableness" as a basis for refusing to enforce unambiguous contractual provisions, stating that such an approach "undermines the parties' freedom of contract."²¹

This judicial restraint was also evident in *Wilkie v Auto-Owners Insurance Co*, where the Michigan Supreme Court explicitly rejected the "rule of reasonable expectations" in contract interpretation.²² The *Wilkie* court characterized this approach, where judges "divine the parties' reasonable expectations and then rewrite the contract accordingly," as "contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance."²³

B. The Role of Discretionary Authority

Despite Michigan's generally restrictive approach to the implied covenant, courts have recognized its particular importance in contracts involving discretionary authority. The Court of Appeals in *Ferrell v Vic Tanny International, Inc* established an important principle in this area, holding that, "[w]here a party to a contract makes the manner of its performance a matter of its own discretion, the law does not hesitate to imply the proviso that such discretion be exercised honestly and in good faith."²⁴ This recognition that discretionary performance must be governed by good faith principles has become a crucial exception to Michigan's otherwise restrictive approach.

The application of this principle can be seen in *Sims v Buena Vista School District*, where the court considered a school district's discretionary authority regarding the continuation of insurance coverage for laid-off employees.²⁵ The court held that "in exercising its discretion to continue coverage, the law implied a requirement that [the district] exercise that discretion honestly and in good faith."²⁶ This decision demonstrates how Michigan courts apply the implied covenant to evaluate whether discretionary powers granted by a contract have been exercised appropriately.

C. The Alternative Approach: *In re Vylene*

The Michigan Supreme Court's specific reference to *Vylene* in its order granting oral argument suggests interest in examining a markedly different approach to the implied covenant.²⁷ The Ninth Circuit's decision in *Vylene*, applying California law, represents a significantly broader view of how the covenant operates within contract law.

The *Vylene* court addressed two distinct applications of the implied covenant. First, it found that a franchisor violated the implied covenant by offering a "commercially unreasonable" renewal agreement that it knew the franchisee would reject. This application is somewhat analogous to Michigan's approach to discretionary provisions, as it involved a specific contractual obligation to negotiate renewal terms.

However, the second application in *Vylene* represents an approach dramatically distinct from Michigan jurisprudence. The Ninth Circuit held that the franchisor breached the covenant of good faith and fair dealing by constructing a competing restaurant within 1.5 miles of the franchisee's location, despite the absence of any territorial exclusivity provision in the franchise agreement. The court reasoned that this action had "the potential to not only hurt [the franchisee], but also to reduce [the franchisor's] royalties,"²⁸ making it an act of bad faith. This holding demonstrates how, under California law, the covenant may be applied to create obligations or restrictions in how a party may exercise reserved rights beyond the express terms of the contract.

The contrast between Michigan's current approach and *Vylene* highlights fundamental differences in how courts conceptualize the implied covenant. Under Michigan's framework, the covenant attaches only to existing contractual obligations and serves primarily as an interpretive tool for understanding the manner in which those obligations should be performed. Claims must be tied to specific contractual provisions, and the focus remains on the express obligations in the agreement.

In contrast, California's framework, as exemplified in *Vylene*, allows the covenant to create additional obligations and protect parties' reasonable expectations even in the absence of express terms. Claims for breach of the covenant can exist independent of specific contractual obligations, and courts focus on the agreement's broader purpose rather than solely on its explicit language.

D. Implications for Michigan Contract Law

The Michigan Supreme Court's forthcoming decision in *Kircher* will likely provide crucial guidance on whether Michigan should maintain its current approach or move toward a broader interpretation of the implied covenant. The Court's analysis must address several key tensions within contract law.

First, there is the fundamental question of predictability versus flexibility. Michigan's current approach, as articulated in *Gorman*, provides clear guidance to contracting parties - they can rely on their written agreements without concern for unwritten obligations or restrictions on how they may exercise rights provided in the agreement. However, this clarity might come at the cost of allowing technically compliant but potentially abusive exercises of contractual discretion.

Second, the Court must consider how different approaches affect freedom of contract. Michigan's traditional emphasis on freedom of contract suggests favoring the current framework, which allows parties to explicitly define their obligations. Yet, as demonstrated in *Kircher*, sophisticated parties might structure transactions in ways that technically comply with contractual terms while potentially undermining the agreement's fundamental purpose or a party's reasonable expectations of the value to be derived from the agreement.

Third, the Court must address how the implied covenant interacts with discretionary contract provisions. The *Kircher* case presents a clear example of how discretionary provisions - such as the decision to agree to alternative valuation methods - can become crucial to a contract's operation. The Court's guidance on how to evaluate the exercise of such discretion will be vital for future contract drafting and interpretation.

The Court's resolution of these issues will have significant practical implications for Michigan businesses and legal practitioners:

Contract Drafting: Attorneys must consider how to draft discretionary provisions that provide necessary flexibility while protecting against potential abuse. The Court's decision will influence whether such protections need to be explicit or if a party can rely partly on the implied covenant.

Business Operations: Companies must understand how the implied covenant affects their exercise of contractual discretion and even rights reserved to them under their contracts, particularly in long-term relationships like the shareholder agreement in *Kircher*.

Dispute Resolution: Courts and practitioners need clear guidance on how to evaluate claims involving the implied covenant, especially in cases where discretionary powers significantly impact contractual rights.

V. Conclusion

The Michigan Supreme Court's forthcoming decision in *Kircher* presents an opportunity to clarify and could potentially reshape the role of the implied covenant of good faith and fair dealing under Michigan law. The Court must balance several competing interests:

- The fundamental principle of freedom of contract;
- The need to prevent abuse of contractual discretion;
- The desire for clarity and predictability in contract interpretation; and
- The practical realities of modern business relationships.

The significance of this decision extends far beyond the specific facts of *Kircher*. It will likely influence how businesses structure their agreements, how courts analyze claims involving contractual *and* extra-contractual discretion, and how parties exercise their rights under existing contracts. The impact could be particularly significant within commercial and business transactions, including the insurance industry.

Part II of this article, to be published following the Supreme Court's decision, will provide a detailed analysis of the Court's ruling and its practical implications. We will examine how the decision affects existing contracts, what changes businesses and practitioners should consider in drafting future agreements, and whether Michigan contract law has evolved to address modern business realities. The article will also explore whether Michigan maintains its traditional approach or moves toward a broader interpretation of the implied covenant, and what that means for businesses, insurers, and legal practitioners across the state.

About the Author

Mitchell Zolton is an associate attorney in the Business Franchise Group at Fahey Schultz Burzych Rhodes PLC, based in Okemos, Michigan. Mr. Zolton's practice focuses on franchising, commercial and real estate transactions, mergers and acquisitions, intellectual property, wage and hour compliance in the hospitality industry, and liquor law.

Endnotes

- 1 *Kircher v Boyne USA, Inc.*, -- Mich --, (2024) (Docket No. 166459).
- 2 *Kircher v Boyne USA, Inc.*, -- Mich App --, (2023) (Docket No. 360821), slip op at 2.
- 3 *Id.*
- 4 *Id.*
- 5 *Id.*
- 6 *Id.* at 3.
- 7 *Id.*
- 8 *Id.* at 4-5.
- 9 *Id.*
- 10 *Id.* at 4.
- 11 *Id.*
- 12 *Kircher v Boyne USA, Inc.*, -- Mich --, (2024) (Docket No. 166459).
- 13 *Gorman v American Honda Motor Co, Inc.*, 302 Mich App 113, 133; 839 NW2d 223 (2013).

- 14 *In re Vylene Enterprises, Inc.*, 90 F3d 1472, 1477 (CA 9, 1996).
 - 15 *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 476; 666 NW2d 271 (2003).
 - 16 *Quality Prods & Concepts Co v Nagel Precision, Inc.*, 469 Mich 362, 370; 666 NW2d 251 (2003).
 - 17 *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005).
 - 18 *Gorman*, *supra* at p 134.
 - 19 *Quality Products*, *supra* at 370.
 - 20 *Rory*, *supra* at 461.
 - 21 *Id.* at 469.
 - 22 *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 62; 664 NW2d 776 (2003).
 - 23 *Id.* at 51-52.
 - 24 *Ferrell v Vic Tanny Int'l, Inc.*, 137 Mich App 238, 243; 357 NW2d 669 (1984).
 - 25 *Sims v Buena Vista Sch Dist*, 138 Mich App 426, 431; 360 NW2d 211 (1984).
 - 26 *Id.*
 - 27 *In re Vylene Enterprises, Inc.*, *supra*.
 - 28 *Id.* at 1477.
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Microsoft's AI Security Warning: A Battle That Can't Be Won?

By Michael C. Maschke, Sharon D. Nelson, Esq. and John W. Simek

The legal industry has been all over the place regarding artificial intelligence. Some attorneys have been on the AI bandwagon since the early days of ChatGPT, some have started to dip their toes in the water with Microsoft Copilot, and the rest have chosen to stay far away from anything AI-related or marketed.

The truth is that AI is here to stay. What we have been told about adopting it with caution and security in mind may not matter in the end.

Microsoft's internal testing of more than 100 of its AI generative products concluded that AI can never be made secure and suggested that securing AI systems will never be complete.

While this conclusion is not surprising, it does throw some cold water on the AI welcoming party. Here are several lessons to help with continuing to secure AI models.

To develop effective defenses, AI models must be understood thoroughly, including what the system can do and where it should be used. AI models behave differently depending on their design and application.

Defense in Depth Security Principles Apply Here Too

Just like with computer systems and information networks, defense-in-depth principles apply to AI models too. Layered security measures help reduce the inherent risks the models pose. The best security measures include controlling access through security permissions, restricting data the models have access to, auditing access, and requiring input validation. Policies and procedures are just as essential to prevent "Shadow AI," where users integrate their own selection of AI products at will into law firms without permission or thought. It is wise to have mechanisms in place to detect any "Shadow AI" attempts.

Having policies and security controls in place is vital, as is training. Training law firm staff on how to use implemented AI products is critical to maintaining the security of the application and law firm data. It is also important to reduce the risk of a user violating the firm's policies by implementing their preferred AI solution or prompting AI software with inappropriate data, such as client confidential data. End-user training is always the foundation of a good security program.

AI Risks are Unknown

One problem cybersecurity professionals face is that the universe of risks posed by AI models is unknown. How AI models learn is unlike software vulnerabilities, which can be reproduced, verified, and patched. Yes, restrictions on input can be put in place to prevent user interface manipulation or validation of inputs to prevent hidden or unintended inputs. Still, the harm that AI can cause are more complex to quantify and reproduce, especially since models can continue learning. Can you imagine what will happen to the volume of security patches for consumer products once AI gets involved, as if it weren't already bad enough with Microsoft?

Microsoft summarizes it well: If users can input private, confidential information, then it is safe to assume the models will output private, confidential information.

Because AI models may be able to learn, they will only continue to amplify existing risks and introduce new ones. That certainly provides job security for cybersecurity professionals moving forward. Still, it leaves users of AI products with difficult decisions about whether to accept the risk and how to become knowledgeable enough to decide whether a particular AI product application appears safe enough to use.

The decision becomes even more critical when you add the ethical requirements that attorneys must adhere to.

What happens when AI is embedded or added to a solution your firm has been using for years, whether you were informed or not? What information is shared with the product vendor and AI model, which will allow the model to continue to learn and grow? Microsoft is already incorporating AI into every piece of software that it can, including Microsoft 365.

Some examples include computers with AI prompts by default, such as Copilot for Windows or Apple Intelligence built into new iPhones, iPads, and Mac computers. This is another example of when reading the Terms of Services (TOS) is crucial, as well as understanding what settings for these AI prompts are turned on by default and how to access them to make any modifications.

If we know users (and trust us, we do), most will click and accept the TOS regardless of what it contains—that's human nature. Will lawyers voluntarily accept a possible ethics violation without knowing? The likelihood is very high.

About the Authors

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LEGISLATIVE UPDATE

New bipartisan session is off to a quick start out of the gate!

*By Christopher J. Petrick and Katharine Buehner Smith
Collins Einhorn Farrell PC*

The Legislature started up again in January with the opening of a new session. As we noted in our last update, the Democrats now only hold a majority in the Senate. The Republicans took over the majority in the House. The new Legislature has hit the ground running and opened up the new session by introducing a plethora of bills –284 in the House and 200 in the Senate. Several have already made their way to the insurance committees.

- **SB 0004** – amends the Insurance Code to require that any insurer providing prescription drug coverage must comply with section 12 of the prescription drug and affordability review act. This bill is tie barred with SB 0003 which creates the prescription drug and affordability review act.
- **SB 0133** – amends the Insurance Code to create a carryover system for continuing education credits for insurance producers who belong to a professional insurance association.
- **HB 4071** – amends the Insurance Code to modify the restrictions on gifts and other benefits that can be given to applicants for insurance by an insurance provider, increasing value limit for gifts to \$50 from \$5. It would also allow an insurer to offer or provide value-added products or services, for free or at a discounted price, if the product or service relates to the insurance coverage and is primarily designed to satisfy certain objectives.
- **HB 4095** – amends the Insurance Code to require any insurer issuing a health policy to promptly include a mental health or substance use disorder provider on their panel.
- **HB 4178** – amends the Insurance Code to create a carryover system for continuing education credits for insurance producers who belong to a professional insurance association.
- **HB 4179** – amends the Insurance Code to increase (from \$5 to \$50) the cap on gifts of merchandise that life insurers can provide applicants for a life insurance policy, to allow the gifts to be given to policyholders as well as to applicants, and changes the cap to apply annually and not on a one-time or cumulative basis.
- **HB 4207** and **HB 4208** – amend the Insurance Code to provide that the terms “health insurance policy” and “health benefit plan,” when used in Chapter 37 (Small Employer Group Health Coverage) or in the code, respectively, do not include coverage that is only for excepted benefits as described under federal law.

One bill has already advanced:

- **SB 0105** – amends the Insurance Code to require that a health plan or nonprofit dental care organization providing dental benefits have at least one method of payment or reimbursement that provides the dentist with 100% of the amount payable and does not include a fee for the payment. ***Passed the Senate (36-0) on 3/19/2025.***

Scenes from the January Meeting and Mixer

The January gathering at the DraftKings Sports & Social in Troy



Rabhi Hamawi and Joe Milanowski



Stefania Gismondi, Michael Hale, Melissa Hirn,
Doug McCray, and Howard Gurwin



The January gathering at the DraftKings Sports & Social in Troy



Maddison Moser, Stoyana Novakova,
and Emma Callihan