Welcome to the second issue of our quarterly publication. The first issue of our Journal was well received, and we are grateful to the staff at the State Bar for taking the bits and pieces that we send them and organizing them into something that looks as good as what you are holding.

Our new section is now up and running, and even running more smoothly than we expected. Our membership is now up to a little over 240, which is also a good sign. At the beginning, we were hoping for 100 members, but we have moved far beyond that modest goal.

Because one of our goals is to work toward sharing the knowledge of our members with as many people as possible, the circulation of this Journal is almost double our paid membership. We send a copy to the chairperson of every section of the State Bar, all of the circuit courts and appellate judges, and all federal district court judges, as well as some business associations. We have also set up a special “e-copy list” for anyone who wants to receive copies by e-mail. If you know of anyone who would like to be on that list, just let us know, and we will add him or her.

The State Bar is sponsoring a leadership conference in mid-June, and we plan to send two representatives. It will be a chance to network with other State Bar sections and explore ways that we can work together to benefit our members.

We are also continuing to spread the word to all groups that might be interested that we can provide speakers for programs or meetings, if they have a topic they would like to learn more about.

Because our section is so new, all of us on the section council are also new at making a State Bar section work, so we are sincere when we invite suggestions and contributions from everyone, members and non-members alike.

If you are reading this and would like to join our section, or work with us on a joint project, or send us an article, or just take advantage of our resources for your group, please contact any of us on the section council to get things started.

Hal O. Carroll
Named Insureds and Additional Insureds

By Timothy F. Casey, Kelley, Casey & Moyer PC, tcasey@kcmlaw.com

Additional insured issues can arise in just about any type of insurance policy and can overlap with liability issues, particularly contractual indemnity, potentially giving rise to a tangled web of analysis. It is not uncommon for additional insured questions to arise in general liability, property, professional liability, auto, homeowners, primary, and excess insurance policies. This column addresses some of the policy provisions and context involved with named insureds and additional insureds, including some suggestions for approaching these issues.

An insurance policy declarations page typically identifies the “named insured.” Policies also typically define “you” as meaning the named insured as shown on the declarations page. Policies usually contain definitions of “insured” which include the “named insured” or “you,” among other potentially insured persons. When, however, the underlying matter involves parties in addition to the “named insured,” potential additional insured considerations need to be addressed, which can include an examination of both language in the initial policy provisions and in endorsements, in conjunction with the underlying facts, which often include contractual indemnity issues.

Policies typically have a section referencing “who is an insured” which sets forth additional persons or entities that may be an “insured,” usually depending on their relationship to the named insured. For example, if the insured is a business, the officers and directors may be insureds, but only with respect to their duties as officers or directors. Employees may be insured, but only for acts within the scope of their employment. Spouses and household residents may be insureds under the policy language in homeowners and auto policies. Determining whether a particular person or party qualifies as “an insured” under such provisions often requires determining the capacity of such person at the time of the underlying conduct at issue; e.g., whether an employee was acting in the course of employment.

Insurance policy endorsement also often adds persons and entities as additional insureds although again, such status typically is restricted to a particular capacity. For example, an additional insured endorsement may add a general contractor as an additional insured under the subcontractor’s policy, but limit that status to apply only when the liability of the general contractor is caused, in whole or in part, by the acts or omissions of the subcontractor. Endorsements can be very specific, limited to a specifically identified person with respect to a specifically referenced project, or can be much more general, potentially applying to unnamed persons in a particular capacity, and to a broad range of business matters. Note as well that sometimes the additional insured is endorsed to be an “additional named insured,” as opposed to simply “an insured.”

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A particular item to look for when analyzing these issues concerns the different status of a “named insured” and simply “an insured.” Insurance policy provisions may apply differently to different “insureds,” depending on their specific status. For example, in Vanguard Ins Co v McKinney, 184 Mich App 799 (1990), the court focused on the distinction between “an insured” and “the insured” in holding that the distinction was dispositive on a coverage issue pertaining to application of an exclusion. In Jayakar v North Detroit General Hospital, 182 Mich App 108 (1990), the court held that only the named insured, not the additional insured, had the right to consent to a settlement.

In the commercial context, once the “additional insured” issues are addressed, another issue typically arises, which is to determine priority among insurers. In other words, if a company has its own insurance policy, but also is an additional insured under another insurer’s policy, the issue becomes determining the priority or allocation among the insurers in providing coverage for that insured. In General Casualty of Wisconsin v Secura Ins, 2006 WL 3019439 (Mich App), for example, the court held that under the particular facts and policy language involved, the insurer of the subcontractor was required to insure the general contractor as an additional insured, with the subcontractor’s policy applying on a primary basis to the policy of the general contractor. These types of determinations are very fact specific, and the policy language must be closely examined.

Application of additional insured provisions frequently gives rise to coverage issues since there are different forms in policy language providing the “additional insured” status. One such dispute involves language in many policies that provides for an additional insured, but only with respect to liability arising out of ongoing operations performed for the named insured. There can be disputes regarding what “arises out of” the operations, and as to whether the additional insured is provided coverage only for its vicarious liability, only when

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Adventures in Construction Joint Ventures: Insurance and Indemnity

By Mark G. Cooper and Benjamin McCracken

While all industries are impacted by rapid technological changes, perhaps no industry is affected as much as the construction industry. More than ever before, builders are expected to use the latest techniques to build stronger, longer lasting structures that will not become obsolete the day they are built. With each new innovation and advance comes more specialization and sophistication, which require additional knowledge and skill, not to mention potential liability. In addition, the scope and corresponding costs to construct projects continue to grow at a staggering rate. These new specializations have created a situation in which it is ideal for two or more construction companies—most typically general contractors or construction managers—to combine their respective skills and resources to bid and complete a project, especially for large, sophisticated projects in which discrete specialties are needed to complete the work.

The solution to a workable relationship between multiple contractors, in many instances, has been to take a team approach to a project by forming a joint venture (JV). As with all business relationships, JVs have their advantages and pitfalls. This article very generally describes JVs in the construction context and introduces two issues that require significant thought when forming a JV: insurance and indemnity.

Construction Joint Ventures

JVs may take a number of forms, but the context in which they are formed is collaboration between two or more unrelated entities to team resources, skill, or expertise for mutual gain. JVs are conceptually similar to partnerships, but unlike a partnership, a JV is typically formed to undertake a single project and terminates at the project's conclusion. The single project nature of the JV makes it especially useful in the construction context where needs change depending on the project and where there is a definable end to the JV.

There are a number of reasons to form a JV. Most often in the construction industry, forming a joint venture allows for the formation of a relationship to leverage each venturer's unique strengths, skills, or capabilities, giving the venturers the ability to pursue the type of projects each venturer would not be able to bid for or complete on its own. Similarly, a JV may allow a contractor to pursue a project that is larger than the contractor might ordinarily undertake alone. Likewise, a JV also permits the combining of contractors to generate bonding capacity that each would not have individually. Another benefit of the JV is that joining with a contractor with an established organization in an area with a contractor that does not have such a presence, but does have unique skills, builds connections, builds business relationships, and can allow access to a market that might not otherwise be accessible to one particular contractor standing alone.

There are many easy examples of construction projects in which forming a JV may be beneficial. The projects can vary from the relatively mundane—such as a reputable local contractor teaming with an experienced urban design build firm from out of state to construct loft condominiums in a hot geographical area—to the unique and far between projects. For instance, many public works jobs—such as bridge or tunnel construction—are suitable for JVs. So, too, are unique projects like building an oil platform or other structure in deep water. Another common example is the type of project in which the “systems” are unique and vital, such as construction of a paint shop for the automobile industry. Broadly speaking, such a project would appeal to a general contractor experienced in constructing large commercial structures. However, the “systems” within the facility—the actual mechanics of the painting facility—bring in a fundamentally distinct set of necessary construction skills. In all of these examples, bringing in other contractors—or venturers, as they would be called once an agreement is in place—allows each venturer to bring its own specialized skills and knowledge into play, spreads risk, and thereby allows the JV to focus on construction of the project.

JVs may take a number of forms, but the context in which they are formed is collaboration between two or more unrelated entities to team resources, skill, or expertise for mutual gain.

As with every business relationship, there are many issues that must be considered when entering into a JV. Addressing all of these concerns in any detail is far beyond this introductory article, but a JV should be defined by a written joint venture agreement (JVA) between the venturers. A JVA can be as simple or as complex as dictated by the needs of the project and the parties. But whatever the circumstances, the end goal should be a comprehensive and fully integrated JVA that anticipates and addresses issues of concern up front and that fully lays out the risks, obligations, and duties of each venturer. It is critical that all key terms in the JVA be plainly defined and addressed because ultimately nearly all of the issues in a JVA relate, in some fashion, to allocation of risk between the venturers and from the venturers to the project owner or third parties.

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It is important that the JVA state the scope and purpose of the JV and the scope of its business. The initial way to address that is to determine what type of JV you wish to form. Very broadly speaking, there are integrated JVs that are most like a true partnership in which the parties share in profits and losses in proportion to each party’s respective interests in the JV, and the parties combine resources and personnel in some agreed upon way; there are non-integrated JVs in which there is typically no sharing of profits and losses, but rather, each venturer agrees to a specified scope of work and is responsible for the profits and losses—as well as necessary resources—related to that work, and there are combination JVs in which the parties take on specific areas of work but agree to act as partners for certain portions of the job and agree to share preliminaries and general conditions necessary for each party’s separate scope of work.

Once the type of joint venture is determined, then all other aspects of the parties’ relationship should be defined in the joint venture agreement, including working capital, warranty work, default of a venturer, management structure, insolvency of a venturer, transfer restrictions on member interests, reporting and accounting, taxes, confidentiality, intellectual property rights, financial control, the right to an audit, and dispute resolution, just to name a few.

Each provision of a JVA is important, and great care should be taken in covering all possible issues. From a risk management standpoint, two important areas that require special attention are insurance and indemnity.

Insurance

It is common practice in the construction industry to purchase commercial general liability—or CGL as it is euphemistically called—coverage to protect against fortuitous events. Often, if not almost always, a project owner dictates that contractors must obtain CGL and other insurance with certain limits and naming the owner as an insured. The need for this type of insurance equally applies to JVs. Many basic JVAs define the insurance obligation along these lines:

The Management Committee shall determine the amount, type, and limits of insurance coverage needed to protect the Joint Venture and Joint Venturers against any risk of loss that will be assumed under contract. The cost of such insurance shall be paid by the Joint Venture. Each Joint Venturer, at the request of the Management Committee, shall execute all applications and indemnity agreements required by the sureties on any bond required in connection with the Contract with the Owner, as may have been previously agreed to by the Joint Venturers. Each Venturer shall indemnify the other against any loss in connection with Indemnity Agreements required by the sureties on any bond in excess of each Venturer’s proportionate share of such loss.

This language is as basic as it gets and barely begins to answer all the questions concerning how the JV entity itself, its individual members, and in most instances the project owner, should be insured. To the extent possible, it is better practice to expressly define in the JVA to obtain insurance for all aspects of risk with the project—not just those inherent in each venturer’s individual activity.

As a starting point, it is critical to obtain insurance for all aspects of risk associated with the project. Simply having each venturer name the Joint Venture as an additional insured on existing coverage is rarely, if ever, sufficient. Rather, liability coverage should be obtained directly for the JV. The type or nature of insurance and corresponding limits to be carried by the JV should be specified in the JVA as should more basic issues involving insurance, such as who is responsible

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Due dates:
- January Issue: December 1
- April Issue: March 1
- July Issue: June 1
- October Issue: September 1
for paying the premiums, whether it is the JV or one of the individual venturers.

Obviously, the size and nature of the project, the owner’s requirements, and the desired contractual relationship between the venturers will dictate the evaluation of insurance considerations, and each project is unique. For example, joint ventures between contractors and design professionals are commonly used to provide design-build services for a project. Therefore, the scope of coverage provided for in the policies obtained for the JV must be closely examined to determine what coverage is available for those entities. Typical CGL coverage could be wholly inadequate—particularly due to certain express exclusions—to provide against some claimed losses involving a design professional, so different coverage may be needed to properly insure the JV in those circumstances.

As an aside, a similar analysis needs to be undertaken to the extent that bid, performance, or payment bonds are required by the project owner. There is one other issue related to insuring a JV that must be addressed in the JVA. First, the issue of losses not covered by insurance should be expressly stated in the JVA. A basic provision commonly seen is:

If the Owner or any third party shall assert any claim or commence any legal action against one or more of the Joint Venturers or against the Joint Venture in connection with any matter arising under the Contract or associated with the Project, then each Joint Venturer shall share all costs thereof (not covered by insurance purchased by the Joint Venture or the Owner) including, but not limited to, all damages, judgments, fees and expenses, in proportion to its respective interest and share in the Joint Venture and as defined herein.

It goes without saying that such a risk-sharing provision can be drafted to suit the venturer’s desire in terms of its respective liabilities. To underscore the importance of defining these obligations, addressing each venturer’s potential liabilities raises a whole different set of provisions that must be addressed in the JVA—and are well beyond what can be covered in this broad, introductory article—including liabilities in the event that one venturer defaults, and liabilities in the event that one venturer becomes insolvent (typically the defaulting or insolvent venturer loses voting rights and profit distributions but remains expressly liable for its share of losses). These issues, in turn, raise the need for indemnity and guarantee provisions for the security of each venturer.

In the end, insurance provisions of the joint venture agreement should be detailed and specific with all risk areas adequately protected. This can only be accomplished by a proper understanding of not only the potential risks involved in the project, but of the scope of work and obligations of each venturer.

Indemnity

Insurance will theoretically protect the JV and its venturers against losses caused by fortuitous events. Insurance will not necessarily help in determining which venturer bears the risk of loss not covered by insurance, especially when there are questions about which venturer’s work was responsible for the loss. Further, insurance will certainly not define the rights of the venturers as to claims against one another. Finally, the Joint Venture Agreement should address indemnity owed to the joint venture from its subcontractors and vendors for claims against the joint venture arising from the work of those subcontractors or vendors. For these reasons, the JV agreement must contain express indemnity provisions. As in other contracts, the indemnity provisions in a JVA seek to pass the risk to party in the best position to prevent the loss and to protect the venturers against loss beyond their means.

As to the venturers, the starting point is typically that there is no indemnity or other liability among them for fraud or dishonesty, such as:

In connection with any matter arising under the Contract, in no event shall any Joint Venturer be liable to any other Joint Venturer or the Joint Venture for the acts or omissions of any of its officers, employees, or agents, nor shall any duly authorized representative on the Management Committee or the Project Manager be liable to any Joint Venturer or the Joint Venture for damages resulting from actual fraudulent or dishonest conduct.

On the other hand, most JVAs contain express indemnity provisions in which each venturer agrees to hold harmless, indemnify, and defend the other venturer against all liability, including actual attorneys’ fees, for damages and costs in excess of that joint venturer’s share of such liability. (Recall that often each venturer shares risk proportionally to its contribution.) The express indemnity provisions should not only take into consideration the extent of joint liability of the venturers, but should clearly demonstrate how responsibility is apportioned among the venturers. In addition to fraudulent and dishonest acts as addressed above, special consideration should be given each venturer’s fiduciary duties to the JV and to each other. This is often addressed through cross indemnity between the participants for liability incurred based on enumerated acts. Likewise, cross indemnity for liability incurred by the JV due to third-party claims against it regarding personal injury, property damage, patent issues, and the like must be addressed in the JVA. The scope of the cross indemnity provisions between the venturers will obviously reflect the complexity of the project and the skill set brought to the table by each venturer.

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Finally, as with all good construction documents, the JVA should require that contracts entered into by JV with subcontractors and vendors for work on the project include indemnity provisions in favor of the JV. It is a near certainty that the project owner will require the JV to indemnify it against losses related to the project. As such, it is critical for the JV to pass that risk to the various subcontractors and vendors performing the actual work and therefore in the best position to avoid the risk.

Again, as with insurance, it is important that the venturers fully understand the responsibilities and skills of each venturer. Proper understanding of where, and to what extent, indemnity will be required can only be obtained through diligent efforts up front to draft a complete agreement that fully takes into account the unique skills and specialization of each venturer, including how resources such as materials and employees will be shared within the JV.

Conclusion

It is often stated that “The devil is in the details.” In a JVA it could more properly be stated that the devil is hiding in the lack of detail. As with all contracts, parties must be careful to cover all possible scenarios and situations, and JVAs are certainly no exception. Although this article provided a very general overview of two areas—insurance and indemnity—where careful detail is required, those issues can be effectively managed with the right approach and a comprehensive document governing the parties’ contractual relationship.

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The views expressed herein are those of the author and do not necessarily represent the views of the author’s law firm or its clients and do not constitute legal advice as to any particular matter.
Auto insurance has been the theme of the insurance opinions issued by our appellate courts during the first two months of 2008. UM/UIM benefits are on the front burner, and it appears the Supreme Court is again reviewing the threshold requirements for serious impairment, with attention to closed-head injuries and permanent disfigurements. Here is a survey of recent developments.

UM/UIM benefits

UM/UIM Claims by Minors Are Statutorily Tolled

Klida v Braman, 2008 Mich App Lexis 357
(Docket No. 273334)

Three years ago, in Rory v Continental Ins Co, 437 Mich 457 (2005), the Supreme Court upheld the one-year limitations period contained in the standard UIM insurance contract. Last month, in Klida v Braman, the court of appeals decided that this contractual period is tolled for minors under MCL 600.5851(1) (the “minority tolling provision”). Katie Klida was injured in an auto accident at age 15, but did not file suit for UIM benefits until she turned 18. The insurer pointed out that the minority tolling provision by its own terms applies to “an action under this act,” which the insurer interpreted to mean causes of actions created by the Revised Judicature Act. UIM benefits, in the insurer’s view, did not comprise such an action. The court of appeals agreed that Farm Bureau’s interpretation was a reasonable one. But it found the opposing argument equally plausible. A broader view of the RJA is that it “prescribes the jurisdiction of the courts . . . and various other procedural guidelines within our civil justice system . . . [and] prescribes a method for disputes to be resolved through the filing of a civil action.” Sl Op, p 4, citing Cameron v ACIA (Cameron II), 476 Mich 55, 60 (2006)(Cavanagh, dissenting).

On concluding that the minority tolling statute could be reasonably construed in two different ways and was therefore ambiguous, the Court resorted to general principles of statutory construction. Given its remedial purpose (which is to safeguard those who cannot file suit on their own behalf until after the limitations period expires), the Court took a liberal view and, after balancing the different policy implications, decided that minority tolling applies to UIM actions. “We conclude that a reasonable construction of the phrase ‘under this act’ contained within the minority tolling provision, MCL 600.5851(1), that best accomplishes the statute’s purpose is that all civil actions are brought ‘under’ the RJA, including plaintiff’s breach of contract action.” Sl Op, p 8. At press time, no further appeal had been filed.

Tolling while Claim for UIM Benefits is Pending

McDonald v Farm Bureau Ins

Lv grt’d 477 Mich 996 (2007)

Supreme Court Case No. 13228

Just last month, the Supreme Court heard arguments on another UIM issue. McDonald asks the Court to decide whether a timely claim for benefits, denied by the insurer after the one-year period expires, is tolled from the time the claim is made to the date of decision on the application. The parties were directed to address “(1) whether a contractual limitations period may be avoided on the basis of the doctrines of waiver or estoppel, and (2) whether the one-year limitations period contained in the insurance policy is tolled from the time a claim is made until the insurance company denies the claim.” A decision is pending.

Effect of default judgment on UIM benefits

Mansella v Morado

Arguments on application grt’d 739 NW2d 628

Supreme Court Case No. 133620

Another UIM issue pending in the Supreme Court concerns the effect of a default judgment against the tortfeasor when the insured applies for UIM benefits. In Mansella, plaintiffs took the default judgment to their UIM carrier and insisted on benefits in that amount. The court of appeals majority interpreted the UIM contract as requiring payment. On January 9, 2008, the Supreme Court heard arguments on the insurer’s application for leave, specifically directing the parties to address the dissenting opinion in the court of appeals. A decision is pending.

Waiver of Notice of Insured’s Acceptance of Case Evaluation

Suminski v State Farm Auto Ins

Unpublished Court of Appeals Docket No. 273947

UM/UIM policies require the insured to give the insurer written notice of any offers of settlement from the tortfeasor. Failure to provide this notice will bar benefits. In the unpublished case of Suminski, the court of appeals allowed an exception to the rule, on grounds other than the contract language. “[D]efendant’s policy clearly and unambiguously provides that there is no coverage if plaintiff settles with another person without defendant’s written consent.” Sl Op, p 3. But the court went on to find that where the insurer knows its insured is in litigation against the tortfeasor and has participated in case evaluation, and where the insurer is informed of the award and is asked whether it objects to an

Continued on next page
acceptance, the insurer’s failure to object constitutes a waiver of the written notice requirement. “A waiver may be inferably established by the acts and conduct of a party against whom it is claimed.” Sl Op, p 4, citing Angott v Chubb Group of Ins Cos, 270 Mich App 465, 470 (2006).

Two “Kreiner” Cases Pending in the Supreme Court
Oral Argument on Application grt’d 741 NW2d 833 (2007)
Supreme Court Case No. 133988
and
Jones v Olson
Supreme Court Case No. 132385

This year, the Supreme Court appears likely to revisit no-fault’s serious impairment threshold for the first time since Kreiner v Fischer, 471 Mich 109 (2004). In Minter, plaintiff claims a mild traumatic brain injury, which implicates the closed-head injury provision of MCL 500.3135(2)(a). The majority in Minter interpreted the statute as automatically creating a question of fact whenever a brain injury is diagnosed by a properly qualified physician. The majority also found a question of fact on whether plaintiff’s facial scar, less than a half inch in length, met the threshold for permanent scarring. On January 9, 2008, the Supreme Court entertained arguments on the defendant’s application. A decision is pending.

In Jones, plaintiff suffered a fractured vertebra in his neck and was disabled from most of his normal activities for several months. He was off work for seven months. The trial court found no serious impairment as a matter of law, but the court of appeals reversed, rejecting any notion that an injury must be permanent. The Supreme Court granted leave on the application, and heard arguments on December 5, 2008. A decision is pending.

Interplay between the No-Fault Act and the Michigan Motor Carrier Safety Act
Michigan Dept of Transp v North Central Cooperative, LLC
2008 Mich App Lexis 186 (Docket No. 268432)

This opinion continues the discussion begun in Michigan Dept of Transp v Initial Transport, Inc., 276 Mich App 318 (2007)(Whitbeck, J. dissenting), concerning the limits of insurance for carriers transporting hazardous substances on Michigan highways. These cases arise out of two separate accidents in which tanker trucks plummeted over highway barriers, causing millions of dollars in damage to Michigan roadways. MDOT sued the owners of these transports to recover repair costs. In the first case, Initial Transport, the Court held that the Michigan Motor Carrier Safety Act, MCL 480.11 et. seq., rather than Michigan’s No-Fault Act, MCL 500.3101 et. seq., sets the upper limits of tort liability for owners and registrants of vehicles that transport hazardous substances. While the no-fault act abolishes tort liability for owners or registrants who maintain $1,000,000 in liability insurance, the MCSA requires $5,000,000 in financial responsibility.

In North Central Cooperative(Zahra, J. dissenting), the Court decided the mechanics of recovery. Suit must be filed against the no-fault insurer to recover the $1,000,000 limits of liability provided under a no-fault policy. Any additional damages must be sued against the tortfeasor insured. “[T]o recover the security...
required under the MCSA for the transportation of hazardous materials, a plaintiff must proceed with a negligence action against the insured.” Sl Op, p. 5. The two actions may not be combined due to the prohibition against informing the jury of the availability of insurance. In his dissenting opinion, Judge Zahra followed Judge Whitbeck’s dissent in Initial Transport, and rejected the idea that the MCSA “expressly or impliedly provides property protection benefits over and above the $1 million maximum limit set by the Michigan No-Fault Act.” Dissenting Op, p 1. Judge Zahra urged the Supreme Court to review this rule of law. At press time, no application was pending.

Insurer allowed to intervene to recover taxable costs assessed in a prior related action

Docket No. 267959

This case grows out of a claim for UM benefits. Plaintiff’s decedent was killed when his car collided with a tractor trailer. Plaintiff sought to recover UIM benefits from Auto Owners, but the courts ultimately determined, in a separate action, that liability insurance was available through one of the tortfeasors. Auto Owners ultimately prevailed in the court of appeals on its denial of UIM benefits, and on remand, was awarded $68,877.70 in taxable costs.

Auto Owners then sought to collect its costs by moving to intervene in a second lawsuit filed on behalf of the estate as a result of the same accident. Its motion was denied. When the estate ultimately settled the second case, the trial court again refused Auto Owners’ attempt to intervene to collect its costs. The court of appeals reversed. “The trial court erred in failing to allow Auto Owners to intervene and recover its award of costs from the wrongful death award before the proceeds of the award were distributed to the beneficiaries.” Sl Op, p 6.

Scraping snow and ice off a car windshield—“maintenance” under no-fault?

_Willer v Titan Ins_
Supreme Court Case No. 133596

Plaintiff slipped and fell on ice while scraping snow off the windshield of her car. The trial court allowed plaintiff to recover no-fault benefits because she was engaged in “maintenance” within the meaning of MCL 500.3105(1). On March 6, 2008, the Supreme Court heard arguments whether plaintiff is entitled to no-fault benefits despite the parked car exclusion in MCL 500.3106(1). A decision is pending.

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No-Fault First-Party Case Report

By Daniel Steele, Vandeveer Garzia, P.C.

There were two noteworthy first-party no-fault cases from the court of appeals in the last quarter. One was published and the other unpublished.

Insurance requirement is linked to the vehicle, not the person. In a published opinion, _Iqbal v BristolWest Insurance Group_, ___ Mich App ____ (2008) (2008 WL 398881), the court considered a situation in which the plaintiff was driving a vehicle owned and insured by his brother. The plaintiff had regular use of the vehicle, so the highest priority insurer argued that the plaintiff was an owner under MCL 500.3101(2)(g). The defendant insurer also argued that since the plaintiff was an owner, he had an obligation to insure the vehicle. Since the plaintiff did not insure the vehicle (even though the brother had a policy on the vehicle), the defendant argued that the plaintiff was disqualified from first-party benefits because he did not have the required insurance. MCL 500.3113(b). The court of appeals held that the plaintiff was not precluded from recovering PIP benefits. It held that the trial court correctly ruled that the plaintiff was entitled to PIP benefits because the vehicle was in fact insured, regardless of whether plaintiff was the “owner” of the vehicle. The _Iqbal_ court acknowledged that there were prior, unpublished court of appeals decisions to the contrary.

One-year-back rule—insurer estopped to assert.
In _Douse v Farm Bureau General Ins Co_, court of appeals no. 274230, an unpublished opinion, the court of appeals agreed that the trial court could estop a defendant from asserting the one-year-back rule. This was allowed because of a letter sent by the insurance carrier, which requested additional information and did not unequivocally deny the plaintiff’s claim. This unpublished decision will have to be viewed in light of the Supreme Court’s decision in _Devillers v Auto Club Insurance Association_, 473 Mich 562; 702 NW2d 539 (2005). _Devillers_ ended the practice of judicial tolling of the one-year-back rule from the time the insured filed a claim until the insurer formally denied the claim. The _Douse_ court referred to _Devillers_ in its opinion and felt that the facts fell within the _Devillers_ language, which indicated that courts should be reluctant to apply equitable estoppel “absent intentional or negligent conduct designed to induce a Plaintiff [to refrain] from bringing a timely action.”
Sometimes the drafting attorney is asked to fix a manuscript clause. In the best of all possible worlds, this happens as a result of routine policy review. Often it happens after a coverage dispute has highlighted some problem with a clause.

It’s not unusual for a manuscript form, drafted by or for the insurer, to need some fixing. Many times, it is simply because a situation that was not foreseen when the clause was drafted has raised questions. Sometimes the drafting itself suffers from problems. Broadly speaking, there are two sources of the problems: (1) they weren’t written by attorneys, or (2) they were.

A sign of a policy provision not written by an attorney is the awkward use of legal phrases. One policy form, for example, referred to “parole” evidence, rather than parol evidence. A lawyer wouldn’t make that mistake. No, a lawyer would make different mistakes.

When the problem comes from lawyers’ drafting, it’s often because of long, circuitous sentences that wind an intricate path through clause after dependent subclause, with a few ponderous phrases and words (“in the event,” “hereinaf”r) thrown in for seasoning. Why lawyers so often abuse the language of Shakespeare is an enduring mystery. Granted, a policy exclusion is as far from the bard as it is possible to imagine, but still, clarity is a virtue. “In the event” is more pretentious than the humble “if,” but it still means the same thing.

However a bad clause got that way, there are techniques that can be used to fix it. Herewith an example. A definition of “property damage” reads:

**Property Damage** – The term “Property Damage,” wherever used herein, shall mean damage to or destruction or loss of use of property of others, (excluding, however, damage to property in the care, custody or control of the Named Insured), including property which is purchased by the Named Insured under a contract which provides that the title remains with the sellers until payments have been completed, the liability of the Company being limited to the payments outstanding.

**Remove the chaff**

The first step is to remove unnecessary words.

**Property Damage** – The term “Property Damage,” wherever used herein, shall mean damage to or destruction or loss of use of property of others,

(excluding, however, **damage** to property in the care, custody or control of the Named Insured), including property which is purchased by the Named Insured under a contract which provides that the title remains with the sellers until payments have been completed, the liability of the Company being limited to the payments outstanding.

**Fix the core definition**

The next step is to look for specific terms that can be improved.

Saying “**Property Damage means damage** . . .” is using the defined term to define itself, a circular definition and a per se drafting faux pas. If we replace “damage” with “physical injury” it avoids circularity. Inserting “physical” makes clear that we are talking about tangible property, not the many kinds of intangible property interests. Just to be sure, we can insert the word “tangible” in front of “property.”

Also, the parenthetical phrase is unclear because it is intended to remove from coverage property of “others” that is in the custody of the insured, but there is no reference to “others” in the parenthetical phrase.

Both of these can be fixed this way:

**Property Damage** means **physical** damage to or destruction or loss of use of the tangible property of others, (excluding, however, but not **any** property of others that is in the care, custody or control of the Named Insured), including property which is purchased by the Named Insured under a contract which provides that the title remains with the sellers until payments have been completed, the liability of the Company being limited to the payments outstanding.
In clean form, it now reads:

**Property Damage** means physical damage to or destruction or loss of use of the tangible property of others, but not any property of others that is in the care, custody or control of the Named Insured, including property which is purchased by the Named Insured under a contract which provides that the title remains with the sellers until payments have been completed, the liability of the Company being limited to the payments outstanding.

Up to the word “including,” it’s easier to read. Note that replacing “excluding, however” with “but not” also avoids the confusion of using “excluding” in one phrase and then following it immediately with “including.”

Separate the separate coverages

The next target is the second half of the sentence, which begins with “including.” This says the amount of coverage is limited when the damaged property is being purchased by the insured under a “title-retaining contract.” That text now reads:

including property which is purchased by the Named Insured under a contract which provides that the title remains with the sellers until payments have been completed, the liability of the Company being limited to the payments outstanding.

The purpose of this clause is to limit coverage where the insured is buying property “on time” and still owes something on it. The idea is to limit coverage to the amount still owed to the seller. Fair enough, but the language needs a lot of work. It’s a real mess.

First the clause uses the phrase “title remains with the sellers,” but a “title-retaining contract” is only one kind of security interest and by far the least common. The insured could well find itself without coverage depending on the formal structure of the purchase. We need reference to security interests in general. Before that, we need to drop the beginning phrase “including property.” This is a separate kind of coverage.

The first sentence covers damage to the property of others, but this part covers damage where the seller sues for the loss to its interest. This part also contains a limit in the amount of coverage. Splicing the different concepts together in one sentence is a bad idea.

It should be a whole new sentence, not tacked onto the previous one. Rewriting the whole second part, we come up with this:

For property that is subject to a security interest, the coverage provided by this policy shall not exceed the amount remaining to be paid to the seller. under a contract which provides that the title remains with the sellers until payments have been completed, the liability of Hudson being limited to the payments outstanding.

There is a side benefit to this new text as well. Under the existing language, the seller (who is not the insured) could argue that it is entitled to add up all the remaining “payments outstanding” and get that sum. But the remaining payments would likely include interest, so that the actual balance owed is less than the sum of the remaining payments. The insurer has good reason to be generous with its insureds, but none to be generous with the seller of goods.

In clean form, then, we have:

For property that is subject to a security interest, the coverage provided by this policy shall not exceed the amount remaining to be paid to the seller.

After all these repairs are made, this is what we end up with.

**Property Damage** means physical damage to or destruction or loss of use of the tangible property of others, but not any property of others that is in the care, custody or control of the Named Insured. For property purchased by the Named Insured and which is subject to a security interest, the coverage provided by this policy shall not exceed the amount remaining to be paid to the seller.

This clause is shorter, more direct, easier to understand, and therefore more “user-friendly” than the existing version. This is not necessarily the only way to write the clause. For example, maybe the reference to “seller” should be a reference to the holder of the security interest, to cover the situation where the purchase is financed by a bank. But the technique of fixing a bad clause is still valid: drop the unnecessary words, look closely at the definitions, control the conjunctions, and give different coverage different sentences.

**Benefit to insurer and insured**

It is a good marketing point for an insurer to be able to show an insured that the policy is clear and easy to follow. Insureds probably assume they will not understand the policy language, and are often both surprised and pleased when they actually can understand it. Clarity benefits everyone. The insured likes it because it knows what is covered, the claims department benefits because coverage is easier to analyze, and the underwriting department benefits because the policy is easier to sell.
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