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## From the Chair

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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.



Elaine M. Pohl

### Join a Committee

I am pleased to report that our Section continues to thrive in 2013. Our membership is growing with almost 600 members and our committees are active. If you would like to get involved with one of our committees, please contact one of the Committee Chairs:

- Program Committee, Kathleen Lopilato (lopilato.kathleen@aoins.com)
- Membership Committee, Barry Feldman (barry@feldmanlaw.us) and Dan Steele (dsteele@VGpcLaw.com)
- Strategic Planning Committee, Adam Kutinsky (adam.kutinsky@kitch.com)
- Publications Committee, Hal Carroll (hoc@HalOCarrollEsq.com)

Participation in a committee is an excellent way to get involved with our Section and provides the opportunity to network with your peers and serve our other members. As part of our Section’s strategic plan, we are striving to make our committees even stronger by establishing clear, achievable goals for each of them. Please consider getting involved.

### Member Database Project

We have been working with the State Bar to set up a database of our members, with information about the members’ areas of practice and expertise. The database will be searchable based on specified criteria, such as practice specialties, services provided, and percentage of business representing insureds or insurers. We expect the database to serve several functions:

- Within our Section, it will be a tool for networking, especially for younger members. It will also help members who have a specific issue find someone to consult or assist them.
- For attorneys outside our Section, it will be a resource for those who are unfamiliar with insurance and indemnity law to find the expertise they need.
- For the courts, especially the new Business Courts, it will serve as a source of attorneys who can assist in early intervention in cases involving insurance or indemnity issues.
- For litigants whose cases involve insurance or indemnity issues, it will assist them in finding potential neutral evaluators, facilitators, or consultants.

No other Section has a database of the type we are planning, and we think this will become a valuable member benefit.

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At present, we are in discussions with a vendor about the best software and structure for the database. If it all goes as we expect, we will be sending each member a form to fill out and return. We will keep you informed as we proceed. Thanks again to Hal Carroll for taking the lead on this project.

### Business Courts

You will recall that our last issue of the Journal was focused on the new Business Courts that are mandated in every county with three or more judges. Cases involving disputes over insurance policies and indemnity agreements may be assigned to these Business Courts as they are created. We believe that insurance and indemnity law cases have unique characteris-

tics that make them good candidates for early resolutions, and we believe our Section can play a part in that. We are working with the relevant state and county agencies and personnel to promote our Section as a source of expertise for Business Court cases. Our Section, and the particular knowledge base of our members, can be a key resource for the Business Courts as they become established. As a result, we are uniquely positioned to assist these Courts and their staff. We are exploring ways in which we can best do that, including by establishing the member database described above.

If you would like more information on this issue or if you are interested in assisting with this project, please contact Hal Carroll or me. We would be happy for additional input. ■

### Editor's Note



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

The *Journal* is a forum for the exchange of information, analysis and opinions concerning insurance and indemnity law and practice from all perspectives. All opinions expressed in contributions to the Journal are those of the author. The Section itself takes no position on issues.

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Invite someone you know to join the fun.

Invite someone to join the section.

Section membership forms can be found at <http://www.michbar.org/sections>



## “Business Risks” and the CGL Policy

By Catherine L. Heise, *Amerisure Insurance Company*

The commercial general liability (“CGL”) policy, developed by the Insurance Services Office (“ISO”), is one of the most commonly used coverage forms in the industry.<sup>1</sup> At the heart of the CGL policy is the concept of “risk,” which is defined as uncertainty about outcomes, some of which can be negative.<sup>2</sup> In exchange for a premium, the CGL policyholder shifts its risk of legal liability to an insurer. The insuring agreement states that the insurer will pay those sums that (1) an insured (2) is legally obligated to pay (3) because of “bodily injury” or “property damage” that is (4) caused by an “occurrence.” An “occurrence” is an “accident,” which courts have interpreted to be something that is “unforeseen,” “fortuitous” or “unusual.”<sup>3</sup>

If a liability claim against the insured satisfies the “insuring agreement,” the next question is whether any of the sixteen exclusions in the ISO CGL policy applies, or whether any endorsements to the policy expand or limit coverage. The “insured bears the burden of proving coverage, while the insurer must prove that an exclusion to coverage is applicable.”<sup>4</sup>

### Is Poor Workmanship an “Occurrence”?

Over the years, two distinct interpretations have developed over whether a claim arising out of the insured’s allegedly poor workmanship constitutes an “occurrence,” with the focus being on the interpretation of the word “accident.”<sup>5</sup> One line of cases holds that “faulty workmanship” constitutes an occurrence as long as the insured did not intend for the damage to occur.<sup>6</sup> This analysis asserts that “business risks” – the “normal, frequent, or predictable consequences of doing business, and which business management can and should control and manage”<sup>7</sup> – are eliminated through exclusions, not the insuring agreement.<sup>8</sup> The competing line of cases holds that an “accident” does not mean damage caused by faulty workmanship to the work product itself.<sup>9</sup> Michigan follows the latter rule, requiring that, in order to satisfy the insuring agreement, an “occurrence” must result in damage to persons or to property other than the work product itself,<sup>10</sup> without further reference to the exclusions.\*

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The competing line of cases holds that an “accident” does not mean damage caused by faulty workmanship to the work product itself. Michigan follows the latter rule, requiring that, in order to satisfy the insuring agreement, an “occurrence” must result in damage to persons or to property other than the work product itself, without further reference to the exclusions

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### The Five “Business Risk” Exclusions

Even under the Michigan rule, however, situations frequently arise where the insuring agreement is satisfied, but there is no coverage for some or all of the loss by operation of one or more exclusions.<sup>11</sup> Some of the exclusions are obvious, such as those dealing with war or expected or intended injury. Other exposures, such as employer liability or automobiles, are excluded because they are addressed by other insurance products.

The standard CGL policy has five “business risk” exclusions, which can be generally understood as limitations on the “all risk” nature of the CGL policy<sup>12</sup> for “rip and tear” expenses associated with repairing, replacing, or removing the insured’s defective “work.” These exclusions are (j), (k), (l), (m), and (n) of the ISO CGL policy. For reference, each of these exclusions is set forth in full at the end of this article.

Each of these exclusions has led to litigation in various states, as the courts have tried to apply them to various factual scenarios. The following is a brief survey of each of them.

#### Exclusions (j)(1-6): “Damage to Property”

Exclusion (J) is an exclusion with six subparts. In subparagraphs 1-4, it precludes coverage for “property damage” to property owned, rented, or occupied by an insured; premises that the insured sells, gives away or abandons if the “property damage” arises out of those premises; property loaned to an in-

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\* **Editor’s Note:** This issue was addressed in a series of articles by member James A. Johnson in three issues of the *Journal*: Vol. 4, No. 1 (January 2011), Vol. 4 No. 3 (July 2011), and Vol. 5, No. 2 (April 2012).

**“Business Risks” ...**  
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sured; and personal property in the “care, custody or control” of the insured. Exclusions (j)(5) and (j)(6) are called the “work in progress” exclusions. Exclusion (j)(5) precludes coverage for (1) “that particular part” (2) of “real property” (3) on which the insured or any contractors or subcontractors (4) *are performing* operations (5) if the property damage arises out of those operations (emphasis added). The use of the present tense in the “Damage to Property” exclusion reflects the policy’s intent that the insured monitor and control the quality of its work while it is still on the job.<sup>13</sup> The use of the words “that particular part” narrows the scope of the exclusion to that property which is the “object” of the insured’s work, and damage to other property would be covered.<sup>14</sup>

The next subparagraph of this exclusion, (j)(6), precludes coverage for “that particular part” of any property that must be “restored or replaced” because “your work” was incorrectly performed on it. Timing controls the application of this “work in progress” sub-exclusion: it applies to work that is underway, and once the project is completed, exclusion (l), for “completed operations”, may apply.

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**Exclusion k: “Damage to Your Product”**

Exclusion (k) deals with damage to the insured’s “product,” which requires reference to “your product” in the “Definitions” portion of the policy (see below). Exclusion (k) is not intended to bar coverage for claims arising *from* the insured’s products, but instead bars coverage *for* the product itself.<sup>15</sup> This is consistent with the notion that a CGL policy is not a “performance bond,” and does not act as a warranty for products that the insured places into the stream of commerce.<sup>16</sup> Exclusion (k) applies to entities that manufacture products, rather than service companies, such as contractors.<sup>17</sup>

**Exclusion l: “Damage to Your Work”  
(a/k/a/ completed operations)**

Exclusion (l) is the “Damage to Your Work” exclusion, also known as the “completed operations” exclusion.<sup>18</sup> Exclusion (l)

inquires whether damages are “property damage,” or are merely additional costs to remedy defective work.<sup>19</sup> Exclusion (l) precludes coverage for work that is both *performed* and *damaged* by the insured.<sup>20</sup> If the insured’s faulty work damages the work of others, then those damages would be covered under the policy. The exclusion has an exception, however, if the damaged work or the work out of which the damage arises was performed on the insured’s behalf by a subcontractor. The rationale for this exception is that the insured cannot control for a subcontractor’s negligence as well as it can for its own.<sup>21</sup> If the insuring agreement is satisfied, and some of the allegedly defective work was subbed out, this exception to exclusion (l) can be a source of coverage.

**Exclusion m: “Damage to Impaired Property or Property Not Physically Injured”**

Exclusion (m), which addresses “Damage to Impaired Property or Property Not Physically Injured,” is meant to apply to losses in which the insured’s defective product, after being incorporated into other property, must be replaced or removed thereby causing *loss of use* of the property.<sup>22</sup> It applies when the loss of use is caused by the insured’s faulty work and there is no physical injury to the property other than the incorporation of the insured’s faulty work.<sup>23</sup>

Exclusion (m) is intended to exclude coverage for the costs of repairing or replacing the insured’s defective work or product where it has not caused any physical injury, but has merely rendered other property less valuable.<sup>24</sup> Exclusion (m), therefore, would not apply to damage to property other than the insured’s work or product, or if other property must be damaged in order to repair or replace the insured’s faulty work. Application of exclusion (m) and its exceptions can be a source of perplexity for insureds, insurers, and counsel.

**Exclusion n: “Recall of Products, Work or Impaired Property”**

Finally, exclusion (n) is the “Recall” exclusion, and is sometimes called the “sistership” exclusion. The term “sistership” arose from an aircraft industry accident in which one plane crashed, and its “sister ships” were subsequently grounded and recalled by the manufacturer in order to correct a common defect.<sup>25</sup> The purpose, therefore, of exclusion (n) is to preclude coverage for the costs incurred because of product recall or withdrawal from use because of a known or suspected defect or deficiency.<sup>26</sup> Precluding coverage for the costs associated with the withdrawal of a product from the market reflects that the CGL policy is designed to respond to damage that *has* occurred, rather than damage that *might* occur.<sup>27</sup>

**Conclusion**

In representing a Michigan business owner, therefore, who has been presented with a liability claim, counsel will first need to examine whether the claim satisfies the “occurrence” requirement of the insuring agreement. If the claim arises out of the insured client’s operations, analysis will be needed as to whether the claim involves the normal risks of doing business, or if the client’s commercial general liability policy, together with its endorsements, will provide coverage.



**The Business Risk Exclusions**

*Exclusion j. Damage To Property*

“Property damage” to:

- (1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another’s property;
- (2) Premises you sell, give away or abandon, if the “property damage” arises out of any part of those premises;
- (3) Property loaned to you;
- (4) Personal property in the care, custody or control of the insured;
- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the “property damage” arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.

Paragraphs (1), (3) and (4) of this exclusion do not apply to “property damage” (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section III – Limits Of Insurance.

Paragraph (2) of this exclusion does not apply if the premises are “your work” and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to “property damage” included in the “products-completed operations hazard”.

*Exclusion k. Damage To Your Product*

“Property damage” to “your product” arising out of it or any part of it.

(Relevant Definitions)

“Your product”:

- a. Means:
  - (1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
    - (a) You;
    - (b) Others trading under your name; or
    - (c) A person or organization whose business or assets you have acquired; and
  - (2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.
- b. Includes:
  - (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your product”; and
  - (2) The providing of or failure to provide warnings or instructions.
- c. Does not include vending machines or other property rented to or located for the use of others but not sold.

*Exclusion l. Damage To Your Work*

“Property damage” to “your work” arising out of it or any part of it and included in the “products-completed operations hazard”.

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

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**“Business Risks” ...**  
Continued from page 5

**Exclusion m. Damage To Impaired Property Or Property Not Physically Injured**

“Property damage” to “impaired property” or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work”; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use.

**Exclusion n. Recall Of Products, Work Or Impaired Property**

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) “Your product”;
- (2) “Your work”; or
- (3) “Impaired property”;

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it. ■

**About the Author**

**Catherine L. Heise** is an attorney with Amerisure Insurance, and serves on the Council of the Insurance and Indemnity Law Section. Her email address is [CHeise@amerisure.com](mailto:CHeise@amerisure.com).

**Endnotes**

1 The policy references in this article are taken from the 2007 ISO Properties, Inc. Commercial General Liability policy, form CG 00 01 12 07. As with all insurance policies, a comprehensive review of the policy and its endorsements is necessary for correct coverage interpretation.

2 Charles M. Nyce, *Foundations of Risk Management* 1.4 (2<sup>nd</sup> ed. 2006)

3 *Hawkeye-Security Ins Co v Vector Construction Co.*, 185 Mich App 369, 374; 460 NW2d 329, 332 (1990)

4 *Heniser v Frankenmuth Mutual Insurance Co*, 449 Mich 155, 161 note 6; 534 NW2d 502 (1995), quoting from *Arco Industries Corp v American Motorists Ins Co*, 448 Mich 395, 425-425; 531 NW2d 168 (1995) (concurring opinion of Boyle, J.)

5 *Groom v Homeowners Ins Co.*, 2007 WL 1166050 (Mich. App. 2007)

6 *Id.*

7 *Hawkeye-Security Ins Co v Davis*, 6 S.W.3d 419,426 (Mo.Ct.App. 1999).

8 *Groom, citing Lennar.*

9 *Hawkeye-Security Ins Co v Vector Construction Co.*, 185 Mich App 369, 378; 460 NW2d 329, 334 (1990).

10 *Id.*; *Radenbaugh v Farm Bureau Gen Ins Co.*, 240 Mich. App. 134; 610 NW2d 272 (2000).

11 Linda B. Foster, Survey of Recent Case Law on Business Risk Exclusions, presented at Mealeys Insurance Coverage Disputes Concerning Construction Defects (October 4-5, 2004), at 2.

12 *Hawkeye* at 384, 460 NW2d 336.

13 Rebecca DiMasi, Clarifying the Confusion Over the “Business Risk Exclusions and Other Related Construction Defect Topics, presented at the Insurance Law Institute (December 7-8, 2006), at 4.

14 4 Bruner & O’Connor Construction Law, Section 11:100.

15 Michael F. Aylward, Shaun McParland Baldwin, Carol P. Keough, Daniel J. Langin, *Problem Issues in CGL*, page 69, National Underwriter Company (2001).

16 Foster, *supra*.

17 *Id.* at 70.

18 DiMasi, *supra* at 5.

19 *Afcon, Inc. v Ellis-Don Michigan, Inc.*, 2005 WL 415671 (Mich App 2005)

20 Aylward et al., *supra*, at page 72.

21 DiMasi at 6.

22 Aylward, et al., *supra* at 75.

23 *Id.*

24 DiMasi, *supra* at 9.

25 Aylward, et al., *supra* at 77.

26 *Id.* at 63.

27 Mark D. Willmarth and Deborah A. Hebert, *Michigan Insurance Law and Practice*, Chapter 6, § 6.28 (ICLE 2009).

## Builders Risk Insurance

By James A. Johnson ©2012; johnsonajmf@hotmail.com

In earlier articles published in the *Journal* – “Construction Defects as Occurrences I, II & III” (January 2011, July 2011, April 2012) – we discussed alleged defects in the performed work. The next question is: what about coverage against direct physical loss or damage to covered property used in the construction process?

Enter “Builders Risk Insurance.”\*

Builders Risk Insurance is a form of property insurance that covers property owners and builders for projects under construction. The term “builder” is misleading because insureds can include not only the general contractor performing the work, but also the owner, subcontractor, lending institution and others. Unlike commercial general liability policies, builders risk policies typically include all project participants as insureds who have an insurable interest in the project. In addition, an insurer cannot generally subrogate against its insured.

### Waivers of Subrogation

As insureds, project participants are provided a level of comfort such that subrogation efforts against them will be barred.

The contract between the parties to the construction project will normally contain its own “waiver of subrogation” clause, in a form similar to this:

**Waivers of subrogation.** The Owner and Contractor waive all rights against each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other . . . for damages caused by fire or other perils to the extent covered by property insurance . . .

Most insurers include in their policies a clause that expressly acknowledges the right of the insured to waive subrogation. A typical clause, usually in the “other conditions” portion of the policy, reads:

**Subrogation.** If “we” pay for a loss, “we” may require “you” to assign to “us” “your” right of recovery against others. “You” must do all that is necessary to secure “our” rights. “We” will not pay for a loss if “you” impair this right to recover.

“You” may waive “your” right to recover from others in writing before a loss occurs.

Actually, the waiver of subrogation clause is effective even if the insurer does not include this language in its policy. This is because of the basic rule that a subrogor can assign only what it has, and once it has waived a claim it has nothing to assign. “It is well-established that the subrogee acquires no greater rights than those possessed by the subrogor.”<sup>1</sup>

### All Risk or Named Peril

No matter what policy form is used, almost all builders risk policy forms provide coverage under one of two basic premises: “all risk” or “named peril” coverage. Builders risk provides coverage on an “all risk” basis for accidental losses, damage or destruction of property such as fire, theft, vandalism, malicious mischief, explosion, water damage, electrical breakdown and collapse for which the insured has an insurable interest. In contrast, a named peril policy insures against direct physical loss or damage to covered property or to insured property where the loss is covered by any of the specifically named perils or causes of loss. Builders risk policies do not cover losses occurring before construction begins or after completion of construction, nor do they cover losses to property outside the project, or injury to workers. Coverage exists during the construction period only and is intended to terminate when the work has been completed and the property is ready for use or occupancy. Construction must be in progress for coverage to exist. This policy insures only against direct physical loss or damage to covered property or a named peril.

The builders risk insurance policy will pay damages up to the coverage limit. The limit must accurately reflect the total completed value including all materials and labor cost. The land value is not included. The construction budget is the best source for determining the appropriate limit of insurance together with the expected completed value of the project. The amount of the insurance required is the actual insurable replacement value or full replacement costs. Builders risk policies are structured to satisfy the insurance requirements set forth in the construction contracts governing a project. These contracts usually specify those required to be protected by the builders risk insurance.

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\* Another article in this issue by Catherine Heise discusses “builders risk exclusions” in Commercial General Liability (CGL) policies.

## Builders Risk Insurance

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### Covered Property

Notwithstanding that the “fortuity doctrine” serves as a threshold to coverage, one of the initial questions in any claim to be considered by a court, is whether the subject claim falls within the policy definition of “covered property.” In *Walden General Contractors, Inc v Michigan Mutual Ins Co*,<sup>2</sup> a fire occurred at the insured’s warehouse, damaging construction materials which had been packaged waiting to be sent to various job sites. The policyholder sought coverage for the loss of construction materials under its builders risk policy. The policy defined “covered property” as:

Property that will become a permanent part of the buildings or structures at the job site; and

- A. While this property is in transit to the job site or to a temporary storage location; or
- B. While this property is being held at a temporary location

Covered Property DOES NOT INCLUDE:

Your property at locations that you own, control or lease other than

At a “job site”, and

At places of temporary storage.

The insurer denied coverage because the materials were not “in transit.” The *Walden* court held that it was error for the trial court to grant summary judgment to the insurer on the grounds that the materials were not covered property. The policy did not require that the materials be in transit at the time of loss to be covered property. This case demonstrates that a policy’s definition of “covered property” is critical.

### Building Materials

In *Lodge Corp v Assurance Co of North America*,<sup>3</sup> the court addressed the definition of “building materials” to determine if the reporting requirements in a builders risk policy were complied with. The policy provided retroactive coverage for a construction site where construction was commenced in the previous month assuming certain requirements were met. One requirement was that the insured, Lodge Corp, was required to report the total estimated value of all structures started during the previous month. The start date was defined as the date when “building materials” were first placed

on the construction site. The policy did not define the term “building materials.” The court stated that the term “building materials” was not ambiguous and included cement. Thus, the construction began when the foundation was poured. The project started in October when the foundation was poured but the insured did not report it until November. The insured violated the reporting requirements and was not entitled to coverage under its builders risk policy.

For an excellent discussion of the distinction between a builders risk and fire insurance policy, together with other relevant issues, see *Hunt Construction Group, Inc v Allianz Global Risks U.S. Ins. Co*.<sup>4</sup> This is a 7<sup>th</sup> Circuit diversity case governed by Michigan law authored by the brilliant jurist Richard Posner.

### Conclusion

Builders Risk Insurance provides coverage on an “all risk” or “named peril basis” for accidental losses as a result of direct physical loss or damage to covered property.

The three key elements of the builders risk insuring agreement that must be satisfied for coverage to exist are (1) a direct physical loss or damage, (2) damage to covered property and (3) damage that was caused by a covered cause of loss.

Coverage exists during the construction period only and is intended to terminate when the work is completed and the property is ready for use or occupancy. Builders Risk policies typically provide broader coverage than commercial policies and are preferred type of property coverage on a construction project from the perspective of all project participants. ■

### About the Author

**James A. Johnson**, of Southfield, Michigan is a trial lawyer. Mr. Johnson concentrates on insurance coverage cases under the Commercial General Liability Policy. He is an active member of the Michigan, Massachusetts, Texas and Federal Court Bars. Mr. Johnson can be reached at 248-351-4808 or [www.JamesAJohnsonEsq.com](http://www.JamesAJohnsonEsq.com)

### Endnotes

- 1 *Commercial Union Ins Co v Medical Protective Co*, 426 Mich 109, 117; 393 NW2d 479 (1986).
- 2 227 Mich App 783; 577 NW2d 139 (1998).
- 3 775 NE 2d 1250 (Mass App 2002)
- 4 503 F3d 632 (7<sup>th</sup> Cir 2007)



## Protection for Professional Liability Losses: Insurance and Indemnity

By Adam Kutinsky, *Kitch, Drutchas, Wagner, Valitutti & Sherbrook* and Hal O. Carroll, *Law Offices of Hal O. Carroll*

Although protecting the professional against liability follows in some ways a pattern similar to protection of businesses in general, for medical professionals in particular it is especially important for the lawyer to look carefully at all sources of recovery available to the professional.

When a business or an individual suffers a loss, the initial question is almost always whether there is any insurance available and intended to cover the loss. For small businesses and individuals, for better or for worse, often the only question that is asked is whether the business or individual's own insurance will cover the loss. Conversely, a large organization that maintains more extensive risk management programs will look beyond its insurance to other sources of recovery, such as indemnity obligations of vendors or non-contracting third parties.

As attorneys, we should always advise our clients, both individuals and businesses, of every available source of recovery in the event of loss. This includes finding available insurance coverage from the client's policy, but it also includes coverage under other policies, contractual indemnity obligations of third parties, and potential statutory or common law sources of indemnity. Interestingly, even when clients don't engage in the extensive risk management planning that we as lawyers would like them to do, non-insurance sources of recovery may exist. For example a construction contract executed by a homeowner or subcontractor, which no matter what size the project, may contain a broad indemnity provision. Or a corporation or LLC may have undertaken indemnity obligations towards its officers.

### The Ideal World – An Ounce of Prevention

Every lawyer who counsels businesses, individuals in business, or professionals, wants the client to plan ahead for self-protection. This means reviewing the insurance policy or policies to ensure they provide the coverage that is needed, reviewing contracts to see that indemnity obligations run in the client's favor, and looking into other insurance policies that might provide additional insurance.

For the client's own policy, this means reviewing it to look for clauses or endorsements that, even if they are ordinary parts of a policy, can cause trouble in the specific circumstances that the client faces.

For contracts and indemnity, the ideal pre-loss risk management review looks closely at the language. This is an area where the difference between "arising out of your performance" and "caused by your act or omission" can mean the difference between signing a check on the front or the back.

Contracts also come into play in terms of insurance from other sources: a contractor or an employer, for example.

Finally, common law indemnity may come into play in some circumstances.

A small amount of time and expense in the beginning can provide big benefits down the road.

A good place to start this preventive process for any client is by asking which party is in the best position to control the particular underlying risk of loss. For example, the contractor that is in control of the job site should be responsible for obtaining insurance coverage for bodily injury claims related to possible on-site injuries. Subcontractors should also have policies to protect against losses caused by their actions. Likewise, since injured third parties looking for compensation may have little concern for the question of which party is in control of the underlying risk after a loss occurs, there should be a proper indemnity clause to transfer risk of litigation to the party that is in actual control of the activity.

In the lawyer's ideal world, the client facing these risks would come in for an annual contract review, and a review before any major new undertaking. Sometimes it happens, but often the reality is different.

With or without that careful pre-planning, the lawyer whose client faces liability will need to guide the client in a search for protection from several sources.

### Insurance – Multiple Insurers

For a business, after looking at the client's own policy, the next step is to look at policies that insure other persons or businesses involved in the project that gave rise to the loss. This raises the issues of how the policies work together. That generally takes the form of sorting out "other insurance" clauses. This can be complicated, but when it comes to insurance policy more is always better.

*continued on the next page*

Protection for Professional Liability Losses:  
Continued from page 9

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For contracts and indemnity, the ideal pre-loss risk management review looks closely at the language. This is an area where the difference between “arising out of your performance” and “caused by your act or omission” can mean the difference between signing a check on the front or the back.

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### Regulated Industries and Professionals

The analysis of loss mitigation becomes significantly more complicated in the event of a loss within a highly regulated industry. Take for example health care, which is extensively regulated and usually involves more complexity than other industries when a contract is negotiated or a loss occurs. Professional Liability Insurance remains the primary source of risk management in the health care industry.

In the event of provider malpractice, the first thought is to look to the individual professional’s own insurance policy to provide defense and indemnity. But, in many cases, there may be more than one available policy depending upon the location or individual and institution involved in the event. A common example is where a physician is sued for injury arising out of surgery performed at the hospital. That physician may be covered by both a hospital policy and a separate professional liability policy for his or her physician practice. There may also be a third policy purchased by the individual physician, separate from his practice, i.e., a General Liability (GL) policy.

What may get lost in analysis, however, are the many other non-insurance indemnity obligations that exist in the health care realm, each of which plays a role in evaluating the proper position to take in a coverage dispute. These indemnity obligations can be both contractual and statutory.

### Health Care Captive Insurers

If insurance is purchased from a third party insurance company with no affiliation with the insured physician, physician group, or hospital, the analysis of where to pursue sources of coverage is relatively simple – the insurance company is looked to as the primary source of funds. But captive insurance programs have become very common among large health care institutions over the past 20 years. Often the captives not only provide coverage for the hospital system, but also issue policies to physician groups and individual physicians that may be employed on a full time or part time basis with the hospital system. This places the hospital in the position of

funding the insurer that covers a loss caused by an employed physician even if the hospital itself may not have any liability for the covered event. So, even if the hospital is dismissed from a malpractice lawsuit and only the physician remains, the hospital may still end up ultimately paying for the loss.

### Captive Insurers and Contractual Indemnity

What may also be of relevance to coverage for a loss are the indemnity obligations contained within the contracts between the various professionals and institutions involved in the health care event. Just about every health care contract contains an indemnity provision. Likewise, every individual or institution that touches health care will be party to a contract with another entity in the chain of health care treatment. By way of example, an employed physician will almost certainly have an employment contract with the hospital that includes an indemnity provision that protects the physician in the event of a loss.

Insurance policies also provide indemnity, but what distinguishes indemnity provisions in contracts from indemnity provisions in insurance policies is what they cover – where insurance policies have standard and often detailed exclusions from coverage, contractual indemnity provisions seldom do, so there may be events that are not covered under an insurance policy but still covered under the health care contract indemnity provision. Significantly, many indemnity provisions state that the institution will contain a promise to indemnify the health care professional “to the fullest extent under the law,” broad language that essentially embraces the entire range of the professional’s activities that give rise to the underlying loss and claim.

The interplay of insurance policy coverage and indemnity obligations in health care contracts becomes especially significant in the event of a coverage dispute. Take for example a malpractice incident that takes place at a hospital and involves an employed physician, when both hospital and physician are covered by the hospital’s captive program. Even if for some reason the physician’s actions fall outside of coverage under the captive insurance program, so that the captive insurer denies coverage, the hospital may still be obligated to indemnify the physician under the broader indemnity obligations in the employment contract between the hospital and the physician. In other words, the hospital must indemnify the physician one way or another, be it through its captive program which is funded by hospital dollars, or under the direct employment contract with the doctor. Frequently, the broad scope of the contractual indemnity provision is overlooked when the focus is on evaluating coverage under the captive insurance policy.

If the contractual indemnity obligation were taken into consideration, the captive may reconsider taking a hard line on coverage under the captive program, since the ultimate financial burden would still fall on the hospital.

## Conclusion

Although protecting the professional against liability follows in some ways a pattern similar to protection of businesses in general, for medical professionals in particular it is essential for the lawyer to look carefully at all sources of recovery available to the professional. In addition to the professional's own policy, a hospital policy, and the hospital's contract with the professional, must also be factored in when the lawyer is analyzing the possible sources of protection. ■

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## 2013 Construction-Industry “Anti-Indemnity” Amendments\*

By Noreen L. Slank, Collins, Einhorn, Farrell PC

In the late hours of the 2012 Legislature, a coalition of construction-industry associations secured significant changes to what some call the “Anti-Indemnity Act,” even though there’s not too much “anti” in it.

MCL 691.991 was enacted in 1966. It disallows construction industry contract terms that indemnify a party for its “sole negligence.” The amendments took effect March 1, 2013. To understand where we are now requires thinking about where we were.

In its original form, the sole-negligence exception applies to contracts for the “construction, alteration, repair, or maintenance” (basically) of structures. It also specifically applies to “moving, demolition and excavating” connected with such contracts.

It is axiomatic that there is no broader category than “any and all” in an indemnity contract. But in the construction-industry context, “any and all” language can’t overwhelm the sole-negligence statutory exception.

Litigants and their liability insurers struggle to evaluate whether sole negligence will squash indemnity obligations. Those on the power end of the indemnity agreement must negate their own negligence or find another negligent party. If they can’t, their contract won’t be able to work its indemnity magic.

Those on the puny end of the indemnity agreement need to consider shoring up not only their own defenses, but also the defenses of everyone (except who they indemnified) that could be negligent, including an injured plaintiff. Because just being free of negligence doesn’t assure an indemnity win.

Although these indemnity battles are fought strictly on the defense side of the “v,” they often dramatically impact the plaintiff side. Co-defendants and their insurers busy arguing about who’s “it” are tempted to resist paying a settlement.

So, that’s the way it was until March 1, 2013. What’s next?

## Indemnity for the Design Phase Now Included Infrastructure as Well

The amendments create more cases that will be afflicted or benefited, depending on your point of view, by sole-negligence battles. The statute was amended to apply to those who contract at the “design” phase. It also will newly apply to construction, design, alteration, repair or maintenance of “a highway, road, bridge, water line, sewer line, or other infrastructure, or any other improvement to real property.”

*continued on the next page*

\* A version of this article originally appeared in *Michigan Lawyers Weekly’s* Feb. 18, 2013, edition.

2013 Construction-Industry “Anti-Indemnity” Amendments  
Continued from page 11

The statute still says that shifting liability for the indemnified party’s sole negligence “is against public policy and is void and unenforceable.” But that has come to mean only that, if a contract lacks such an exception, a court will apply the sole-negligence exception anyway.

The parties are then free to go about their indemnifying ways. Contracts are conformed to the statute rather than being nullified.

**Public Entities Limited to Comparative Fault  
(Except Universities)**

The other amendments govern “public entity” contracts. They apply to the same activities regulated by the sole-negligence exception, complete with the newly expanded applicability to all sorts of improvements to real property, including all infrastructure.

“Public entity” means all the entities you are imagining (including the State of Michigan). But, significantly, the definition excludes “institutions of higher education” as described in Article VIII, §§ 4 and 6 of the state Constitution and their “employees or agents.”

Section 4 of the Constitution lists 10 institutions. Section 6 speaks of “other institutions of higher education established by law having authority to grant baccalaureate degrees.” Universities were not keen on shouldering more responsibility for personal injury and property damage. Some successfully

fought to be excluded from the public-entity definition.

The amendment sets out what “a public entity shall not require.” It can’t require any of the categories of protected parties “to defend the public entity or any other party.” And it can’t require any of the protected parties “to assume any liability or indemnify the public entity or any other party” “for any amount greater than” the protected parties’ “degree of fault.”

The protected parties are any “Michigan-licensed architect, professional engineer, landscape architect, or professional surveyor” or “contractor.” So neither the damages caused by the public entity or the public entity’s defense costs can be shifted to others via the public entity’s contract.

The comparative fault amendments contained in MCL 691.991(2) only regulate what public entities can require in their own construction contracts. They don’t regulate what other parties in the contract mix can require of each other in terms of defense and indemnity.

Lawyers advising construction-industry clients may want to urge a review of contract documents to assure that indemnity terms are not potentially confounding the effect of the public-entity amendments.

If those contracts are requiring that public-entity owners be indemnified, the public entities may argue that the statute does not trump contract language situated outside the public entity’s contract.

The key section of the amendment that prohibits public entities from requiring protected parties to assume liability or

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indemnity “for any amount greater than the degree of fault” includes complicated sentence structure.

This complexity may lead to arguments about whether the permitted aggregate fault that lumps together a protected party with its “subcontractors and sub consultants” applies to all protected parties or only to contractors.

And there may be issues about whether the new provisions apply only to contracts signed after the March 1 effective date or also to earlier contracts when injury and damages occur after that date.

These amendments are no sea change. But in cases where the public entity’s liability is substantial, despite governmental

immunity, they should significantly decrease the liabilities of the businesses involved. And more contracts will now be subject to the sole-negligence exception. ■

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## MCL 691.991-Amended

### VOID CONSTRUCTION CONTRACTS (EXCERPT) Act 165 of 1966

\*\*\*\*\* 691.991.amended THIS AMENDED SECTION IS EFFECTIVE MARCH 1, 2013 \*\*\*\*\*

#### **691.991.amended Building construction or design; certain provisions for indemnification void; contractor defined; "public entity" defined; application of MCL 691.1401 to 691.1419.**

Sec. 1. (1) In a contract for the design, construction, alteration, repair, or maintenance of a building, a structure, an appurtenance, an appliance, a highway, road, bridge, water line, sewer line, or other infrastructure, or any other improvement to real property, including moving, demolition, and excavating connected therewith, a provision purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable.

(2) When entering into a contract with a Michigan-licensed architect, professional engineer, landscape architect, or professional surveyor for the design of a building, a structure, an appurtenance, an appliance, a highway, road, bridge, water line, sewer line, or other infrastructure, or any other improvement to real property, or a contract with a contractor for the construction, alteration, repair, or maintenance of any such improvement, including moving, demolition, and excavating connected therewith, a public entity shall not require the Michigan-licensed architect, professional engineer, landscape architect, or professional surveyor or the contractor to defend the public entity or any other party from claims, or to assume any liability or indemnify the public entity or any other party for any amount greater than the degree of fault of the Michigan-licensed architect, professional engineer, landscape architect, or professional surveyor, or the contractor and that of his or her respective subconsultants or subcontractors. A contract provision executed in violation of this section is against public policy and is void and unenforceable.

(3) For the purposes of this section, a contractor may be an individual, sole proprietorship, partnership, corporation, limited liability company, joint venture, construction manager, or other business arrangement.

(4) As used in this section, "public entity" means this state and all agencies thereof, any public body corporate within this state and all agencies thereof, and any nonincorporated public body within this state of whatever nature and all agencies thereof; including, but not limited to, cities, villages, townships, counties, school districts, intermediate school districts, authorities, and community and junior colleges as provided for in section 7 of article VIII of the state constitution of 1963, and their employees and agents, including, but not limited to, construction managers or other business arrangements retained by or contracting with the public entity to manage or administer the contract for the public entity. However, public entity does not include institutions of higher education as described or provided for in section 4 or 6 of article VIII of the state constitution of 1963, or their employees or agents.

(5) Nothing in this act affects the application of 1964 PA 170, MCL 691.1401 to 691.1419.

**History:** 1966, Act 165, Eff. Mar. 10, 1967;—Am. 2012, Act 468, Eff. Mar. 1, 2013.

**Insurance  
and  
Indemnity  
101**


## Insurance and Indemnity—Kissin’ Cousins

Hal O. Carroll, *Law Office of Hal O. Carroll*

The name of our section is “Insurance *and* Indemnity Law Section” for a reason. The two are often similar in important respects, they often work in parallel, and sometimes they intertwine. But they also have significant differences. The link between these two areas often confuses practitioners who don’t deal with them regularly, and sometimes confuses even claim adjusters who do.

### Indemnification

First, the principal similarity. Both are about paying someone else’s debt, typically when the debt results from an adverse judgment. So each involves an obligation to indemnify.

“The indemnitor undertakes to save the indemnitee against loss arising from an unknown or contingent event. The contract of indemnity is one of insurance.”

*Moore v Capitol National Bank of Lansing*, 274 Mich 56, 61; 264 NW2d 288 (1936).

And of course the insurer’s duty to indemnify the insured is at the core of an insurance policy. In a liability policy the typical language is something like:

We will pay those sums that the insured becomes liable to pay as damages . . .

### Duty to Defend

The similarity begins to break down, though when it comes to defense. A typical liability policy will include a duty to defend, but not all policies do that. Some are “indemnity only”; but an indemnity only policy might include the money the insured pays to defend the action as part of the “loss” that the insurer will indemnify.

An indemnity agreement may or may not include a duty to defend. If the agreement uses the phrase “defend and indemnify,” then the obligation to defend is included. Often, by the way, the indemnity clause says “defend, indemnity and hold harmless.” Lawyers love triads (like “give, devise and bequeath”), which may explain why “hold harmless” is added. It’s not clear that adding the third phrase adds anything substantive, though.

### Dollar Limit

The insurance policy, of course, comes with a deductible and a policy limit. The indemnity agreement does not. There is no reason an indemnity clause could not have an upper limit, but they don’t, for the reason under the next heading. The indemnitor often has no choice.

### Volunteers and Draftees

The insurer is a volunteer; it willingly takes on the duty to defend and indemnify. That’s the business it’s in. The indemnitor, though, is usually a draftee. Often the indemnitor is a subcontractor who must agree to indemnify the general contractor and the owner for any claim if it wants the work, and it doesn’t get paid extra for taking on the same risk an insurer gets paid for.

### Policy versus Clause

The insurer’s obligation is expressed in a policy, which is festooned with definitions, conditions, exclusions and limits. The indemnity obligation is usually just one clause in a contract that contains many other non-indemnity obligations.

### Sharing

When there is more than one insurer, their relative obligations can be complicated to sort out. This is the realm of “other insurance” clauses, with their tripartite distinction between “sharing” clauses, “excess” clauses, and “escape” clauses. A sharing type of clause will usually state that the insurer will share the loss with another insurer on the basis of equal shares, or will pay an amount prorated according to the policies’ respective policy limits. An excess clause says the other policy must pay first, but if the other policy also says it is excess then they share in proportion to their policy limits. The escape clause claims that if there is other insurance, it will pay nothing. In a clash between the escape clause and the sharing clause, the escape clause wins. But if the fight is between an excess cause and an escape clause, an unpublished but well-reasoned opinion says that they conflict, so the default rule of sharing by policy limits applies. *Beddingfield v Vaughan*, unpublished Court of Appeals no. 300471, Jan 2012, 2012 WL 164073.

None of that intricacy applies when two or more indemnitors clash. Each pays an equal share. *Eller v Metro Industrial Contracting*, 261 Mich App 569; 683 NW2d 242 (2005).

## Enforcing the Obligation

If the insurer declines coverage or issues a reservation of rights saying it will defend the claim but may later decline coverage, the insured can bring a declaratory action under MCR 2.605. The same is true if the potential indemnitor declines to defend or indemnify.

In the unusual situation where the insurer (or the indemnitor) declines the obligation and the insured (or the indemnitee) does not file a declaratory action (perhaps because it is insolvent and just does not care), can the injured person, the tort claimant file the declaratory action by itself?

For an insurance policy, the answer is yes. The tort claimant can be the one to initiate a declaratory action to confirm coverage. The insurer may argue that the tort claimant is not a third party beneficiary of the insurance agreement, but the argument is misplaced. A declaratory action can be brought by anyone who has an “interest” that needs to be adjudicated. Clearly the tort claimant does in reality, because the insurer will be the source of funds to pay the judgment. Perhaps more important, insurance is a regulated industry and statutory law makes special provisions that are designed to guarantee that the insurance will be available to pay a judgment. MCL 500.3006 provides that bankruptcy will not relieve the insurer of its obligation and that the tort claimant can garnish the policy. This either creates, or recognizes, an enforceable legal right, which satisfies the requirement of an “interest” for purposes of a declaratory action.

The situation is not clear for an indemnity agreement. The indemnitee has an actual financial interest in the existence of an enforceable indemnity clause, but there is no statute that relates to indemnity clauses, and indemnitors, unlike insurers, are not in the business of taking responsibility for losses, in exchange for a premium.

## Collecting

MCL 500.3006 specifically provides that “an action in the nature of a writ of **garnishment** may be maintained by the injured person, or his or her personal representative, against such insurer under the terms of the policy for the amount of the judgment in the said action not exceeding the amount of the policy.”

There is no similar statute for indemnity obligations, which raises the question whether garnishment is available. The issue is perhaps not very important because it is clear that the indemnitee can assign his or her rights under the contract, and the tort claimant can sue as assignee. The likely result is that once a judgment is entered against the indemnitee, the

indemnitor’s obligation is triggered, and becomes a debt that can be the subject of garnishment.

## Insolvency

MCL 500.3006 also addresses the issue of the insolvent insured. It says that the insurer is not relieved of its obligation:

In such liability insurance policies there shall be a provision that the insolvency or bankruptcy of the person insured shall not release the insurer from the payment of damages for injury sustained or loss occasioned during the life of such policy . . .

There is no similar provision for indemnity clauses, because indemnity is not a regulated industry – actually it’s not an industry at all. MCL 500.3006 was necessary for insurance policies because without it the tort claimant would be without a remedy. In the absence of a similar statutory provision for indemnity agreements, it follows that if the indemnitee is insolvent, the indemnitor is under no obligation to pay. But the issue is unresolved.

## Intersection- Indemnity as Insured Contract

Mostly, insurance policies and indemnity clauses do their work in parallel and independently of each other. There is one place where they intersect: the standard provision in a general liability policy that the policy will cover an insured contract. Actually, the “insured contract” clause is an exception to a broad exclusion for contract obligations, so it is not a grant of coverage, but by negating the exclusion, the provisions in the insuring agreement are free to cover the loss, if it arises from an “occurrence” and is not otherwise excluded.

## Conclusion

Since insurance contracts and indemnity clauses so often come into play at the same time, it is important for the practitioner to be aware of how they are similar and how they are not. Like so much in this area of practice, the devil is in the details, and attention to detail is the basis for success. ■

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**ERISA  
Case  
Summary**



**ERISA Decisions of Interest\***

Michael R. Shpiece, *Kitch Drutchas Wagner Valitutti & Sherbrook*  
Kimberley J. Ruppel, *Dickinson Wright*

**Michigan Court of Appeals**

*Magen v. Dep't of Treasury*, \_\_\_ Mich App \_\_\_, No. 302771  
(Mich App. Feb. 21, 2013)

Pension benefits transferred from 403(b) plan to IRA not subject to Michigan income tax.

This case involved a MSU employee who had a Section 403(b) account through MSU. Section 403(b) plans, authorized under Internal Revenue Code 403(b), can be established certain public educational institutions (such as MSU) and tax-exempt employers. Certain ministers and chaplains may also participate in these plans.

After he retired, he transferred the money in his 403(b) account to his IRA. Under the Michigan Income Tax Act, distributions from 403(b) plans are exempt from the Michigan income tax, but distributions from IRAs are not. The Michigan Court of Appeals majority held that the money distributed from the 403(b) plan maintained its non-taxable status even after being placed in an IRA. (Income earned from the assets while in the IRA would probably be subject to tax, however.) The dissent disagreed, by mechanically applying the language of the statute that said distributions from an IRA were taxable.

**NOTE:** As you may know, Michigan made many changes

to the Michigan income tax in 2011. While the 2011 changes do not appear to affect this decision, the reader should review MCL 206.30 to determine the taxability of other pension and retirement benefits.

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\* This is an abbreviated case review. More cases will be discussed in the next issue.

**Insurance  
Case  
Summary**



**Significant Insurance Decisions**

By Deborah A. Hebert, *Collins, Einhorn, & Farrell*

**Michigan Supreme Court**

UIM coverage of \$20,000/\$40,000 not illusory

*Ile v Foremost Insurance Company*  
493 Mich 915 (2012)

In a summary order, the Supreme Court determined that a Michigan UM/UIM policy with 20,000/\$40,000 liability limits was not illusory. The policy guaranteed the insured a recovery of up to \$20,000/\$40,000 in the event of an accident involving an uninsured person or alternatively, a person with liability coverage less than the Michigan limits. Any contrary expectation of the insured did not override the plain terms of the policy.

**Michigan Court of Appeals-Published**

No-fault limitations on tort liability do not apply to intentional acts

*Gray v Chrostowski*  
\_\_\_ Mich App \_\_\_ (2012), lv pending  
(Docket No. 303536, December 6, 2012)

Plaintiff sued defendant for noneconomic damages arising out of an incident of "road rage." Plaintiff, however, was uninsured at the time of the incident and under the Michigan No-Fault Act, "[d]amages shall not be assessed in favor of a party who was operating his or her own vehicle at the time the injury occurred and did not have in effect for that motor

vehicle the security required by” MCL 500.3101. Defendant argued that plaintiff was barred from bringing suit but the court held that no-fault limitations on tort liability did not apply where the harm to persons or property was intentionally caused. Because defendant was being sued for intentionally injuring plaintiff, he could not assert the tort liability defenses afforded by the act. “The No-Fault Act’s grant of immunity does not extend to tort liability arising from a defendant’s intentional conduct.”

**Selected Unpublished Decisions of the Michigan Court of Appeals**

**Rescission of a homeowner’s policy**

*EMC Mortgage Corp. v American Fellowship Mutual Insurance Company*

Unpublished per curiam opinion of November 20, 2012, lv pending (Docket No. 298518)

Weeks after this insured took out a new homeowners policy with American Fellowship, the insured home was destroyed by fire. American Fellowship made a partial payment on the mortgage but later determined that the fire was intentionally set while the home was vacant. The dispute over insurance coverage went to the jury on a series of issues, including the insured’s misrepresentation in her insurance application regarding occupancy and her alleged involvement in a conspiracy to intentionally set fire to the house. The jury found for the insurer and the decision was affirmed on appeal.

**Use of premises “in connection with insured residence”**

*Fremont Insurance Company v Izenbaard (On Remand)*

Unpublished per curiam opinion of November 27, 2012 (Docket No. 300825)

The insured homeowner was sued for injuries arising out of the claimant’s use of the insured’s all-terrain vehicle (ATV). The accident occurred on property owned by Consumers Energy and located near the insured residence. Liability coverage extended to claims arising out of the use of other property “in connection with the insured residence.” Because there were competing facts about the connection between the two parcels of property and the manner of use, the case was remanded to the trial court.

**Life insurance claim denied consistent with terms of divorce judgment**

*Estate of Partlow v Person*

Unpublished per curiam opinion of November 27, 2012 (Docket No. 308001)

During the decedent’s marriage to the defendant, he took

out a life insurance policy naming his wife as the beneficiary. The couple subsequently divorced by a consent judgment that extinguished all rights of either party to benefits payable under insurance policies issued during the marriage, unless otherwise stated in the judgment. Because there was no provision in the divorce judgment excepting the life insurance proceeds at issue, defendant wife was not entitled to benefits. The fact that the couple continued their relationship after the divorce did not modify the terms of the judgment.

**Residence/domicile of an adult child in the military**

*United Services Automobile Association v McDevitt*

Unpublished per curiam opinion of November 27, 2012 (Docket No. 307958)

In a dispute over the residency of an adult son enlisted in the United States Army, the court first determined that residence and domicile are the same thing under Michigan law. In determining a person’s residence or domicile, the courts are to consider multiple factors, including the formality of the relationship with members of the insured household, the existence of another place of lodging, mailing address, maintenance of possessions in the insured residence, address on a driver’s license or other legal documents, etc. The insured’s son had lived most of his life as a minor with the named insured mother and had continued to use his mother’s home as his permanent address while in the service. Based on these facts, he was a resident of the insured household.

**Insurance agent had no duty to advise of cancellation notice**

*Triangle Business Center, LLC v Hartford Casualty Insurance Company*

Unpublished per curiam opinion of November 29, 2012 (Docket No. 305504)

Plaintiff’s commercial building was destroyed by fire a few months after the property insurance on the building was cancelled for nonpayment of premiums. Plaintiff claimed it never received the cancellation notice because it had moved out of the building due to financial difficulties. Plaintiff further claimed that it notified both the insurer and the insurance agency of the change in its corporate business address. This appeal revolved around the insurance agency’s liability for failing to advise plaintiff of the cancellation notice or to otherwise monitor lapses in coverage. Because of the lack of any evidence of a special relationship between the insured and its agent, the agent had no duty to advise the insured on matters of coverage.

*continued on the next page*

**Insurance Case Summary**

Continued from page 17

**TCPA claim covered as an advertising injury**

*Auto-Owners Ins Co v Tax Connection Worldwide, LLC*  
Unpublished per curiam opinion of December 4, 2012  
Docket No. 306860

Faced with a class action lawsuit after sending unsolicited fax solicitations to a number of businesses in violation of the Telephone Consumer Protection Act (TCPA), the insured looked to its CGL insurer for coverage under the personal and advertising injury provisions of its policy. This opinion holds that Coverage B applies because the claimed injuries arise out of the “[o]ral or written publication of material that violates a person’s right or privacy.” Person includes organizations; and “privacy” means “the state of being free from unsanctioned intrusion.” (This policy apparently did not include the TCPA exclusion).

**One-year UIM limit is unenforceable**

*Ogg v Farm Bureau Gen'l Ins Co*  
Unpublished per curiam opinion of December 6, 2012  
Docket No. 307196

A one-year contractual limitations period for UIM insurance is unenforceable under Order No. 05-060-M of the Office of Financial and Insurance Services (OFIS), which requires limitation periods of at least three years. This policy did not fit within the exception to the rule because even though the policy was issued prior to the order, this specific UIM endorsement revised a prior form and was issued after the rule went into effect.

**Assignment of homeowner repair costs cannot be enforced in the absence of repairs**

*Sparkle Builders I, Ltd. v Williams*  
Unpublished per curiam opinion of December 6, 2012  
Docket No. 307522

After fire damaged her home, the insured entered into a contract with plaintiff builder for repairs. She assigned to the builder rights under her homeowners policy for the cost of repairs. Later, however, the insured decided to exercise an option allowed by her policy to rebuild in another location rather than make repairs to the existing home. On these facts, the contractor was not entitled to the cost of repairs from the insurance company because there was no direct contractual relationship between the insurer and the contractor, and the insured had only assigned her right to recover the cost of repairs. Since no repairs were made, no cost of repair was owed the insured.

**Workers compensation coverage**

*Chase v Terra Nova Industries*  
Unpublished per curiam opinion of December 11, 2012,  
reconsideration den 2/14/13  
Docket No. 295138

Resolving a dispute between two insurance companies over the obligation to pay worker’s compensation benefits, the court determined that the wrap-up policy did not afford coverage because there was no evidence that the employer of the injured worker had executed the required agreement prior to the injury. The court further rejected a claim that the WCAC exceeded its statutory authority in applying principles of equitable estoppel in weighing the actions of an insurance agent to determine the responsible insurer.

**Insurer failed to prove formal denial sufficient to trigger limitations period**

*Brown v AAA Michigan Insurance*  
Unpublished per curiam opinion of December 18, 2012  
Docket No. 308478

Plaintiff submitted a claim under his homeowners policy for a property loss related to a theft in 2005. He failed to consistently follow up with the claim over the next three years and in November of 2008, the defendant “communicated” a settlement offer and advised that the offer was final and that additional sums were denied. Plaintiff waited approximately 2½ years after that communication to file suit against the insurer, at which point the insurer asserted the one-year period of limitations. The court determined that the limitations period was tolled from the time the claim was submitted to the time the claim was formally denied under the tolling provision of MCL 500.2833 (applicable to fire insurance policies but accepted by both parties as relevant here). The court then found a question of fact as to if and when the claim was ever formally denied. Defendant’s only evidence of a communication was the affidavit of a company representative describing a verbal offer/denial over the phone by an adjuster. The court found this evidence insufficient to establish a formal denial and remanded the case for further proceedings.

**“Insured contract” coverage under an auto policy**

*Russell v Dan’s Excavating, Inc.*  
Unpublished per curiam opinion of December 20, 2012,  
recon den 2/22/13  
Docket No. 304514

The insured trucking company was a subcontractor on a road construction project. Its subcontract promised to indem-

nify the general contractor for any claims arising out of work performed under the subcontract. One of the insured's truck drivers was involved in an accident with the plaintiff at the construction site, which led to a lawsuit against the insured, its employee-driver, and the general contractor. After resolving the indemnity dispute in favor of the general contractor, the Court of Appeals addressed the coverage for the indemnity liability of the subcontractor. It found no coverage under the CGL policy because of its auto exclusion. Coverage was instead afforded under the insured's auto policy, which covered liability arising out of the use of a motor vehicle. The contractual liability exclusion in the auto policy did not defeat coverage because it specifically excepted liability assumed in an "insured contract," defined in the policy as a contract or agreement "pertaining to your business . . . under which you assume the tort liability of another to pay for 'bodily injury' or 'property damage' to a third party or organization." In addition, the auto policy contained a blanket additional insured endorsement for any person or organization the named insured was obligated to add as an additional insured per an "insured contract." Because the subcontract contained such a requirement in favor of the general contractor, it was an additional insured under the sub-contractors' policy.

#### Scheduled value for personal property loss

*Shemesh v Citizens Insurance Company of America*

Unpublished per curiam opinion of December 27, 2012

Docket No. 305621

Plaintiffs' homeowners policy contained a "personal articles floater" covering two handmade silk carpets. When the carpets were damaged, the insurer attempted to repair them but the insureds claimed the carpets were not restored to their original condition and thus demanded full appraised value. There was no dispute about the original value of the carpets. The insurer, however, demanded an appraisal because the insurance contract allowed either party to make that demand in the event of a dispute over the amount of a loss. But the insurer failed to provide timely written notice of the demand and was thus bound by the contract to pay scheduled value.

#### UIM claim too late under 3-year limitations provision

*Krueger v Auto Club Association.*

Unpublished per curiam opinion of January 8, 2013

Docket No. 306472

Where the UIM policy required the filing of a lawsuit or a demand for arbitration within 3 years of the date of the accident, the insured's letter dated five days prior to expiration of this limitations period, notifying the insurer for the first time of a UIM claim, did not extend the time for recovering benefits. The absence of an actual disagreement over coverage did

not excuse the insured from compliance with the three-year period. Nor was there evidence to support plaintiff's claim of equitable estoppel based on alleged misrepresentations from the insurer concerning coverage.

#### Computing damages where the duty to defend is breached

*Hastings Mut Ins Co v Mosher Dolan Cataldo & Kelly, Inc.*

Unpublished per curiam opinion of February 14, 2013

Docket No. 296791

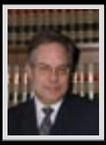
In 2006, the Court of Appeals resolved a dispute between these parties regarding CGL coverage for construction defect claims. It held that construction defects were not "occurrences." But the insurer did have a duty to defend claims by homeowners for damage to personal property, and that duty continued until all claims against the insured were confined to non-covered claims. The case was remanded for further proceedings regarding the insured's claim that the defense was pulled prematurely.

A jury awarded more than \$700,000 in fees and costs on remand. Both parties appealed and in a lengthy opinion, the court held: (1) the insurer was barred by the law of the case from asserting policy exclusions to avoid its duty to defend because the first panel implicitly rejected those exclusions; (2) the insured was limited to supplemental payments of \$250 a day in recouping the cost of time spent by its principals and employees assisting with the defense, including time spent by the principals purportedly assisting as "experts"; (3) the trial court properly refused to allow recovery of attorney fees at a rate higher than the insurer's capped hourly rate because when the insurer was defending, the parties had agreed that the insured could hire its own attorneys and pay the difference in hourly rate; (4) CGL insurance is not "litigation insurance," and does not cover the insured's loss of profits caused by litigation; and (5) the insured was entitled to penalty interest under the Uniform Trade Practices Act, MCL 500.2006, because defense costs are first-party benefits and the "statute clearly provides for penalty interest in this context." ■

#### About the Author

**Deb Hebert** serves on the Council for the Insurance and Indemnity Section of the State Bar. Her practice focuses heavily on insurance coverage, with a strong emphasis on declaratory judgment litigation and appeals. She is co-author of the chapter on commercial general liability insurance in *Michigan Insurance Law & Practice (ICLE)* and has been selected by her peers for inclusion in the *Top Lawyers of 2011 and 2012*, published in "dbusiness," *Detroit's Premier Business Journal*. Her email address is [deborah.hebert@ceflawyers.com](mailto:deborah.hebert@ceflawyers.com)

## No-Fault Corner



By Ronald M. Sangster Jr.  
Law Office of Ronald M. Sangster, [rsangster@sangster-law.com](mailto:rsangster@sangster-law.com)

As readers of this column are well aware, the impetus for changes to the No-Fault system, whether it be the proper application of the One Year Back Rule, or the type of benefits recoverable under the Act, has been with the courts. However, for the first time in many years, the Legislature has enacted a series of legislative changes to Michigan's No-Fault Insurance Act. Although not as far reaching as the comprehensive no-fault amendments that were proposed in early 2011, those bills that were enacted into law have the potential of changing the way we handle no-fault claims, both on the plaintiff and defense sides. What follows is a brief analysis of the legislative changes that have been made to Michigan's No-Fault Insurance Act, through the closing of the 2012 legislative session.

### 2012 PA 158 – “Mini-Tort”

This Act amended the “mini-tort” provisions of Michigan's No-Fault Act, found at MCL 500.3135(3)(e). First, the legislation increased the damages recoverable on a mini-tort claim from \$500.00 to \$1,000.00. The Act still preserves the phrase “damages . . . to a motor vehicle,” meaning that a motorcyclist still cannot recover mini-tort damages to the motorcycle, since a motorcycle is not a “motor vehicle” under the No-Fault Act. See MCL 500.3101(2)(e); *Nerat v Swacker*, 150 Mich App 61, 388 NW 2d 305 (1986).

However, the Legislature enacted a new exclusion for mini-tort damages. MCL 500.3135(4)(e) now provides:

“Damages shall not be assessed if the damaged motor vehicle was being operated at the time of the damage without the security required by section 3101.”

Note that the statutory provision ties the insurance requirement to the vehicle itself – not to the owner or registrant of the motor vehicle. Furthermore, the identity of the operator of the vehicle is irrelevant. Simply put, if the vehicle is not insured as required by MCL 500.3101, the owner of the

vehicle is not entitled to recover mini-tort damages. These changes became effective on October 1, 2012.

### 2012 PA 204 – Assigned Claims Facility

This Act made a number of significant changes with regard to claims filed with the Michigan Assigned Claims Facility. The Assigned Claims Facility is the “insurer of last resort” and is responsible for paying benefits only where (1) no policy of no-fault insurance is applicable to the injury, (2) no personal protection insurance applicable to the injury can be identified, (3) two or more automobile insurers dispute their obligation to provide coverage or are unable to agree upon the equitable distribution of a loss, or (4) the insurer responsible for paying benefits is, “because of financial inability of one or more insurers to fulfill their obligations,” insufficient to provide benefits up to the maximum proscribed by law. Effective January 1, 2013, responsibility for administering assigned claims was transferred from the Michigan Secretary of State's Office to the Michigan Automobile Insurance Placement Facility (MAIPF). The program is now known as the “Michigan Assigned Claim Plan.”

In addition, 2012 PA 204 enacted a comprehensive fraud exclusion. MCL 500.3173a(2) now provides:

“A person who presents or causes to be presented an oral or written statement, including computer-generated information, as part of or in support of a claim to the Michigan Automobile Insurance Placement Facility for payment or another benefit knowing that the statement contains false information concerning a fact or thing material to the claim commits a fraudulent insurance act under section 4503 that is subject to the penalties imposed under section 4511. A claim that contains or is supported by a fraudulent insurance act as described in this subsection is ineligible for payment or benefits under the assigned claims plan.”

Readers may wonder why this provision was included in 2012 PA 204. The answer is straightforward – most, if not all, insurance policies contain some sort of fraud exclusion, which can potentially disqualify an individual who submits a fraudulent insurance claim from recovering benefits. However, there are no “policies” involved in an assigned claim. In this writer's opinion, this legislation was designed to close this potential loophole and will serve to prevent a drain on the Assigned Claims Plan as a result of fraudulently submitted No-Fault claims.

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Some insurers may incorporate language in their policy that permits the \$1,000.00 deductible to be satisfied by payments made by the health insurer. If the no fault insurer amends its policy appropriately, the injured person may be required to pay, out of his own pocket, up to \$1,000.00 in co-pays or deductibles before the no fault carrier becomes obligate to pay no fault benefits.

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### 2012 PA 454 – Maximum Deductible Cap Removed

This legislation, effective December 27, 2012, changes the deductible provision found at MCL 500.3109(3). Since the No-Fault Act was amended, the maximum deductible that could be assessed by a no-fault insurer was \$300.00. Any other deductible required prior approval of the Insurance Commissioner. 2012 PA 454 removes this “arbitrary” cap and also removes the requirement that the Insurance Commissioner approve the deductible. MCL 500.3109(3) now reads:

“An insurer providing personal protection insurance benefits under this chapter may offer, at appropriately reduced premium rates, a deductible of a specified dollar amount. This deductible may be applicable to all or any specified types of personal protection insurance benefits, but shall apply only to benefits payable to the person named in the policy, his or her spouse, and any relative of either domiciled in the same household.”

Arguably, this provision could allow insurance companies to change their policy provisions and require out-of-pocket payments by the insured, his or her spouse or a relative domiciled in the same household, in addition to payments that may be made by the injured person’s health insurer. For example, let us assume that a person carries a coordinated no-fault policy, with a \$1,000 deductible. Some insurers may incorporate language in their policy that permits the \$1,000.00 deductible to be satisfied by payments made by the health insurer. If the no-fault insurer amends its policy appropriately, the injured person may be required to pay, out of his own pocket, up to \$1,000 in co-pays or deductibles before the no-fault carrier becomes obligate to pay no-fault benefits.

In addition, MCL 500.3109(a) was amended to remove the requirement that the insurer “shall” offer coordinated medical expense coverage. Now, no-fault insurers are no longer required to offer coordinated medical expense coverage. This legislation appears to be a reaction to the argument

put forth by many insurers that, due to the prevalence of self-funded ERISA Plans, many of which exclude coverage for auto accident-related injuries, insurers were not getting the benefit of the bargain when they sold coordinated no-fault policies.

### 2012 PA 542 – Medical Marijuana is Not Covered

This legislation, effective January 2, 2013, makes it clear that a no-fault insurer is not obligated to pay for any expenses associated with the medical use of marijuana. Specifically, this legislation added MCL 500.3107(2)(b), which states:

“An insurer shall not be required to provide coverage for the medical use of marihuana or for expenses related to the medical use of marihuana.”

### Supreme Court Action

Supreme Court rules that corporations cannot have “family members”

On January 18, 2013, the Michigan Supreme Court issued an order in *Michigan Ins. Co. v National Liability & Fire Ins. Co.*, docket no. 144771, following oral argument on the Applications for Leave to Appeal. In its Order, the Supreme Court reversed the judgment of the Court of Appeals and remanded the matter to the Oakland County Circuit Court for entry of an order granting summary disposition in favor of National Liability & Fire Insurance Company.

National Liability insured an adult foster care facility operated by a corporate entity. One of the residents, Lawrence Stubbe, had voluntarily left the adult foster care facility and was wandering around Pontiac, while intoxicated, when he was struck by a motor vehicle whose owner and registrant was insured by Michigan Insurance Company. Michigan Insurance Company paid no-fault benefits to or on behalf of Mr. Stubbe under MCL 500.3115(1), and then filed suit against National Liability, arguing that National Liability, the insurer of a vehicle owned by the adult foster care facility, occupied a higher order of priority under MCL 500.3114(1). Michigan Insurance Company noted that the National Liability policy, as do many other policies using a standard ISO policy form, defined the term “insured” as including:

“A person related to you by blood, marriage or adoption who is a resident of your household, including a ward or foster child.”

Michigan Insurance Company argued that because Lawrence Stubbe was a “ward” of the adult foster care facility, National Liability was responsible for paying his benefits under MCL 500.3114(1), relying on the Court of Appeals’

*continued on the next page*

**No-Fault Corner**

Continued from page 21

decision in *USF&G v Citizens Ins Co*, 241 Mich App 83, 613 NW 2d 740 (2000). The circuit court agreed with Michigan Insurance and granted summary disposition in its favor.

The Court of Appeals reversed the decision of the Oakland County Circuit Court, on the basis that it was not at all clear whether Lawrence Stubbe was, in reality, a “ward” of the adult foster care facility, given his rather high level of functioning. Simply put, the Court of Appeals determined that there existed a genuine issue of material fact on this issue, thereby precluding summary disposition.

The Supreme Court reversed both orders and simply found that, under the circumstances of this case, Lawrence Stubbe was simply not a “relative” of National Liability’s corporate named insured. Therefore, National Liability did not fall within any of the orders of priority established in MCL 500.3114. The Court’s Order casts into doubt the continuing viability of the Court of Appeals’ decision in *USF&G, supra*.

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... the Court of Appeals agreed with State Farm and ruled that transportation expenses unrelated to medical treatment are simply not recoverable, even if a doctor issues a prescription that such personal trips are “necessary for the patient’s care, recovery or rehabilitation.”

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#### Supreme Court vacates Court of Appeals decision regarding compensability of conservatorship fees and expenses

In April 2011, the Michigan Court of Appeals released its decision in *May/Carroll v ACIA*, 292 Mich App 395, 807 NW 2d 70 (2011) and squarely held, for the first time, that conservatorship fees and expenses are compensable as “allowable expenses” under the No-Fault Insurance Act. AAA filed an application for leave to appeal with the Michigan Supreme Court and argued that conservatorship fees and expenses (i.e., management of an injured person’s financial affairs) are simply not necessary for an individual’s care, recovery or rehabilitation, as required under MCL 500.3107(1)(a). Rather, they were, at best, replacement services, limited by MCL 500.3107(1)(c) to \$20.00 per day for the first three years following the accident. The Supreme Court had earlier issued an order holding AAA’s application for leave to appeal in abeyance, pending the court’s decisions in *Johnson v Recca*, 492 Mich 169; 821 NW 2d 520 (2012) and *Douglas v Allstate Ins Co*, 492 Mich 241, 821 NW 2d 472 (2012). Both of those decisions were released on July 30, 2012, and practitioners were wondering

what the Supreme Court would do with the application for leave to appeal in *May/Carroll v AAA*.

On December 5, 2012, the Michigan Supreme Court issued an order vacating the Court of Appeals’ published decision and remanding the matter back to the Court of Appeals for reconsideration in light of the Supreme Court’s decisions in *Johnson* and *Douglas*. Although the Court of Appeals has not yet issued its opinion on remand, it does appear that the Michigan Supreme Court is sending a strong signal that conservatorship fees and expenses are, in reality, replacement services, not allowable expenses. A decision from the Michigan Court of Appeals in *May/Carroll v ACIA* is expected some time this summer.

#### Court of Appeals Action

##### Court of Appeals clarifies compensability of transportation expenses

In a published opinion, *ZCD Transportation v State Farm*, \_ Mich App \_, \_ NW 2d \_ (2012), docket number 304719, rel’d for publication 1/29/2013, the Michigan Court of Appeals clarified what type of transportation expenses are compensable as “allowable expenses” under the No-Fault Insurance Act. In *ZCD Transportation*, one Arnold Grinblatt was injured in an automobile accident in 2001. Prior to the accident, Mr. Grinblatt was unable to walk and had to rely on an Amigo personal mobility vehicle to get around. He was also able to drive a van fitted with a lift and hand controls. After the accident, Grinblatt was too weak to move himself from the Amigo scooter to the driver’s seat of the van. Therefore, he hired ZCD Transportation to provide transportation services, both for medical appointments and for personal trips unrelated to medical treatment. ZCD Transportation charged a pick-up fee of \$35.00 to come and pick up Mr. Grinblatt, a wait fee of \$30.00 per hour (billed in 15-minute increments) and \$3.00 per mile for mileage. Every client was charged a minimum of 10 miles for a one-way trip and 20 miles for a round trip, regardless of the number of miles actually driven. ZCD acknowledged that most of Grinblatt’s trips involved distances less than the 10 mile/20 mile minimums. State Farm refused to pay for medical transportation costs to the extent that ZCD Transportation was seeking compensation for times when Grinblatt was not actually in the vehicle being transported. State Farm also objected to paying for Grinblatt’s personal transportation needs.

After reviewing the recent holdings in *Johnson v Recca*, 492 Mich 169; 821 NW 2d 520 (2012) and *Douglas v Allstate Ins Co*, 492 Mich 241, 821 NW 2d 472 (2012), the Court of

Appeals agreed with State Farm and ruled that transportation expenses unrelated to medical treatment are simply not recoverable, even if a doctor issues a prescription that such personal trips are “necessary for the patient’s care, recovery or rehabilitation.” The Court noted that transportation services that are not directly related to the injured person’s medical treatment, but were incurred solely to maintain his pre-injury quality of life were nothing more than replacement services, not allowable expenses, “because Grinblatt did his own pleasure driving before the accident and, but for the injuries sustained in the accident, would have continued to do so.”

The Court reaffirmed Plaintiff’s argument that the cost of transportation and mileage to and from medical appointments are “allowable expenses” under MCL 500.3107(1)(a). However, State Farm was not responsible for payment of any mileage expenses “beyond that actually traveled by Grinblatt.” In other words, ZCD Transportation could only bill for the actual miles that Grinblatt was in the van, being transported to and from physician appointments, and not an arbitrary minimum number of miles.

#### Governor Snyder’s reform goals

In his State of the State Address, Governor Snyder indicated that one of his goals was to reform Michigan’s no-fault insurance system. It remains to be seen what reforms are ultimately enacted by the Legislature, particularly with regard to the competing public policy considerations between the insurance industry and the medical providers. The Insurance industry is attempting to lower the cost of the No-Fault system by arguing for a fee schedule for medical expenses, similar to the Workers’ Compensation system, and the medical providers wish to preserve the current legislative language, found in MCL 500.3107(1)(a), regarding “reasonable” expenses incurred for the injured person’s care, recovery or rehabilitation. ■

#### About the Author

**Ron Sangster** practices extensively in the area of First Party No Fault litigation, at both the trial court and appellate court levels. He serves as an Adjunct Professor of Law at Cooley Law School-Auburn Hills, where he teaches the No Fault course. In addition, he is a frequent guest lecturer at Professor Wayne Miller’s No Fault course at Wayne State University Law School. In addition to litigating No fault and insurance coverage disputes, he also consults with No Fault insurers regarding policy language changes, insurance coverage issues, and other matters of interest to No Fault insurers. He can be reached at [rsangster@sangster-law.com](mailto:rsangster@sangster-law.com).

## Nominations Open for Major State Bar Awards

Nominations are now open for major State Bar of Michigan awards that will be presented at the September 2013 Annual Meeting in Lansing.

The **Roberts P. Hudson Award** goes to a person whose career has exemplified the highest ideals of the profession. This award is presented periodically to commend one or more lawyers for their unselfish rendering of outstanding and unique service to and on behalf of the State Bar, given generously, ungrudgingly, and in a spirit of self-sacrifice. It is awarded to that member of the State Bar of Michigan who best exemplifies that which brings honor, esteem and respect to the legal profession. The Hudson Award is the highest award conferred by the Bar.

The **Frank J. Kelley Distinguished Public Service Award** recognizes extraordinary governmental service by a Michigan attorney holding elected or appointed office. Created by the Board of Commissioners in 1998, it was first awarded to Frank J. Kelley for his record-setting tenure as Michigan’s chief lawyer.

The **Champion of Justice Award** is given for extraordinary individual accomplishments or for devotion to a cause. No more than five awards are given each year to practicing lawyers and judges who have made a significant contribution to their community, state, and/or the nation.

The **Kimberly M. Cahill Bar Leadership Award** was established in memory of the 2006-07 SBM president, who passed away in January 2008. This award will be presented to a recognized local or affinity bar association, program or leader for excellence in promoting the ideal of professionalism or equal justice for all, or in responding to a compelling legal need within the community during the past year or on an ongoing basis.

The **John W. Cummiskey Pro Bono Award**, named after a Grand Rapids attorney who was dedicated to making legal services available to all, recognizes a member of the State Bar who excels in commitment to pro bono issues. This award carries with it a cash stipend to be donated to the charity of the recipient’s choice.

The **John W. Reed Michigan Lawyer Legacy Award** was introduced in 2011 and is named for a longtime and beloved University of Michigan Law School professor and Wayne State University dean. This award will be presented periodically to a professor from a Michigan law school whose influence on Michigan lawyers has elevated the quality of legal practice in the state.

**All SBM award nominations are due by 5 p.m. Monday, April 1, 2013.**

Any SBM member can nominate candidates for awards. To apply online or download application forms visit [www.michbar.org/programs/eventsawards.cfm](http://www.michbar.org/programs/eventsawards.cfm). Cummiskey Award nominations can be directed to Robert Mathis at [rmathis@mail.michbar.org](mailto:rmathis@mail.michbar.org); all other nominations can be submitted to Joyce Nordeen, State Bar of Michigan, 306 Townsend St., Lansing, MI 48933 or [jnordeen@mail.michbar.org](mailto:jnordeen@mail.michbar.org). For more information visit the State Bar’s website, [www.michbar.org](http://www.michbar.org), or call (517) 346-6373 or (800) 968-1442, or fax (517) 482-6248.

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