The Journal of Insurance & Indemnity Law

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From the Chair


Adam Kutinsky, Dawda Mann

I would like to wish a happy new year to all 932 members of our growing section and I also offer a note of gratitude to the council and other active members for their hard work in 2016. I welcome our new committee chairs, Renee VanderHagen (Education Committee) and Rabih Hamawi and Pat Crandell (Membership Committee). Rabih and Pat are also two of our newest council members. Pat has also offered to regularly update our section council on new legislation affecting insurance and indemnity matters.

The last event of 2016 was an excellent program about professional responsibility organized by our new chair-elect, Larry Bennett. This program was the first event of many to be offered this term and the first program of recent memory that focused on ethics. The presenters covered various subjects, including a discussion of the work-product doctrine and the attorney-client privilege where in-house counsel is involved.

One of the panelists focused on the *tri-partite relationship* which he discussed at length. The *tri-partite relationship* is described as the relationship among an insurer, its insured, and defense counsel retained by the insurer to defend the insured against third-party claims. In the words of the Michigan Supreme Court, the tri-partite relationship "contains rife possibility of conflict."[1] And, when an underlying insurance dispute develops between an insurance company and its insured, the common-law rule articulated by one presenter is that the primary duty of loyalty owed by the defense attorney retained by the insurer lies with the insured, and not the insurer. Defense counsel should keep this general rule in mind when a coverage dispute arises between his client and the insurance company.

The program also covered the grievance process from start to finish, which included some very helpful tips. For instance, even with frivolous complaints, it is essential that a response is filed to prevent a default and no matter how ridiculous the grievance allegations may be, it is recommended that ethics counsel be hired. As stated by one presenter, the common adage applies to grievance matters that "an attorney who represents himself has a fool for a client."

Our section intends to organize three additional educational programs this term all related to insurance or indemnity matters. Of course, our quarterly *Journal* which is edited by Hal Carroll will be published and include case updates and feature articles.

We are also very fortunate to maintain a section account balance of $33,088.35 and are discussing ideas for use of the funds. One idea would include the funding of a scholarship for law students interested in insurance. Despite the important role of insurance in legal transactions and disputes, many law schools do not offer a class on the subject and few law students strive to work in the insurance field. Perhaps a scholarship would help generate more interest in the practice of insurance law.

The subject of neutrality was raised at the last council meeting in response to a recent *Journal* article. It should not come as a surprise that the *Journal* has prompted more than one such discussion over the years, especially when the opinion of a feature article author differs from the opinion of a *Journal* reader. To address this natural response to opinion/editorial pieces, each *Journal* includes the following statement in the Editor's Notes:

> The *Journal* – like the Section itself – takes no position on any dispute between insurers and insureds. All opinions expressed in contributions to the *Journal* are those of the authors.

One purpose of the *Journal* and most legal publications is to generate critical responses from its readers. After all, the free market place of ideas is based upon the principle that the truth will emerge from an open, free and honest debate. It is when an attorney publishes his opinion that this debate is opened and other opposing viewpoints are shared in response. Although we may not reach the truth through the debate every time, we always learn a great deal through the process. ■

Endnotes

1 *Atlanta International Insurance Company v Bell*, 438 Mich 512; 475 NW2d 294 (1991)

Editor's Notes

By Hal O. Carroll
www.HalOCarrollEsq.com

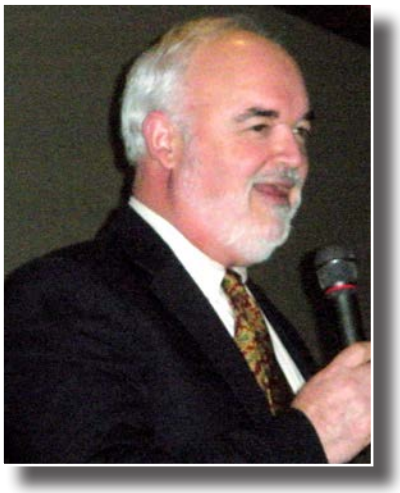
The *Journal* – now in its ninth year – is a forum for the exchange of information, analysis and opinions concerning insurance and indemnity law and practice from all perspectives. The *Journal* – like the Section itself – takes no position on any dispute between insurers and insureds. All opinions expressed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

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

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

Scenes from our November Program

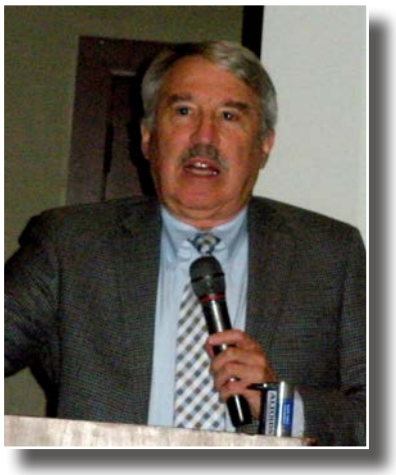
Professional Responsibility Challenges Facing Lawyers Today



Prof. Peter Henning

Alan M. Gershel

Michael J. Sullivan



Kenneth M. Mogill

Is the Auto Negligence Threshold Impaired? Nope, All is Well.

By David Christensen, *Christensen Law*

A pair of recent articles[1] suggest that the automobile negligence serious impairment of body function threshold has become so minimal that it is all-but dead. Contrary to that spin, the numbers demonstrate that the threshold is alive and healthy. The evidence shows that the threshold is performing its function of maintaining a crucial balance since it was returned to being defined by the plain and simple language of the statute.

In order to recover non-economic damages, a plaintiff in an automobile negligence action must not only prove that they were injured, but that the injury amounted to a "serious impairment of body function." This serious impairment threshold is defined by three elements: (1) an objectively manifested impairment; (2) of an important body function; (3) that affects the person's general ability to lead his or her normal life. This area of summary disposition activity nearly always focuses on whether there is a material question of fact about the third prong.

In an article in the October 2016 issue of this *Journal*, Ms. Javon David argues that "too often, dispositive motions are denied on the basis that even the slightest impairment" establishes a threshold case. This suggests that courts are ruling that there is a serious impairment as a matter of law on even the slightest impairment. Perhaps the author actually meant that a court finds there to be a question of fact, and merely denies the motion, although this is not what was stated.

The evidence shows that the threshold is performing its function of maintaining a crucial balance since it was returned to being defined by the plain and simple language of the statute.

Threshold Injury as a Question of Fact

It is exceedingly rare for a court to rule that a plaintiff has a threshold injury as a matter of law. There are only six such opinions approved by the Court of Appeals since August of 2010. The author's statement that the "slightest impairment" meets the threshold is left utterly unsupported by a court opinion or order using such language or even implying such an interpretation. Moreover, there are two dozen plaintiffs that have experienced the Court of Appeals affirming dismissals of their case on the threshold issue who would also disagree with her statement.

Limited Probative Value of Unpublished Cases

The second issue that deserves response is Ms. David's suggestion that unpublished cases present some value for the courts in deciding threshold cases. They do not. The unpublished cases do not show trends and they do not offer authority in the threshold area. In the area of serious impairment, nearly all the Court of Appeals opinions are unpublished. The results of those cases are incredibly inconsistent. The Court of Appeals frequently reaches opposite conclusions when deciding cases with similar or even identical facts.

The cases reviewed by Ms. David's article do not show any pattern or trend, other than the fact that those plaintiff's claims apparently suffered from severe lack of proofs. Those cases variously show an absence of proof of impairments, of causation, and/or an objective manifestation, among other shortcomings. The true lesson from those cases is that plaintiff attorneys must assiduously marshal their proofs for these motions, or the cases will be dismissed. If the proof is not there to be marshalled, then dismissal is appropriate in most of those instances. This is not a new trend in the Court of Appeals.

The trial courts can look to the published jurisprudence for authority and guidance. There is one controlling Supreme Court case, *McCormick v Carrier*, 487 Mich 180 (2010), and four published Court of Appeals cases on the topic. These are the only precedential guidelines that trial courts may invoke as authority in these motions.[2] *McCormick* makes it clear that this is an intensely fact sensitive, case-by-case determination.

The Flood of Third Party Litigation is a Trickle

At their essence, these two recent articles argue that the defense does not win enough serious impairment summary disposition motions, so the threshold should be made tougher to meet. When those authors say the defense is losing motions, 'losing' can only mean that the court found a question of fact, and the motion was denied. (Technically, this is a tie, not a loss.) The supposed problem posed by this situation is left

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somewhat to our imagination, but it implies that such rulings are unfair to the insurance industry. Ms. David's article also suggests that this problem is the source of a "flood" of third party auto litigation, but this is objectively disproven by the SCAO statistics and real-world observations of trial attorneys practicing in this field.

It should also please the defense bar that that, since 2010, when *McCormick* reinstated the statutory language after a six-year hiatus, the Court of Appeals has affirmed four times more summary dispositions in favor of defendants than of plaintiffs. The Court of Appeals decided 74 threshold cases between August 1, 2010 and August 30, 2016. Of those, six found in favor of the plaintiff and 24 found in favor of the defendant, as a matter of law. In 44 cases, there were found to be questions of fact that precluded summary disposition.[3] When the statistics are considered, the arguments that the threshold is failing ring hollow.

Summary disposition is an extreme tool for cases where plaintiff's proofs or a defendant's defenses are so weak that no reasonable person could find in favor of the non-movant.[4] Fairness could lead one to ask whether it should be used in favor of the defense about as often as it is used in favor of the plaintiff. I recognize that a plaintiff has the burden of proof, but where weighty facts only weigh in the plaintiff's direction, is summary disposition any less appropriate? In either instance, summary proceedings are serious as they deprive a litigant of the right to a jury trial, and it should be granted rarely.

Summary proceedings are an extreme measure. I know, lawyers love to win their case on a motion, but our civil justice system is based on the Seventh Amendment's right to a jury trial. Don't panic, this is exactly what the threshold is made for: The serious impairment threshold is the best trial defense ever created for the garden-variety auto case. The serious impairment element is the most common reason plaintiffs lose these cases, and, yes, the majority of plaintiffs do lose at trial.

The recent articles are not the first arguments we have heard seeking a tougher threshold. First there was *Cassidy v McGovern*, 415 Mich 483 (1982), then *DiFranco v Pickard,* 427 Mich 32 (1986).

For the edification of lawyers who have entered the auto negligence practice since 2010[5], we should review what happens when courts are encouraged to toughen-up the threshold. Between 2004 and 2010, the threshold was drastically ratcheted up under the new language the Supreme Court added to the No-Fault Act in *Kreiner v Fischer*, 471 Mich 109 (2004). *Kreiner* sharply tilted the table in favor of the defense and Plaintiffs survived only 51 times out of the 249 cases heard by the Court of Appeals under *Kreiner*.

Six years later in *McCormick v Carrier*, 487 Mich 180 (2010), the Supreme Court found that the *Kreiner* court had departed from the plain language of MCL 500.3135, *id.* at 184, reversed *Kreiner's* judicially enhanced threshold, and reinstated the statutory language.

Once the plain statutory text of the threshold was reinstated, there was a restoration of the statute's intended balance between no-fault's generous PIP benefits and a corresponding restriction on some third party litigation provided by the serious impairment threshold. This obviously meant that there was a substantial decrease in summary disposition motions, but that is what the statute's language dictates. This is the way it is supposed to work!

> "**Those who cannot remember the past are condemned to repeat it." –*Santayanna*.**

Memories grow dim… denial sets in… "I promise I won't do it again." Those automobile negligence lawyers who survived the six dark years of *Kreiner* will recall that so many summary disposition motions were being granted that there was a specialized Court of Appeals docket (called the "rocket docket") that was totally dedicated to handling *Kreiner* motion appeals, and, in eight out of ten cases, granting a dismissal of the case.

The Reality of the *Kreiner* Regime

Before we heed the suggestions in the recent articles to consider treading down the *Kreiner* path again, let's recall where it leads.

- In *Jones v Jones*, Ct App: 274627 (11/15/07) (unpublished), dismissal was upheld for a leg fracture requiring open reduction internal fixation surgery, a wheelchair and walker, and in-home health care.
- In *Henderson v Bond*, Ct App: 273210 (10/23/07) (unpublished), dismissal was upheld for a torn rotator cuff requiring surgery and physical therapy, where the plaintiff could not perform certain household and grooming tasks more than one year later.
- In *Adams v Hodge*, Ct App: 279023 (8/26/08) (unpublished), dismissal was upheld for a fractured wrist requiring the insertion of a plate and six screws and 36 physical therapy visits, a continuous wrist brace due to swelling and pain, and long term limitations on ability to bathe, drive, cook and do housework.
- In *Plaggemeyer v Lee*, Ct App: 284016 (5/12/09) (unpublished), dismissal was upheld for a fractured left femur requiring surgery, three-day hospitalization, a walker for

four weeks, crutches for the next two months, and a cane for the next 4 to 6 weeks. Plaintiff was restricted at work for 14 weeks, unable to do home maintenance for a year, no longer jogs, hikes or plays tennis, has an 8 inch scar on his thigh, and his left leg has decreased in diameter from atrophy. Case dismissed under serious impairment and serious permanent disfigurement thresholds.

- In *Cottrill v Senter*, Ct App: 285216 (6/23/09) (unpublished), dismissal was upheld where a drunk driver with a BAC of .30 crossed the centerline and struck the vehicle occupied by the 11 year-old plaintiff who suffered fractures of his left ulna (wrist), left hand, three right foot fractures, and three fractured ribs. One of the foot fractures was comminuted and the bone shortened. His arm and foot were casted. The plaintiff could not walk or use his arm for one month, was out of school for two months and restricted from sports for an extended period. Case dismissed for failing to meet the threshold.
- In *Jones v Wheelock*, Ct App: 258974 (4/25/06) (unpublished), dismissal upheld for complete tears of the ACL and MCL, where the plaintiff underwent reconstructive surgery.

The widespread injustice from the Kreiner case was so severe that it galvanized the plaintiff's bar and the defense bar to take united action to protect the constitutional right to jury trial. The Negligence Law Section's mission is to protect the right to civil jury trial. The Section is led by a council consisting of equal numbers of plaintiff and defense lawyers. That Section urged the legislature to pass a "Kreiner fix" to relax the threshold. When that failed to materialize, the Negligence Section filed an amicus brief with the Supreme Court in support of McCormick to overturn the Kreiner travesty.

Why the Threshold Matters

Michigan's no-fault system is a jewel, and the threshold is its key to survival. The No-Fault Act was borne of a bargain that was struck between consumers and the insurance industry that benefitted both sides. The public would receive easily obtainable PIP benefits in exchange for a restriction on their ability to realize a recovery of their non-economic damages for minor injuries.[6] It is a *quid pro quo*: both sides gave up things and both sides received things. In order to remain viable, the no-fault deal demands that the two sides of the bargain remain in balance. If the restriction on third party cases is tightened up, there must be a corresponding loosening of PIP benefits, and vice versa.

The system rests on a delicate balance. Reducing the ability to file a third party case without a corresponding expansion of PIP benefits, throws the system out of balance, and threatens its viability. We witnessed this dire threat during the *Kreiner* regime. In many quarters, forces were considering strategies for abolishing the entire system. This system is a marvelous unique benefit to the citizens of Michigan that should never encounter those threats again.

Flood? No, Just a Trickle

Ms. David's article suggested that there is a flood of third party auto negligence litigation, and granting summary disposition more often would be a "solution." Far from a flood, third party lawsuits have remained at a trickle since *McCormick*. Attorneys in the auto litigation field and other attorneys that sit as case evaluators will agree that the field is dominated by first party litigation, and a there are surprisingly few third party auto cases.

The numbers reveal claims of a flood to be a false alarm. The Supreme Court Administrative Office Caseload Reports from 2015 demonstrate very modest numbers of circuit court auto negligence case filings: Genesee (8 judges) saw 595 new filings and 641 dispositions; Washtenaw County Circuit Court (5 judges) saw 449 filings and 394 dispositions; Macomb (15 judges) saw 1749 new filings and 1616 dispositions; Oakland (19 circuit judges with 13 currently assigned to civil cases) saw 1786 filings and 1707 dispositions; and Wayne (50 Circuit judges with 16 currently assigned to civil cases) saw 9088 new filings and 8826 dispositions.

These numbers are low. Prior to *Kreiner*, one plaintiff firm with 10 attorneys could easily have more cases than were filed in Genessee and Washtenaw counties combined. A large defense firm could handle all of Wayne County's 2015 caseload! These caseload statistics and real life experience demonstrate a trickle of filings, not a flood.

The Threshold Works

In sum, the threshold is being applied as it was intended. The genius of the Act is at work: case filings are modest, the threshold continues to thwart the majority of plaintiffs in garden-variety cases at trial, and the right to a jury trial is preserved. The recent articles' arguments for another judicially enhanced threshold that tilts the scales in favor of the defense should be carefully examined. Whenever our threshold has been judicially altered, the balance has gone askew and the viability of the system has become legitimately threatened.

Talk of defendants losing too often is not borne out by the statistics, and neither is the reflexive "flood of litigation" ballyhoo. All is well with the No-Fault threshold. ■

About the Author

David Christensen *is the principal of Christensen Law, in Southfield, MI. David handles truck, auto and no-fault matters. He presents frequently to lawyers at ICLE and MAJ seminars on matters of no-fault and third-party litigation, and trial advocacy. He is a past chair of the SBM Negligence Section, served as an*

officer and remains an executive board member of the Michigan Association for Justice, and is a member of American Board of Trial Advocates. David was awarded the Leader in the Law Award by Michigan Lawyers' Weekly *in 2012.*

Endnotes

1 David, Javon. "Michigan No-Fault & Third Party Practice: Is the Tide Turning in McCormick Era?", *The Journal of Insurance & Indemnity Law,* v.9, no.4, October 2016; Murray, Thomas, "Seriously, Is There Any Threshold Left?", The Grand Rapids Lawyer, Grand Rapids Bar Ass'n,Nov/Dec 2016.

2 *Nelson v Dubose*, 291 Mich App 496 (2011); *Johnson v Recca*, 292 Mich App 238 (2011); rev'd on other grounds in 492 Mich 169 (2012); *Chouman v Home-Owners Insurance Company*, 293 Mich App 434 (2011); *Hunter v Sisco*, 300 Mich App 229; RB 3331 (2013).

3 The best resource available for researching no-fault issues is the "No-Fault Red Book Online" edited by Goerge Sinas, Tim Donovan, and Tom Sinas. Every no-fault opinion is indexed since 1974. It is published by the Michigan Association for Justice.

4 Footnotes 7 and 27 to *McCormick* point out that Section 3135(2)(a) conflicts with the standard for summary disposition in MCR 2.116(C)(10) and strongly suggests that the statute is unconstitutional. The statute allows a judge to summarily dismiss a case when "[t]here is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination whether the person has suffered a serious impairment of body function or permanent serious disfigurement." The court suggests that the statute presents an unconstitutional incursion into the exclusively judicial procedural realm when, for example, "a court is required to (1) resolve material, disputed facts with regard to issues *other* than the nature and extent of the injury, such as the extent to which the injury actually impairs a body function or the injured party relied on that function as part of his or her pre-accident life, or (2) decide whether the threshold is met even though reasonable people could draw different conclusions from the facts. See *Skinner v Square D Co*, 445 Mich 153, 161-162, 516 NW2d 475 (1994), and *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 357, 596 NW2d 190 (1999)."

5 During 2004 through August 1, 2010, all old hands will agree that almost no new attorneys entered the auto field in Michigan. The *Kreiner* regime led to a vast exodus of attorneys from this field, many firms closed, and many lawyers simply left the state. Most auto negligence attorneys are members of the Negligence Law Section of the State Bar. That Section's membership was 3041 in 2003, the year before *Kreiner*, and shrank to 1904 in 2010, the year *Kreiner* was reversed.

6 For a more thorough discussion of the trade-offs sought in the No-Fault Act see the discussion in *Cassidy v McGovern*, 415 Mich 483, 499-500 (1982).

PROPERTY INSURANCE 101

The Co-Insurance Clause: Don't Let Your Policy Limits Fool You

By Jason Liss, *Fabian, Sklar & King, PC*

"It is perfectly true that the coinsurance clause is a dangerous thing for a person who does not understand it and for a person who does not keep close watch of his values—not dangerous in the sense that the insured will not get what he ought to get, but in the sense that he will not get what he thinks he is going to get."[1]

Many property insurance policies require the policyholder to purchase coverage limits that meet a specified percentage of the value of the insured property, sometimes referred to as being insured-to-value ("ITV"), or risk becoming a "co-insurer" of the insured's own loss. A typical co-insurance clause requires the covered property to be insured to at least 80% of its full replacement cost or be subject to what is commonly referred to as a co-insurance penalty--the penalty being a percentage of the loss the policyholder must absorb even though the coverage limits, at first blush, appear to be more than adequate.

By way of example, the base homeowners form issued by one well-known Michigan insurance carrier states that it will only pay for the cost to repair or replace the damaged part of the dwelling with new materials of like size, kind and quality if, at the time of the loss, the dwelling limits are 80% or more of the insured dwelling's replacement cost.[2] This particular policy further states that if, at the time of the loss, the dwelling is insured for less than 80% of its replacement cost, the insurer will pay the larger of either the actual cash value ("ACV") of the damaged part of the dwelling *or the amount of the loss multiplied by the ratio of the amount of insurance to 80% of its replacement cost.*[3]

By way of example, consider a home suffering a $25,000 partial loss, covered with $50,000 limits which has a full

replacement cost of $100,000. If the policy contains an 80% co-insurance requirement, the insurer is required to pay only $15,625 of the loss (prior to the application of the policy deductible) even though the loss is well within the policy limits. The insurer's payment is based on the following formula:

> *Amount of Loss * (Coverage Limits ÷ Coverage Requirement)*

In our example, the coverage requirement is $80,000, i.e. 80% of the $100,000 cost to replace; and, under the above formula, the insurer is responsible for covering only 62.5% of the loss (50,000 ÷ 80,000 = 0.625).[4] Therefore, in our example, the insured becomes a co-insurer of 37.5% of the loss and suffers a $9,375 "co-insurance penalty."

Because it is not uncommon for policies to contain 90% or even 100% co-insurance requirements, it is important to recognize that the higher the co-insurance requirement, the greater the risk is to the insured of incurring a co-insurance penalty. With an 80% co-insurance requirement, the insurer will pay 100% of a partial loss (up to the policy's coverage limits) if the property is insured to 80% or more of its replacement value, thereby giving the insured a 20% margin for error when making this determination. It follows, with a 90% co-insurance requirement, the insured has only a 10% margin for error and no margin for error if the policy has a 100% co-insurance requirement.[5]

One might ask: what is the purpose of a co-insurance clause, since an insurer has presumably collected a premium commensurate with the risk it agreed to underwrite? The co-insurance clause has been a fixture in Michigan property insurance policies for at least 130 years,[6] and as the Michigan Supreme Court explained in a 1907 decision, is intended to be a mechanism by which insurers can set equitable rates:

> The principle is that the entire property at risk should bear the burden of the loss of any part of it. That can only be done when the property is either fully insured or is totally destroyed. The co-insurance clause is only operative in partial losses, which are a large percentage of the fire losses. In these cases the owner contracts that he will either carry insurance to the limit required, or himself become a co-insurer for the deficiency. Without this clause the underwriter cannot intelligently rate any risk. Property worth $10,000 and insured for $10,000 is a very different risk from the same property insured for $1,000. In the one case the destruction of one-tenth of the property means a 10 per cent. loss, and in the other case it means a total loss. The two risks cannot properly be written at the same rate, because they do not involve the same hazard. The effect of the universal application of the principle would be that the amount of insurance would be somewhat increased, the premium rate would be reduced, while rates would be equalized as between the owners who have heretofore carried partial insurance and those who have carried full insurance.[7]

Equitable principles aside, as a practical matter, a policy with a co-insurance clause is usually less expensive than a policy without a co-insurance clause. While a reduced premium is typically desirable, a policy's co-insurance provisions can feel like an inequitable surprise in the event of a significant loss for the unwary. Therefore, unless an insured is willing to assume the risk of becoming a co-insurer of a loss in exchange for a reduced premium, the insured needs to be proactive in determining that the property is fully insured-to-value. However, being insured-to-value is not tantamount to being fully and adequately insured. Insuring a property to 80% of its replacement cost may avoid the imposition of a co-insurance penalty, but in the event of a total loss, the property will nonetheless be underinsured by 20%.

Given the fact that values fluctuate, an insured who wishes to eliminate the risk altogether can purchase a policy not containing a co-insurance clause or, for a policy containing a co-insurance clause, the insured can purchase an endorsement, such as a true guaranteed replacement cost endorsement[8] or an agreed-value endorsement, which suspends the co-insurance requirement.[9]

Despite its risks, a co-insurance clause can provide savings to an insured looking for the best value so long as the insured understands the risks involved and has taken the proper precautions.

About the Author

Jason J. Liss *is an attorney with Fabian, Sklar & King, P.C., a firm specializing in the representation of policyholders in residential and commercial property insurance disputes. He is a Certified Fire and Explosion Investigator (CFEI), qualified by the National Association of Fire Investigators (NAFI), and an appointed alternate on the Technical Committee on Fire Investigator Professional Qualifications, a peer committee comprised of public and private sector industry professionals responsible for writing* NFPA 1033: Standard for Professional Qualifications for Fire Investigator. *Mr. Liss is a council member of the Insurance and Indemnity Law section of the State Bar of Michigan and serves on the Executive Board of the Michigan Association for Justice. Mr. Liss can be reached at jliss@fabiansklar.com.*

Endnotes

1 *Aldrich v Great Am Ins Co*, NY, 195 AD 174, 184, 186 NYS 569, 576 (App. Div. 1921).

2 MemberSelect Ins. Co. (AAA Insurance), form 6500-42132-MI-77 (Eff. 7-22-07), p. 10 of 26.

3 ACV is the depreciated value of the loss.

4 Some commentators characterize this ratio as "what you had" divided by "what you should have had."

5 In the author's experience, some agents misunderstand the concept of co-insurance and at least one has testified in deposition that a policy with a 100% co-insurance requirement provides more favorable coverage to an insured than a policy with an 80% co-insurance requirement.

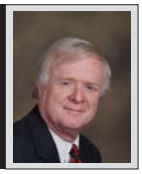
6 See *Chesebrough v. Home Ins Co*, 61 Mich 333 (1886).

7 *Attorney Gen. v. Comm'r of Ins*, 148 Mich 566, 112 NW 132 (1907) (internal quotation omitted).

8 A true guaranteed replacement cost endorsement shifts the burden to the insurer to establish the policy limits and in exchange for the insured agreeing to carry those limits and meeting other specified conditions, such as reporting any improvements made over a certain value threshold, the insurer guarantees that it will pay the full cost to replace the damaged property without regard to the policy limits.

9 An agreed-value endorsement is more commonly available for commercial policies and is typically only offered in homeowners policies insuring high-value homes. The term "agreed-value" is somewhat misleading in that it only suspends a policy's co-insurance requirement, but does not indisputably establish the property's value in the event of a total loss.

Insurance and Indemnity 101



The Jargon of the Trade

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

Like any other area of law, the insurance and indemnity filed of practice has its own jargon, and learning the terms of art will make it easier for someone who is new to the field to move ahead.

Types of policies. There is a dizzying array of policies, covering just about any conceivable risk. As another article in this issue explains, there is even a statutory provision for covering Uber vehicles. Once upon a time, this author was asked to come up with an "Elevator Collision" coverage endorsement. There really is such a thing. It covers a loss is an elevator crashes into the equipment that lifts and lowers it.

CGL and GL. The most common policies that members of this Section will encounter are liability, property, and auto. The most common liability policy for businesses is the Commercial General Liability policy (aka CGL or just GL).

Like most policies, the GL policy will typically have a deductible, the amount that the insured pays before the policy pays anything. If the insured is a business with substantial resources, it may decide to have a large deductible. For example, the insured may "self-insure" the first $500,000. The "deductible" then gets a new name, the "self-insured retention" or SIR.

SIR and TPA. If the SIR is large, the insured may also agree to provide its own defense. In that case, the insurer may want some assurance that the defense will be handle professionally. If so, the insurer will require that the insured hire a "third party administrator" (TPA) that is approved by the insurer.

ISO forms. Many insurance policies are professionally written. The most common of these come from the Insurance Services Office (ISO). Most insurance companies use the ISO forms as their own. ISO gives it forms a standard numbering format. For example, "CG 00 01 01 96." "CG" identifies it as a CGL policy. 00 01 means it is policy form 1. 01 96 means that it was issue January 1996.

Manuscript forms. ISO forms are contrasted with "manuscript" forms, which are drafted by the insurer itself. While the ISO forms are of high quality, manuscript forms are all over the map in terms of quality. Some are good, some are embarrassing. For an insurer seeking to find coverage, manuscript forms can be a source of hope. For example, "claims made" forms, such as are issued to professionals, typically require that the insured report the claim in the year in which it is made. The definition of a claim being made is something like "when the insured receives a demand." But one particular manuscript form contained the statement that "a claim will be deemed to be 'made' when the insured reports it." So when the insured reported, in 2004, that it received a demand in 2001, the policy's coverage applied.

Primary and Excess. GL coverage is often bought in layers, with a primary insurer at the bottom, and one or more excess layers at the top. An insured might have $1 million of coverage at the primary layer and then $4 million on top of that, for a total of $5 million. This is described as "$4MM XS $1MM." There can be many layers, each one described as

"XS" the sum of the layers below.

Re-insurance. Sometimes an insurer that has issued a large policy (maybe the $4 million in the example above), will be concerned that it will not be able to handle a $4MM loss. If so, it can buy "re-insurance." This looks a little like excess insurance, but it's not the same. In this case the insurer is also the insured as to some portion of its $4MM exposure.

Facultative and treaty reinsurance. There are two kinds of reinsurance. Facultative reinsurance is written on a one-off basis for a particular policy. Treaty reinsurance is written to cover a particular type of insurance policy that the reinsured issues.

Claims-made versus occurrence-based policies. One distinction between types of liability policies is the difference between occurrence-based policies. The more common is the occurrence-based policy. The typical auto liability policy is occurrence-based. The obligation of the insurer is fixed as of the date of the accident, even if the actual claim comes two years later. But for professionals, mistakes often do not have an easily determinable date. Professional errors can take place gradually. For that type of exposure, claims made policies were invented. As the term implies, coverage is based on the date that the claim is made.

Claims made retro date. The advantage of claims-made coverage from the perspective of the insurer is that it can close its books once the year ends and no claims have been reported. That limitation of coverage can be a problem for the insured in to ways. First, the insurer will be reluctant to cover a claim that was based on conduct that took place before the policy year. Among other things, that could encourage an insured to wait and buy a policy once he or she anticipates a claim. The insurer will therefore require the insured to certify that he or she is not aware of any likely claims. Another way the insurer will protect itself is by setting a "retro date," which is the date after which the underlying liability-causing event must have taken place. Sometimes the retro date is the inception date of the first policy year. Or the insured can sometimes "buy" a retro date earlier than the inception date.

Claims made tail coverage. The insured will have concerns at the other end as well. If the insured retires in 2017, it is possible that a claim may be made a year or two after. The protect against that the claims made policy will usually contain a provision that allows the insured to buy "tail" coverage at a stated price. ■

About the Author

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Will the No-Fault Act Halt the Retreat of Michigan Courts from the Innocent Third Party Rule?

By James T. Mellon, *Mellon Pries, PC*

Since at least 1876, in a variety of contractual situations, the courts of the State of Michigan have applied forms of what has become known as the "innocent third party rule," which precludes a party to a contract from rescinding the contract, once the rights of innocent third parties have intervened.[1]

In the context of No-Fault coverage, the courts had also applied the "innocent third party rule," to preclude rescission by an insurer after an innocent third party has sustained injury. As early as 1976, shortly after the passage of the No-Fault Act, in deciding *State Farm Mut Auto Ins Co v Kurylowicz*,[2] the Court of Appeals held:

> the policy of the State of Michigan regarding automobile liability insurance and compensation for accident victims emerges crystal clear. It is the policy of this state that persons who suffer loss due to the tragedy of automobile accidents in this state shall have a source and a means of recovery. Given this policy, it is questionable whether a policy of automobile liability insurance can ever be held void Ab initio after injury covered by the policy occurs.[3]

However, the Court of Appeals noted in 1976 that the "innocent third party rule" was not before it.[4] Prior to *Kurylowicz*, in a case which arose prior to the enactment of No-Fault, the Michigan Court of Appeals had held:

> "The liability of the insurer with respect to insurance . . . becomes absolute whenever injury or damage covered by such policy occurs. The policy may not be canceled or annulled as to such liability by agreement between the insurer and the insured after the occurrence of the injury or damage."[5]

The Michigan Court of Appeals would have no difficulty concluding that the "innocent third party rule" applied to policies of No-Fault insurance, when it was presented that particular issue.[6] The "innocent third party rule" continued to be applied, without deviation, for a period of decades in the context of No-Fault.[7]

The Fraud Defense Outside of No-Fault

In 2012, however, the Michigan Supreme Court considered the rule outside the No-Fault context in *Titan Ins Co v Hyten*.[8] In *Hyten*, the Michigan Supreme Court considered "whether an insurer may avail itself of traditional legal and equitable remedies to avoid liability under an insurance policy on the ground of fraud in the application for insurance, when the fraud was easily ascertainable and the claimant is a third party."[9] The decision was couched in terms of the "easily ascertainable rule," and only mentioned innocent third parties in passing.[10] The Michigan Supreme Court rejected decades of Court of Appeals precedent, and instead applied its own holding from a 1960s case, permitting rescission, even where a fraud is easily ascertainable, as an insurer has no duty to investigate representations made by potential insureds.[11] The Michigan Supreme Court further reaffirmed the principle "that an insurer has no duty to investigate or verify the representations of a potential insured."[12] The conclusion to *Hyten*, however, created as many questions as it answered, because although the case was really directed only at the "easily ascertainable rule," the Supreme Court concluded the opinion with these words:

> In accordance with our longstanding jurisprudence before *Kurylowicz*, an insurer may seek to avoid liability under an insurance policy using traditional legal and equitable remedies including cancellation, rescission, or reformation, on the ground of fraud made in an application for insurance, notwithstanding that the fraud may have been easily ascertainable and the claimant is a third party.[13]

Attorneys and litigants alike were left to wonder first, whether *Hyten* had effectively abrogated the "innocent third party rule" as well as the "easily ascertainable rule," and second, whether *Hyten* also applied to statutorily-mandated insurance coverages, which were explicitly noted not to be at issue.

The latter issue was made even more complicated by the Michigan Supreme Court's decision in *Harris v Auto Club Ins Ass'n*, 494 Mich 462, 472; 835 NW2d 356 (2013), which held that as to certain No-Fault claimants, such as motorcyclists, they are "not claiming benefits under a no-fault insurance policy that he or anyone else procured" and that their "right to PIP benefits arises solely by statute." Thus, as to certain claimants, the benefits are statutory and not contractual in nature, at all. Therefore, there is a question whether any rescission is possible because when the Legislature speaks through a comprehensive statutory scheme, it "will be found to have

intended that the statute supersede and replace the common law dealing with the subject matter."[14]

The Michigan Supreme Court rejected decades of Court of Appeals precedent, and instead applied its own holding from a 1960s case, permitting rescission, even where a fraud is easily ascertainable, as an insurer has no duty to investigate representations made by potential insureds.

Innocent Third Party Defense in the Court of Appeals

Following the decision in *Hyten*, the Michigan Court of Appeals encountered the "innocent third party rule" in the No-Fault context on several occasions and reached divergent results in a series of unpublished opinions.[15] The Michigan Court of Appeals finally issued a published opinion on the issue in *Bazzi v Sentinal Ins Co*.[16] In that case, the Michigan Court of Appeals determined that *Hyten* abolished the innocent third-party rule. The decision directly addressed an argument that *Hyten* "did not involve mandatory PIP benefits and it only considered the 'easily ascertainable' rule and not the 'innocent third-party' rule."[17] In fact, the Court of Appeals determined that the "easily ascertainable rule" and the "innocent third party rule" "are one and the same."[18] The Court of Appeals further concluded that even if the two rules were distinct, it was of no import, as "Both such rules have their roots in the *Kurlyowicz* decision. And [*Hyten*] clearly overrules *Kurlyowicz* 'and its progeny… ."[19]

The Court of Appeals then turned to whether *Hyten* controlled statutorily-mandated No-Fault benefits, and concluded that it did.[20] The true question, according to the Court of Appeals, "is not whether PIP benefits are mandated by statute, but whether that statute prohibits the insurer from availing itself of the defense of fraud."[21] No party identified any provision of the No-Fault Act which restricts the defense of fraud.[22] MCL 257.520(f)(1) which limits cancellation of motor vehicle liability policies "required by this chapter" (Chapter V of the Motor Vehicle Code, *i.e.*, financial responsibility) did not apply, and the Michigan Supreme Court determined in *Hyten* that to limit the defense of fraud, that statute, or a similar statute, must apply; and the Court of Appeals already concluded that no similar provision of the No-Fault Act was identified.[23] The public policy argument was already criticized in *Hyten*, and it was noted that while such arguments may have merit, they were better addressed to the Legislature, not the courts.[24] The Court of Appeals summarized its findings:

> We conclude that: (1) there is no distinction between an "easily ascertainable rule" and an "innocent third-party rule," (2) the Supreme Court in [*Hyten*] clearly held that fraud is an available defense to an insurance contract except to the extent that the Legislature has restricted that defense by statute, (3) the Legislature has not done so with respect to PIP benefits under the no-fault act, and, therefore (4) the judicially created innocent third-party rule has not survived the Supreme Court's decision in [*Hyten*]. Therefore, if an insurer is able to establish that a no-fault policy was obtained through fraud, it is entitled to declare the policy void ab initio and rescind it, including denying the payment of benefits to innocent third-parties.[25]

The decision drew a lengthy dissent from Judge Beckering, who disagreed that the two rules were one and the same, or that *Hyten* was controlling. Interestingly, none of the judges noted the existence of the "innocent third party rule" as predating *Kurlyowicz*.

Following the decision in *Bazzi*, several cases which had been ordered held in abeyance were decided, but even those cases did not necessarily agree with *Bazzi*.[26] In fact, even the Michigan Court of Appeals has noted, in deciding a peripheral issue, "A current dispute is ongoing in this Court [which] involves cases arising from no-fault automobile insurance, and specifically involves the distinction and viability of the 'easily ascertainable' rule, articulated in *Titan*, 491 Mich. at 572–573, and the 'innocent third-party rule[.]'"[27]

Presently, *Bazzi* and *State Farm Mut Auto Ins Co v Mich Mun Risk Mgmt Auth*, are pending before the Michigan Supreme Court awaiting the Court's decision on their respective applications for leave to appeal.[28]

Unresolved Issues

Notable issues not addressed by *Bazzi* include (1) the development of the "innocent third party rule" prior to *Kurylowicz*; (2) the Michigan Supreme Court's conclusion that certain No-Fault claimants' rights to benefits arise solely by statute, not contract; and (3) the practical effect of permitting rescission in the context of No-Fault, where rescission can often take years after the injury to be claimed, and additional time to litigate, when "The basic goal of the personal injury provisions of the no-fault insurance act is to provide individuals injured in motor vehicle accidents assured, adequate and prompt reparation for certain economic losses."[29] Furthermore, the Michigan Supreme Court has determined that traditional contract defenses, such as non-cooperation of the insured, have already been rejected in the context of No-Fault.[30]

Additionally, one cannot help but note the reliance in *Hyten* on the 1968 decision of *Keys v Pace*, which led the Michi-

gan Supreme Court to conclude that "in accordance with this Court's precedent," there was "nothing in the law to warrant the establishment of an 'easily ascertainable' rule" in *Kurylowicz* in 1976.[31] Thus, it would appear that adherence to precedent which had never been overruled was part of the reason *Hyten* was decided in the manner it was. However, as pointed out above, the "innocent third party rule" in contracts, predates *Keys* by nearly a century, and in motor vehicle insurance, predates *Kurylowicz*.

> ...as to certain claimants, the benefits are statutory and not contractual in nature, at all. Therefore, there is a question whether any rescission is possible because when the Legislature speaks through a comprehensive statutory scheme, it "will be found to have intended that the statute supersede and replace the common law dealing with the subject matter."

Implications beyond Insurance Law

The Michigan Supreme Court's affirmance of *Bazzi* or its declination to hear the case could have vast implications, even outside the law of insurance. The Michigan Supreme Court has previously equated and interpreted insurance contracts with any other form of contract.[32] Thus, one must question whether the decision in *Bazzi* applies to all contracts, such that one's status as an innocent third party will no longer matter, even in cases of contracts for sale, deeds, or other instruments. Furthermore, "whenever one of two innocent persons must suffer by the act of a third, the loss shall be borne by that one whose behavior in the matter denoted to the other that such third person's doings therein were worthy of trust according to their outward seeming."[33]

Argument could be made that by issuing insurance the No-Fault provider represented to the public that the alleged misrepresenter was insurable, which, in turn, permitted the alleged misrepresenter to obtain a registration, and legally drive upon Michigan roads. No such argument appears to have been made in *Bazzi*. If *Bazzi* stands, questions will arise about the viability of this related rule applied as between two innocent third parties. *Bazzi* may indeed signal a shift in contracts for insurance which would remove them from their current treatment as any other contract. While such a rule may seem beneficial to insurers, at first glance, one must remember that if the makeup of the Michigan Supreme Court were to change, and precedent existed to construe insurance contracts differently than other contracts, insurers may find themselves in an unfavorable position, and ironically, the slippery slope may have started with *Bazzi*, a decision which is generally favorable to the insurance industry.[34]

About the Author

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Endnotes

1 *See e.g.*, *Curran v Rogers*, 35 Mich 221, 226 (1876); *Merrill v Wilson*, 66 Mich 232, 243; 33 NW 716 (1887) ("The facts fully warranted him in rescinding his contract; and, if the rights of innocent third parties have not intervened, he would have been entitled to a cancellation of the deed upon being informed of the fraud practiced upon him. ... It is an established doctrine that a court of equity will not rescind a contract on the ground of fraud, when the party asking the relief is not able to put those against whom it is sought into the same situation in which they stood when the contract was entered into."); *North v Wagner*, 264 Mich 110, 116; 249 NW 494 (1933) ("[I]f the rights of third persons have intervened and vested rights would be interfered with, no right of reconsideration or rescission exists[.]").

2 67 Mich App 568; 242 NW2d 530 (1976).

3 67 Mich App 568, 574; 242 NW2d 530 (1976).

4 *Id.*

5 *DAIIE v Ayvazian*, 62 Mich App 94, 100; 233 NW2d 200 (1975) (quoting 1 Long, The Law of Liability Insurance, s 3.25, pp. 3-83-84).

6 *Cunningham v Citizens Ins Co of Am*, 133 Mich App 471, 477; 350 NW2d 283 (1984) (citing to *Kurlyowicz*).

7 *E.g.*, *Hammoud v Metro Prop & Cas Ins Co*, 222 Mich App 485, 488; 563 NW2d 716 (1997).

8 491 Mich 547, 552 n2; 817 NW2d 562 (2012) (noting that statutorily mandated benefits were not at issue, as the parties conceded their obligations to provide statutory minimums).

9 *Id.* at 560.

10 *Id.* at 563-64.

11 *Id.* at 564-571 (discussing *Keys v Pace*, 358 Mich 74; 99 NW2d 547 (1967)).

12 *Id.*at 570.

13 *Id.* at 572-73.

14 *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 389-90; 738 NW2d 664 (2007) (quoting *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006)).

15 *Price v McCullough*, unpublished per curiam of the Court of Appeals, issued January 29, 2013 (Docket No 307045) (concluding rescission was not possible with an innocent third party, but ex-

pressing no opinion as to the applicability of *Hyten*, as no party argued that the recent decision in *Hyten* changed the analytical framework); *Silvernail v Liberty Mut Ins Co*, unpublished per curiam of the Court of Appeals, issued May 23, 2013 (Docket No 308762) (permitting rescission, despite an innocent third party); *Frost v Progressive Ins Co*, unpublished per curiam of the Court of Appeals, issued September 23, 2014 (Docket No 316157) (concluding rescission was possible, despite an innocent third party), *vacated* 497 Mich 980; 860 NW2d 636 (2015) (remanding with instructions to hold in abeyance); *State Farm Mut Auto Ins Co v Mich Mun Risk Mgmt Auth*, unpublished per curiam of the Court of Appeals, issued February 19, 2015 (Docket No 319710) (concluding rescission was not possible with an innocent third party, where the benefits are mandated by statute), *vacated* 498 Mich 870; 868 NW2d 898 (2015) (remanding with instructions to hold in abeyance); *Hoskins v Miller*, unpublished per curiam of the Court of Appeals, issued July 16, 2015 (Docket No 320150) (concluding that the injured party failed to raise her status as an innocent third party before the trial court, but disagreeing that *Hyten* stood for the proposition that "an insurer cannot avoid liability if an innocent third party would be harmed");

16 ___ Mich App ___; ___ NW2d ___ (2016), 2016 WL 3263905.

17 *Id.*, slip op at 3.

18 *Id.*

19 *Id.*, slip op at 4.

20 *Id.* slip op at 5.

21 *Id.*

22 *Id.*

23 *Id.*, slip op at 6-8.

24 *Id.*, slip op at 8-9.

25 *Id.*, slip op at 10.

26 *AR Therapy Servs, Inc v Progressive Marathon Ins Co*, unpublished per curiam of the Court of Appeals, issued June 14, 2016 (Docket No 322239) (noting that the court was bound by *Bazzi*, but drawing a concurrence from Judge Beckering, stating that while she was bound by *Bazzi*, she did not agree with it); *Frost v Progressive Mich Ins Co (On Remand)*, unpublished per curiam of the Court of Appeals, issued July 28, 2016 (Docket No 316157) (reaching the same conclusion that rescission was possible, which "is consistent with and adheres to the majority decision in *Bazzi*); *SE Mich Surgical Hosp, LLC v Allstate Ins Co*, --- Mich App ---; --- NW2d --- (2016) (concluding that it was bound by the *Bazzi* decision, but agreeing with the dissenting opinion from *Bazzi*, and declaring a conflict; the Court of Appeals would later decline to convene a conflict panel); *State Farm Mut Auto Ins Co v Mich Mun Risk Mgmt Auth*, --- Mich App ---; --- NW2d --- (2016) (noting that it was bound by the decision in *Bazzi*, but Judge Murphy felt compelled to file a concurrence, noting that while he was bound by *Bazzi*, he believed *Hyten* "cannot be interpreted as abolishing the innocent third-party rule in the context of statutorily-mandated automobile insurance coverage, as to reach such a conclusion would require a wholesale disregard of Titan 's footnote 17."); *Dewley v Pioneer State Mut Ins Co*, unpublished per curiam of the Court of Appeals, issued October 25, 2016 (Docket Nos 324751, 324828) (noting "in light of this Court's decision in *Bazzi*, Dewley's status as an innocent third party is no longer legally relevant").

27 *Electric Stick Inc v Primeone Ins Co*, unpublished per curiam of the Court of Appeals, issued September 15, 2016 (Docket No 327421).

28 Docket Numbers 154442 and 154434

29 *Auto Club Ins Ass'n v Hill*, 431 Mich 449, 458; 430 NW2d 636 (1988).

30 *Coburn v Fox*, 425 Mich 300, 310; 389 NW2d 424 (1986).

31 *Hyten*, 491 Mich at 550.

32 *Farm Bureau Mut Ins Co of Mich v Nikkel*, 460 Mich 558, 566; 596 NW2d 915 (1999) ("The principles of construction governing other contracts apply to insurance policies").

33 *Peake v Thomas*, 39 Mich 584, 589 (1878).

34 *E.g.*, *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003) (abolishing reasonable expectations because the "approach, where judges divine the parties' reasonable expectations and then rewrite the contract accordingly, is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy.").

ERISA Case Summary

ERISA Decisions of Interest

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Sixth Circuit Update

Sixth Circuit Clarifies Standing Requirements

Soehnlen v Fleet Owners Ins Fund
844 F3d 576 (6th Cir 2016)

The employer and employee sued a multi-employer welfare benefit plan, alleging that the plan and its trustees violated ERISA, the Patient Protection and Affordable Care Act ("ACA"), the Taft-Hartley Act, and a trust agreement based on the plan's per-participant and per-beneficiary pecuniary caps for annual and lifetime benefits. The district court dismissed for failure to state a claim, and the Sixth Circuit affirmed.

As related to the ERISA claims, the Sixth Circuit first held that the plaintiffs lacked Article 3 standing to assert their section 1132(a)(1)(B) claim for monetary and injunctive relief. The plaintiffs alleged that the defendants violated section 1132(a)(1)(B) because the plan's benefit caps were contrary to the ACA's requirements. Article 3 standing requires a plaintiff to show "injury in fact," and the Court held that simply alleging a statutory violation does not constitute a "concrete" injury under the Supreme Court's recent decision in *Spokeo Inc v Robins*, 135 S Ct 1540 (2016).

Second, the Sixth Circuit held that the plaintiffs could not get injunctive relief under section 1132(a)(3), noting that "we have never held that such a claim can proceed without the individual plaintiffs showing a constitutional injury."

Third, and perhaps most importantly, the Sixth Circuit affirmed dismissal of the plaintiffs' breach of fiduciary duty claim. It noted that a prior decision -- *Loren v BCBSM*, 505 F3d 598 (6th Cir 2007) -- stated that plaintiffs "need not demonstrate individualized injury to proceed with their claims for injunctive relief" under section 1132(a)(3), but "may allege only violation of the fiduciary duty owed them as a participant in and beneficiary of their respective ERISA plans." 505 F3d at 609.

In *Soehnlen*, the Sixth Circuit "now recognize[d] that some ambiguity may have been engendered by this decision and take this opportunity to provide clarification." It held that "it is not sufficient merely to state, as plaintiffs do, that the plan is deficient without showing which specific fiduciary duty or specific right owed to them was infringed." Thus, because the plaintiffs alleged no more than speculative, prospective injury not tied to a specific right, they did not establish standing to bring a fiduciary duty claim.

Lastly, the Court held that the plaintiffs failed to state a claim under section 1149, which prohibits any false statement about benefits. Noting that Fed R Civ P 9 requires pleading fraud with particularity (including the "time, place and content of the alleged misrepresentation"), the plaintiffs did 'nothing more than restate the relevant section of" section 1149 and failed to "identify specific statements from particular trustees at specific times which constitute the purportedly false promises and assurances Plaintiffs now claim they relied upon."

Plaintiff's State Law Negligence Claim Against Third-Party Medical Reviewer Was Completely Preempted and Failed to State A Claim

Milby v. MCMC, LLC, 844 F3d 605 (6th Cir 2016)

The plaintiff, a nurse at the University of Louisville Hospital, received disability benefits until a third-party medical reviewer, the defendant MCMC, Inc, determined that she could return to work. The plaintiff sued MCMC in state court, alleging only a claim of negligence *per se* for practicing medicine in Kentucky without a license. MCMC removed the case to federal court based on complete preemption under ERISA. The district court denied the plaintiff's motion to remand, holding that ERISA preempted the plaintiff's state negligence claim, and dismissed the complaint for failure to state a claim.

The Sixth Circuit affirmed. It first noted that section 1132(a) of "ERISA completely preempts 'any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy'." (quoting *Aetna Heath Inc v Davila*, 542 US 200, 209 (2004)). Under *Davila*, a state law claim is preempted when it meets both prongs of a 2-part test: (1) the plaintiff complains about the denial of benefits to which he is entitled only because of the terms of an ERISA plan' and (2) the plaintiff does not allege the violation of any duty, state or federal, that exists independently of ERISA or the plan's terms.

As to the first prong, the Court held that MCMC's "conduct was indisputably part of the process used to assess a participant's claim for a benefit payment under the plan, making the negligence claim an alternative enforcement mechanism to ERISA's civil enforcement provisions."

As to the second prong, the Court asked whether Kentucky law "creates an independent duty between the medical reviewers" and the plaintiff that would be breached by the

defendant medical reviewer's alleged unlicensed practice of medicine. Case law held that nurse reviewing medical records to decide whether a claimant was able to perform his job duties did not constitute "the practice of medicine" because it did not involve the "diagnosis, treatment, or correction" of sickness or injury, and did not involve the determination of the "medical necessity of any treatment," which is the Kentucky statute's definition of "the practice of medicine." The Sixth Circuit held that "[i]f medical professionals reviewing documents without making determinations regarding medical necessity are not practicing medicine within the meaning of the Kentucky licensing law, it follows that the licensing law does not create a duty that flows from those professionals to claimants." Thus, MCMC did not have a duty to the plaintiff under Kentucky law. As such, section 1132(a) preempted the plaintiff's state law negligence claim.

Lastly, the Sixth Circuit affirmed dismissal for failure to state a claim because the proper defendant under ERISA is the plan administrator, not the third-party medical reviewer that the plan retained.

United States District Court Update

Shaw Road Map Taking Hold

Filthaut v AT&T Midwest Disability Benefit Plan, --- F.Supp.3d --- (E.D. Mich., 2016), Case no. 15-cv-12872 (2016 WL 6600038)

The plaintiff applied for short term disability benefits for three different, non-consecutive periods due to her claims of kidney issues and chronic back pain. All three claims were denied by the plan's claim administrator for lack of sufficient medical evidence the plaintiff was unable to perform her sedentary job as a service representative.

The court here followed the road map set forth by the Sixth Circuit in *Shaw v. AT&T Umbrella Ben. Plan*, 795 F. 3d 538 (2015), noting that the plan, the claim administrator, the plaintiff's job, and the type of claim were identical or nearly identical in both cases.

Similar to *Shaw*, the court found the claim administrator wrongly determined that there was no evidence of functional impairment where the plaintiff's family doctor noted that she was "unable to ambulate," and then improperly rejected that information without stating a reason. Further, the claim administrator failed to allow reasonable time for contact with treating providers, reaching a conclusion after not receiving any response within only 24 hours.

The claim administrator was also criticized for engaging in a selective review of the evidence, relying too heavily on a consulting nephrology specialist's determination that the plaintiff's kidney claims did not result in any functional impairment, while seemingly ignoring evidence of functional impairment resulting from the plaintiff's additional claims of back pain.

Although a plan is not precluded from relying on a file review alone, courts are critical of this practice in the context of making a credibility decision about a claimant's reported pain level. The court applied that reasoning here and faulted the claim administrator for not conducting a physical examination of the plaintiff.

Finally, the court found that the claim administrator relied too heavily on a consultant whose work had been questioned in a number of federal cases, in all of which he was hired by the same claim administrator. As a result, the court held that the claim administrator arbitrarily and capriciously denied two of the three claims for benefits.

Supplemental Jurisdiction Existed, Mandating No-Fault Carrier's Consent to Removal

Askew v Metropolitan Property and Casualty Ins. Co., --- F.Supp.3d --- (E.D. Mich., 2016), Case no. 16-cv-12130 (2016 WL 6776286)

In this common scenario, the plaintiff was injured in an automobile accident and sought both no-fault insurance and disability insurance benefits. Plaintiff's disability insurer removed the state court action to federal court, alleging federal question jurisdiction under ERISA. The co-defendant automobile insurer did not join in or consent to removal.

The disability insurer argued that consent to removal was not required by 28 U.S.C. § 1441(c) because the state law claims alleged against the no-fault carrier were not within the original or supplemental jurisdiction of the district court such that consent to removal was not required.

The court was not persuaded. Here, two insurance policies covered plaintiff's different types of injuries arising out of the same automobile accident. Accordingly, the court found the plaintiff's state law claims arose out of the same factual events that gave rise to her ERISA claims, so the court had supplemental jurisdiction.

As a result, the court held that removal of the case without the consent of the no-fault carrier was improper and remanded the case to state court. ■

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Insurance Case Summary

Selected Insurance Decisions

By Deborah A. Hebert, *Collins, Einhorn, Farrell PC; Deborah.hebert@ceflawyers.com*

Michigan Court of Appeals – Published Decisions

Exclusion for Wet Rot Bars Coverage

Michigan Battery Equipment v EMCASCO Ins Co
___ Mich App ___ (2016), lv app pending
Docket No. 326945
Released September 15, 2016

Plaintiff-insured's warehouse suffered damage as a result of "prolonged water infiltration through deteriorated rubber grommets in the roof." This prolonged moisture caused the roof trusses to rot, crack and give way. The commercial property policy covering the warehouse and its adjoining offices protected against "all risks" unless expressly excluded. One of the exclusions eliminated coverage for property damage caused by wet rot, unless the wet rot was caused by fire or lightning or otherwise resulted in a "specified cause of loss" as defined in the policy. Neither exception applied and so coverage was excluded.

Michigan Court of Appeals – Unpublished

Fraud in the Application and Loss of Coverage

Electric Stick, Inc v Primeone Ins Co
Docket No. 327421
Released September 15, 2016, lv app pending

Plaintiff insured falsely reported its history of bankruptcies and tax liens when it applied for insurance and Primeone produced evidence that if the financial information had been accurately reported, the insured would have been charged a higher premium if the policy were issued at all. Primeone was entitled to summary disposition on its motion to rescind the policy for fraud in the application.

Insurable Interest Is Not Synonymous with Legal Title

AB Petro Mart, Inc v Ali T. Beydoun Ins Agency
Docket No. 327481
Released September 15, 2016, lv app pending

Plaintiff is the named insured under a commercial property policy and the operator of gas station. It submitted a claim for repairs to a gas pump damaged by a customer's vehicle. Because the gas pump was not owned by the named insured (a corporation) but by the named insured's sole shareholder (an individual), the insurer denied coverage due to the named insured's lack of an insurable interest in the damaged property. But the Court of Appeals pointed out that Michigan does not equate "insurable interest" with legal title. It is enough for an insured to be "financially affected by the functioning or non-functioning of the" property insured, such as in this case, where the named insured's business was affected by the loss of use of the gas pump.

No UIM Coverage Where No Occupancy

Banks v Laster
Docket No. 327416
Released September 15, 2016

UIM coverage was limited to persons "occupying" a covered auto at the time of injury. "Occupying" was defined in the policy as "in, getting into or getting out of" the vehicle. Plaintiff minor was struck by another vehicle as he was leaning against the bumper of the covered auto, with both feet on the ground, sorting through grocery bags in the trunk. UIM coverage did not apply because he was not "occupying" the vehicle.

Limitation of Liability Provision in Broker Agreement Enforced

Altman Mgt Co v AON Risk Ins Services West, Inc
Docket No. 328593
Released September 20, 2016, lv app pending

Altman contracted with AON to procure, update and manage Altman's insurance for properties throughout the country. Although the contract did not require AON to report lawsuits to Altman's insurers, the two parties engaged in a course of conduct that arguably altered the agreement to include that service. Altman forwarded a wrongful death complaint to AON but the complaint was never forwarded on to the insurer. Following the entry of a default and an arbitrated judgment of $3.5 million, Altman sued AON for breach of contract. The trial court conducted a bench trial and determined that the terms of the written contract, as amended by parties' conduct, involved reporting lawsuits, but there was no change to the provision in the policy expressly stating that AON bore no liability for any claim arising out of any error or omission by Altman. Evidence at trial established several omissions by Altman in handling the lawsuit and so the limitation of liability provision applied.

Res Judicata Bars Insured from Suing Insurer Following a DJ Action

Stanton v Auto Owners Ins Co
Docket No. 327644
Released October 25, 2016

Auto Owners defended its insured against a liability claim subject to a reservation of rights and also filed a declaratory judgment action because of the potential application of an exclusion for employee injuries. Auto Owners subsequently settled the liability claim on behalf of the insured, who then field a separate action against the insurer to recover its economic costs and loss of income attributable to the Declaratory Judgment action and for the emotional distress of facing the prospect of no insurance coverage. The court held that the insured's lawsuit was barred by the res judicata. Michigan's court rules eliminating compulsory counter-claims did not trump that doctrine of finality.

Loss Payee Coverage

Ken Holdings, LLC v Auto-Owners Ins Co
Docket No. 325427
Released November 1, 2016, motion for reconsideration pending

In this case, the majority opinion concluded that defendant's property insurance policy covered the owner of the fire-damaged property as a loss payee even though coverage was excluded for the named insured, who was purchasing the property under deed and was suspected of arson. The dissenting opinion found ambiguity in the endorsement providing coverage for the owner as loss payee and would have remanded for a trial on the parties' actual intent.

Sign-In Bonuses/Loans as "Earnings"

Lynn v Provident Life and Casualty Co
Docket No. 328321
Released November 8, 2016

Provident properly calculated plaintiff's "earnings" in assessing his claim for partial long-term disability benefits. Upon being hired, plaintiff was provided a loan for which payments were forgiven if he stayed in his position at least 9 years [and thus functioning much like a signing bonus]. Provident included the forgiven payments as "earnings," defined in the policy as including any "bonuses and any other income earned for the work you do". The forgiven loan payments were in return for work performed and were reported on plaintiff's W-2 forms.

6Th Circuit Court of Appeals Decisions

Excess Insurer Not Liable Where Case Was Settled Without Its Consent

Stryker Corp v TIG Ins Co
___ F3d ___ (6th Cir 2016)
Released November 18, 2016

For some years, Stryker was required to defend product liability claims arising out of the distribution of defective knee replacement joints. Subject to a $2 million retention, Stryker was protected by umbrella coverage up to $15 million and beyond that, excess coverage with TIG up to $25 million. Both insurers challenged coverage based on Stryker's potential prior knowledge, and during the course of litigating that coverage issue, Stryker settled multiple claims nationwide for a total of $7.6 million. After these settlements, Stryker faced a judgment in the amount of $17.7 million. The umbrella insurer satisfied the latter liability first and resolved the judgment. Stryker then turned to TIG for coverage on the settled claims. TIG's policy, however, limited coverage to judgments and to settlements but only those paid with TIG's written consent. Because none of the claims were settled with TIG's written consent, the court denied coverage.

Federal District Court Opinions – Unpublished

One-Year SOL Applied to this No-Fault Property Claim

Hanson Cold Storage Co v Chizek Elevator & Transport, Inc
W.D. Case No. 15-cv-869
Released September 7, 2016
Appeal filed 10/7/16

Plaintiff's warehouse was damaged when a parked tractor-trailer, with an empty cab, rolled into the building after the driver neglected to engage the brake. Plaintiff sued both the self-insured owner of the tractor-trailer and its driver. The District Court applied Michigan no-fault law and concluded that because the accident arose out of the ownership or operation of a motor vehicle being used in the course of its transportational function, plaintiff's claims were barred by the one-year-statute of limitations applicable to property damage claims. ■

No-Fault Corner

Uber Vehicles and No-Fault— New Legislation Changes the No-Fault Landscape Once Again!

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With the increasing popularity of Uber and similar transportation networks, it was only a matter of time before the Legislature stepped in to clarify the rules regarding the insurance requirements for those vehicles. Uber, for example, provides $1,000,000.00 in liability coverage in the event that one of its drivers is involved in a motor vehicle accident, resulting in bodily injuries. However, there was no provision in the Uber insurance contract for payment of Michigan nofault insurance benefits. Furthermore, when confronted with a claim for nofault benefits arising out of the operation of an Uber vehicle, many insurance companies were taking the position that they were not obligated to afford coverage under a variety of theories. Many insurance company were also rescinding coverage altogether, as the vehicles they were insuring under a personal automobile insurance policy were essentially being used for commercial purposes.

Finally, at the end of the 2015-2016 legislative session, the Legislature passed a series of bills designed to clarify this area of the law. Not surprisingly, some provisions of the NoFault Insurance Act have been amended to take into consideration this relatively new class of motor vehicles being operated on the highway and byways of our state.

> ... "during the time that a transportation network company driver is engaged in a transportation network company prearranged ride," he or she is required to carry minimum combined single limit liability coverage of $1,000,000, together with the PIP and PPI coverages required under the No-Fault Act.

First, 2016 PA 345, known as the "Limousine, Taxicab and Transportation Network Company Act" provides many important definitions that are utilized in the recent Insurance Code and NoFault Act amendments. Section 2 of the Act defines the following terms that, as we shall see, are repeated in the NoFault Insurance Act:

> (h) "Personal vehicle" means a motor vehicle with a seating capacity of 8 passengers or fewer, including the driver, that is used by a transportation network company driver that satisfies both of the following:
>
> (i) The vehicle is owned, leased, or otherwise authorized for use by the transportation network company driver.
>
> (ii) The vehicle is not a taxicab, limousine, or commercial vehicle.
>
> (m) "Transportation network company digital network" means an online-enabled application, website, or system offered or utilized by a transportation network company that enables the prearrangement of rides with transportation network company drivers.
>
> (o) "Transportation network company prearranged ride" means the provision of transportation by a transportation network company driver to a transportation network company rider, beginning when a transportation network company driver accepts a ride requested by a transportation network company rider through a digital network controlled by a transportation network company, continuing while the transportation network company driver transports the requesting transportation network company rider, and ending when the last requesting transportation network company rider departs from the personal vehicle. Transportation network company prearranged ride does not include a shared-expense carpooling or vanpooling arrangement or transportation provided using a taxicab, limousine, or other vehicle.

With these definitions in mind, let us now examine how they impact on the insurance requirements in this states.

First, **2016 PA 348** added a new section to the Michigan Financial Responsibility Act – MCL 257.518b. This section, applicable only to automobile insurance obtained by a network transportation company driver or a transportation network company, increases the minimum insurance policy limits required by the driver and sets two separate limits of liability coverage. MCL 257.518b(a) provides that "During the time that a transportation network company driver is logged onto the transportation network company's digital network and is

available to receive transportation requests but is not engaged in a transportation network company prearranged ride, all of the following types of automobile insurance" are required:

- $50,000/$100,000 in liability coverage;
- PIP and PPI coverage as required under the NoFault Insurance Act.

However, "during the time that a transportation network company driver is engaged in a transportation network company prearranged ride," he or she is required to carry minimum combined single limit liability coverage of $1,000,000, together with the PIP and PPI coverages required under the No-Fault Act.

2016 PA 346 amends Chapter 30 of the Michigan Insurance Code by adding section 3017. This section allows an insurer to exclude all coverages for any loss or injury that occurs while a transportation network company driver is engaged in providing transportation services. This newly enacted statute provides:

> An authorized insurer that issues an insurance policy insuring a personal vehicle may exclude all coverage afforded under the policy for any loss or injury that occurs while a transportation network company driver is logged on to a transportation network company digital network or while a transportation network company driver is providing a prearranged ride. By way of example and not as limitation, all of the following coverages may be excluded under this section:
>
> (a) Residual liability insurance required under sections 3009 and 3101.
>
> (b) Personal protection and property protection insurance required under section 3101.
>
> (c) Uninsured and underinsured motorist coverage.
>
> (d) Comprehensive coverage.
>
> (e) Collision coverage, including coverage required to be offered under section 3037.

However, this amendatory provision indicates that an insurer is free to provide coverage for a transportation network company driver's personal vehicle by contract or endorsement.

This same Act likewise amends section 1 of the Michigan NoFault Insurance Act, MCL 500.3101 by adding subsection (5). This amendment provides:

> An insurer that issues a policy that provides the security required under subsection (1) may exclude coverage under the policy as provided in section 3017.

At the same time, the Legislature added a fifth exclusion to MCL 500.3113. This new exclusion provides:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> * * *
>
> (e) the person was the owner or operator of a motor vehicle for which coverage was excluded under a policy exclusion authorized under section 3017.

When these provisions are examined in their entirety, it becomes clear that the Legislature intended to draw some bright line rules so that both the insurer and the insured are aware of the circumstances under which coverage may not be afforded if the vehicle is being used as part of a transportation network.

Finally, 2016 PA 347 amends the nofault priority provisions applicable to passengers in a transportation network company vehicle. Specifically, MCL 500.3114(2) was amended as follows:

> A person suffering accidental bodily injury while an operator or a passenger of a motor vehicle operated in the business of transporting passengers shall receive the personal protection insurance benefits to which the person is entitled from the insurer of the motor vehicle. This subsection does not apply to a passenger in any of the following, unless the passenger is not entitled to personal protection insurance benefits under any other policy:
>
> (a) A school bus, as defined by the Department of Education, providing transportation not prohibited by law.
>
> (b) A bus operated by a common carrier of passengers certified by the Department of Transportation.
>
> (c) A bus operating under a government sponsored transportation program.
>
> (d) A bus operated by or providing service to a nonprofit organization.
>
> (e) A taxicab insured as proscribed in section 3101 or 3102.
>
> (f) A bus operated by a canoe or other watercraft, bicycle, or house livery used only to transport passengers to or from a destination point.
>
> (g) *Any transportation network company vehicle.*

Thus, the passenger in a transportation network company vehicle, like the passenger in a school bus, charter bus or taxicab, will seek benefits first from his or her own insurer, or the insurer of a spouse or relative domiciled in the same household. It is only where there is no insurance at that level that the passenger will obtain nofault benefits from the insurer of the vehicle he or she is occupying.

This, of course, raises the question of what happens if a transportation network company driver is operating a vehicle, carrying a passenger, and the owner/ driver's insurance company has excluded coverage under the newly enacted exclusion set forth in MCL 500.3017. Under that section, and the newly enacted MCL 500.3113(e), it is clear that the owner and operator of the transportation network company vehicle will be excluded from recovering benefits, but what about the passenger? The language in MCL 500.3017 provides that an insurance company "may exclude *all coverage* afforded under the policy for any loss or injury that occurs" and this would seem to apply to the passenger's claim.

> ... the passenger in a transportation network company vehicle, like the passenger in a school bus, charter bus or taxicab, will seek benefits first from his or her own insurer, or the insurer of a spouse or relative domiciled in the same household. It is only where there is no insurance at that level that the passenger will obtain no fault benefits from the insurer of the vehicle he or she is occupying.

If the passenger has no benefits available to him in his or her household, and if coverage is excluded under MCL 500.3017 on the transportation network company vehicle, it seems that the next highest order of priority would be the insurer of other vehicles that may be owned by the transportation network company owner/ driver under MCL 500.3114(4). See *Titan Ins Co v American Country Ins Co*, 312 Mich App 291 (2015). If the transportation network company driver owns no other vehicles, the passenger will then need to resort to the Michigan Assigned Claims Plan. In that case, because the transportation network company vehicle is essentially uninsured for PIP benefits, the Michigan Assigned Claims Plan will then have a right of reimbursement against the owner of the transportation network company vehicle. Incidentally, all of these provisions take effect on March 21, 2017.

Many insurance companies have already started to amend their policies to incorporate these provisions. For example, State Farm recently issued Amendatory Endorsement 6128U to clarify the liability exclusion where an insured is carrying persons for a charge. This exclusion now reads:

> There is no coverage for an ***insured*** for damages arising out of the ownership, maintenance, or use of a vehicle while it is:
>
> (a) made available; or
>
> (b) being used to carry ***persons*** for a charge.

In addition, State Farm is now excluding PIP coverage for individuals who are providing transportation network services, or occupying vehicles being used to provide transportation network services. This exclusion reads:

> There is no coverage for an ***insured*** who is:
>
> 1. providing transportation network services; or
>
> 2. ***occupying*** or struck by ***your car***, a ***newly acquired car***, or any other ***motor vehicle*** that is being operated by ***you*** or a ***resident relative*** while such vehicle is being used to provider transportation network services.

There are similar exclusions under State Farm's property protection coverage, uninsured/underinsured motorist coverage and physical damage coverages.

Conclusion

In short, individuals participating in these transportation network companies such as Uber, need to notify their insurers to determine whether or not their insurer will still provide coverage in the event of an accident. It appears that many insurers are unwilling to accept the risk inherent in utilizing a personal vehicle for commercial purposes. Based upon the author's experience, though, the insurer will probably not have any knowledge of the fact that the vehicle insured under its personal auto policy is being used for commercial purposes until after a loss occurs. As a result, the owner and operator of the motor vehicle may suddenly find himself uninsured. **Life lesson - be honest and up front with your insurance agent about the use that the insured vehicle will be put to, or risk suddenly finding yourself on the receiving end of a denial of coverage and/or a Declaratory Judgment action!** ■

Legislative Update

Notable Bills Passed in the Lame Duck Session

Patrick D. Crandell
Collins Einhorn Farrell PC

The 98th Michigan Legislature has adjourned *sine die*, which means that all pending legislation before both the Michigan House of Representatives and Senate expired and will need to be reintroduced after the new legislature is sworn in January.

Michigan law imposes term limits on state legislators -- House members can serve for a total of six years (three two-year terms) and Senate members for a total of eight years (two four-year terms). As term-limited members prepare to leave the legislature, it sets up a two-month period every two years when legislators look to quickly pass pending bills before they expire -- we call this the lame-duck session.

The following are notable bills passed during this lame-duck session (the Governor had acted on only two of the packages at the time of the writing of this report, but he will have addressed the rest by the time the *Journal* is printed):

- **Energy Package** (SBs 437-438) (Public Acts 341-342 of 2016) -- Revises the system for state approval or denial of new power plant construction requests; updates the requirements and caps for engaging in electric choice (a market for consumers to switch to alternative electric suppliers for their electric supply); outlines increased electricity percentages that must be generated from renewable resources.
- **Autonomous Vehicles** (SBs 995-998) (Public Acts 332-335 of 2016) -- Allows the testing and operation of driverless vehicles and creates the Michigan Council on Future Mobility to set and monitor the relevant standards.
- **Drones** (SB 992) -- Creates a regulatory structure for operating drones in Michigan, including a 27-member task force to recommend regulations.
- **Medical Malpractice** (SB 1104) -- Limits damages for past medical or rehabilitation services to the actual damages paid (rather than billed) for medical care resulting from the alleged malpractice.
- **Speed Limit Changes** (HBs 4423-4427) -- Modifies various statewide speed limits: increase to **75 mph on certain highways** and 65 mph on certain rural highways, decrease by 10 mph in hospital zones; reduces points for speeding tickets: 1 point less for less than 6 mph over and 2 points less for 6-16 mph over the limit.
- **Liquor Sales** (SBs 929, 973 and 1088) -- Allows gas stations throughout the state to sell beer and wine (with certain local restrictions); allows direct shipments of alcohol from Michigan retailers to consumers and sets reporting requirements for shippers and facilitators; allows a person holding a specific permit to fill and sell growlers for off-premises consumption.
- **Local Government Retiree Health Care Plans** (HB 6075) -- Requires local governments with retirement health care plans that are less than 60 percent funded to post an action plan online regarding correcting the issue.
- **Collection of Medicaid Use Tax** (SB 1172) -- Calls for a use tax on Medicaid managed care in order to collect Michigan's Medicaid match, when the Health Insurance Claims Assessment expires.
- **Local Government Road Funding** (SB 1068) -- Calls for a decreased amount that cities and villages would incur as their cost-sharing requirements for road-funding projects: populations of 50,000 (12.5 percent), 40,000 to 50,000 (11.25 percent), 25,000 to 40,000 (8.75 percent).
- **Safe Drinking Water Act** (HB 5120) -- Shortens to 3 days (currently 30 days) the time period in which a public-water-supply operator must notify the public of high lead levels.

Future legislative updates will advise on newly introduced bills (and status reports on those bills) that address insurance and indemnity law issues.

About the Author

Patrick D. Crandell *is a partner at Collins Einhorn Farrell PC. He devotes a significant portion of his practice to commencing and defending insurance coverage actions in both state and federal court, preparing coverage opinions and counseling insurance carriers on complex insurance coverage disputes. Patrick serves on the Representative Assembly of the State Bar, as a Council member on the Insurance and Indemnity Law Section, and as a member of the Oakland County Bar Association's Legislative Committee. Patrick also has served as a policy analyst in the Michigan Senate. His email address is Patrick.Crandell@ceflawyers.com.*

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