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From the Chair

Lauretta Pominville, *McNish Group*

Our April 14th meeting at the Detroit Athletic Club was a wonderful success! This was our first in-person event since John Sier's presentation on indemnification at the Birmingham Athletic Club on January 16, 2020. Thank you to everyone who attended – in person or remotely. Thank you, too, to everyone that responded to our Section Survey asking what you would like to see from your membership. Your responses assisted our discussion, together with input from our prior-Chairs, on how best to proceed as a Section and renewal of our 5-Year Strategic Plan, which has been revised and will be put to vote at our next Business Meeting on July 14th. We hope that you can join us for our July 14th meeting at the historic Ford Piquette Avenue Plant in Detroit, which includes a presentation on title insurance by Michael Luberto, President of Chirco Title.

Congratulations to Amanda Delekta, who was selected as the winner of our 2022 Scholarship Program! We will present Amanda with her $5,000 scholarship check at our July 14th meeting, and her winning article is printed in this issue of *The Journal*. Plans are now underway for the 2023 Scholarship Program and the writing topic will be announced at our Annual Meeting in October.

Most likely, many of you belong to more than one Section, and I wonder how many of you also belong to the Intellectual Property Law Section as our Council recently learned a lesson in trademark law. *The Journal*, as you know, has been the mainstay of our Section since its inception, and has been spearheaded by its beloved Editor, Hal O. Carroll, who recently advised our Publication Committee that he is making plans to retire. Consequently, it was our hope to honor Hal when Council voted unanimously at our April Business Meeting to rename *The Journal* as "The Hal O. Carroll Journal of Insurance and Indemnity Law." What we had not taken into consideration, however, was Hal's reluctance to accept the limelight. Frankly, given how he has quietly and tirelessly worked for the last fifteen years to put together each quarterly publication, it should have come as no surprise when Hal informed Council of 15 USC §1052, which requires the written consent to use the name of a living individual, and refused to have *The Journal* renamed in his honor. Although our efforts were thwarted, the sentiment remains and we will treasure all the more the next few issues as Hal has graciously agreed to assist with our transition.

Details for upcoming events can be found on our Facebook page or SBM Connect page at *https://connect.michbar.org/insurance/home*. Your input is invaluable! Please let us know what you would like to see from your membership in the Insurance and Indemnity Law Section. Please share your ideas for topics to be discussed. ■

Editor's Notes—New No-Fault Reporter

By Hal O. Carroll, *www.HalOCarrollEsq.com*

This issue marks the entry of a new contributor. The *Journal* welcomes Eric Conn of Jacobs Diemer, who has taken up the "No-Fault Portfolio," with his report of Recent Notable No-Fault Opinions.

The *Journal* is a forum for the exchange of information, analysis and opinions concerning insurance and indemnity law and practice from all perspectives. All opinions expressed in contributions to the *Journal* are those of the author. The *Journal* – like the Section itself – takes no position on any dispute between insurers and insureds. 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, so being published in the Journal is a good way to reach the decisionmakers in Michigan's judicial and legislative system.

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*. ■

As Hackers Attack, The Law Must Fight Back

By Amanda Delekta

Editor's Note: *This article was the winning entry in the Insurance and Indemnity Law Section's annual scholarship contest.*

Introduction

In July 2020, Teiranni Kidd arrived at an Alabama hospital to deliver her baby.[1] Unfortunately during delivery, the baby's umbilical cord wrapped around the baby's neck causing the baby severe brain damage and ultimately resulting in her death.[2] As a grieving parent Kidd was devastated, but she was also furious because Kidd learned that the hospital was hit by a major ransomware attack just days before the delivery.[3] The attack compromised communication systems within the hospital including the fetal heartbeat monitors used in the labor and delivery process.[4] Kidd learned that the ransomware attack took her child's life.[5]

Kidd's story is a tragedy, and it goes without saying that no life, especially the life of an innocent child, should be needlessly lost because of the greed of others. Hackers are just that, greedy; they pray on vulnerable entities where they can wreak havoc until the entity pays the ransom demanded.[6]

Kidd is not alone in suffering a devastating loss from a ransomware attack, and the frequency of ransomware attacks is only increasing.[7] Most entities find it easier and cheaper to just pay the ransom demanded than to fight the hackers and try to restore their systems and data.[8] This means the hackers are winning. Hackers continue to attack entities and walk away with the ransom they demand to just turn around and wreak havoc against another entity. The current calculus incentivizes attacks, which makes every entity less safe.[9] It's not just our data at risk, but as Kidd's story highlights, our physical safety.[10] As a matter of public policy, the law must respond in a way that disincentivizes hackers.

First, Part I of this Article explains why companies are incentivizing hackers to launch future ransomware attacks by paying the ransom demanded.[11] Part II looks at how ransomware attacks fit into the existing body of agency law and looks at how to disincentivize hackers by proposing 1) the payment of ransom is a breach of the fiduciary duty of loyalty; and 2) boards of directors should be held accountable for implementing and maintaining sufficient security measures to protect data systems.[12]

The Hackers Are Currently Winning

When hackers attack, they seize control of an entity's data and operating systems demanding ransom in exchange for the safe return of the entity's data.[13] Entities are left with two choices. First, an entity can fight the hackers and try and restore the entity's systems and secure its data.[14] However, this can be expensive because highly skilled people are needed to restore the data and there is still a risk, even once the data is restored, the hackers have permanently damaged the data.[15]

The second choice is to pay the ransom and ensure the quick return of its data.[16] With the time, expense, and risk involved in fighting against the hackers, many entities just pay the ransom in an effort to quickly move on.[17] However, when entities pay the ransom, they are incentivizing hackers to continue launching attacks because the hackers know companies are likely to pay the ransom.[18]

Because hackers are currently winning the ransomware fight, they are becoming more aggressive.[19] Current data shows ransomware attacks are increasing in the frequency of occurrence and the amount of ransom demanded.[20] Until the law fights back and creates a way to disincentivize hackers, they will not slow down. It is true that the law already attempts to deter hackers by criminalizing hacking; however, hackers are often able to operate without detection, so criminal liability does not have the deterrent effect in reality.[21]

The ransomware crisis is pervasive across all industries and no entity is immune to its risks, but this article will focus on corporate entities.[22]

Fighting Ransomware Attacks within the Existing Body of Agency Law

The existing body of agency law provides a framework for disincentivizing hackers from launching attacks by discouraging entities from paying ransom and making it more difficult for hackers to launch successful attacks.

The Insurers' Fiduciary Duty Should be Used to Discourage Entities from Paying Ransom

Corporations are risk averse entities and, as such, purchase insurance to protect themselves from the risk of loss.[23] Insurers are a fiduciary to the corporations they insure.[24] As a fiduciary,

insurers are subject to the duty of loyalty.[25] The duty of loyalty requires an insurer to act in the best interest of its insured.[26]

Among the types of insurance corporations can buy is cyber insurance, which protects the corporation's data from loss.[27] When a corporation with data protection coverage is the victim of a ransomware attack, its insurer becomes responsible for deciding whether to fight the attack or to pay the ransom.[28] As a rational actor, the insurer often picks the more efficient choice – paying the ransom.[29] When an insurer pays ransom to a hacker, it incentivizes hackers to continue launching attacks because they know the corporation (or the corporation's insurer) is likely to pay the ransom demanded.[30] Incentivizing hackers to continue launching ransomware attacks makes all corporations less safe and worse off.[31] Therefore, when an insurer pays ransom to a hacker it breaches the duty of loyalty. As paying the ransom makes all entities worse off, every corporation insured by that particular insurer has a claim against the insurer for breach of the fiduciary duty of loyalty.

Treating the payment of ransom as a breach of the fiduciary duty of loyalty, fewer insurers will actually pay the ransom demanded and hackers will be disincentivized from launching future attacks. As this is a matter of public policy, state legislatures should consider enacting statutes that preclude the payment of ransom in ransomware attacks. However, because such a statute would curtail the freedom corporations enjoy to make their own business decisions, such a statute may receive significant pushback and may not be politically salient. Therefore, it is best to find a solution within the existing framework of agency law.

In Waging the War Against Hackers, Insurance Companies Need to Be Protected from Insolvency

By punishing insurance companies for paying ransom, hackers will not be the only group disincentivized. Insurers may worry about the time and expense of fighting ransomware attacks and decide it is no longer worth it to offer cyber security insurance. Afterall, the main goal of an insurance company is to remain solvent.[32] Due to the magnitude of ransomware attacks today, insurers may determine that cyber security insurance is too risky and stop offering cyber security coverage. To address this concern corporations can be held accountable for implementing and maintaining sufficient security measures to protect their data systems or the government can create a reinsurance program to protect insurance companies.

Heightened Security Measures Will Protect Insurers from Insolvency by Making it More Challenging for Hackers to Launch Successful Ransomware Attacks

As insurance companies are increasing their exposure by having to deal with the expenses of fighting a ransomware attack, corporations should be required to maintain secure systems in an effort to prevent an attack from occurring at the outset. Corporations can be held accountable for maintaining sufficient data security in two ways. First, insurance companies can include language in their cyber insurance policies that excludes coverage unless the insured has satisfied its duty to adequately secure its data. Examples of strategies that corporations should employ to satisfy their duty to protect their data include employee training, stress testing, and regularly backing up files.[33] Second, shareholders can hold directors and officers of corporations accountable for implementing sufficient data security within the existing fiduciary duty of care framework. Similar to how insurers are in a fiduciary relationship with their insureds, directors and officers are in a fiduciary relationship with their shareholders.[34] As such, directors and officers owe a fiduciary duty of care to their shareholders.[35] Failing to implement and maintain sufficient cyber security should be treated as a breach of the duty of care that creates a cause of action for shareholders to sue the corporation's officers and directors.

A corporation that fails to implement and maintain sufficient cyber security would breach the duty of care it owes to its shareholders. A ransomware attack should be prima facie evidence the directors and officers breached their duty. However, it is well established that it is hard for shareholders to win actions for the breach of fiduciary duty of care, because directors are often shielded from liability for breaching the fiduciary duty of care by the "business judgment rule," which does not require directors to make the best decision so long as the director has a "rational basis" for making the decision.[36] Therefore, the best way to hold corporations accountable for implementing sufficient cyber security protection is for insurance companies to include language in their cyber insurance policies that excludes coverage unless the corporation has satisfied its duty to adequately secure its data.

A Federal Reinsurance Program Will Protect Insurers from Insolvency by Insulating Insurers from the Risk of Loss

To protect insurance companies from paying outrageous costs to fight ransomware attacks and potential insolvency, Congress could implement a reinsurance program. The program would allow insurers to be eligible for reimbursement from the federal government of claims arising from ransomware attacks after paying a deductible. This is not a new concept. In 2002, the government implemented a reinsurance program in response to insurance companies limiting coverage from losses arising from events of terrorism.[37] After 9/11, the government recognized it is in the best interest of society to be protected from these attacks, but acknowledged if insurance companies had to bear the cost of the loss, insurance companies would become insolvent.[38] However, because of the prevalence of ransomware attacks, a reinsurance program for ran-

somware attacks would be a significant cost to the government both in terms of funding and administering the program.

In conclusion, due to the costs of a reinsurance program, it is likely best to protect insurance companies from insolvency by holding insureds accountable for implementing and maintaining sufficient cyber security measures through cyber insurance policy exclusions. When insurance companies stop paying the ransom, hackers will not get the ransom windfall they have grown accustomed. Without the incentive to collect ransom, hackers will be discouraged from launching future attacks.

Conclusion

As hackers attack, the law must fight back. Currently, it is more efficient for insurance companies to pay the ransom than to try and restore a company's data. As rational actors, insurance companies choose the most efficient choice and pay the ransom demanded. By paying the ransom, hackers are incentivized to launch more attacks in hopes of more ransom demands being paid. The law must fight back to disincentivize hackers from staging ransomware attacks. Working within the existing body of agency law, courts should hold that insurance companies who pay the ransom breach the fiduciary duty of loyalty. To protect insurers from having to wage costly battles against the hackers to secure their insureds' data, insurance companies should require their insureds to implement heightened security measures to protect their data. In tandem, these efforts will fight back against hackers and make ransomware attacks less pervasive. ■

About the Author

Amanda Delekta *graduated from the Michigan State University College of Law in May, 2022. At school, Amanda served as the Senior Articles Editor for Law Review, competed in mock trial, served as a clinician in Michigan State University College of Law's Housing Clinic, and completed the Geoffrey Fieger Trial Institute, a competitive, two-year, program focused on an intensive litigation curriculum. After taking the July bar exam, Amanda will join Carson LLP in Fort Wayne, Indiana as an Associate Attorney.*

Endnotes

1 Shlomo Kramer, *The Coming Remedy for Ransomware*, Wall St. J., Feb. 4, 2002, https://www.wsj.com/articles/the-coming-remedy-for-ransomware-cybersecurity-cyberattack-hack-hospital-medical-healthcare-11644013112 (telling the story of how a ransomware attack at a hospital resulted in the loss of life).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 Peter A. Halprin & Nicholas A. Pappas, *Ransomware, Cybersecurity, and Insurance*, 2021 Pr. Ind. Brf. 0157 (describing that a ransomware attack works by a nefarious actor entering a company's computer system and locking the system until the company pays the ransom demanded by the hackers).

7 David Oberly, 31 No. 7 Intell. Prop. & Tech. L.J. 17 (stating that in 2016, ransomware attacks increased by 82%).

8 Shaun Jamison, *Your Money or Your Data*, 75 J. Mo. B. 82 (2019) (describing why companies would rather pay the ransom than try to recover their data).

9 When the victim pays ransom, hackers are incentivized to continue attacking other entities, which increases the odds of a single entity being attacked, which makes every entity more vulnerable to falling victim to a ransomware attack. *See* Jamison, *supra* note 8 at 82.

10 *See* Kramer, *supra* note 1.

11 *See infra* Part I.

12 *See infra* Part II.

13 *See* Halprin & Pappas, *supra* note 6.

14 *See* Jamison, *supra* note 8 at 82.

15 *See id.*

16 *See id.*

17 *See id.*

18 *See id.*

19 *See* Halprin & Pappas, *supra* note 6.

20 *See id.* (stating that from 2019 – 2021 that average ransomware payment increased 33%); *see* Oberly, *supra* note 7 (stating that in 2016, ransomware attacks increased by 82%).

21 *See* Jamison, *supra* note 8 at 82.

22 *See* Halprin & Pappas, *supra* note 6.

23 Kenneth S. Abraham & Daniel Schwarcz, Insurance Law and Regulation 3 (Saul Levmore et al. eds., 7th ed. 2020) (explaining how entities who purchase insurance are risk adverse because they would prefer to pay a premium to shift any risks to the insurer instead of risk facing a future loss).

24 *See id.* at 68–70 (explaining how insurers are agents of their insures, which creates a fiduciary relationship between the insurer and insured and places certain obligations on the insurer).

25 *Genesee Foods Servs., Inc. v. Meadowbrook, Inc.*, 760 N.W.2d 259, 263 (Mich. Ct. App. 2008) (explaining that insurance agents owe a fiduciary duty of loyalty to their insureds).

26 *See id.*

27 *See* Halprin & Pappas, *supra* note 6 (discussing how cyber insurance often specifically protects against cyber extortion, which includes the payment of the ransom demanded. Other policies include data recovery protection, which is the payment for costs related to recovering data from attacks).

28 *See id.*

29 *See* Jamison, *supra* note 8 at 82.

30 *See id.*

31 *See id.*

32 *St. Paul Fire & Marine Ins. Co. v. Barry,* 438 U.S. 531, 554 (1978) (supporting the proposition that solvency is necessary for an insurance company to remain in business and fulfill its promises to those it insures).

33 Christopher C. Shattuck, *When Ransomware Strikes: Strategies to Prevent and Recover*, Wis. Law., October 2019, at 45 (explaining the importance of employee training because 90% of ransomware attacks originate as phishing scams where recipients click on a link letting nefarious actors into the system); David Oberly, 31 No. 7 Intell. Prop. & Tech. L.J. 17 (stating the importance of backing up files routinely because a company can then restore its data on its own without having to pay the ransom).

34 *Wallad v. Access BIDCO, Inc.,* 600 N.W.2d 664, 666 (1999) (stating that directors of a corporation owe fiduciary duties to shareholders, which are duties "to act for someone else's benefit while subordinating one's personal interests to that of the other person").

35 Mich. Comp. Laws Ann. § 450.1541a (West 1989). In Michigan, the duty of care that boards of directors owe to shareholders is codified in statute. *Id.*

36 *Adelman v. Compuware Corp.,* No. 333209, unpublished slip op. at 3 (Mich. Ct. App. Dec. 14, 2017) (explaining how directors are often shielded from liability for breaching the fiduciary duty of care by the business judgment rule that does not require directors to make the best decision so long as the director has a rational basis for making the decision).

37 *See* Abraham & Schwarcz, *supra* note 23.

38 *See id.*

Image Courtesy of Ford Piquette Avenue Plant

Cyber Security and Insurance

By James A. Johnson, Esq.

Ransomware cyberattacks are a threat to every organization with a computer connected to the internet. Ransomware is malicious software or malware that hackers use to encrypt data and deny access until a ransom is paid. Ransomware shuts down operations. This is a serious threat. Organizations will face lost profits from business interruption and reputation loss, in addition to the ransom payment. Moreover, the organization will have substantial costs associated with negotiating, remediating and investigating the attack, including the cost of complying with legal and regulatory obligations and notifying individuals and companies that their information, data and other sensitive materials may be compromised.

The threat of ransomware is so serious that the U.S. Department of Justice is treating ransomware with the same level of priority that it treats terrorism.

Having a viable backup of your data that can be restored immediately and having a reputable firewall is a good business practice. Encrypt all sensitive data to ensure that if it is stolen its confidentiality is not compromised. Lawyers must understand cyber risks in order to advise their business clients and to protect their own law firms. The growth of cyber security and privacy regulations makes maintenance for cyber security a requirement. Regulators are investigating breaches and imposing substantial penalties and fines.[1] A company that maintains personal identification information or protected health information, notification of a data breach is necessary and required by law in many states.[2]

If you have information about a cyber crime or any information that will assist the Federal Government, contact the Cyber Task Force or FBI at *cywatch@ic.fbi.gov* In addition, the FBI through the American Bar Association is sending out security alerts to its members about security threats targeting law firms. Also, the State Bar of Texas, Massachusetts Board of Bar Overseers and the American Bar Association have issued warnings to the undersigned and its entire membership. The warnings relate to E-Mail scams, bogus disciplinary violations, hackers and cybercrimes. Moreover, lawyers must be cognizant of their ethical responsibility in transmitting by e-mail a client's privileged or confidential information.

Cyber Insurance

Cyber insurance is used to protect businesses and individuals from internet based risk. Companies that use a computer, receive, transmit electronic data, store information or connect to the Internet are exposed to cyber liability. Cyber liability encompasses both first and third party risks such as privacy issues, virus transmission and infringement of intellectual property. First-party coverage insurers against losses that happen to the insured when the insured's own system is damaged. Third-party insurance protects the insured by means of defense or indemnification from actually having to pay all or part owed for causing injury and damages to someone else.

Traditional liability products do not address internet exposures and risks or at best only provide limited coverage.

Privacy exposure can also involve human error such as a lost laptop. Computer-specific policies provide specific grants of coverage. Coverage is limited to defined persons, acts and injuries. Thus, cybercrime claims require new policy forms and terms. A common question in cybercrime claims is whether the policy applies to acts of the person who used the computer to cause the injury. Computer specific policies often limit coverage to bad acts of the person who are not authorized and exclude acts by employees.[3]

Traditional liability products do not address internet exposures and risks or at best only provide limited coverage. The standard Commercial General Liability (CGL)policy has exclusions data-breach related liability. Cyber-related losses generally involve loss or damage to data, extortion, customer notification, forensic experts, legal and public relations experts. These loses do not fall within the CGL or property damage coverage. Moreover, the Insurance Services Office (ISO) has developed a form exclusion for cyber-related losses.[4] This exclusion provides a limited exception when the breach results in bodily injury arising out of electronic data.

Under most forms for third-party cyber liability, coverage is provided on a "claims made and reported" basis. Most policies provide for a defense on an "eroding" basis, with defense expenses charged against and reducing the aggregate limit of coverage. The wrongful act or breach need not take place during the policy period for coverage to apply, so long as the claim is first made and reported to the insurer within the inclusive dates of coverage.[5]

The Fifth Circuit in 2016 decided a case that required it to construe computer fraud coverage in a crime protection policy. In *Apache Corp. v. Great American Insurance Co.,* Apache

had a crime protection insurance policy that covered losses by computer fraud:

Apache received a fraudulent e-mail from a vendor's account resembling the vendor's e-mail address attaching a false letter on vendors letterhead. The e-mail and the attached letter directed Apache to direct payments to a new account. Great American denied Apache's claim on the basis that the loss did not result directly from the use of a computer nor did the use of a computer cause the transfer of funds. The e-mail that redirected payment to a new account was merely incidental to the fraudulent scheme. Losses due to e-mail based fraud schemes that do not involve actual hacking are not covered by a typical computer provisions.[6]

However, in 2018 the U. S. Court of Appeals for the Sixth Circuit held otherwise on similar facts. In *American Tooling Ctr., v Travelers Cas. & Surety Co. of America* the Sixth Circuit found that the plaintiff, America Tooling (ATC) suffered a direct loss by computer fraud. After receiving e-mails claiming that its Chinese vendor had changed bank accounts, ATC wire- transferred $834,000 to the new accounts before it learned the e-mails were fraudulent. The court held that ATC direct loss was directly caused by computer fraud.[7]

The Texas Supreme Court has a strong preference for cross-jurisdictional uniformity in cases involving insurance provisions. In deciding *Apache*, the court first analyzed a Ninth Circuit case, *Pestmaster Services, Inc v Travelers Casualty & Surety Co. of America.* In *Pestmaster*, a payroll contractor diverted payments to himself. Although the payments were made using a computer there was no coverage because the transfers were authorized and therefore the transfers themselves were not fraudulent.[8]

Similarly, in *Brightpoint, Inc. v. Zurich Am Ins, Co.* the court in the Southern District of Indiana held there was no coverage because the faxed fax purchase orders did not "fraudulently cause" a business to transfer prepaid phone cards to fraudsters.[9]

Cyber insurance policies differ by insurer and there is no standard cyber first-party insurance policy. Wording used by an insurer is critical to the extent of coverage provided. Wording in insuring agreements, definitions and exclusions must be carefully reviewed to ensure that the coverage provided meets the actual exposures of the organization.

Under most forms for third-party cyber liability, coverage is provided on a "claims made and reported" basis. Most policies provide for a defense on an "eroding" basis, with defense expenses charged against and reducing the aggregate limit of coverage.

Incidence Response Plan

Every firm needs an Incident Response Plan (IRP), which should designate the positions in the firm who will be responsible for functions set out in the plan.

According to Sharon D. Nelson and John W. Simek, experiencing a law firm data breach is not an *"if"* but it is a *"when."* They maintain that it is imperative to be ready with an incidence response plan. For example, identify a data breach lawyer, insurer's contact information, law enforcement officials, identify a digital forensics company, damage control, notice to employees, notice to third parties and many other pertinent functions.[10]

Cybercrimes

As technology continues to advance with mobile devices so too do efforts to better protect content from unauthorized access. In addition to its existing privacy features, "WhatsApp" also encrypts voice calls.[11] This accelerated development revolves around the Apple/FBI dispute and accessing encrypted data on the iPhone iOS. The Fifth Amendment of the U. S. Constitution guarantees that no person shall be compelled in any criminal case to be a witness against himself, so compelling a defendant to divulge a passcode on a mobile device is protected because such evidence is testimonial or communicative.[12] Therein lies the current problem in which the government cannot force an accused to reveal knowledge of facts or share his thoughts or belief's relating to the offense that may incriminate him.[13] But, what about a fingerprint to unlock a mobile phone? Compelling a defendant to use his or her fingerprint is that a physical characteristic not protected by the Fifth Amendment? The answer to this question is a topic for another day.

On February 28, 2017, the American Bar Association announced that it is adding cyber liability coverage to its insurance offerings for law firms as a member benefit. The cyber insurance, underwritten by Chubb Limited covers law firm expenses associated with hacking including the costs of network extortion, income loss, forensics, liability protection and defense costs.[14]

New York State Cybersecurity Regulations

Effective March 1, 2017 the New York State Department of Financial Services (NYDFS) developed Cybersecurity Requirements for Financial Services Companies.[15] The purpose of the regulations is to ensure the protection of customer information by establishing minimum standards. The new law has requirements for direct board involvement with cybersecurity of companies regulated by the NYDFS covered companies such as insurance companies and other financial institutions. It also applies to companies that are third-party service providers for "covered entities."[16]

New York requires that the board of directors take control and responsibility for the cybersecurity program. Annually, the board's senior officer or chairman must sign a written certification of compliance with the statutory requirements.[17] In addition, the regulations require covered entities to obtain contractual assurances that companies they do business with have sufficient cybersecurity safeguards and comply with provisions of the cybersecurity regulations.

Texas's Notification Requirements

Texas requires a person who conducts business in Texas and collects and stores computerized data that includes sensitive personal information to notify any individual whose electronic sensitive personal information (SPI) is reasonably believed to have been acquired by an unauthorized person.[18] Failure to comply with this notification requirement can result in civil penalties up to $100.00 per person for the delayed time up to a maximum amount of $250.000 per breach.[19]

January 1, 2020, HB 4390 amends this law to require that such notification be made without unreasonable delay and in each case not later than the 60th day after the date on which the person determines that the breach occurred. Also, this amendment adds the requirement for notifying the Texas attorney general during the 60-day period if the breach involves at least 250 Texas residents.[20]

Electronic Discovery

Discovery in the digital information age is not just about documents. Images and social media messages and all relevant forms of electronically storied information (ESI) are discoverable. The key is to ensure that you are considering all potentially relevant forms of ESI and have a plan for reviewing the data. If not done carefully transferring or storing ESI during the discovery process can put data at risk. It is important to take extra caution, when transferring and storing ESI during discovery such as using encryption.

Logikcull is cloud-based ediscovery software that automates many essential processing steps that come with ediscovery. Logikcull gives law firms control of the discovery process. Its automated ediscovery tools simplify of the complex steps in discovery. Logikcull offers a secure, cloud-based solution to solve the expensive, complex and risky challenges associated with ediscovery. In sum, Logikcull filters through electronic documents for customers, identifies duplicate documents, extracts rich text, searches for keywords and converts documents to static images.[21]

Conclusion

Cyber-attacks are epidemic and getting worse. According to the *Lansing State Journal* on November 30, 2016, Michigan State University estimates spending $3 million in responding to its data breach. Lawyers need to understand cyber insurance for their clients and their own law firms. A data breach is a nightmare. But, if you have an Incidence Response Plan in place you will be better prepared to survive it. Assemble a team with members who have the types of expertise to address the organization's risk exposure. Law firms have a special exposure when hacked because of client files with personal and other sensitive information. This could trigger notification obligations on part of the law firm.

There is limited coverage for cyber liability under general commercial policies. An effective cybersecurity policy should be a primary policy, so that it will respond first. Cyber exposures are not static and evolve as society continues to use and rely on computers. Individuals continue to find ways to invade computers for malicious purposes. The procurement process for cyber insurance policies is no different than used to obtain any other type of insurance. The decision to choose one company over another is by understanding the coverage differences of each policy, limits, retentions, exclusions and actual policy language terms and conditions. Attorneys should have a basic understanding of cyber risk to guide and advise clients how they can protect their businesses.

The risk of a ransom attack continues to grow and 2022 is expected to be another record-setting year for cyber criminals. Companies must have adequate insurance coverage to fill gaps and to meet company insurance objectives. The retention of insurance professionals in the State Bar of Michigan Insurance Law Section can greatly enhance this understanding and process. ■

. The Fifth Amendment of the U. S. Constitution guarantees that no person shall be compelled in any criminal case to be a witness against himself, so compelling a defendant to divulge a passcode on a mobile device is protected because such evidence is testimonial or communicative.

About the Author

James A. Johnson *is an experienced attorney and concentrates on serious Personal Injury, Insurance Coverage, Sports & Entertainment Law and Federal Criminal Defense. He is an active member of the Michigan, Massachusetts, Texas and Federal Court Bars and can be reached at www.JamesAJohnsonEsq.com*

Endnotes

1 Rizkallah, The Cybersecurity Regulatory Crackdown, *Forbes* (August 25, 2017); *https://www.forbes.com/sites/forbestechcouncil/2017/08/25/the-cybersecurity-regulatory-crackdown/#afbb3314573d* (last visited 4-18-22).

2 Conn Gen Stat § 38a-999b (2015) and § 4e-70 (2015); Cal Civ Code § 1798.81.5 (2016) and § 1798.91.04 (2019); Colo Rev Stat § 6-1-713.5 (2018).

3 *Stop & Shop Co. v Federal Ins. Co.,* 136 F. 3d 71 (1st Cir.1998).

4 ISO Endorsement CG 21 06 05 14 (Exclusion-Access Or Disclosure of Confidential Or Personal Information And Data-Related Liability-With Bodily Injury Exception).

5 Travelers Cyberrisk Form CYB-3001 (Ed 07-10); Chubb Form 14-02-22815TX (10/2017) and Chubb Forefront Portfolo 3.0 Cybersecurity Coverage Part 14-02-17276 (12/2010).

6 *Apache Corp. v. Great Am. Ins. Co.,* 2016 WL 6090901 (5th Cir. Oct. 18 2016. See also *Great Am. Ins. Co. v. AFS/IBEX Fin. Servs., Inc.,* CIV. A. 307-CV-924-O, 2008 WL 2795205 (N.D. Tex. July 21, 2008), aff'd. 612 F. 3d 800 (5th Cir. 2010).

7 *American Tooling Ctr. v. Travelers Cas. & Sur. Co. of America,* U. S. Court of Appeals (6th Cir. July 13, 2018).

8 *Pestmaster Services, Inc. v. Travelers Casualty & Surety Co. of America,* 656 Fed. Appx. 332, 333 (9th Cir. 2016).

9 *Brightpoint, Inc. v. Zurich Am. Ins. Co.,* 1:04-cv-2085-SEB-JPG, 2006 WL 693377 (S.D. Ind. Mar. 10, 2006).

10 Sharon D. Nelson and John W. Simek, What Will You Do When Your Law Firm is Breached? *Texas Bar Journal,* May 2016, Vol. 79, No. 5, P. 348-350.

11 Danny Yadron, Facebook, Google and WhatsApp plan to increase encryption of user data, The Guardian, *https://www.theguardian.com/technology/2016/mar/14/facebook-google-whatsapp-plan-increase-encryption-fbi-apple* (last visited 4-18-22).

12 *United States v. Wade,* 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (U.S. 1967).

13 *United States v. Kirschner,* 823 F. Supp. 2d 665 (E.D. Mich. 2010).

14 ABA Cyber Liability Insurance *http://www.abajournal.com/news/article/aba_to_offer_cyber_liability_insurance_as_one_of_its_member_benefits* (last visited 4-18-22).

15 23 NYCRR §500.

16 23 NYCRR §500(c).

17 23 NYCRR §500.04.

18 Tex. Bus. & Com. Code § 521.053 (b).

19 Tex. Bus. & Com. Code § 521.151 (a-1).

20 Tex. Bus. & Com. Code § 521. 053 (b) (i).

21 *https://logikcull.com* (last visited 4-18-22).

Covid-Related Case Results

Through May 26, 2022

The Michigan cases summarized below are taken from a national summary prepared by KennedysCMK, Basking Ridge, New Jersey

Michigan Cir. Ct. (Ingham County)

Gavrilides Management Co. v. Michigan Ins. Co.
20-258-CB, 7/1/2020

Favorability: Insurer
Motion: MTD
Business Type: Restaurant

Ruling:

(1) Michigan Executive Orders did not cause direct physical loss of or damage to property;

(2) Virus exclusion not ambiguous and applied to preclude coverage;

(3) Acts or decisions exclusion applied to preclude coverage.

Virus Exclusion: Yes (CP 01 40 07 06)

ND of Michigan

Turek Enterprises, Inc., d/b/a Alcona Chiropractic v. State Farm Mut. Auto. Ins. Co. et al.
20-11655, 9/3/2020

Favorability: Insurer
Motion: MTD
Business Type: Chiroporactic clinic

Ruling:

(1) Executive Orders did not cause accidental direct physical loss; and

(2) Virus exclusion precluded coverage.

Note: Court observed argument for "loss of use" would be stronger had language been direct physical loss of property.

Virus Exclusion: Yes (not CP 01 40 07 06)

ED of Michigan

Richard Kirsch, DDS v. Aspen Am. Ins. Co.
20-11930, 12/14/2020

Favorability: Insurer
Motion: MTD
Business Type: Dental clinic

Ruling:
(1) Executive Orders did not cause direct physical loss of or damage to property;

(2) Not entitled to ordinance or law coverage; and

(3) Not entitled to civil authority coverage.

Virus Exclusion: None

Appeal: Appealed

Salon XL Color & Design Group, LLC v. West Bend Mut. Ins. Co.
20-11719, 2/4/2021

Favorability: Mixed
Motion: MTD
Business Type: Hair Salon

Ruling:
(1) Allegations that COVID-19 contaminated property and persons at the premises was sufficient to allege direct physical loss of or damage to property (terms "damage" and "loss" are ambiguous);

(2) Allegations that Executive Orders issued in response to spread of COVID-19 throughout the state, including at the premises, sufficient for Civil Authority coverage and Communicable Disease coverage; and

(3) Virus exclusion and Loss of Use exclusion applied to preclude all coverage except for Communicable Disease coverage.

Virus Exclusion: Yes (CP 01 40 07 06)

Dye Salon, LLC v. Chubb Indemnity Ins. Co.
4:20-cv-11801, 2/10/2021

Favorability: Insurer
Motion: MTD
Business Type: Hair Salon

Ruling:
(1) No standing to sue entities not party to the insurance policy (claim administrators);

(2) Virus exclusion applied to preclude coverage, relying in part on the exclusion's anti-concurrent causation language;

(3) Virus exclusion not limited to instances of contamination; and

(4) Regulatory estoppel did not apply.

Virus Exclusion: Yes (not CP 01 40 07 06)

Stanford Dental, PLLC v. The Hanover Ins. Group, Inc.
20-cv-11384, 2/10/2021

Favorability: Insurer
Motion: MTD
Business Type: Dental clinic

Ruling:
(1) No standing to sue entities not party to the insurance policy (claim administrators);

(2) Virus exclusion applied to preclude coverage, relying in part on the exclusion's anti-concurrent causation language;

(3) Virus exclusion not limited to instances of contamination; and

(4) Regulatory estoppel did not apply.

Virus Exclusion: Yes (not CP 01 40 07 06)

The Brown Jug, Inc. v. The Cincinnati Ins. Co.
20-CV-13003, 5/26/2021

Favorability: Insurer
Motion: MTD
Business Type: Restaurant

Ruling:
(1) Executive Orders did not cause accidental physical loss or damage to property; and

(2) Not entitled to Civil Authority coverage.

Virus Exclusion: None

Dino Drop, Inc. v. The Cincinnati Ins. Co
2:20-cv-12549, 6/21/2021

Favorability: Insurer
Motion: MTD
Business Type: Restaurant

Ruling:
(1) Executive Orders and COVID-19 did not cause direct physical loss or damage to property; and

(2) Not entitled to Contamination or Civil Authority coverage.

Virus Exclusion: None

Chelsea Ventures, LLC v. Cincinnati Ins. Co.
5:20-cv-13002, 6/21/2021

Favorability: Insurer
Motion: MTD
Business Type: Restaurant

Ruling:
(1) Executive Orders and COVID-19 did not cause direct physical loss or damage to property; and

(2) Not entitled to Contamination or Civil Authority coverage.

Virus Exclusion: None

Captain Skrip's Office LLC v. Conifer Holdings, Inc.
20-11291, 6/28/2021

Favorability: Insurer
Motion: MTD
Business Type: Restaurant

Ruling: Virus exclusion precluded coverage.

Virus Exclusion: Yes (CP 01 04 07 06)

Madison Square Cleaners and Saverio Sanfratello v. State Farm Fire and Casualty Company
2:21-cv-11273, 9/17/2021

Favorability: Insurer
Motion: MTD
Business Type: Dry Cleaner

Ruling:
(1) Executive Orders and COVID-19 did not cause direct physical loss or damage to property; and

(2) Virus exclusion precluded coverage.

Virus Exclusion: Yes (not CP 01 40 07 06)

Mitchell Milan v. The Cincinnati Ins. Co.
20-cv-12222, 10/21/2021

Favorability: Insurer
Motion: MTD
Business Type: Dentistry clinic

Ruling:
(1) COVID-19 and Executive Orders did not cause direct physical loss or damage to property;

(2) Not entitled to civil authority coverage.

Virus Exclusion: None

Salon XL Color & Design Group, LLC v. West Bend Mut. Ins. Co.
2:20-cv-11719-SFC-DRG, 4/12/2022

Favorability: Insurer
Motion: MSJ
Business Type: Hair Salon

Ruling: Not entitled to coverage under the Communicable Diseases coverage provision of the policy.

Virus Exclusion: Yes (CP 01 40 07 06)

ED of Wisconsin

Paradigm Care & Enrichment Center, LLC, et al. v. West Bend Mut. Ins. Co.
20-CV-720, 3/26/2021

Favorability: Insurer
Motion: MTD
Business Type: Childcare center

Ruling:
(1) Neither Executive Orders nor presence of COVID-19 caused direct physical loss of or damage to property;

(2) Not entitled to Civil Authority coverage; and

(3) Not entitled to Communicable Disease coverage.

Virus Exclusion: Unknown

WD of Michigan

St. Julian Wine Co., Inc. v. The Cincinnati Ins. Co.
1:20-cv-374, 3/19/2021

Favorability: Insurer
Motion: MTD
Business Type: Winery

Ruling:
(1) Executive Orders did not cause accidental direct physical loss or accidental direct physical damage to property; and

(2) Not entitled to Civil Authority coverage.

Virus Exclusion: None

Gro Holdco, LLC v. Hartford Fire Ins. Co.
1:20-cv-1093, 5/7/2021

Favorability: Insurer
Motion: MTD
Business Type: Eye clinic

Ruling: Virus exclusion applied to preclude coverage.

Virus Exclusion: Yes (not CP 01 40 07 06)

Michagan Court of Appeals

Gavrilides Management Co. v. Michigan Ins. Co.
20-000258-CB, 2/1/2022

Favorability: Insurer
Motion: MSJ
Business Type: Restaurant

Ruling:
(1) Affirmed trial court's ruling granting summary judgment;
(2) COVID-19 did not cause direct physical loss or damage to property;
(3) Not entitled to civil authority coverage;
(4) Virus exclusion precluded coverage.

Virus Exclusion: Yes (CP 01 40 07 06)

Massage Bliss, Inc. v. Farm Bureau General Ins. Co. of Michigan
356445, 5/19/2022

Favorability: Insurer
Motion: MSJ
Business Type: Spa and salon

Ruling:
(1) Affirmed trial court's decision granting insurer's summary jugdment and dismissing case;
(2) COVID-19 and Executive Orders did not cause direct physical loss or damage to property.

Virus Exclusion: None

Three Won Three Corp. v. Property Owners Ins. Co.
356791, 5/19/2022

Favorability: Insurer
Motion: MSJ
Business Type: Restaurants

Ruling:
(1) Court affirmed trial court's dismissal of Plaintiff's complaint;
(2) COVID-19 and Executive Orders did not cause direct physical loss or damage to property;
(3) Virus exclusion precluded coverage;
(4) Not entitled to civil authority coverage.

Virus Exclusion: Yes (CP 01 40 07 06)

Gourmet Deli Ren Cen Inc. v. Farm Bureau General Ins. Co.
357386, 5/26/2022

Favorability: Insurer
Motion: MSJ
Business Type: Restaurant and deli

Ruling:
(1) Affirmed trial court's decision;
(2) COVID-19 and Executive Orders did not cause direct physical loss or damage to property;
(3) Not entitled to civil authority coverage.

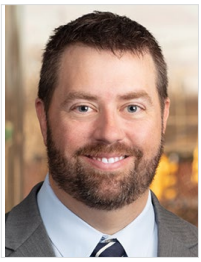
Virus Exclusion: None

6th Circuit Court of Appeals
Brown Jug, Inc. v. Cincinnati Ins. Co.
21-2644/2715/2718, 2/23/2022

Favorability: Insurer
Motion: MTD
Business Type: Restaurants/entertainment venues

Ruling:
(1) COVID-19 or Executive Orders did not cause direct physical loss or damage to property;
(2) Not entitled to civil authority coverage.

Virus Exclusion: None ■



Recent Notable No-Fault Opinions

By Eric Conn, *Jacobs Diemer, PC*

Editor's Note: No-Fault is a perennial favorite of *Journal* readers, so today we begin a new No-Fault feature, focused on individual cases, with an explanation of the background for the decision and a take-away. Eric Conn, of Jacobs Diemer, PC, will provide No-Fault case summaries for each issue, selecting cases that are likely to have significant for the practice and for no-fault jurisprudence.

Published Court of Appeals Opinions

When a Maryland Resident Who Plans to Move to Michigan Buys a Maryland Policy, the Policy Is Not Required to Provide Michigan No-Fault Benefits

Kennard v Liberty Mutual Insurance Co
___ Mich App ___
Published opinion, docket number 355462
(March 3, 2022)

The plaintiff, a former *Maryland* resident, moved to *Michigan* in October 2017. She was involved in a November 2017 motor vehicle accident in *Ohio*. Before moving to Michigan, plaintiff obtained a Maryland auto insurance policy from the defendant. The plaintiff testified that around the time she moved to Michigan from Maryland she told the defendant's representative about her move. As a result of the accident and the injuries the plaintiff sustained in it, she sought personal injury protection (PIP) benefits from the defendant. The defendant, consistent with its Maryland policy, paid the plaintiff the $2,500 policy limit. Plaintiff filed suit seeking recovery under Michigan law and the defendant sought summary disposition. The trial court concluded that the plaintiff had a "Maryland policy" and granted summary disposition. The plaintiff appealed and the Court of Appeals affirmed.

The plaintiff argued that she was entitled to reform the policy to comply with the requirements of the Michigan No-Fault Act pursuant to MCL 500.3012. The operative language in MCL 500.3012 permits reformation when an insurance policy is "issued" in violation of the No Fault Act. Relying on *Farm Bureau Ins Co v Allstate Ins Co*, 233 Mich App 38, 41; 592 NW2d 395 (1998), the Court of Appeals reaffirmed the proposition that "an out-of-state insurer is not required to provided Michigan no-fault coverage if the policy is issued to a person who provides no indication to the insurer of being a Michigan resident." Finding that there was no evidence that the defendant issued a new policy that purported to be a Michigan policy, and finding no evidence that plaintiff had done anything other than inform the defendant that she intended to move to Michigan in the future, the Court of Appeals ruled that MCL 500.3012 did not apply.

TAKEAWAY: When moving to (or from) Michigan, providing written notice of the move to all insurers is as important as remembering to pack your kids. Without written notice, and without providing specific information in the notice, obtaining benefits will inevitably be an uphill fight because the right to reformation is not automatic. Also, don't drive in Ohio.

"Hit and Run" Coverage Does Not Apply When the Plaintiff Stopped and Spoke to the Other Driver After the Accident

Wasik v Auto Club Ins Assoc.
Published opinion, docket number 355848
(June 2, 2022)

The plaintiff was a passenger in his girlfriend's car, which she drove onto a patch of ice while attempting to turn. The vehicle slid as the girlfriend continued the turn. Meanwhile, a car behind the one in which the plaintiff was riding slid on the same patch of ice and struck the girlfriend's vehicle. The plaintiff's girlfriend and the driver of the other vehicle pulled off the road and checked the damage to the vehicles. Finding none, they agreed there was no need to call the police and they left the scene without exchanging any information. Shortly thereafter, the plaintiff began to complain of injuries, was taken to the emergency room, and was diagnosed with a concussion. The plaintiff filed a claim and eventually a lawsuit seeking uninsured motorist benefits from two different insurers on the theory that the driver that struck his girlfriend's vehicle was a "hit and run driver." The insurers sought summary disposition and the trial court granted their motion. The plaintiff filed a motion for reconsideration, which was denied, and a subsequent appeal. The Court of Appeals, noting that it was presented with a matter of first impression, affirmed.

To recover, the plaintiff had to demonstrate under both policies that his girlfriend's vehicle was struck by a "hit-and-run" driver that was unknown and incapable of being identified. The crux of the plaintiff's argument on appeal was that "hit and run" was an undefined phrase under both insurance policies. The Court of Appeals relied upon the dictionary definition of "hit-and-run" in support of its conclusion that the driver that struck the plaintiff's girlfriend's vehicle was not one (a hit-and-run driver was defined as "being or involving a motor-vehicle driver who does not stop after being involved in an accident."). Based upon the contract and definition of "hit-and-run," the Court found that "'hit and run vehicle' means a vehicle that hits another vehicle and the driver leaves the scene of the accident-either without stopping or at any time before exchange of information can take place." Here, because the driver of the other vehicle left the scene after stopping and speaking with the plaintiff's girlfriend, it was readily apparent to the Court of Appeals that plaintiff was not hit by a hit and run vehicle.

TAKEAWAY: The decision in *Wasik* should be limited to those policies that have an "unknown driver" component in them. The Court of Appeals combined the common definition of "hit and run" with the "unknown driver" requirement from the policy to come to its decision. When ascertaining whether coverage applies, all language contained in the policy will control, which may make for a different result with different policy language.

Unpublished Court of Appeals Opinions

Hourly Rate for Attendant Care Was Not Increased by Agreement with Health Care Company

5 Star Comfort Care, LLC v Geico Indemnity Co
Unpublished, docket number 356786
(May 19, 2022)

As a result of a 2018 motor vehicle accident, an injured occupant was prescribed in-home attendant care services. The injured occupant contacted the plaintiff, who in turn hired the injured occupant's girlfriend. The girlfriend was paid $10 per hour by the plaintiff. The plaintiff charged the defendant $39.99 per hour for the care the girlfriend provided. The injured occupant assigned his right to collect from the defendant. After the defendant paid a portion of a $94,696.32 bill, plaintiff filed suit for the remainder. At the close of discovery, defendant filed for summary disposition arguing that plaintiff only incurred $10 per hour, not the $39.99 per hour it sought. The trial court granted summary disposition and dismissed the case. The plaintiff appealed and the Court of Appeals affirmed.

On appeal, plaintiff argued that it "incurred" $39.99 per hour because of the language in its assignment with the injured occupant. The assignment contained the following language: [Injured occupant] hereby certifies that he has incurred charges for services provided by [plaintiff] for which the right, privilege and remedies for payment are hereby assigned." The Court of Appeals was not persuaded by the language, noting that nothing contained in the assignment required the injured occupant to pay for attendant care services at the higher, $39.99 per hour rate.

TAKEAWAY: Assignments should be crafted carefully and specifically to avoid arguments that the intended fee (which presumably includes overhead, administrative costs, etc.) is unrecoverable in the event of dispute. There may be other provisions that warrant this type of specificity as well, including perhaps, reliance on the medical opinions of a claimant's physicians to justify the need of the services.

Plaintiff's Testimony Regarding Spinal Injury Did Not Establish Impairment of a Body Function

Kidd v Salame, et al
Unpublished opinion, docket number 357587
(June 2, 2022)

The plaintiff brought a first and third party case arising out of an October 2018 motor vehicle accident. The defendant in the third party action filed a motion for summary disposition pursuant to MCL 500.3135 claiming that the plaintiff did not sustain a serious impairment of body function. The injuries allegedly sustained by the plaintiff included neck pain. A CT of the neck and head on the day of the accident revealed small disc bulges at two levels, but no evidence of acute or traumatic findings. An MRI of the plaintiff's cervical and lumbar spine taken six months after the accident revealed annular tears and disc herniations in her cervical spine, and annular tears, nerve root impingement and disc herniations in her lumbar spine. The defendant pointed to medical records that demonstrated pre-existing severe back pain in the years leading up to the accident. An IME also supported the defendant's argument that the plaintiff's injury was chronic and unrelated to the crash.

During her deposition, the plaintiff revealed that she started a job as a waitress a few days after the accident, spent less time with her grandchildren after the accident (though she admitted that was partially due to getting older), did not go to church as often (because of the pain she experienced working as a waitress), and did not attend jazz concerts (because they were out of season). Of note and seeming importance in the court's decision, the plaintiff's response did not attach additional medical records. The trial court granted summary disposition, the plaintiff appealed, and the Court of Appeals affirmed, finding that "the records and testimony properly before us are insufficient to establish that plaintiff's neck injury affected her general ability to lead her normal life."

TAKEAWAY: For those that remember the days of *Kreiner* motions, this is not a return to them. The plaintiff's honest deposition testimony limited her ability to link the subsequent

decrease in activity to her post-accident injuries. Further, the record on appeal was limited because there were no records attached by the plaintiff to her response to the summary disposition motion, though there were in her motion for reconsideration. Procedurally, the plaintiff appealed the summary disposition, not the motion for reconsideration, which led the Court of Appeals to disregard them because "documents attached for the first time to a motion for reconsideration should not be considered when reviewing a trial court's summary-disposition order." Perhaps the biggest takeaway is to make sure you are appealing the correct ruling and have a fully developed record to argue on appeal.

MCCA Cannot Be Sued by a Service Provider in a Dispute With the Insurer

Hope Network Rehab Services v
Michigan Catastrophic Claims Assoc, et al
Unpublished opinion, docket number 355372
(June 9, 2022)

Via an assignment, the plaintiff filed suit after unsuccessfully attempting to resolve a PIP case with Farm Bureau. The plaintiff later amended its complaint to name the Michigan Catastrophic Claims Association ("MCCA") on a theory of intentional interference with a business relationship or expectancy. According to the plaintiff, "the MCCA [] refused to approve payment by Farm Bureau or threatened to withhold reimbursement to Farm Bureau for all or some of [plaintiff's] charges." In response to the amended complaint, the MCCA moved for summary disposition pursuant to MCR 2.116(C)(8), arguing that the plaintiff's complaint was improper because the dispute was between the plaintiff and Farm Bureau, and that "the MCCA would reimburse Farm Bureau for whatever amount it was statutorily obligated to pay in light of the jury's verdict." The MCCA also argued that the plaintiff failed to plead that its conduct was improper, illegal, unethical, or fraudulent. The trial court denied the MCCA's motion for summary disposition and the MCCA appealed.

The Court of Appeals reversed, relying in part on *United States Fidelity & Guaranty Co v MCCA, (On Rehearing),* 484 Mich 1 (2009). The Court of Appeals found that a proper function of the MCCA is to "step in before a settlement has been reached and adjust situations that it anticipates might otherwise expose it to unreasonable indemnification costs." The Court of Appeals found that the plaintiff's complaint only alleged that the MCCA "had either withheld or threatened to withhold reimbursement to Farm Bureau." Yet, the Court of Appeals found that "[t]he MCCA's alleged involvement with Farm Bureau with respect to [plaintiff's] claim, which was not supported by specific facts, was not so inherently wrongful that it could never be justified given the MCCA's power to step in before a settlement."

TAKEAWAY: The MCCA has the authority to intervene in settlement negotiations and independently evaluate the sufficiency of any proposed terms. While this may present practical problems to members on both sides that are looking to settle in the best interests of their clients, the MCCA's authority to do so is clear (at present) and its current actions are not so unreasonable to warrant Court correction. Perhaps the best takeaway from this case is for counsel to ensure that the MCCA is involved early in the process and to utilize it as a partner and stakeholder in the settlement process.

Cases to Watch

In this section, I will provide information about cases that may have an impact in this area. This section will not speculate as to how the cases will or should be decided but will simply advise what issues (or the main issues) that have been raised.

Retroactivity of Limitation on Family-Provided Attendant Care

Andary v USAA Casualty Ins Co, et al
Pending in the Court of Appeals (docket number 356487)

The *Andary* appeal tests the retroactive impact of the recent amendments to the Michigan No Fault Act. In *Andary*, the plaintiff was catastrophically injured in a motor vehicle accident that left her in need of 36 hours of in-home attendant care *per day*. That care has been mostly provided by the plaintiff's family. The plaintiff argues that the limitation on family-provided attendant care services that was added to MCL 500.3157(10) should not be applied retroactively, and therefore, that she should be entitled to utilize her friends and family for attendant care despite the recent amendment to the No Fault Act. Depending on the outcome of this matter, it could have an impact on other revisions that were implemented in the 2019 amendment to the No Fault Act.

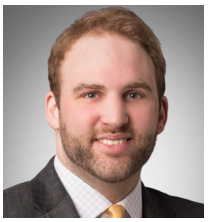
Oral argument in the Court of Appeals occurred on June 7, 2022 and a decision is expected in the next several months.

Constitutionality of 2019 No-Fault Reforms

Gedda v State Farm Mut Auto Ins Co.
Application pending in the Court of Appeals
(docket number 361693)

The *Gedda* case involves the constitutionality of the recent, 2019 No-Fault reforms, and a request for injunctive relief in advance of the substantive arguments related to them. In *Gedda*, the plaintiff was catastrophically injured as a result of a 2011 motor vehicle accident. The plaintiff suffered a spinal injury that left him quadriplegic and ventilator dependent. As a result, the plaintiff has claimed a need to 24/7 nursing care and 24/7 high tech home health aide services. State Farm has relied on the No Fault reforms to pay the 2019 implemented schedule rates for plaintiff's services. The plaintiff filed suit and

sought a preliminary injunction that would require State Farm to pay past benefits at the pre-2019 rates, and to continue to make those payments until the case is fully adjudicated. The Washtenaw County Circuit Court granted plaintiff injunctive relief in April 2022, finding that the 2019 reforms were unconstitutional, and that State Farm should continue to pay at the pre-reform rates. On June 7, 2022 State Farm filed an application for leave to appeal to the Court of Appeals. ■



Selected Insurance Decisions

By Christopher T. Lang, *Collins, Einhorn, Farrell PC*

Michigan Supreme Court

Privity for res judicata/collateral estoppel does not apply when an assignment was executed before the relied-upon judgement

Mecosta Cnty Med Ctr v Metro Group Prop & Cas Ins Co,
Docket No. 161628
June 10, 2022.

In this case, the plaintiff medical facilities had been assigned a patient's right to collect PIP benefits. These facilities thereafter brought action against State Farm, seeking payment for their respective treatment of the claimant. After the assignment was executed, the underlying claimant's separate PIP suit was dismissed on the basis that he was neither a named insured nor a resident relative under the applicable policy. State Farm then asserted that the medical providers claims must also be dismissed under a theory of res judicata and/or collateral estoppel. The lower courts rejected this argument and the Michigan Supreme Court agreed. In upholding the lower courts' rulings, the Michigan Supreme Court held that the medical provider plaintiffs were not bound by an earlier judgment and were not in privity with the underlying claimant, given that the adverse judgment was entered after the underlying claimant had executed the assignment.

Right of an insurer to subrogation under a standard mortgage clause survives recission of a policy ab initio

Meemic Ins Co v Jones
Docket No. 161865
June 14, 2022

The defendant obtained a policy from Meemic, which provided a mortgage clause, protecting the interests of her mortgagee, CitiMortgage. A fire damaged the insured property, and the defendant filed a claim under the policy. Meemic, however, rescinded the at-issue policy and declared it void *ab initio* after the defendant admitted to making a material misrepresentation in the original policy application. After the policy was rescinded, Meemic issued a payment to CitiMortgage according to the mortgage clause of contract. Meemic then sought subrogation against the defendant for the amount it paid to CitiMortgage. The defendant asserted that she was not responsible for any funds paid by Meemic to CitiMortgage, because the policy was deemed void ab initio. The Michigan Supreme Court, however, rejected this argument. The court reaffirmed the well-settled caselaw that a standard mortgage clause was not voided when a policy was rescinded *ab initio.* Since the at-issue clause constituted a separate risk contract between the insurer and mortgagee, it survived even after the insurer voided the contract with the insured, and ruled in favor of Meemic.

Michigan Court of Appeals - Published Opinions

Interpleader - Competing estates are entitled to jury trial on issue of pro rata share of damages before an equitable distribution can be made

Secura Ins Co v Stamp
___ Mich App _____ (2022), Docket No. 357395
May 19, 2022

This case concerns the distribution of interpleaded insurance funds when those funds are inadequate to pay all claimants in full. In this case, the trial court proceeded to split the insurance proceeds equally between two estates, without first holding a trial or making any factual findings. The trial court issued an equal distribution, even though, one of the estates claimed unequal losses. The Court of Appeals reversed and remanded to the trial court for an evidentiary hearing. In remanding the matter, the Court of Appeals held that in order to achieve a pro rata distribution, each estate's share of the limited funds, must be equal to the ratio of its damages. The Court of Appeals found that merely dividing a limited fund

into equal shares, when a claimant asserts unequal losses, was not an equitable result.

Health-Care Sharing Ministry does not satisfy "other health and accident coverage" under MCL 500.3109a

Meemic Ins Co v Christian Care Ministry, Inc
___ Mich App _____ (2022), Docket No. 356739
June 9, 2022

Under MCL 500.3109a, coordination of coverage occurs with "other health and accident coverage on the insured," meaning that the insured must obtain payment and services from the health insurer if health coverage is available. In this case, the insured purchased no-fault insurance at a lower price from Meemic, on the basis that he had health insurance through Medi-Share – a provider under the Health Care Sharing Ministries Freedom to Share Act. The Court of Appeals ultimately held that coordination does not apply to an entity like Medi-Share. The Court of Appeals found that the Legislature placed health care sharing ministries entities, such as Medi-Share, entirely outside of the insurance system. The Court of Appeals noted that health care sharing ministry facilities provided assistance to its participants on a purely voluntary basis based on a person's financial needs. The Court of Appeals stated that this arrangement was the "antithesis of coverage." In light of this, the Court of Appeals found no basis to characterize what a health care sharing ministry provides to its participants as "other health and accident coverage" for purposes of coordination of coverage under MCL 500.3109a.

Limiting Definition of a Hit-and-Run Vehicle

Wasik v Auto Club Ins Assn
___ Mich App _____ (2022), Docket No. 355848
June 2, 2022

In a case of first impression, the Court of Appeals examined what constitutes a "hit-and-run vehicle" in a specific fact pattern. In this case, the Court of Appeals determined that when a vehicle pulled over after hitting another vehicle, the drivers of both vehicles exited the cars and inspected the vehicles for damage, and mutually concluded that since no damage existed and that there is no need to contact the police or exchange insurance information before leaving, did not constitute a "hit-and-run" vehicle under the policy. In reviewing the applicable policy language, the Court of Appeals determined that a "hit-and-run" vehicle was defined as one that hits another vehicle and the driver leaves the scene of the accident, either without stopping, or at any time before an exchange of information can take place. Here, since the at-fault driver in this case only left the accident scene *after* the other driver told him that there was no damage to the vehicle, and they both agreed that there was no need to contact the police or exchange information, the Court of Appeals found that the at-fault vehicle did not fall under the plain/ordinary meaning of "hit-and-run vehicle."

Court of Appeals - Unpublished Opinions

COVID-19 losses not covered by property insurance policy

Gourmet Deli Ren Cen, Inc v
Farm Bureau Gen Ins Co of Michigan
Unpublished opinion of the Court of Appeals
Issued May 26, 2022
(Docket No. 357386), 2022 WL 1714202

The plaintiff, a deli located in the Renaissance Center, filed a claim for lost profit under the business income and civil authority coverage of its property insurance with Farm Bureau based on lost business for COVID closures. On appeal, the Court of Appeals found that neither of the claimed coverages applied. The Court of Appeals noted that the plaintiff failed to submit evidence that: (1) a physical or structural change is not required under the policy, (2) COVID-19 causes property damage from its impact on humans, or (3) COVID-19 was ever present in the plaintiff's space. Therefore, the plaintiff could not claim business income coverage. Regarding the alleged civil authority coverage, the Court of Appeals found that the policy provided coverage only when a civil authority "prohibits access to the premises," not when a civil authority simply limits its use. Since there was no physical loss or damage to the areas surrounding the plaintiff's space from COVID-19, nor was the plaintiff prohibited from accessing its space by Executive Order 2020-9 and subsequent orders, the plaintiff was not entitled to any civil authority coverage.

Homeowner's insurance policy did not provide for duty to defend in cases of sexual molestation

Farm Bureau Gen Ins Co of Michigan v Jones
Unpublished opinion of the Court of Appeals
Issued May 12, 2022
(Docket No. 356901), 2022 WL 1509302

Farm Bureau General Insurance Company of Michigan issued homeowners insurance policies, including personal liability coverage, which provided coverage for several rental properties owned by the defendants. The Court of Appeals held that, based on the plain language of these policies, Farm Bureau owed no duty to defend the insureds in a federal harassment or discrimination lawsuit against the defendants. Furthermore, the Court of Appeals also held that no accidental injury coverage was owed, since the defendants did not accidentally harass, molest, or discriminate against the female tenants.

Trade-in vehicle not automatically covered as "newly acquired auto" when no notice was provided to insurer and there was no breach of duty for agent's alleged failure to procure policy

Hamilton v Citizens Ins Co of Midwest
Unpublished opinion of the Court of Appeals
Issued May 12, 2022
(Docket No. 356967), 2022 WL 1521428

This case stems out of an August 2019 accident in which plaintiff totaled his newly purchased F-350 Truck. The plaintiff first claimed that he did not need to provide any notice to Citizens (his no-fault insurer) of the newly acquired automobile due to the ambiguous language of the "newly acquired auto" coverage in his policy. The Court of Appeals, however, disagreed. There was no dispute that the plaintiff never requested coverage on the new F-350 Truck before the accident or within the 14 days as detailed in the policy. The Court of Appeals found that this policy language notice requirement was not ambiguous, and since there was no question that no such notice was provided, the plaintiff was not entitled to coverage under this automatic coverage. In addition, the plaintiff also asserted a claim against his insurance agent, under a theory of negligence, alleging it breached a duty owed to him by failing to procure coverage for him before the accident. Again, the Court of Appeals rejected this claim. In rejecting this claim, the Court of Appeals found it fatal that the plaintiff failed to produce any evidence that he actually requested that his agent add the F-350 Truck to his policy before the accident.

MCL 500.3145(1) requires only that an insurer be provided with ordinary notice

Orchard Labs. Corp v Auto Club Ins Assn
Unpublished opinion of the Court of Appeals
Issued May 26, 2022
(Docket No. 356597), 2022 WL 1711701

MCL 500.3145(1) requires "written notice of injury" within one year of an accident to claim first-party no-fault benefits. Auto Club argued that the provider-plaintiff's action was barred by the statute of limitations since it was untimely. The Court of Appeals rejected this argument. In finding that sufficient notice was provided the Court of Appeals relied on the fact that within one year of the date of the accident, Auto Club learned of the accident and learned that injuries were sustained from several sources, including the injured party's wife and a police report. The Court of Appeals held that this information was sufficient notice of the nature of the injured party's injury under MCL 500.3145(1). ■

Legislative Update: Summer Recess and Election Season

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

We're now into the legislative summer recess, which means there are only a few tentatively scheduled session days. This allows legislators to spend more time in their districts and to campaign in an election year (which it is). The Legislature will resume regular session in September. Between now and then, there won't be much committee work.

But the insurance committees have been meeting since the last update, with an emphasis in the House on reviewing concerns about rate reductions to PIP providers; although none of the related bills have yet advanced. Several other bills did advance from both committees:

- **PIP Priorities –** HB 5719 amends the Insurance Code to change the order of priority for payment of PIP benefits for a person injured while in a vehicle-for-hire (i.e. taxis, Uber, Lyft, etc.) *Passed the House (57-48) on 6/15/22; Referred to the Senate Committee on Insurance and Banking on 6/16/22*
- **Revised penalties for overdue payments –** HB 5870 amends the Insurance Code to revise penalties for overdue insurance benefit payments. *Discharged from the House Insurance Committee, placed on Second Reading of Bills, and referred to the Committee on Rules and Competitiveness (5/19/22)*

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Legislative Update
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- **Group health plan disclosures –** SB 447 amends the Insurance Code to require disclosure of group health claim utilization in certain circumstances. *Passed the Senate (35-0) on 11/10/21; Passed the House (102-2) on 6/9/22; Senate Concurred in House Amendments (37-0), given Immediate Effect and Ordered Enrolled on 6/15/22*
- **Annuities – interest rates –** SB 624 amends the Insurance Code to modify the interest rate used in determining the minimum nonforfeiture amount in annuities. *Passed the Senate (34-1) on 11/10/21; Referred to the House Insurance Committee on 11/10/21; Reported out of the House Insurance Committee on 5/19/22.*
- **Fraternal benefit societies – rehabilitation and liquidation –** SB 712 amends the Insurance Code to modify the liquidation and rehabilitation procedures for fraternal benefit societies *Reported out of the Senate Committee on Insurance and Banking on 5/26/22*

And the Legislature continues to introduce new bills – 2,251 in the House and 1,088 in the Senate – with several new referrals to the insurance committees:

- **HB 5990 –** would amend the Insurance Code to modify the rating factors that insurers can use when determining premiums
- **HB 5996 –** would amend the No-Fault Act to state that medical treatment is not inappropriate solely because it isn't usually associated with the condition being treated
- **HB 5997 –** would amend the Insurance Code to impose a 300% penalty if an insurer refuses to pay a claim in bad faith
- **HB 5998 –** would amend the Michigan Consumer Protection Act to clarify its application to certain conduct generally authorized by law
- **HB 5999 –** would amend the Insurance Code to require the Department of Insurance and Financial Services to annually prepare a report regarding complaints about insurers' payments of PIP benefits
- **HB 6000 –** would amend the Insurance Code to modify the process for and factors that the Director of the Department of Insurance and Financial Services can consider when approving an automobile insurance rate
- **HB 6001 –** would amend the Insurance Code to require refunds from the MCCA to be issued within 30 days of the review determining an excess balance in the fund
- **HB 6002 –** would amend the Insurance Code to prohibit third-party company assistance in reviewing administrative appeals
- **HB 6003 –** would amend the Insurance Code to prohibit insurers from denying a claim solely because the insured did not submit proof of loss in a particular format or on a particular form
- **HB 6004 –** would amend the Insurance Code to require the MCCA to annually disclose all data it uses to compute the premium, expected losses and expenses
- **HB 6005 –** would amend the Insurance Code to prohibit automobile insurers from determining rates based on any category that is prohibited under the Elliott-Larsen Civil Rights Act
- **HB 6096 –** would amend the Insurance Code to require homeowner policies to cover loss of use due to the state or a political subdivision prohibiting occupancy
- **SB 1002 –** would amend the Insurance Code to modify the rating factors that insurers can use when determining premiums. ■