This is my first message to our members, and as we begin our still-young, but growing, Section's fourth year, I think it is a good time to reiterate some of the principles and themes that motivate our Section.

First, since many – though not all – insurance issues involve disputes between insureds and insurers, our Section has adopted a position of neutrality on those issues. The Journal of Insurance and Indemnity Law is intended to be a forum for the exchange of views, so we welcome articles from all perspectives, but the Section itself does not advocate for one position or the other. The makeup of our Section Council reflects our diversity. Some members are counsel for insurance companies, while many others represent insureds, work in areas concerned with the regulatory aspects of the insurance business, or in areas in which insurance-related issues orbit around their primary practice area. The fact that insurance issues touch so many practice areas is one of the ways our Section is unique.

Our membership is diverse in other ways. Some of our members have joined because they specialize in this area of practice. Others have joined the Section for the opposite reason. They encounter insurance issues from time to time and want to become more familiar with how insurance and indemnity operate.

This brings up another dimension – indemnity. Indemnity law is a closely related cousin to insurance law, but has its own set of principles and procedures. Again, many of our members specialize in or encounter this area of law regularly in their practice and others have joined to learn about it. Either way, our Section serves as a valuable resource on those issues.

I'm happy to report that our Section has been a success. Some other sections have lost membership in the past few years, but we continue to grow. Our membership (before the 2010 dues period has ended) stands at 439.

I think all of this provides a good beginning, and we plan to build on this. We will work toward closer liaison with other State Bar Sections where we have shared interests. We plan to offer more programs and seminars to our members and others who are interested in our area of practice. Perhaps most of all, we intend to demonstrate enthusiasm to our members and encouragement to them to become involved.

We would like to hear from you.
• Tell us what you would like to get out of your membership.
• Suggest programs you would like to see.
• Tell us how we can improve our quarterly Journal.
• Submit an article of your own to the Journal.
• Tell us ways in which you think we can increase our membership.

Every issue of the Journal has a complete list of our officers and council members, so please contact any of them with questions, comments or suggestions. By working together we can make a good State Bar Section even better.
McCormick v Carrier and Regents v Titan

Days of Future Past*

On July 31, 2010, the “new” Michigan Supreme Court released its long-awaited decisions in McCormick v Carrier, Docket Number 136738 and Regents of the University of Michigan v Titan Insurance Company, Docket Number 136905. In McCormick, the “new” Supreme Court overruled Kreiner v Fischer, 471 Mich 109, 683 NW 2d 611 (2004), as expected, and did so in a highly critical tone. This article will discuss the impact of McCormick on third-party automobile negligence cases. The next issue of this Journal will feature an analysis of the Supreme Court’s decision in Regents v Titan Insurance Company. As discussed in prior articles, Justice Hathaway’s election in November, 2008 continues to have a dramatic impact on Michigan jurisprudence, as many of the major cases decided during the Taylor Court era (1999-2008) have either been overruled, or likely to be overruled in future cases, assuming that the Supreme Court membership does not change in the November, 2010 election.

McCormick v Carrier Facts

Plaintiff Rodney McCormick was injured as a result of a motor vehicle-pedestrian accident of January 17, 2005, when a co-worker backed a truck into Mr. McCormick, knocking him to the ground. The truck then drove over his left ankle. X-rays showed a fracture of the left medial malleolus, and Mr. McCormick subsequently underwent surgery to repair the fracture. Plaintiff was non-weight bearing for a month after the surgery, followed by multiple months of physical therapy. The hardware was removed from his ankle on October 31, 2005, nine months post-accident. An independent medical evaluation, formed two weeks after the hardware was removed, indicated that Plaintiff could return to work, albeit with no prolonged standing or walking for three weeks. After that, the IME physician opined that Plaintiff could return to work with no restrictions. Following another functional capacity evaluation, Mr. McCormick eventually returned to work on August 16, 2006, 17 months post-accident.

During the time that Plaintiff was off work, he did not require any assistance with household chores. He was able to drive, and there was no loss of consortium claim. He was also able to engage in many of his pre-accident recreational activities, such as fishing and golf.

Lower Court Proceedings

Defendant filed a motion for summary disposition, arguing that Plaintiff’s injuries did not meet the no-fault threshold of serious impairment body function, as defined in MCL 500.3135(7), and as interpreted by the Michigan Supreme Court in Kreiner v Fischer, 471 Mich 109, 683 NW 2d 611 (2004). The trial court granted the motion for summary disposition. In an unpublished 2-1 decision, with Judge [now Justice] Alton Davis dissenting, the Court of Appeals affirmed the lower court’s ruling, on the basis that Plaintiff’s “course and trajectory” life had not changed, as he was able to care for himself, and was able to perform most of his recreational activities. The majority also observed that Plaintiff was able to return to work at the same rate of pay and without restrictions within a relatively short period of time.

Plaintiff filed an Application for Leave to Appeal with the Michigan Supreme Court, which was denied in a 4-3 decision released on October 22, 2008, approximately two weeks before the November, 2008 election. Following Justice Hathaway’s election, but before she took the bench, Plaintiff filed a Motion for Reconsideration, which was granted by the “new” Supreme Court.

Justice Cavanagh’s Role in Interpreting the Phrase “Serious Impairment of Body Function”

The fact that the majority opinion was authored by Justice Cavanagh is significant and deserves mention at this point. Readers will remember the so-called Cassidy era (Cassidy v McGovern, 415 Mich 483, 330 NW 2d 22 (1982)) in which the Supreme Court ruled that the issue of serious impairment body function was an issue of law to be decided by the courts. Cassidy was released on December 23, 1982, one week before Justice Cavanagh took the bench on January 1, 1983. Four years later, Justice Cavanagh authored the majority opinion in DiFranco v Pickard, 427 Mich 32, 398 NW 2d 896 (1986),
in which the court overruled Cassidy and held that the issue of whether Plaintiff's injuries constituted a serious impairment body function was an issue to be submitted to trier of fact.

Readers will remember the so-called Cassidy era in which the Supreme Court ruled that the issue of serious impairment body function was an issue of law to be decided by the courts.

Following the tort reform amendments to the No-Fault Act, which were enacted in 1995, the Michigan Supreme Court's first opportunity to interpret those amendments occurred in Kreiner. The Kreiner Court observed that for the most part, the legislature rejected Justice Cavanagh's DiFranco analysis in favor of a modified Cassidy standard. Justice Cavanagh authored a vigorous dissent in Kreiner, which has now become the majority opinion. With this history, it is not at all surprising that Justice Cavanagh authored the majority opinion in McCormick. In doing so, Justice Cavanagh devoted a majority of his argument to criticizing the Taylor court's Kreiner decision. After reading the majority opinion, one cannot help but wonder whether we have returned to the days of DiFranco, where the issue of serious impairment of body function will be submitted to the trier of fact, notwithstanding the legislature's directive, in MCL 500.3135(2)(a) that the issue of serious impairment of body function, or permanent, serious disfigurement, “are questions of law for the court” if the court finds that there is no factual dispute regarding the nature and extent of the person's injuries, or there is a factual dispute but the dispute is not material to the determination as to whether or not the person has suffered a serious impairment of body function or permanent, serious disfigurement.

Key Holdings

Procedural

Justice Cavanagh did acknowledge the statutory language utilized by the legislature, to the effect that the issue of serious impairment body function is a question of law for the court to decide, if there is no factual dispute concerning the nature and extent of the person's injuries. However, in footnotes 7 and 8, Justice Cavanagh strongly implied that the balance of MCL 500.3135(2)(a) “could” be unconstitutional, to the extent that it conflicted with MCR 2.116(C)(10), governing the filing of summary disposition motions where there exists no genuine issue of material fact. The majority avoided having to decide this constitutional issue, as it ruled that Plaintiff Rodgenuy McCormick's injuries constituted a serious impairment body function as a matter of law. However, in this dissent, Justice Markman took note of Justice Cavanagh's observation, and stated:

“It is interesting that, although the majority acknowledges that the constitutionality of MCL 500.3135(2)(a) is not at issue here, it repeatedly implied that MCL 500.3135(2)(a) “could” be unconstitutional, thus making it obvious that MCL 500.3135(2)(a) will also likely fall within the majority's effort to expunge the jurisprudence of the past decade.”

Nonetheless, it is apparent that, except in the most extreme cases, involving clearly minor injuries, the issue of serious impairment body function will be submitted to the trier of fact, as was the practice under DiFranco.

Legislative Definition of “Serious Impairment of Body Function”

In 1995, the legislature enacted MCL 500.3135(7), which added the following definition of the phrase “serious impairment body function:”

“As used in this section, “serious impairment body function” means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life.”

Both the majority and the dissent agreed that under MCL 500.3135(7), three prongs are necessary to establish a “serious impairment body function”. First, the impairment must be objectively manifested. Second, the impairment must be an “important body function.” Third, the impairment must affect the person's general ability to lead his or her normal life. At this point, however, the agreement ends and, in the majority opinion, Justice Cavanagh went to great lengths to criticize the Kreiner Courts and its interpretation of all three prongs.

“Objectively Manifested Impairment”

In Kreiner, the Taylor court held that “subjective complaints that are not medically documented are insufficient” to establish that an impairment is objectively manifested. In McCormick, Justice Cavanagh resurrected his earlier opinion in DiFranco and engrafted DiFranco's interpretation of the “objectively manifested” requirement onto the statutory definition of “impairment,” noting that a Plaintiff must “introduce evidence establishing that there is a physical basis for their
subjective complaints of pain and suffering.” McCormick, slip opinion at pg 15. In McCormick, Justice Cavanagh went a step further and noted that the Kreiner court’s requirement of medical documentation was inconsistent with the statutory language:

“To the extent that [the Kreiner court’s interpretation of “objectively manifested”] is inconsistent with DiFranco’s statement that medical testimony will generally be required to establish an impairment, it is at odds with legislative intent expressed by the adoption of the “objectively manifested” language from DiFranco and Cassidy. Thus, to the extent that Kreiner could be read to always require medical documentation, it goes beyond the legislative intent expressed in the plain statutory text, and was wrongly decided.”

In his dissent, Justice Markman agreed that Plaintiff had suffered an objectively manifested impairment. He did not comment on the majority’s disregard of the medical verification requirement, as the nature of the dissent’s disagreement pertained to the application of the third prong – lifestyle impairment.

“Important Body Function”

The second prong has not been the subject of any appellate court decisions since the enactment of MCL 500.3135(7). In McCormick, the majority paid lip service to the Kreiner court’s interpretation of the second prong, as the Kreiner court simply indicated that, “it is insufficient if the impairment is of an unimportant body function.” In what can only be characterized as a remarkable disdain for the opinion in Kreiner, Justice Cavanagh criticized even this statement, noting that:

“If, however, the Kreiner majority’s disposition has been construed in a manner that is inconsistent with this opinion, then we disapprove of those constructions.”

Again, the issue of “important body function” has never been an issue in any appellate decisions released since 1995.

“Which Affects the Person’s General Ability to Lead His or Her Normal Life”

Justice Cavanagh devotes 10 pages of his opinion to address the third prong. Justice Markman devotes 15 pages of his dissent to this issue as well. A side-by-side comparison of how the majority opinion and the dissenting opinion deal with the third prong illustrates just how badly divided the “new” Supreme Court is along ideological lines. In Kreiner, the Supreme Court focused its majority opinion on the legislature’s use of the word “general” in MCL 500.3135(7) and noted that the word “general” meant “with respect to the entirety.” Therefore, in order to impair a person’s general ability to lead his or her normal life, the impairment needed to have affected the “course” or “trajectory” of a person’s life.

Rejecting this construction, the McCormick majority interprets the phrase “general ability” as meaning “some ability”:

“The other definitions [of the term “general”] however, more or less convey the same meaning: that “general” does not refer to only one specific detail or a particular part of a thing, but, at least some parts of it. Thus, these definitions illustrate that to “affect” the person’s “general ability” to lead his or her normal life is to influence some of the person’s power or skill, i.e., the person’s capacity to lead a normal life.”

Justice Markman, in his dissent, picks up on the differences between the word “general” and the word “some” as follows:

“More accurately, it is the meaning that the majority gives to “general” that is created out of thin air.” The majority concludes that the word “general” means “some”, even though the definition that the majority itself relies upon does not even include “some”, but instead indicates that “general” means “whole,” “every,” “majority,” “prevalent,” “usually,” “in most instances,” “not limited,” and “main features.” Nowhere among these possible meanings can a reader sight the word “some.”

Nonetheless, it is no longer necessary that a reviewing court determine whether a person’s “course” or “trajectory” of life has been affected by a particular impairment. Rather, all that is necessary now is that the impairment affects “some” of the person’s capacity to lead his or her normal life.

Furthermore, in Kreiner, the Supreme Court set forth a “non-exhaustive list of objective factors” that a reviewing court needed to utilize in comparing an individual’s pre-act and post-act set of lifestyles. These factors included the nature and extent of the impairment, the type and length of treatment required, the duration of the impairment, the extent of
any residual impairment, and the prognosis for eventual recovery. In McCormick, the new majority determined that this “non-exhaustive list of objective factors” was inconsistent with the statutory text utilized in MCL 500.3135. Therefore, these factors no longer need to be considered by the court in determining whether or not an injury constituted a serious impairment body function.

The majority’s decision to discard this “non-exhaustive list of objective factors” prompted Justice Markman to observe that Justice Cavanagh had discussed the use of such factors in his DiFranco opinion:

“Indeed, in DiFranco itself, Justice Cavanagh provided numerous “extra-textual” factors to be considered in determining whether a plaintiff has established a serious impairment of body function. DiFranco, 427 Mich at 69-70, states:

“In determining whether the impairment body function was serious, the jury should consider such factors as the extent of the impairment, the particular body function impaired, the length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors.”

Indeed, these “extra-textual” factors are remarkably similar to the Kreiner factors: “(a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery.” Kreiner, 471 Mich App at 133. It is not clear why the authoring justice thought it acceptable to list “extra-textual” factors in DiFranco, but unacceptable to cite virtually the same factors in Kreiner.”

Nonetheless, it is clear that the “non-exhaustive list of objective factors,” set forth in Kreiner, are no longer applicable to the analysis of whether an injury constitutes a serious impairment body function. Thus, one is left to ask precisely what is the new majority’s test to determine whether a plaintiff has sustained a serious impairment body function.

Majority’s New Test

Justice Cavanagh summarized the new majority’s analysis on pages 20 and 21 of the slip opinion. First, Justice Cavanagh observed that a person’s general ability to lead his or her normal life need only be affected, not destroyed, by the impairment. Therefore, “courts should consider not only whether the impairment has led the person to completely cease a pre-incident activity or lifestyle element, but also whether, although a person is able to lead his or her pre-incident normal life, the person’s general ability to do so was nonetheless affected.”

This apparent rejection of any temporal consideration led Justice Markman, in his dissent, to argue that the majority’s decision essentially guts the no-fault threshold of any meaning, since it can be satisfied in almost every case.

Second, Justice Cavanagh also stated that only some of the person’s ability to lead his or her normal life must be affected, again consistent with his interpretation of the term “general” as meaning “some.” Justice Cavanagh noted:

“Thus while the extent to which a person’s general ability to live his or her normal life is affected by an impairment is undoubtedly related to what the person’s normal manner of living is, there is no quantitative minimum as to the percentage of a person’s normal manner of living that must be affected.”

This leads to the third and most crucial part of Justice Cavanagh’s analysis — “[T]he statute does not create an express temporal requirement as to how long an impairment must last in order to have an effect on ‘the person’s general ability to live his or her normal life.’” This apparent rejection of any temporal consideration led Justice Markman, in his dissent, to argue that the majority’s decision essentially guts the no-fault threshold of any meaning, since it can be satisfied in almost every case.

“How can it possibly be determined whether an impairment ‘affects the person’s general ability to lead his or her normal life’ without taking into account temporal considerations? As Kreiner, 471 Mich App at 133, n 18, inquired:

“Does the dissent [now the majority] really believe that an impairment lasting only a few moments has the same affect on a person’s “general ability to lead his or her normal life” as an impairment lasting several years or that an impairment requiring annual treatment have the same affect on a person’s general ability to lead his or her normal life’ as an impairment requiring daily treatment?”

Does the majority really believe that the legislature intended for the serious impairment threshold to be met in every instance where an objectively manifested impairment of an important body function affected a person’s ability to lead his normal life for a mere moment in time? What if a person gets hit in the head and passes out for five minutes, but after those five minutes is completely unaffected by the impairment? If all temporal considerations are
irrelevant, would not this person satisfy the majority’s threshold, because his general ability to lead his normal life was certainly affected for those five minutes of unconsciousness? Under the majority’s rule, it is apparently irrelevant that the person arose after those five minutes and led a completely normal life thereafter. The majority asserts that all that matters is that for that moment in time, the person’s general ability to lead his normal life has been affected. I am not sure that the majority’s new threshold can even be called “threshold” when it can be satisfied in virtually every automobile accident case that results in injury. As long as the Plaintiff has suffered an objectively manifested impairment of an important body function, that Plaintiff will have satisfied the majority’s threshold, because the majority has essentially read the third criterion, i.e., ‘that affects the person’s general ability to lead his or her normal life,’ out of the statute.”

In this regard, one must wonder whether the majority’s interpretation has created an even looser standard than in *DiFranco*, since Justice Cavanagh in *DiFranco* did incorporate some temporal considerations into his opinion; i.e., “the length of time the impairment lasted” and “the treatment required to correct the impairment.” Certainly, it cannot be said that this is what the Republican-led legislature, with a Republican governor, had in mind when it enacted the various tort reform measures in the mid-1990s.

**Majority and Dissent’s Analysis of Legislative History**

Although not particularly relevant with regard to the day-to-day litigation of third party automobile negligence cases, the majority and the dissent’s treatment of legislative history is fascinating because it illustrates an improbable role reversal. During the Taylor court era, Justice Cavanagh repeatedly relied upon legislative history in cases where he disagreed with the former majority’s application of what it believed was the plain language of the statute at issue. In *McCormick*, though, Justice Cavanaugh pays little heed to the legislative history behind the 1995 tort reform amendments and, as noted above, has arguably created an even looser threshold than what we had under *DiFranco*, given the apparent disregard of temporal considerations. In doing so, Justice Cavanagh indicated that MCL 500.3135(7) was unambiguous, and that legislative history need not be examined.

In his dissent, Justice Markman notes that in this case, the legislative history behind the 1995 tort reform amendments was “an ideal example of legitimate legislative history” as 1995 tort reform amendments were “intended to repudiate the judicial construction of a statute” – the 1986 Supreme Court decision in *DiFranco*, authored by none other that Justice Cavanagh. Justice Markman then spends five pages of his dissent illustrating why, in his opinion, the majority erred in failing to consider this legislative history when, in effect, the new majority has resurrected its *DiFranco* analysis.

**Application of Stare Decisis**

Perhaps the clearest illustration of the ideological divides in this court can be found in the majority and the dissent’s treatment of the doctrine of stare decisis. Justice Cavanagh leads this portion of his opinion by stating the following:

The dissenters’ stare decisis protestations should taste like ashes in their mouths. To the principles of stare decis, to which they paid absolutely no heed as they denigrated the wisdom of innumerable predecessors, the dissenters now would wrap themselves in its benefits to save their recent precedent.”

Justice Markman responded by noting: “The majority overrules *Kreiner* while paying its usual lip service to stare decisis.” Justice Markman also observes that the position of the dissenting justices on stare decisis “has not changed a whit since we were in the majority; by contrast, the position of the majority justices is unrecognizable.”

Justice Markman then goes on to recite the number of cases where the new majority has reversed decisions of the Taylor court. Justice Markman also makes note that the majority “has already teed up six more cases in its grant orders for possible overruling, including *Michigan Citizens v Nestle Waters*, 479 Mich 280, 737 NW 2d 447 (2007), *Preserve the Dunes, Inc. v Dept of Environmental Quality*, 471 Mich 508, 684 NW 2d 847 (2004), *Trentadue v Buckler Automatic Lawn Sprinkler Co.*, 479 Mich 378, 738 NW 2d 664 (2007),

Conclusion

Clearly, we have returned to the DiFranco era, where the vast majority of serious impairment claims will now be decided by the trier of fact. Given the majority’s apparent disregard of temporal considerations, it is arguable that we are now dealing with an even looser standard than what we were dealing with during the DiFranco era.

What cannot be doubted is that the current Supreme Court is perhaps even more bitterly divided than what it had been during the Taylor court era, from 1999 through 2008. Justice Markman is probably correct in his observation that the current court appears to be intent on expunging cases that were decided during the Taylor court era that the new majority did not agree with, and there is no doubt but that this has created a great deal of instability in the law of this state. Absent some change in the court’s membership, this instability is likely to continue for some time. Depending on the outcome of the November, 2010 general election, the new majority’s decision in McCormick could very well prompt yet another legislative reaction, similar to what occurred in 1995. Only time will tell. ■

Endnotes

1 McCormick, slip opinion at pg 16.
2 McCormick, slip opinion at pgs 18-19.
3 McCormick, slip opinion at pg 24 (Markman, J. dissenting).
4 McCormick, slip opinion at pg 26 (Markman, J. dissenting).
5 McCormick, slip opinion at pg 20.
6 McCormick, slip opinion at pg 20.
7 McCormick, slip opinion at pg 21.
8 McCormick, slip opinion at pg 31-32 (Markman, J. dissenting).
9 McCormick, slip opinion at page 28, n 21.
10 McCormick, slip opinion at pg 39 (Markman, J. dissenting).
11 McCormick, slip opinion at pg 51 (Markman, J. dissenting).

On July 8, 2010, the Michigan Supreme Court issued its decision in the “insurance credit scoring” case of Insurance Institute of Michigan v Commissioner of the Office of Financial and Insurance Services, ___ Mich ___ (2010) (Case Nos. 137400, 137407). As previously reported, the Insurance and Indemnity Law Section filed an amicus brief in the case, not on the merits of using credit scores to discount rate plans, but on the authority of OFIS (now OFIR) to ban discount factors that meet the requirements of MCL 500.2110a. This statute generally defines the criteria for using discount factors and requires that they be non-discriminatory, within the meaning of the Insurance Code. If an insurer can show that a discount factor meets these standards, it should not be the prerogative of OFIR to categorically prohibit its use for the public’s interest.

In an opinion authored by Justice Corrigan, the Court held that the rules promulgated by OFIR banning all use of credit scores are “invalid and unenforceable.” Sl op, p 18. Insurance scoring is a permissible discount factor under the Insurance Code, as long as it reflects reasonably anticipated reductions in losses or expenses and is applied in a non-discriminatory manner. MCL 500.2110a. “[U]nder Chapters 24 and 26, insurers may generally establish any rating plan that ‘measures any differences among risks that my have a probable effect upon losses or expenses.’ As discussed . . . the experience of the in-

Special Report

Supreme Court Strikes Down OFIR’s Rules Banning the Use of Insurance Credit Scores in Rate Discount Plans

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... the Insurance and Indemnity Law Section filed an amicus brief in the case, not on the merits of using credit scores to discount rate plans, but on the authority of OFIS (now OFIR) to ban discount factors that meet the requirements of MCL 500.2110a.
insurance industry, as established in the lower court record, demonstrates a correlation between insurance scores and risk of loss. Thus, just as insurance scoring may be used to establish a premium discount plan under Chapter 21, the use of insurance scoring as part of a rating plan is consistent with Chapter 24 and 26. All three chapters, however, prohibit rates that are “excessive, inadequate, or unfairly discriminatory.” Sl op, p 30.

The dissent would hold that the Commissioner’s power to “effectuate the purposes” of the Insurance Code is a broader grant of authority than recognized by the majority.

The Court rejected OFIR’s claim that insurance credit scoring was unfairly discriminatory. Under the Insurance Code, “unfairly discriminatory” means that “the differential between the rates is not reasonably justified by differences in losses, expenses, or both, or by differences in the uncertainty of loss, for the individuals or risks to which the rates apply.” Sl op, p 31, quoting MCL 500.2109(1)(c), and citing MCL 500.2403(1)(d) and MCL 500.2603(1)(d). In addressing OFIR’s criticisms of credit reports as a reliable measure for predicting losses or risk, the Court noted that OFIR “also regulates the state banking and finance industries,” where credit reports are standard tools of the trade, yet it “has taken no action to curtail the use of credit reports in those industries.” Sl Op, p 32. The Court also pointed out that the report on which OFIR relied to establish the unreliability of credit reports actually concluded that “[w]e cannot determine the frequency of errors in credit reports” on the basis of the data gathered by others. Sl op, p 33. Other evidence submitted by the insurers established that, for the most part, credit reports contain “minor errors that have little or no effect on insurance scoring.” Sl op, p 35.

In conclusion, “[b]ecause the Commissioner has no authority under the Insurance Code to ban a practice that the code permits, the OFIS rules exceed the scope of the Commissioner’s rulemaking authority under the Insurance Code.” Sl op, p 37. The dissent would hold that the Commissioner’s power to “effectuate the purposes” of the Insurance Code is a broader grant of authority than recognized by the majority. MCL 500.210. And in exercising that broader authority, the Commissioner’s interpretation of the enabling statute and its assessment of the evidence concerning the use and reliability of credit scores should be accorded great deference.

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An Update on the Pollution Exclusion

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Michigan courts have construed various types of pollution exclusions in many cases over the years. Earlier cases typically addressed the pollution exclusion in the context of environmental contamination property damage claims, but more recent cases have addressed this exclusion in the context of bodily injury claims arising out of exposure to various substances.

Most cases involve either the “standard” pollution exclusion or the “absolute” pollution exclusion, although more recent policies may have various additions or exceptions, including by endorsements. While the specific and complete language needs to be reviewed in any particular case, generally speaking, the “standard” pollution exclusion precludes insurance coverage for bodily injury or property damage arising out of the discharge, dispersal, release or escape of toxic chemicals, fumes, irritants, contaminants or pollutants, but the exclusion does not apply if the discharge, dispersal, release or escape was “sudden and accidental.” An “absolute” pollution exclusion eliminates the “sudden and accidental” exception and generally precludes insurance coverage for injury or damage arising out of pollutants at or from any location owned by the insured, or on which any insured is performing operations involving pollutants, as well as claims by governmental authorities, and other matters. With respect to the “standard” pollution exclusion in the environmental property damage context, see, e.g., Matakas v Citizens Mutual Insurance Co, 202 Mich App 642 (1993); and with respect to the “absolute” pollution exclusion, see, e.g., McGuirk Sand & Gravel, Inc v Meridian Mutual Insurance Co, 220 Mich App 347 (1996).

More recent cases have addressed application of the pollution exclusion in the context of bodily injury claims and we can anticipate more cases in this area. Much of the focus in these types of cases is upon whether the substance involved was a “pollutant” and the cases indicate the court will closely examine the substance(s) at issue in the context of the policy language and facts of each specific case.

In McKusick v Travelers Indemnity Co, 246 Mich App 329 (2001), the plaintiffs were exposed to a toluene-type chemical when a high-pressure hose delivery system failed while the plaintiffs were in the course of their employment. The plaintiffs sued the manufacturer of the hose delivery system, and Travelers, its insurer, denied coverage on the basis of an absolute pollution exclusion. In this particular case, it was not disputed that the substance was a pollutant; rather, the focus was on whether the discharge or release of the pollutant must be widespread, such that the exclusion would only be applicable to claims of environmental pollution, or whether the exclusion applied regardless of the location or other characteristics of the discharge. The court held that there were no limitations regarding the scope of the exclusion and that it applied, precluding coverage.

The “standard” pollution exclusion precludes insurance coverage for bodily injury or property damage arising out of the discharge, dispersal, release or escape of toxic chemicals, fumes, irritants, contaminants or pollutants, but the exclusion does not apply if the discharge, dispersal, release or escape was “sudden and accidental.”

In Carpet Workroom v Auto Owners Insurance Co, Court of Appeals Nos. 223646, 224040, decided July 30, 2002, workers installing flooring were overcome by fumes from the adhesives used. The court held that the absolute pollution exclusion could apply even though the case did not involve traditional, environmental contamination. The court further held that “it cannot be seriously doubted that the adhesive vapors or fumes constituted pollutants,” noting that the labels on the product stated that they contained “hazardous ingredients.” Thus, the court held the pollution exclusion provisions were not ambiguous and there was no insurance coverage available.

In Watson v Travelers Indemnity Co, Court of Appeals No. 253127, decided April 12, 2005, a worker knocked over a drum containing a Burmastic (an adhesive) and diesel fuel mixture, resulting in the contents splashing an individual, causing injury. The court held that the Burmastic/diesel fuel mixture constituted a pollutant because it was a liquid irritant or contaminant, which included chemicals and fumes, within the definition of “pollutant”. The court went on to hold the absolute pollution exclusion was clear and unambiguous and barred coverage.

The Michigan Supreme Court construed the term “pollutants” in City of Grosse Point Park v Michigan Municipal Liability and Property Pool, 473 Mich 188 (2005). In that case, there was a lawsuit against the city arising out of the discharge of sewage which resulted in backups into homes and businesses.
The Supreme Court noted that the applicable insurance policy defined “pollutants” as “any solid, liquid, gaseous or thermal irritant or contaminant including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.” The court stated that the policy did not specifically define “waste” and therefore, the term should be accorded its commonly understood meaning. The court referred to dictionary definitions in holding that the term “waste” is commonly understood to include sewage. Thus, the term “waste,” in the policy was not ambiguous and the pollution exclusion applied.

Some very recent cases illustrate the necessity to focus on the specific policy language involved, and that Michigan courts will continue to be faced with addressing the pollution exclusion in the context of bodily injury claims and different substances. In Auto Owners Insurance Co v Ferwerda Enterprises, Inc, 283 Mich App 243 (2009); reversed and remanded, 485 Mich 905 (2009), persons were injured by a “cloud of gas” created by chlorine and muriatic acid in the swimming pool area of a hotel. The hotel’s insurance policy contained an absolute pollution exclusion, but also included an endorsement which set forth an exception for building heating equipment. The Michigan Supreme Court, in an Order, held that the circuit court had correctly granted summary disposition in favor of the hotel based upon the building heating equipment endorsement since the harmful gases emanated from the mechanical system that heated the pool building. Thus, under that policy provision and those facts, coverage applied.

In Hastings Mutual Insurance Co v Safety King Inc, 286 Mich App 287 (2009); application for leave dismissed by stipulation, Michigan Supreme Court Order 140320-1, June 4, 2010, persons allegedly were injured from Safety King’s use of a sanitizing agent, triclosan (a pesticide) during duct cleaning services performed in a home. The Court of Appeals held that the insurer had not established that triclosan was a “pollutant.” The court noted that the terms “irritant” and “contaminant” were not defined in the insurance policy and the court looked to the dictionary definitions for their ordinary meaning. Applying those definitions, the court also noted that Safety King showed that the triclosan was where it was supposed to be located, i.e. in ductwork, such that it was not generally expected to cause injurious or harmful effects to people. The court therefore reversed summary disposition for Hastings, finding that there was a genuine issue of material fact whether triclosan was a pollutant. (The court also referenced its view that since using sanitizing agents was part of Safety King’s normal business practice, it would have “reasonably expected” coverages. The Michigan Supreme Court, however, has rejected the “reasonable expectations” rule as to coverage. See, Wilkie v Auto-Owners Insurance Co, 469 Mich 41 (2003)).

In summary, while many issues involving the pollution exclusion have been addressed in Michigan, it can be anticipated that courts will continue to construe this exclusion, particularly in the context of bodily injury claims.

Endnotes
1 This article first appeared in the July 19, 2010 edition of Michigan Lawyers Weekly and is reprinted with permission.
Disability That Was Not “Continuous” Did Not Extend Eligibility For Coverage


In this life insurance dispute, the employee/participant took a leave of absence, during which time he received short-term disability benefits, and later returned to work, only to be terminated due to a reduction in force. The employee’s severance package did not include continuation of his life insurance coverage, and he did not exercise the option to convert his group policy into an individual policy. He died later that year. The beneficiary brought suit after the insurer determined that life insurance coverage had ceased on the last day of the month when his employment was terminated.

The plaintiff argued for application of the disability extension definition in the policy, which expressly applies only prospectively. Applying the arbitrary and capricious standard of review, despite a contrary opinion of the plaintiff’s treating physicians.

Disability Benefits Claim Was Arbitrarily and Capriciously Denied Based on a Flawed IME


In this long term disability benefits dispute, the plaintiff attempted to introduce extraneous evidence during motion practice, purportedly in support of her procedural challenge. However, the court granted the defendant’s motion to strike the Social Security award letter, a scientific article and medical literature, finding that these documents had no bearing on whether the defendant adequately explained why the plaintiff’s benefits were terminated.

Applying the arbitrary and capricious standard of review, the court held that the defendant’s decision must be overturned, despite relying on an independent medical examination report because the reviewing doctor recognized, but failed to address objective evidence of the plaintiff’s spinal problems or the contrary opinions of the plaintiff’s treating physicians.

Retiree Health Coverage Cases

Winnett v Caterpillar, Inc, 609 F2d 404 (6th Cir. 2010)

Moore v Menasha Corp, ___ F Supp 2d ___, (WD Mich. 2010)


Attempts by employers to change or end retiree health coverage continue to wind up in Court. The situation involves an employer that for many years – often in connection with a collective bargaining agreement – has provided its retirees with health care coverage at minimal or no cost. The employer has decided that it no longer wants to incur that cost and so it purports to change or end the coverage – even for existing retirees. Naturally, the affected retirees (and often their union) sue, claiming that the retiree coverage was a vested benefit, which the employer cannot unilaterally change. (While health and welfare benefits do not legally vest as pension benefits do, the courts have ruled that they can be vested by agreement of the parties.) Since the documents are rarely clear about the intent of the parties, extrinsic evidence is often reviewed to determine the parties’ intent. The Sixth Circuit has held that there is an “inference” – but not a “presumption” – that retiree benefits are intended to vest.

Bender and Moore present typical fact patterns. There were collective bargaining agreements that provided health care to
retirees. The employer tried to reduce benefits and increase retiree contributions. The retirees sued. The Courts considered extrinsic evidence and ruled in favor of the retirees. (*Moore* held that coverage to the retirees’ spouses was not vested, however.)

*Winnett* presented a different twist -- whether a claim is barred by the statute of limitations. The UAW and Caterpillar negotiated a collective bargaining agreement in 1988 that called for “lifetime, cost-free healthcare to its retirees and their surviving spouses.” The agreement expired in 1991 and it took until 1998 for the parties to reach a new agreement, however the *Winnett* plaintiffs continued to work under the 1988 Agreement. The new agreement made several changes in health benefits and Caterpillar applied those changes to individuals who retired between 1992 and 1998. It also announced its unilateral right to change benefits in the future. In 2004 and 2006, Caterpillar made additional, more significant, changes resulting in this lawsuit, which was filed in March 2006.

The Sixth Circuit held that *Winnett*’s claims were barred by the Statute of Limitations. Because ERISA does not establish a statute of limitations, the closest analogous state statute of limitations applies; in this case, 6 years. The question of when the claim accrued, however, was determined by federal law, and the court held the claim accrued in 1998 when Caterpillar first changed the plans and announced it right to make unilateral changes in the future. This provided the “clear repudiation” necessary for the claim to accrue and thus the claim was time-barred.

*Bender* also addressed the statute of limitations issue. The employer claimed that some of the affected retirees had been receiving reduced benefits for more than six years. But the Court held that the action accrues only when the employer “clearly repudiated” its obligation. “Before that time, Defendants may have inadvertently mishandled the claims of a handful of retirees, but the undisputed evidence shows that Defendants’ promptly and fully corrected the mistakes.”

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**ERISA Case Summary**

*Continued from page 11*

Eric Braverman and Bill Healey

Outgoing Chair Tim Casey presents gavel to Mark Cooper

Mark Cooper present plaque to Tim Casey

Pictures from the Annual Meeting
Michigan Supreme Court

OFIR Overstepped Its Authority in Banning Insurance Credit Scoring

*Ins Inst of Mich v Cm'r of OFIS*, ___ Mich ___ (2010)(Case No. 137400)

The Section filed an amicus brief in this case. See the Special Report elsewhere in this issue.

HIPPA and Medical Malpractice Plaintiffs

*Holman v Rasak*, ___ Mich ___ (2010)(Case No. 137993)

HIPPA (Health Insurance Portability and Accountability Act), 42 USC 1320d et seq., “permits ex parte interviews by defense counsel with treating physicians” of medical malpractice plaintiffs, as long as “reasonable efforts have been made . . . to secure a qualified protective order that meets the requirements of” that statute.

Serious Impairment Claims Revisited


As expected, the Michigan Supreme Court overruled *Kreiner v Fischer*, 471 Mich 109 (2004) and devised a new approach for determining whether the threshold for tort liability has been met under Michigan’s no-fault act, MCL 500.3135. Under *McCormick*, if there is no material factual dispute about the nature and extent of an injury, the court (not the jury) decides whether there has been a serious impairment of body function. The serious impairment threshold is met if the court finds: (1) an objectively manifested impairment (2) of an important body function that (3) affects the person’s general ability to lead his or her normal life. *McCormick* stresses a more flexible case-by-case analysis: “the Legislature avoided drawing lines in the sand . . . so must we.”

 “[A]n objectively manifested impairment” means that the impairment (not the injury) is “observable or perceivable from actual symptoms or conditions.” Plaintiffs are not required to prove this impairment through medical documentation.

An “important body function” is “a body function of value, significance, or consequence to the injured person.” What is “important” will vary from person to person and must be decided on an individual basis; what may seem to be a trivial body function for most people may be subjectively important to some, depending on the relationship of that function to the person’s life.”

The effect on a person’s ability to lead his or her normal life means that the impairment “influences some of the plaintiff’s capacity to live in his or her normal manner of living.” A showing of only some effect is enough; and length of the impairment is not dispositive. “[W]hat is important to one is not important to all; a brief impairment may be devastating whereas a near permanent impairment may have little effect.”

*McCormick* expressly jettisoned *Kreiner’s* focus on the trajectory of a person’s life and replaced it with an emphasis on the “day to day process of living.” Mr. McCormick suffered a broken ankle, which affected his ability to walk, crouch, and climb. He was out of work for a period of months and returned to limited job duties, though at the same pay. His impaired body function also affected his abilities to pursue his hobbies of golfing and fishing. The serious impairment threshold was met.

Insurance Company Discharged from Obligation to Ex-Wife


Supreme Court Order

As reported in the January 2010 issue of this Journal, this case involves the proper application of MCL 552.101(2), which protects insurers against double liability on a life insurance policy where it pays a former spouse as the named beneficiary because it “does not receive written notice of a claim and a divorce.” Unum paid the insured’s former wife before receiving notice of a claim from another. The Court of Appeals held that because the insurer knew of the divorce, it should have investigated the potential for other claims before paying the named beneficiary. The Supreme Court reversed that ruling and adopted the Court of Appeals’ dissent by Judge Fitzgerald.

Judge Fitzgerald wrote that the reference in MCL 552.101(2) to “any other person having interest in the policy” refers to persons other than the named beneficiary, a person already known to the insurer. Since other persons had not provided UNUM notice of a claim prior to its payment of benefits to the named beneficiary, Unum was discharged of all liability for double payment.

Continued on next page
Insurance Decisions of Interest . . . 
Continued from page 13

Payment of Benefits and Joint Annuitants

Supreme Court Order

“The Court of Appeals erred by finding a conflict between the annuity application and the annuity policy,” both of which referenced and identified joint annuitants. Where there are joint annuitants, and where the annuity policy directs payments to the beneficiary “after the Annuitant’s death,” the payment obligation is “operative after the death of the last annuitant.”

Michigan Court of Appeals—Published

Insurance Commissioner’s Disapproval of Rate Adjustment Upheld

*M1 Basic Property Ins Assoc v OFIR, et al.*

On March 11, 2008, the MBPIA submitted a rate level adjustment for its home insurance program, which was subsequently disapproved by the insurance commissioner. The Court of Appeals approved the decision of the insurance commissioner stating: “In summary, the statutory provision at issue, MCL 500.2930(a)(1), is ambiguous because it fails to identify the subject matter to be calculated as a weighted average. The insurance commissioner is charged with oversight of the insurance industry to ensure fair and reasonable rates to the general public. Petitioner was created to allow qualified persons to obtain insurance unavailable in the regular market. Petitioner is subject to supervision and regulation by the insurance commissioner, and petitioner must follow a plan of adoption that assures fair, reasonable, equitable and nondiscriminatory maintenance of the pool.

In his expertise, the insurance commissioner concluded that petitioners calculation of territorial rates were improper because it was premised on base rates of the ten insurers with the largest premium volume in this state. The insurance commissioner acknowledged that base rates may have been utilized in the past, but he also recognized that, in recent years, base rates were deliberately inflated to account for “discounts” that ultimately lead to the premium charged the insured . . . Review of the insurance code, the authority of the insurance commissioner, and responsibilities of the pool, we conclude that respondents’ construction of the statute is in accordance with the intent of the Legislature. Furthermore, cogent reasons do not exist for overruling respondent’s interpretation.”

Criminal Acts Exclusion in Homeowner’s Policy Defeats Coverage

*Auto Club Group Ins Co v Booth*,

Auto Club issued a homeowner’s policy with an exclusion that barred coverage for bodily injury claims “resulting from . . . a criminal act.” The homeowner unintentionally shot his tenant while the two were drinking with a group of friends. He was criminally charged and ultimately pled no contest to the misdemeanor of reckless discharge of a firearm. The Court of Appeals held that Auto Club properly denied coverage for the homeowner when he was sued by the tenant for his injuries. *McCarn II* did not control the analysis because the exclusion in that policy “was significantly different.” Nor is the criminal act exclusion contrary to public policy.

No MCCA Reimbursement Where Insured is not a Michigan Resident

*United Services Auto Asse v Michigan Catastrophic Claims Asc*,

This is one of two significant decisions released these past few months involving the MCCA. The Court of Appeals affirmed the MCCA’s refusal to reimburse a member insurer for roughly $650,000 in excess PIP benefits paid to its insured. The insurer’s underwriting department had inadvertently omitted a vehicle owned by the insured from the Michigan no-fault policy it issued. When it realized its error as the result of a claim, it added the vehicle retroactively. Further investigation revealed that, although the insured had significant contacts with Michigan (he lived here most of his life, owned a home here, insured other cars here, and returned to Michigan regularly due to obligations to the military), he resided in Florida and had purchased and registered the omitted vehicle.
there, which is also where his accident occurred. Because the insured was a non-resident owner who was not required to register his Florida vehicle in this state, the MCCA had no statutory duty to reimburse the insurer for amounts paid in PIP in excess of the retention limit.

MCCA’s Limited Reimbursement Obligation for Commercial Auto Policies with High Deductibles


This is a consolidated appeal by two commercial auto insurers, whose claims for catastrophic claims reimbursement were denied by the MCCA. The dispute was “whether the MCCA can consider the payment of a deductible by a policyholder . . . in determining whether the member insurer has sustained an ‘ultimate loss,’” which is what the MCCA is statutorily obligated to pay. The Court of Appeals agreed with the insurers that the statute itself does not allow the MCCA to factor in deductibles in calculating “ultimate loss.” But the Court then went on to conclude that the MCCA’s Plan of Operation effectively alters the statutory mandate by requiring member insurers to reimburse the MCCA for “third party recoveries,” which was held to include deductibles paid to or owed the insurer by the policyholder.

PIP Benefits Payable for Joyriding in Stolen Vehicle


Plaintiff hospital sued Esurance for medical bills incurred by its insured after he was badly injured in a motor vehicle accident. The insured was operating a vehicle he knew to be stolen, though he was not involved in the actual theft of that vehicle. The issue was whether Esurance was responsible for his medical bills in light of the statutory exclusion for no-fault benefits when the insured is injured in connection with a stolen vehicle. Because the statute barred recovery of PIP only where the accident involved a vehicle “which [the insured] . . . had taken unlawfully,” Esurance was obligated to pay plaintiff’s bills. Its insured had driven, but not taken, the stolen vehicle.

Judicial Finding of Fraud By the Insured Binds the Medical Provider


In a prior case between the insured and the insurer, a jury found that the insured had fraudulently submitted a claim for PIP benefits to State Farm. That finding was res judicata in this action by the medical provider who sued the insurer directly for payment of the insured’s medical bills. “Plaintiff, by seeking coverage under the policy, is now essentially standing in the shoes of” the insured. It was therefore bound by the prior finding of fraud.

Issue of Fact Defeats Statute of Limitations Defense


This was an insurance coverage dispute arising out of a fire on March 18, 2003 that completely destroyed a farmhouse owned by Plaintiff. A jury awarded Plaintiff $69,500 plus interest under MCL 500.2006 and case evaluation sanctions. The Court of Appeals affirmed the jury verdict but reversed the trial court’s decision to reduce Plaintiff’s attorney fees. Prior to filing suit, Plaintiff’s public adjuster wrote a series of letters to the carrier which prompted the carrier to at first deny the claim, then reconsider the denial and then deny the claim again. By the time Plaintiff filed suit, over 1 year elapsed from the initial denial, so the carrier moved to dismiss under MCL 500.2833(1)(q). In response, Plaintiff argued that the carrier’s correspondence with the public adjuster tolled the time before a final denial was made. The trial court denied the carrier’s motion noting that there was a factual dispute as to when the formal denial occurred. At trial, the carrier abandoned the issue. After the jury returned a verdict for Plaintiff, the carrier appealed the trial court’s denial of its motion.

The Court of Appeals determined that the carrier waived the defense by abandoning it after the Court ruled on its motion. Further, the Court of Appeals determined that the trial court properly concluded that there was an issue of fact concerning when the formal denial occurred. The Court also discussed the distinction between “vacant” and “unoccupied” under the policy. Additionally, the Court determined that the Griswold case is to be given retroactive application. Finally, the Court determined that the trial court had improperly reduced Plaintiff’s requested reasonable attorney fees since counsel had submitted billing records that were legally sufficient, testimony in support thereof and no contrary evidence was presented by the defense.

Michigan Court of Appeals—Unpublished

UM Limit Is Offset by Liability Payment Under Same Policy

Phelps v Allstate Property & Cas Ins, Unpublished per curiam issued June 10, 2010 (Docket No. 289537)

John Phelps was fatally injured in a motor vehicle accident, while a passenger in a car insured by Allstate. The other vehicle was uninsured. Phelps’ estate sought both the liability and UM limits of Allstate’s policy, each of which had limits of $100,000. Allstate paid its liability limits of $100,000...
but refused to pay anything under the UM policy. Its UM policy stated that the $100,000 limit in coverage was to be reduced by “all amounts paid by . . . anyone . . . legally responsible.” Because the estate received $100,000 in liability payments on behalf of the driver of the care in which the decedent was riding, there was nothing to be paid under the UM coverage form.

**UM Insurance Properly Denied Under Family Owned Vehicle Exclusion**

*Mikolaski v Farmers Ins Exchange*
Unpublished per curiam issued August 19, 2010 (Docket No. 292005)

Plaintiff husband was injured in an auto accident while driving his wife’s car, which was insured by Citizens. Plaintiff also owned a vehicle which he insured with Farmers, who paid his PIP benefits. Farmers declined to pay UM benefits because the policy contained an exclusion for bodily injury sustained by a person “...while occupying any vehicle owned by . . . a family member . . . for which insurance is not afforded under this policy . . . .” Plaintiff was injured while occupying his wife’s car, which was not insured under the Farmer’s policy. The exclusion applied.

**Breach of Promise to Insure Obligates Promisor on Liability Judgment**

*Morgan v Menasha Corporation*
Unpublished per curiam opinion of the Court of Appeals, Issued June 15, 2010 (Docket No. 289826)

Plaintiff alleged that he was injured on Menasha Corporation’s premises while delivering wood chips in the course of his employment with an independent contractor. He obtained a judgment against Menasha following a jury trial. Menasha looked to Fairhaven, the supplier of the wood chips, to indemnify and/or insure Menasha against the liability under the provisions in their contract. In a prior appeal, the Court of Appeals held that the indemnity provision did not obligate Fairhaven on the claim. The case was remanded by the Supreme Court for a ruling on the claim that Fairhaven breached its agreement to insure Menasha against the claim. On remand, the trial court determined that the parties’ contract clearly and unambiguously required Fairhaven to obtain insurance for Menasha and Fairhaven failed to do so. Fairhaven was thus liable for the resulting damages, which included the amounts Menasha paid to satisfy the plaintiff’s judgment.

**Negligence of Captive Agent May Equitably Estop Statute of Limitations defense**

*Albrecht v State Farm Mutual Auto Ins Co*
Unpublished per curiam opinion of the Court of Appeals, Issued June 22, 2010 (Docket No. 289042)

Plaintiff purchased three forms of insurance from State Farm: homeowners, auto and hospitalization. All three policies were procured through a captive agent. When plaintiff was subsequently injured loading items into a trailer connected to a truck, she contacted the agent and informed the office manager about her accident. She was sent a claim form for hospitalization insurance only, which she timely submitted. Plaintiff collected the maximum benefits under her hospitalization policy, which she timely submitted. Plaintiff argued that State Farm was equitably estopped by the negligence of its captive agent in failing to also provide a claim form for the no-fault policy. The Court of Appeals found that an issue of fact existed regarding the agent’s negligence. If it was found that the agent was negligent in failing to provide the no-fault claim form, State Farm could be equitably stopped from asserting the statute of limitations.

**Court Indicates a Shift in Harts Special Relationship Test**

*National Assoc of Investors Corp v Dobson-McOmber Agency, Inc.*
Unpublished per curiam opinion of the Court of Appeals, Issued June 29, 2010 (Docket No. 286295)

Plaintiff, a non-profit corporation, purchased a directors and officers policy from its longtime independent insurance agent. Plaintiff had apparently also asked its agent to provide a presentation explaining the coverage afforded under the policy. The agent, however, failed to discuss the policy exclusions at the presentation. After the policy was issued, a former board member sued the plaintiff, who tendered the complaint to the insurer for a defense. The insurer denied coverage based on the “insured v insured” exclusion, which prompted the plaintiff to sue its agent for negligence. The trial court applied the *Harts* special relationship test and granted the agent’s motion for directed verdict.
The Court of Appeals reversed on the authority of several significant legal principles and engaged in a short discussion of whether the Harts special relationship test applies to independent agents, stating: “it appears that the Harts case may not even apply to this case.” Although the court did not explicitly refuse to follow Harts, it implicitly challenged the prior cases that applied Harts to independent insurance agents.

Penalty Interest Runs From Date of Satisfactory Proof of Loss

Dept of Transportation v Initial Transport, Inc., et al.

Unpublished per curium opinion of the Court of Appeals, Issued June 24, 2010
(Docket No. 291010)

This case arises out of an accident and resulting fire that significantly damaged the overpass between I-75 and I-94. In December of 2003, one of the involved auto insurers tendered its $1 million policy limit to the state conditioned on the state's presentation of satisfactory proof of loss and a complete release of liability. The state declined to grant a release. Litigation ensued and in 2007, the Court of Appeals ordered the insurer to pay penalty interest under MCL 500.2006(1). The case was remanded for a determination of the amount of interest owed, but in answering that question, the trial court failed to ascertain the date on which the state submitted its proof of loss, which is what triggers the penalty interest running under the statute. The state declined to grant a release.

In this opinion, the Court of Appeals again remanded the case with instructions to determine the date of the satisfactory proof of loss for proper calculation of the interest.

Michigan’s County Courthouses

by John Fedynsky
The University of Michigan Press, 2010, Ann Arbor
Reviewed by Hal O. Carroll

Michigan has a history that is second to no other states in its interesting and even fascinating stories. The first ship built on the Great Lakes, the Griffin, went down on its maiden voyage in Lake Michigan. The whereabouts of Pere Marquette’s remains is lost in the mists of time. Like Columbus, he seems to be in several places at once. Detroit, in its early days, had its own werewolf legend, and it was by no means certain that the state would belong to the United States rather than Canada. Then there is the great Toledo War.

County by county, Mr. Fedynsky’s book focuses on the courthouses, past and present, of each county, but goes beyond that to tell the stories about the people in the county. In Tuscola county, the county seat, Caro, was actually named for Cairo, Egypt, and the records were brought to Caro from the temporary county seat, Vassar, by canoe in the dark of the early morning.

The story of Chippewa County, with its county seat of Sault Ste. Marie, recalls the counter-intuitive fact that Michigan was settled from the “top down.” Sault Ste. Marie was settled in 1641, sixty years before Detroit. Like Detroit (which means “straits” in French), Sault Ste Marie was named for the local waterway (“sault” means “rapids”). The first canal to bypass the rapids was built in 1853.

Michigan, in its early days, was as wild as any place in the Wild West. Menominee County saw a lynching of two brothers, the McDonalds, that a priest tried unsuccessfully to stop. Having been knocked to the ground and spat on, the priest cursed the men behind the lynching and prophesied that they would all die violently. According to legend, the prophecy was fulfilled.

Then there is the story of the Monroe County defendant who beat a charge of inebriation when he challenged the testimony that “his eyes were bloodshot” by taking out his glass eye. Not to be outdone by the wild west, Gogebic County can boast of the last stagecoach robbery east of the Mississippi. And E. M. Miller’s close call is a compelling read – wrongly convicted of murder, sentenced to hang, imprisoned when Michigan abolished capital punishment, then released when the state’s star witness made a deathbed confession.

In short, this is a book that is a simple delight to read. Every county gets two or three pages, and every entry has an interesting tale of how the early settlers in Michigan struggled, survived and ended up making a state.
Economics of Law Practice Survey
October 31 Deadline

Participate in the Economics of Law Practice Survey and enter to win a new iPad, a $250 gift card, or a $200 donation to Access to Justice. Originated in the late 1960s, this survey yields the authoritative document providing 2010 information on fees, rates, revenues, expenses, incomes, and views on the economic conditions facing the legal industry.

Results are free and available for year-end planning in December. Free assistance will be available to help you internalize findings. Separate surveys are offered for private and non-private practitioners to help avoid wading through inapplicable questions. The survey should take 15 minutes to complete. You can stop and restart where you left off at any time as long as you use the same computer.

We appreciate rapid completion, and we thank you for your time and interest.

Take the Survey Now!

- **Private Practice** ([http://www.surveymonkey.com/s/PPFHLQJ](http://www.surveymonkey.com/s/PPFHLQJ))—Includes solos, space sharers, or those in firms of all sizes.
- **Non-Private Practitioners** ([http://www.surveymonkey.com/s/TGZGCSM](http://www.surveymonkey.com/s/TGZGCSM))—For those not in private practice.

If unemployed, select the survey based on your most recent position.

Your anonymity is assured. The Applied Statistics Laboratory, a third-party research firm, will tabulate responses.

As with past research studies, we safeguard your identity when completing surveys or reporting results. Our third-party vendor will process your iPad and other prize give-aways.

Need help or more information? Call or e-mail Dr. Lawrence Stiffman in Ann Arbor at (734) 369-6052 or aslinfo@aol.com.
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