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This journal is published by the Insurance and Indemnity Law Section, State Bar of Michigan
Opinions expressed herein are those of the authors or the editor and do not necessarily reflect the opinions of the section council or the membership.
From the Chair

It is hard to believe that another year passed since our last annual meeting! Thank you to all who attended this year’s meeting in Novi. I would like to welcome our new council members, Renee Vander Hagen and Steve Hicks. I would also like to congratulate the elected returning incumbents, Hal Carroll, James Thome, Doug Young and Nicole Wilinski. I would also like to thank Adam Kutinsky, Nicole Wilinski and Renee Vander Hagen for putting on a fantastic program regarding the facilitation of Insurance and Indemnity disputes. A special thank you also goes out to our esteemed panel, James J. Rashid, Martin Weisman and Kevin Hendrick.

It gives me great pleasure to announce a new tradition for the Section. We have established the Hal O. Carroll Leadership Award and presented it for the first time at the annual meeting to its namesake, Hal Carroll. Hal was a founding member of the Section and is the editor of the Journal of Insurance and Indemnity Law. His contributions to the Section have been numerous and invaluable.

We are financially flush with enough resources to plan some spectacular events and programs this year. Keep an eye out for more information about our annual Holiday social event. Details will be finalized shortly.

I would also like to welcome our returning slate of officers: Adam Kutinsky, Chair Elect; Larry Bennett, Secretary; and Gus Igwe, Treasurer. We are all looking forward to a productive and memorable year for the Section.

For those of you who are new to the Section, here’s a quick overview. First, our Section is structured differently from most, in that our officers serve for two years. In most sections the officers serve for one year. Two-year terms leaves more time for accomplishing things and less for training the newbies.

Second, our Section is always neutral as between insurers and policyholders. Some of us represent one side of that divide, some represent the other, and some have clients on both sides. The Section’s purpose is to share information on the topics and issues that arise in our area of practice, and provide resources for practitioners, but never to take a position on those issues. You will see opinions expressed in issues of the Journal, but only the opinions of the authors.

If you have expertise and/or an opinion you would like to share in the form of an article, get in touch with the Journal’s editor, Hal Carroll, at HOC@HalOCarrollEsq.com.

A continuing focus for the next year is going to be the active encouragement of participation on one of our committees. We currently have the following committees: membership, programs, and publications. If you are interested in being on one of these committees, please contact me at Lopilato.kathleen@aoins.com.

Chair-Elect Adam Kutinsky and Chair Kathleen Lopilato present Hal Carroll with the leadership award.

Editor’s Notes

By Hal O. Carroll
www.HalOCarrollEsq.com

The Journal – now in its eighth year – 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. We welcome all articles of analysis, opinion, or advocacy. The Section itself takes no position on issues.

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

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

At the business meeting, the officers were re-elected to their second terms. The practice in our Section is that the officers serve two-year terms.

The officers are:

Chairperson        Kathleen A. Lopilato  
                   Auto-Owners Insurance Company  

Chairperson Elect  Adam B. Kutinsky  
                   Dawda, Mann, Mulcahy & Sadler, PLC

Secretary          Larry Bennett
                   Seikaly & Stewart, P.C.

Treasurer          Augustine O. Igwe
                   Kaufman, Payton & Chapa

The Council members are:

- Hal O. Carroll, Law Offices of Hal O. Carroll
- Steven A. Hicks, Speaker Law Firm, PLLC
- James K. Thome, Vandevier Garzia, PC
- Renee T. Vander Hagen, First Mercury Insurance Company
- Doug Young, Wilson Young PLC
- Nicole Wilinski, Collins Einhorn Farrell, PC

The title of our program was: “Top 10 Ways To Sabotage Facilitations”

Panelists:

Kevin Hendrick  Martin Weisman  James Rashid

Below are the PowerPoint slides:

1. Submit a 40 page summary with 6 inches of exhibits (non-highlighted), some of them extracts of longer document, and provide it for the first time by email the day before mediation. Better yet, submit a new expert report with your mediation summary!
2. Bring 10 people with your team to the mediation for “technical issues” and/or fail to bring someone with authority, or bring someone with only limited authority.
3. Show up late and address like a slob, and work on your iPhone or laptop whenever anyone other than your team is talking.
4. Respect no one! Focus on the adversarial nature of the proceeding!! Make sure to call someone a liar in your opening statement!!!
5. Start by saying “to hell with this process! Here’s my bottom line!”
6. Fight to take control of the process from the mediator.
7. Don’t trust that mediator and make sure your client doesn’t either!
8. Never allow the mediator to talk directly with your adjuster or decision maker, not even by phone!
9. When it is clear that a settlement will occur, insist on new terms like indemnification for claims by nonparties, a written apology, a waiver of mediation fees, non-disparagement provisions, confidentiality, etc.
10. Schedule a flight out for 3:00 p.m. on the day of the mediation but don’t tell anyone until an hour beforehand.
Michigan’s Motor Carrier Transportation Contract Anti-Indemnity Act

By Noreen L. Slank
Collins, Einhorn, & Farrell; noreen.slank@ceflawyers.com

“A motor carrier transportation contract” is defined in the statute. MCL 470.21(3)(a) basically says it means contracts for transporting property by a motor carrier, entrance onto property by a motor carrier to load, unload or transport the property, and services incidental to these activities.

A “motor carrier” is defined in Michigan’s Motor Carrier Act at MCL 475.1(q), incorporating definitions from (r) and (s). MCL 475.1(q) recursively says that a “motor carrier” is “a motor carrier of general commodities or a motor carrier of household goods.” And those two notions are further defined so that “motor carrier” means a for-hire carrier of property of all kinds. This is so because “motor carrier of general commodities” means “a person that is an authorized for-hire motor carrier, either directly or through any device or arrangement, of property other than household goods upon or over a public highway” [MCL 475.1(r)] and “motor carrier of household goods” means “a person that, either directly or through any device or arrangement, packs, loads, unloads, or transports household goods upon or over a public highway for the general public in exchange for payment” [MCL 475.1(s)].

This anti-indemnity statute operates against a “promisee.” So the statute needed to define the term. “Promisee” “means a party to a motor carrier transportation contract who is not a motor carrier or, if the promisee is a motor carrier, a party to a motor carrier transportation contract who is not transporting property for compensation or hire.” MCL 479.21(30(b).

A circular-definition funhouse. Dessert means ice cream that’s not chocolate, but if dessert is chocolate ice cream, dessert means chocolate ice cream without a cherry on top. I fear whether we’ll know what we’re eating.

Most contracts subject to this statute will be between a motor carrier and somebody else who the motor carrier agreed to indemnify. That somebody else would clearly be a “promisee” subject to the statute. Maybe what follows the definition’s disjunctive (“or”) is aimed at voiding indemnity contracts between two motor carriers when the indemnified motor carrier isn’t physically doing the transporting. But maybe not. This 2013 Act re-landscaped indemnity obligations in most motor carrier transportation contracts. The wannabe-indemnified party won’t be able to shift the risk of its own negligence or its own intentional acts or omissions.

Now, for that one exception to the Act. Here’s what MCL 479.21(2) excepts out:

(2) This section does not apply to the uniform intermodal interchange and facilities access agreement administered by the Intermodal Association of North America or other agreements providing for the interchange, use or possession of intermodal chassis or other intermodal equipment.

The “mission statement” of the Uniform Intermodal Interchange & Facilities Access Agreement, administered by the Intermodal Association of North America, aids understanding of this exception. The mission is “to promote intermodal productivity and operating efficiencies through the development of uniform industry processes and procedures governing the interchange of intermodal equipment between ocean carriers, railroads, equipment leasing companies and intermodal trucking companies.”

If the contract involves or implicates transporting containers from ships, to trains, or onto roadways, be on the lookout for the exception to apply. Apparently our legislators’ anti-indemnity aspirations can only be pushed so far.

Endnotes
1 http://www.intermodal.org/, accessed September 22, 2015. The IANA voting members include railroads, port authorities, intermodal truckers and over-the-road highway carriers, intermodal marketing and logistics companies, and suppliers to the industry.
The Obamacare “Tax” Is An Illegal Tax

By Ryan Dennis Brown, CR Myers & Associates

Introduction

In March 2010, the Patient Protection and Affordable Care Act – more commonly known as Obamacare – was passed by Congress and signed into law by President Barack Obama.1 The Constitution of the United States contains only four categories of taxes: duties, excises, direct taxes, and the income tax.5 Because these are the only four types of federal taxes authorized by the Constitution, it is necessary that every tax imposed by the federal government be within the scope of one of them. In his opinion, Chief Justice Roberts gives a short analysis and then swiftly concludes that the shared responsibility payment is a tax “triggered by specific circumstances.”16

The Four Types of Federal Taxes

“Taxation is but the means by which government distributes the burdens of its cost among those who enjoy its benefits.”17 Congress’s power to tax derives from several sources in the Constitution,18 and every tax must fit into one of the four categories. These categories are specified in Article I, Section 8, Clause 1, which states that “Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.”19

Article I, Section 9, Clause 4 imposes a limit on taxation: “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.”20 With these two constitutional provisions enclosed in Article I, it seems that three – and only three – unique and separate types of federal taxes emerge: duties, excises, and direct taxes. In fact, as stated in Davis v. Boston & M. R. Co., “[i]t is well settled that taxation by Congress is limited to those forms of taxes described in section 8 of article 1 of the Constitution . . . .”21 The court in Davis further explicated that:

If [the tax imposed is not within the meaning of Article 1, Section 8 of the Federal Constitution], it is not a tax that Congress is authorized to levy. No other provisions of the Constitution than [S]ection 8 of [A]rticle 1 give any powers to Congress to levy taxes and the kind of taxes it might levy are expressly defined therein as direct taxes, duties, imposts, and excise taxes, and these can only be levied to pay the debts and provide for the common defense and general welfare of the United States.22
This limitations inherent in Section 8 were emphasized in the landmark tax case of Pollock v. Farmers' Loan & Trust Co.: “[A]lthough there have been, from time to time, intimations that there might be some tax which was not a direct tax, nor included under the words ‘duties, imports, and excises,’ such a tax, for more than 100 years of national existence, has as yet remained undiscovered . . . .”23 Of course, the fourth and final tax that was eventually “discovered” and incorporated into American tax law was the federal income tax, created by the Sixteenth Amendment: “The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”24

Chief Justice John Roberts dismissed the government’s other arguments regarding the commerce clause and the Necessary and Proper Clause, but held that Obamacare’s “shared responsibility payment” could “reasonably be characterized as a tax.”

The word “impost” has also been construed to fit the same meaning of a duty for purposes of federal taxation.26

A duty or an impost is a tax on the importation of goods. Health insurance is not a good and cannot be imported. And even if health insurance were a “good,” a duty could not be imposed on the non-purchase of health insurance, any more than it could be imposed on the failure to import automobiles or other goods.

**Excises**

The second type of tax permitted by the Constitution is an excise.27 Black’s Law Dictionary defines an excise as a “tax imposed on the manufacture, sale, or use of goods (such as a cigarette tax), or on an occupation or activity (such as a license tax or an attorney occupation fee).”28 Although an excise tax is relatively straightforward, the United States Court of Appeals for the Ninth Circuit in United States v 4,432 Mastercases of Cigarettes, More Or Less used this definition to further explain what an excise is by differentiating it from a property tax:

An excise tax . . . is one “imposed on the performance of an act . . . or the enjoyment of a privilege.” The quintessential excise tax in our country is the sales tax. An excise tax, because it is based on a particular transaction or activity, can be imposed only once per act, whereas an ad valorem property tax can be imposed annually, as is typical of property taxes.29

Because there is so much manufacture, sale, and use of goods, as well as so many occupations and activities that could fall within the scope of facing the excise tax, an exhaustive list of excises could never be compiled. Instead, broad categories illustrate the bounds of the excise tax. As stated in 4,432 Mastercases, the most common form of excise tax in America is the state general sales tax.30 The sales tax, as described by the Supreme Court in Federal Land Bank of St. Paul v. Bismarck Lumber Co., is a tax on the sale or purchase of an entity.31 Another type of excise tax is the estate tax. In United States v. Wells Fargo Bank, the Supreme Court again made the distinction between an ad valorem tax and an excise by stating, “an excise tax . . . is levied upon the use or transfer of property even though it might be measured by the property’s value . . . The estate tax is a form of excise tax.”32

The characteristic that all excises share is that each one is imposed on an activity, such as the purchase of cigarettes or gasoline, or the passing of money by gift or inheritance. An excise is “a tax imposed on the manufacture, sale, or use of goods, or on an occupation or activity.”33 Because not buying health insurance is not an “occupation or activity” and does not involve manufacturing, selling, or using a good, the lone argument in favor of treating the shared responsibility payment as an excise tax would have to be that the forbearance of purchasing health insurance is an activity. To argue
that inaction is the same as action deprives both words of any meaning. The shared responsibility payment cannot be classified as an excise.

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A duty or an impost is a tax on the importation of goods. Health insurance is not a good and cannot be imported. And even if health insurance were a “good,” a duty could not be imposed on the non-purchase of health insurance, any more than it could be imposed on the failure to import automobiles or other goods.

**Direct Taxes**

The third of the three permissible taxes under the federal Constitution is a direct tax. As stated in Article I, Section 9, “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.” Black’s Law Dictionary provides the respective definitions for both a direct tax and a capitation. A direct tax is “presumed to be borne by the person upon whom it is assessed, and not ‘passed on’ to some other person. Ad valorem and property taxes are direct taxes.” A capitation is “a fixed tax levied on each person within a jurisdiction.” From these two definitions alone, a direct tax is one that is seemingly imposed upon all taxpayers proportionately.

The meaning of the direct tax was squarely addressed in the 1796 paradigm case of *Hylton v. United States*, In that case, the defendant did not pay a tax on the ownership of his one hundred and twenty-five carriages, challenging that it was not an apportioned direct tax. In upholding the tax, the justices of the seriatim opinion provided unique insight as to what a direct tax’s limits are. Both Justice Chase and Justice Iredell held in their respective opinions that “[a]ll direct taxes must be apportioned; all duties, imposts, and excises must be uniform.” The other justices also contemplated that only two forms of direct taxes existed, as seen in a statement by Justice Chase: “[T]he direct taxes contemplated by the Constitution, are only two, to wit, a capitation, or poll tax, simply, without regard to property, profession, or any other circumstance; and a tax on [land].” With capitations and land taxes being the only two forms of direct taxes, each has developed its own respective confines.

Capitations, also known as poll taxes, as explained by Justice Chase in *Hylton*, are imposed on all taxpayers “without regard to property, profession, or any other circumstance . . . .” Furthermore, Chief Justice Roberts explained in *NFIB* that a capitation is “a tax that everyone must pay simply for existing.” Reading these two statements together, capitations are taxes that every single taxpayer must pay with the one restriction that the tax is apportioned among the states. Consider the following to demonstrate how a capitation works: If Congress chose to raise $300,000,000, it could not impose a $1 per taxpayer capitation. Rather, it would have to collect $6,000,000 from each of the fifty states. Because each state must impose the tax in apportion to its population due to the population disparity, Wyoming would collect over $10 per taxpayer, and California would collect less than 20 cents per taxpayer.

Land taxes also fall within the scope of direct taxes. The Supreme Court in *Bromley v. McCaughn* stated that “taxes levied upon . . . because of their general ownership of property may be taken to be direct [taxes].” The Court similarly stated in *Fernandez v. United States* that “Congress may tax real estate or chattels if . . . apportioned.” Finally, the United States Court of Appeals for the Fourth Circuit in *Simmons v. United States* explained the span that a land tax could have in order to still be considered a direct tax:

A direct tax is a tax on real or personal property, imposed solely by reason of its being owned by the taxpayer. A tax on the income from such property, such as a tax on rents or the interest on bonds, is also considered a direct tax, being basically a tax upon the ownership of property.

With such authority, it seems clear that direct taxes are those imposed on every taxpayer and can be imposed for owning property or for just simply existing. The key test for determining whether a direct tax is constitutional is whether it is equally apportioned among the states.

The shared responsibility payment is also not a direct tax. The plaintiffs’ argument in *NFIB* was that “if the individual mandate imposes a tax, it is a direct tax, and it is unconstitutional because Congress made no effort to apportion it among the states.” After discussing the background of direct taxes, Chief Justice Roberts concluded that

A tax on going without health insurance does not fall within any recognized category of direct tax. It is not a capitation. Capitations are taxes paid by every person, ‘without regard to property, profession, or any other circumstance.’ The whole point of the shared responsibility payment is that it is triggered by specific circumstances—earning a certain amount of income but not obtaining health insurance. The payment is also plainly not a tax on the ownership of land or personal property. The shared responsibility payment is thus not a direct tax that must be apportioned among the several States.

The Chief Justice’s reasoning makes perfect sense. The shared responsibility payment is clearly not a tax on property because the taxpayer has actually refused to buy something.
Nor can it be a direct tax because health insurance – let alone the lack of health insurance – cannot be considered real estate. Lastly, because not every taxpayer is subject to the shared responsibility payment, the shared responsibility payment cannot be considered a capitation. A capitation is “a tax that everyone must pay simply for existing.”

The Income Tax

The fourth and final type of tax permitted by the Constitution is the income tax, which was brought into the Constitution by the Sixteenth Amendment. Before that amendment was adopted the 1895 landmark case of Pollock v. Farmers’ Loan & Trust Co. confronted the question of whether the federal government could disproportionately tax incomes.

In Pollock, the Court addressed the question: if “no apportioned tax can be imposed upon real estate, [can] Congress without apportionment nevertheless impose taxes upon such real estate under the guise of an annual tax upon its rents or income?” The Court eventually held that such a scheme was “in violation of the constitution, and . . . invalid.” The Court reasoned that “under the state system of taxation, all taxes on real estate personal property or the rents or incomes thereof [are] direct taxes, [and] that the rules of apportionment and of uniformity were adopted in view of that distinction . . . .” Because the tax that Congress imposed was not apportioned, it could not be considered a direct tax, and therefore not within the scope of Congress’s taxing power.

The Sixteenth Amendment, ratified on February 3, 1913, reverses Pollock and allows Congress to tax “incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.” While the amendment’s text is straightforward, the true inquiry is deciphering what Congress can classify as “income” to be taxed. One answer comes from the decision in Commissioner v. Glennshaw Glass Company.

In Glennshaw Glass, the issue was whether an award of punitive damages was taxable income. The Supreme Court held that the awards were income, and created a three-element test to determine the existence of income: Income exists when the taxpayer has (1) an “undeniable accession to wealth,” (2) “clearly realized,” (3) “over which the taxpayer [has] complete dominion.”

Another source for a definition of “income” is Section 61(a) of the Internal Revenue Code. This Section states that “gross income means all income from whatever source derived.” Section 61(a) further provides that gross income includes, but is not limited to:

- Compensation for services, including fees, commission, fringe benefits, and similar items; gross income derived from business; gains derived from dealings in property; interest; rents; royalties; dividends; alimony and separate maintenance payments; annuities; income from life insurance and endowment contracts; pensions; income from discharge of indebtedness; distributive share of partnership gross income; income in respect of a decedent; and income from an interest in an estate or trust.

Because not buying health insurance is not an “occupation or activity” and does not involve manufacturing, selling, or using a good, the lone argument in favor of treating the shared responsibility payment as an excise tax would have to be that the forbearance of purchasing health insurance is an activity.

What’s Next?

While Chief Justice Roberts won the battle for Obamacare, his holding on the tax power has the potential to start a new legal war. The simplest and most obvious way to test the substance of the argument above is to sue over it. While the phrase “triggered by specific circumstances” has neither any inherent substantive content nor any constitutional support, Chief Justice Roberts’ inadvertent creation raises the argument that the holding in NFIB surpasses the scope of judicial power and is unconstitutional. Even more controversial is how the concept of a tax “triggered by specific circumstances” seems to clash with a statement in the Chief Justice’s opinion that the Commerce Clause confers a broader power on Congress than the taxing power.

[Although the breadth of Congress’s power to tax is greater than its power to regulate commerce, the taxing power does not give Congress the same degree of control over individual behavior. Once we recognize that Congress may regulate a particular decision under the Commerce Clause, the Federal Government can bring its full weight to bear. Congress may simply command individuals to do as it directs.]

Such a statement, while made in the context of the Commerce Clause, can be directly related to Congress’ “new” taxing power.

In NFIB, the Supreme Court seems to have reversed the question: instead of asking what Congress can tax, the ques-
tion becomes what can’t Congress tax? If the answer is as simple as anything “triggered by specific circumstances,” then perhaps Chief Justice Roberts misjudged in saying that “the taxing power does not give Congress the same degree of control over individual behavior” as its power to regulate commerce. Perhaps the best evidence of the Chief Justice’s misstatement is his own words in the beginning of the prevailing opinion: “[Congress’ taxing power] gives the Federal Government considerable influence even in areas where it cannot directly regulate. The Federal Government may enact a tax on an activity that it cannot authorize, forbid, or otherwise control.” Now that Congress can tax an inactivity that it cannot compel, the Commerce Clause may take second place as a basis of broad federal power over individuals.

There may yet be a way to prevent Congress from using the decision in NFIB as a basis forever more detailed management of the lives of its citizens. If a single taxpayer refuses to purchase health insurance and squarely and explicitly challenges the constitutional basis for the shared responsibility payment as a tax, the judiciary will have to decide whether this tax, “triggered by specific circumstances,” falls within the scope of a duty, excise, direct tax, or income tax. Such a ruling could start the issue on its way through the courts and back up to the Supreme Court of the United States. Raising this issue will require overcoming four potential obstacles: standing, res judicata, collateral estoppel, and stare decisis.

**Standing To Sue**

The concept of standing “focuses on the plaintiff and asks whether the plaintiff is entitled to have the Court’s power exercised on its behalf . . . [and] asks whether the plaintiff may assert the claim.” “This turns on . . . concerns such as concrete adversariness, injury, [and] a personal stake in the outcome . . .” The Supreme Court has provided the legal test to determine whether a plaintiff does have standing: “The party seeking review [must] be himself among the injured, for it is this requirement that gives a litigant a direct stake in the controversy and prevents the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders.”

To establish standing, a plaintiff challenging whether the shared responsibility payment is constitutional would have to go without health insurance and face the tax. At that point, the plaintiff would have a direct stake in the controversy and fulfill the standing requirement.

**Res Judicata**

The next hurdle is the concept of res judicata – also known as claim preclusion. Res judicata “treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same ‘claim’ or ‘cause of action.’ . . . When the plaintiff obtains a judgment in his favor . . . he may seek no further relief on that claim in a separate action.” “Under these rules of claim preclusion, the effect of a judgment extends to the litigation of all issues relevant to the same claim between the same parties, whether or not raised at trial.”

“The aim of claim preclusion is thus to avoid multiple suits on identical entitlements or obligations between the same parties, accompanied, as they would be, by the redetermination of identical issues . . .”

Res judicata prohibits the NFIB plaintiffs from relitigating their prior claims. However, the issue raised in this article was not presented and was not within the scope or potential scope of the original challenge. Therefore, no res judicata bar exists.

**Collateral Estoppel**

The third obstacle for the plaintiff challenging the shared responsibility payment’s constitutionality is collateral estoppel – also known as issue preclusion. Collateral estoppel “bars the relitigation of issues actually adjudicated, and essential to the judgment, in a prior litigation between the same parties.” As the Supreme Court stated in [Ashe v. Swenson](https://www.supremecourt.gov), “when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.”

For purposes of a plaintiff challenging the shared responsibility payment, collateral estoppel will not bar the lawsuit because the issue the plaintiff will present will have never been litigated. Chief Justice Roberts concluded that the shared responsibility payment was a tax, but he never addressed its constitutionality nor specified which of the four permitted federal taxes it is. In fact, the plaintiffs in NFIB only argued that if it were a tax, it would be an unconstitutional form of a direct tax – which Chief Justice Roberts addressed and eventually dismissed. Furthermore, the fact that the tax has yet to be imposed on a single taxpayer demonstrates the improbability that this issue could have been litigated. Because the constitutionality of this tax has never been challenged, collateral estoppel does not bar this lawsuit from proceeding.

**Stare Decisis**

The final issue a plaintiff challenging the shared responsibility payment’s constitutionality will have is stare decisis. Stare decisis is a “doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.” While the Court heard and decided arguments regarding the shared responsibility payment, it did not address the question that this article presents – thus rendering stare decisis a non-issue. Even if an argument were made that precedent would control, however, the Supreme Court has explicitly stated that deciding a constitutional issue correctly is more important than its adherence to stare decisis.

The biggest barrier in the way of raising these issues will likely be the Supreme Court itself. It is hard to imagine why
the Court would once again want to entertain the media circus it did during March and June of 2012.

Conclusion

The shared responsibility payment is not a duty, an excuse, a direct tax, or an income tax. Instead, the Supreme Court has seemingly created a new category of tax – a tax “triggered by specific circumstances.” The vagueness of this phrase – as well as the fact that it has no constitutional basis – is a matter of serious concern.

The result in NFIB is, or ought to be, a matter of concern to the public in general and the legal profession in particular. The premise of the opinion – that a citizen's inaction can be the subject of taxation – is disturbingly broad, and the opinion does not suggest any limits to it. There are many things that individuals fail to do that governments think they should do, and each such failure is a “specific circumstance.” Examples closely related to health-care are easy to find. Examples are health maintenance through nutrition and exercise. The failure to exercise regularly, and to do it the right (i.e., approved) way, is an inaction that is almost universally seen as harmful to health. And each failure is a “specific circumstance.”

But NFIB contains no language that would limit the “specific” – i.e., taxable – “circumstance” to health care. NFIB, therefore, is far more than a decision to resolve a particular dispute. It is a charter authorizing both a bureaucratic, legislative leviathan called Obamacare and an ever more intrusive government bent on micro-managing the lives of its citizens.

About the Author

Ryan D. Brown, an attorney with an expertise in finance and retirement planning, is a partner at CR Myers & Associates in Southfield, Michigan, and also a partner in The Independent Excellence Group, a very prestigious think-tank in the financial services industry. His e-mail is ryandennisbrown@gmail.com. He would like to dedicate this work to his parents, Dennis & Denise Brown, and to Mr. Randy Kowalski. This article is a shortened version of Mr. Brown’s Law Review Note in the Mississippi College Law Review (see 33 Miss. C. L. Rev. 291).

Endnotes

9 Id. at 2585.
10 Id. at 2593.
11 Id. at 2566.
13 The term “prevailing opinion” is used instead of “majority opinion” throughout this Note because while some parts of the opinion are on behalf of a majority, others are plurality, and some are where the Chief Justice is writing solely on his behalf.
15 See generally U.S. CONST.
18 See generally U.S. CONST.
19 U.S. CONST. art. I, § 8, cl. 1.
20 U.S. CONST. art. I, § 9, cl. 4.
21 Davis v. Bos. & M. R. Co., 89 F.2d 368, 373 (1st Cir. 1937).
22 Id.
24 U.S. CONST. amend. XVI.
28 BLACK'S LAW DICTIONARY 646 (9th ed. 2009).
29 United States v. 4,432 Mastercases of Cigarettes, More Or Less, 448 F.3d 1168, 1185 (9th Cir. 2006) (internal citations omitted) (citing BLACK'S LAW DICTIONARY 646 (9th ed. 2009)).

30 Id.


33 BLACK'S LAW DICTIONARY 646 (9th ed. 2009).

34 See U.S. Const. art. I, § 9, cl. 4.

35 Id.

36 BLACK'S LAW DICTIONARY 1595 (9th ed. 2009).

37 Id.

38 Hylton v. United States, 3 U.S. 171 (1796).

39 Id. at 181 (opinion of Iredell, J.).

40 Id. at 175 (opinion of Chase, J.).

41 Id.


45 Simmons v. United States, 308 F.2d 160, 166 (4th Cir. 1962).


47 Id. at 2599.

48 Id.


50 Id.

51 Id. at 583.

52 Id. at 573-74.

53 U.S. Const. amend. XVI.


55 Id. at 431.


57 Id.

58 While I do not necessarily adopt it, I would like to draw attention to Dr. Charles Krauthammer's analysis of Chief Justice Roberts’ possible mindset in making his decision to ultimately save Obamacare. See Charles Krauthammer, Why Roberts Did It, Wash. Post, Jun. 28, 2012, available at http://www.washingtonpost.com/opinions/charles-krauthammer-why-roberts-did-it/2012/06/28/gIQA4X0g9V_story.html. Specifically, Dr. Krauthammer opines that Chief Justice Roberts’ tax holding in NFIB is “one of the great constitutional finesses of all time. [Chief Justice Roberts] managed to uphold the central conservative argument against Obamacare, while at the same time finding a narrow definitional dodge to uphold the law – and thus prevented the court from being seen as having overturned, presumably on political grounds, the signature legislation of the administration.


61 Id. at 2600 (emphasis added).

62 Id. at 2579 (emphasis added).

63 Id. at 2599.

64 DENNIS ALAN OLSON, CASES ON CONSTITUTIONAL LAW 61 (2010).

65 Id.


68 Id.

69 Id.

70 Id.


73 Id. at 2599.

74 BLACK'S LAW DICTIONARY 1536 (9th ed. 2009).

75 Edelman v. Jordan, 415 U.S. 651, 671 (1974) (“Since we deal with a constitutional question, we are less constrained by the principle of stare decisis than we are in other areas of the law”); Arizona v. Gant, 556 U.S. 332, 348 (2009) (“The doctrine of stare decisis is of course ‘essential to the respect accorded to the judgments of the Court and to the stability of the law,’ but it does not compel us to follow a past decision when its rationale no longer withstands ‘careful analysis.’”).

“Reinsurers” Need to Prove It

Court: Wayne County, Hon. Daniel P. Ryan
Case: Yummy Galaxy Chocolate & Gifts, Inc. v. The Hartford Steam Boiler Inspection And Insurance Company et al, No. 15-001024-CK
Date: June 1, 2015
Issue: Is an alleged reinsurer entitled to summary disposition on a breach of insurance contract claim before discovery?

Ruling: Defendant asserts that it was merely a reinsurer, and there is no right of action between an insured and a reinsurer. “When an insurer decides to transfer some of the risk it has undertaken in a policy, the insurer cedes a portion of the risk to another insurance company, which is the reinsurer.” Michigan Tp Participating Plan v Fed Ins Co, 233 Mich App 422, 427; 592 NW2d 760 (1999). The court finds that Defendant is not entitled to summary disposition under MCR 2.116(C)(10). In deciding this motion, the court must consider all the documentary evidence in the light most favorable to Plaintiff. In this case, Defendant has failed to submit any documentary evidence supporting its argument that it was merely a reinsurer and did not have a direct insurance contract with Plaintiff. On the other hand, Plaintiff has submitted evidence of two communications it received from Defendant. In one of the letters from Jared McClelland on behalf of Defendant, McClelland references a claim and policy number, an investigation Defendant made of the damaged premises, a conclusion that a video surveillance system and two heating units were a covered loss, and a note that “the policy is susceptible to a $500 deductible.” In the second letter, McClelland once again references a claim and policy number and indicates that if he does not hear from Plaintiff within 30 days, the claim will be closed due to lack of activity.

Note: If an insurance company truly believes that it has no obligation to an alleged insured, it would be wise to communicate that clearly.

Arbitration is a Substitute for Litigation, not a Warmup for It

Court: Wayne County, Hon. Daniel P. Ryan
Case: Peter Karmanos, Jr. v Compuware Corporation, Case No. 13-014776-CK
Date: May 11, 2015
Issue: Whether an arbitration award of $16,500,000 may be vacated or modified where the parties agreed that the arbitrator would issue the arbitration award without findings of fact.

Ruling: In reviewing this matter, the court notes that in Michigan it is well-settled law that arbitration is intended as a substitute, not a warmup for litigation. Put another way, a court is not permitted to substitute its judgment for that of the arbitrator. Gordon Sel-Way, Inc. v. Spence Bros., Inc. 438 Mich 488, 497; 475 NW2d 704 (1991). The party seeking to challenge the arbitration award bears the burden of proving the existence of a substantial error. DAIIE v Gavin, 416 Mich 407, 434-435; 331 NW2d 418 (1982); see also Gordon, 438 Mich at 497. For only when a substantial error is shown, may a court invade the province of the arbitrator. Id.

Here, Compuware repeatedly asserts that there is only one explanation of the arbitrator’s award: the conversion claim provides for treble damages and attorney fees. Facially, Compuware’s claim appears reasonable. However, after reviewing the extensive record and considering the arguments of counsel, the Court cannot declare that this is the only explanation of the arbitrator’s award. Indeed, the Court is hampered in its review by the very stipulation that Compuware now implicitly challenges. For if such findings were permitted, Compuware would not find itself in its present predicament.

Note: If parties wish to build some basis for review of an arbitrator’s decision into the proceedings, they should agree clearly on such a basis before commencing arbitration.

Kassem Dakhlallah is a senior partner with At Law Group PLLC in Dearborn. Kassem is a Wayne County Circuit Court Business Court case evaluator and mediator. Kassem is also a board member of the Detroit Metropolitan Bar Association Barristers. Kassem is a Super Lawyer – Rising Star for 2014 and 2015 in the Business Litigation category. Kassem’s practice focuses on business and commercial litigation, including commercial insurance litigation. His email address is kd@atlawgroup.com.
Selected Insurance Decisions

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

6th Circuit Decisions

No Common Law or Third Party Beneficiary Duties Owed by Brokers to Claimants

*Johnson v Doodson Insurance Brokerage of Texas, LLC*
793 F3d 674 (6th Cir 2015)

Applying Michigan law, the 6th Circuit held that insurance brokers owe no common law duty to third-party injured claimants to ensure that the tortfeasor has full liability coverage; nor do injured claimants qualify as third party beneficiaries of the broker agreement absent language making them so. In this case, the policy obtained for an amusement company excluded coverage for injuries caused by inflatable structures. Plaintiff's husband was fatally injured when the insured's inflatable slide collapsed on him. Plaintiff has no actionable claim against the broker for the negligent procurement of insurance or for breach of the broker agreement.

Michigan Supreme Court Decisions

Spouse Ownership of Uninsured Vehicles to be Considered

*Harrell v Titan Indemnity Co*
Supreme Court No. 151134
September 23, 2015

On the insurer's application for leave to appeal, the Supreme has scheduled arguments to consider, in part, "whether the plaintiff, who was driving an uninsured vehicle titled in the name of her husband, is an 'owner' under MCL 500.3101(2)(k)(i).

Michigan Court Of Appeals – Published Decisions

Availability Of Penalty Interest For Uim Claim

*Nickola v MIC General Ins Co*
(Docket No. 322565)

MIC General Insurance denied UIM coverage due to the lack of threshold injuries sustained by its two insureds. The parties arbitrated their dispute per the terms of the UIM form (arbitration was required even if only one party requested it) resulting in an award for less than the full UIM limits. Claimant then sought 12% penalty interest under MCL 500.2006, as though the claim was a first-party claim. This opinion holds that claims for UIM coverage are essentially third-party tort claims and therefore, the applicable penalty interest rule is the one applicable to third-party claims, which means there is no penalty interest if the claim was reasonably in dispute.

Named Driver Exclusion Applies to Property Damage Coverage

*Frankenmuth Insurance Co v Poll*
___ Mich App ___
(Docket No. 320674)

Named driver exclusions are allowed for all coverage forms required by the No-Fault Act. MCL 500.3009(2). When a covered vehicle is operated by a driver specifically excluded by a named driver exclusion in the policy, coverage becomes void for all insureds. In this case, the named insured mother allowed her son, a named excluded driver, to operate the insured vehicle. When the son crashed into the named insured's home causing extensive damage, repairs were made by the homeowner's insurer who then sought to recover against the no-fault insurer. Because the auto policy was void, there could be no recovery under that policy.

Michigan Court Of Appeals - Unpublished

Failure to Notify Police Results in Loss of UM Coverage

*Grimmett v Farmers Ins Exchange*
Docket No. 321492
Released October 6, 2015

Insured is not entitled to UM coverage because he failed to notify the police of his accident with a hit and run vehicle within 24 hours after it occurred, which was one of the conditions for UM coverage, plainly stated in the policy.
Lack of Causation in Suit Against Agency  
*Williams v Jerviss-Fehlke Ins Co*  
Docket No. 323434  
Released September 29, 2015

Causation is an essential element of every negligence claim, including an insured’s claim against an insurance agency for negligent advice or procurement. This insurer presented unrebutted expert testimony establishing that the type of policy sought by the insured for her rental property was not commercially available. Plaintiff thus could not prove that the agent’s actions caused her uninsured loss.

Notice of Loss Required  
*Hacker v Farm Bureau Mut Ins Co of Mich*  
Docket No. 322059  
Released September 29, 2015

The insurer properly denied coverage for this first-party property loss (theft) under a farm policy when the insured repeatedly submitted general estimates of the loss without supporting details. The insurer repeatedly asked for more specificity and documentation and finally denied the claim.

Policy Limits Available for Property Loss  
*Craft Recreation Co, LLC v Home-Owners Ins Co*  
Docket No. 321435  
Released September 25, 2015

A fire loss policy issued under MCL 500.2827 allows the insured to recover the full policy limits “if the amount of loss or damage to the insured property . . . exceeds the amount of liability covered by the contracts.” Actual repair or replacement is not required. A fire loss policy issued under MCL 500.2826 requires actual repair or replacement “with new materials of like size, kind, and quality” before the insured is entitled to more than the property’s actual value at the time of loss. The court determined that this policy was issued under MCL 500.2827 and thus allowed the recovery of full policy limits without repair because the actual damages exceeded those limits.

When a covered vehicle is operated by a driver specifically excluded by a named driver exclusion in the policy, coverage becomes void for all insureds

No-Fault Property Damage Claim Filed too Late  
*DTE Electric Co v Theut Products, Inc*  
Docket No. 322701  
Released September 29, 2015

DTE cannot recover on its claim for damage to overhead electric lines caused by defendant’s cement trucks because DTE failed to name and serve the responsible no-fault insurer within the one-year statute of limitations. A complaint naming only “John Doe Insurance Company” did not toll the statute as to the actual insurer. Nor could DTE proceed against the owner of the cement trucks because tort liability...
for property damage arising out of the ownership, operation or maintenance of a motor vehicle has been abolished by the No-Fault Act.

Three-Year Statute of Limitations for Negligence Claims Against Insurance Agents

*American Erectors, Inc v McNish Group, Inc*
Docket No. 322799
September 15, 2015

Claims against an insurance agent for failure to procure suitable coverage and for failure to advise of the actual scope of coverage are subject to the three-year statute of limitations for ordinary negligence claims rather than the two-year statute for claims of professional negligence. The insured in this case first learned of the denial of coverage from the insurer more than three years prior to filing suit against the agent. The claims were time-barred despite the insured’s continued discussions with the agent regarding plans to resolve the coverage issue. Plaintiff failed to sufficiently plead that these continued discussions amounted to fraudulent concealment.

Rescission Due to Misrepresentation in the Application

*Auto-Owners Ins Co v Motan*
Docket No. 321059
Released September 8, 2015

The court upheld the lower court’s rescission of this commercial property policy due to misrepresentations in the insurance application, but remanded the case for an order directing the insurer to refund policy premiums, holding that there is no difference between an insurer’s request to void and to rescind policies. Additionally, the insurer’s initial decision to merely cancel the policy when it learned of one of the insured’s misrepresentations did not prevent the insurer from subsequently moving to rescind after the property was destroyed by fire because the insurer learned of additional misrepresentations between the notice of cancellation and the action to rescind.

No UIM Coverage Where Tortfeasor’s Policy Limits Exceed UIM Limit

*Farm Bureau General Ins Co of Michigan v Hare*
Docket No. 320710
August 20, 2015

Because the tortfeasor’s liability policy provided up to $250,000 in liability coverage, there was no coverage under the insured’s UIM policy with limits of $100,000. The UIM policy expressly reduced coverage by the amounts paid or payable by the tortfeasor’s policy for the same bodily injury. The fact that the tortfeasor’s policy limits were paid to others injured in the same accident is irrelevant because prior to that settlement, the limits were payable to this insured.

Resolving Ambiguities in an Insurance Policy

*Secura Ins v Hughes*
Docket No. 320943
August 13, 2015

Supreme Court Application pending

This opinion delves into the methods of determining coverage in the face of an ambiguous insurance contract. The insured landscaping company routinely removed liability coverage from vehicles placed in storage during the off-season; coverage for that period would be limited to comprehensive only. For the policy year in question, however, the insurer issued a “change in coverage” endorsement wrongly reporting that it was the comprehensive coverage that was removed, not the liability coverage. Other parts of the policy made clear that the correct coverage was the comprehensive coverage and the insured paid no premiums for liability coverage. But when a vehicle with only comprehensive coverage was involved in an accident, the insured argued for liability coverage based on his reliance on the endorsement.

The Court of Appeals found the policy ambiguous and then went on to consider whether there was a question of fact as to the parties’ intent. After reviewing the evidence, including the insured’s pattern of practice over approximately ten years and the communications from the insured regarding reductions in coverage during the off-season, the court found no question that the intent of the parties was to remove liability coverage during the off-season. Because the liability coverage was not reinstated, there was no coverage for this accident.

The claims were time-barred despite the insured’s continued discussions with the agent regarding plans to resolve the coverage issue. Plaintiff failed to sufficiently plead that these continued discussions amounted to fraudulent concealment.

Agent Not Responsible For Errors Of Insurer

*Land Escape Outdoor Maintenance, LLC v Insurance Advisors*
Docket No. 321859
August 13, 2015, reconsideration denied 10/5/15

In this companion case to *Secura v Hughes* (above), the insured landscaping company sued its insurance agent over the erroneous “change in coverage” endorsement and the agent’s failure to advise of the error. The Court of Appeals affirmed the trial court’s order of summary disposition on those claims because there was no dispute that the erroneous endorsement was issued by the insurer. However, the court found that the insured’s motion to amend the complaint should have been
Welcome back to our survey of recent no-fault opinions from both the Michigan Supreme Court and the Michigan Court of Appeals. After celebrating the 42nd anniversary of the enactment of the Michigan No-Fault Insurance Law (which took effect on October 1, 1973), we still find the appellate courts of this state grappling with new and interesting arguments being proffered by both sides of the aisle. No-fault continues to be one of the most heavily litigated areas of Michigan law and, to my knowledge, is the only no-fault insurance system anywhere in the United States that is taught as a specific course at numerous law schools in the State of Michigan!

This article will discuss recent Supreme Court activity, and some published decisions from the Court of Appeals. Our next article will discuss some of the more interesting unpublished opinions from the Court of Appeals.

Supreme Court Action

Oral Argument on the Application Use of Vehicle for More than 30 Days

After a fairly quiet 2014-2015 year, the Michigan Supreme Court recently granted “mini oral argument” on a no-fault insurer’s Application for Leave to Appeal in a case addressing the issue of statutory or constructive “ownership” under the No-Fault Insurance Act. In Harrell v Titan Ins Co, Supreme Court docket no. 151134, the Supreme Court granted “mini oral argument” on the issue of whether or not Plaintiff Tanika Harrell was an “owner” of the uninsured motor vehicle, titled in the name of her husband, at the time of her involvement in a motor vehicle accident, which occurred on June 17, 2011.

In an unpublished opinion, Harrell v Fremont Ins Co, Court of Appeals docket no. 320607, July 2, 2015

In their application for homeowners insurance, the insureds denied having a criminal history for “any degree of fraud.” In fact, they previously had been convicted of obtaining money under false pretenses. The insurer was allowed to rescind the policy after the insureds’ fire loss claim on evidence that it never would have issued a policy to someone with this criminal record.

Construction Defects and CGL Occurrence Coverage

Auto-Owners Ins Co v Kelley
Docket No. 319641
July 21, 2015

In this construction defect case, the court found occurrence-based liability coverage for damage to the interior of a log cabin where the insured’s work was limited to the outer shell. The homeowners alleged that defects in the exterior structure allowed the intrusion of water and other elements into the home and resulted in damage to interior work performed by other contractors. Relying on Radenbaugh v Farm Bureau General Ins Co of Mich, 240 Mich App 134 (2000) for the proposition that “occurrence” encompasses a construction contractor’s damage to “other property,” the court found a duty to defend all claims and a duty to indemnify the insured’s liability in connection with property damage other than the costs of repairing or correcting the insured’s own work. The court rejected policy exclusions for expected or intended damage, for damage to property on which the insured is working, and for impaired property.

Rescission Allowed for Misrepresentations in the Application

Hanson v Fremont Ins Co
Docket No. 320607
July 2, 2015

In their application for homeowners insurance, the insureds denied having a criminal history for “any degree of fraud.” In fact, they previously had been convicted of obtaining money under false pretenses. The insurer was allowed to rescind the policy after the insureds’ fire loss claim on evidence that it never would have issued a policy to someone with this criminal record.
that there is no insurance available under MCL 500.3114(2), as the specific vehicle occupied by the injured Claimants was not insured. The Court also observed that there was no insurance available to either Claimant through their households under MCL 500.3114(1). Therefore, the next step is to analyze the provisions of MCL 500.3114(4). The Court of Appeals determined that American County occupied the highest order of priority at this level, because it undoubtedly insured the “owner” of the motor vehicles occupied by the injured Claimants, even though it did not insure the specific vehicle occupied.

In an interesting concurring Opinion, Judge Gleicher suggested that the Michigan Supreme Court may want to look at this issue, as both parties had legitimate arguments about how the priority scheme should be applied. At this point, it is unknown if American Country will follow up on Judge Gleicher’s suggestion and take this matter up to the Michigan Supreme Court.

Given that the Michigan Supreme Court has granted “mini oral argument” on the insurer’s Application for Leave to Appeal, it may be that the Supreme Court is willing to re-examine the Court of Appeals’ formulations regarding the extent of use necessary in order for one to “have the use” of a vehicle for more than thirty days.

Court of Appeals Rules that Submission of Medical Records and Billing Records are Insufficient to Constitute “Notice of a Claim for No-Fault Benefits”; Therefore, Plaintiff’s Claim was Barred by MCL 500.3145(1).

In Perkovic v Zurich American Ins Co, _ Mich App _, _ NW2d _ (docket no. 321531, rel’d 9/10/2015), the Michigan Court of Appeals was asked to determine whether or not the insurer’s receipt of medical records and billings records constituted sufficient “notice” under MCL 500.3145(1). This statute provides, in pertinent part:

“An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. . . The notice shall give the name and address of the claimant and indicate in
ordinary language the name of the person injured and the time, place and nature of his injury.”

In this case, the injured Plaintiff was involved in a motor vehicle accident on February 28, 2009, in the State of Nebraska. He subsequently received emergency room treatment at the Nebraska Medical Center. Two months post-accident, the Nebraska Medical Center mailed a copy of Plaintiff’s medical records and billings records to Defendant Zurich American Insurance Company, the fleet insurer that the Plaintiff was hauling freight for at the time of the accident. The records clearly listed the insured’s name and provided his home address. It also provided the name of the claimant (the hospital itself) and the medical records described the nature of Plaintiff’s injuries. Three weeks after receiving these records, the insurer sent a notice to the Nebraska Medical Center denying the claim on the basis that “no injury report on file for this person.” Although Plaintiff filed suit against his own personal no-fault insurer, he did not add Zurich American Insurance Company as a party Defendant until more than one year post-accident.

After the Court of Appeals determined that Zurich occupied the highest order of priority in an earlier unpublished opinion (Perkovic v Hudson Ins Co, docket no. 302868, unpublished decision rel’d 12/20/2012), the matter was remanded back to the Circuit Court to determine if Zurich received proper notice of the claim within the one year period specified in MCL 500.3145(1). The Circuit Court found that it did not, and Plaintiff appealed.

On appeal, the Court of Appeals agreed with the Circuit Court that at no time did the insurer have proper written notice that would have alerted Zurich to the pendency of a no-fault claim, which would have triggered its obligation to investigate the loss and appropriate funds for settlement. Although the Court of Appeals acknowledged that the technical requirements of the notice provision had been complied with (because the medical records did contain the name and address of the Claimant, the name of the person injured and the time, place and nature of his injury), the Court of Appeals went on to note that the submission of the medical bills and medical records, standing alone, “did not fulfill the purposes of the statute.” Therefore, the Court of Appeals ruled that summary disposition was properly granted in favor of the no-fault insurer.

Readers of this article are cautioned against an overly broad application of this decision. It is apparent that the Nebraska Medical Center was unfamiliar with the operation of the Michigan No-Fault Insurance Act. Michigan medical providers, who are represented by able attorneys throughout the State of Michigan, are well acquainted with how the Act operates and will no doubt alter their procedures to indicate that the purposes of the claim submission is to invoke a potential claim for Michigan no-fault insurance benefits.

Courts of Appeals Rules that Plaintiff Is Entitled to No-Fault Benefits After Gun Safe, Either Being Carried or Pulled by a Motor Vehicle, Fell On Plaintiff’s Leg

In Wadega v Farm Bureau, Mich App (docket no. 321721, rel’d 9/10/15), Plaintiff and his wife were in the process of moving a gun safe that weighed over 1500 lbs. There were two different versions of events presented to the court. One version had the safe being attached to the truck by way of a rope and being dragged along the ground. Apparently, while the truck was dragging the safe out of the garage onto the driveway, the safe fell a section of uneven concrete, causing it to flip over and land on Plaintiff’s leg. The second version had the safe already partially loaded onto the bed of the truck and that when the truck hit the uneven portion of the driveway, the safe fell out of the truck and onto Plaintiff’s leg. Under either scenario, the trial court granted summary disposition in favor of Plaintiff, ruling that his injuries still arose out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle.

On appeal, the Court of Appeals affirmed the decision of the Circuit Court, in a published opinion. Relying on the Michigan Supreme Court’s decision in McKenzie v ACLA, 458 Mich 214, 580 NW2d 424 (1998), the Court of Appeals noted that the vehicle was used in a manner consistent with its “transportational function” because “it is normal and foreseeable to use a truck, attached with a trailer hitch, to move heavy objects.” In this regard, the Court of Appeals noted that the fact pattern in this case was very similar to that in Smith v Community Service Ins Co, 114 Mich App 431, 319 NW2d 358 (1982), in which the Court of Appeals held that Plaintiff was entitled to benefits after he was injured while riding in an inner tube, which was being towed by a motor vehicle insured by the Defendant insurer in that case. The key takeaway from this case is that if a vehicle is moving, no matter how short of a distance, it is likely to be considered as being used in a manner consistent with its “transportational function.”

Court of Appeals Rules That Settlement of a Claim for No-Fault Benefits Does Not Preclude a Later Suit for Uninsured Motorist Benefits

In Adam v Bell, Mich App (docket no. 319778, rel’d 8/11/2015), Plaintiff was injured in a motor vehicle accident on July 3, 2011. Plaintiff ultimately filed suit for no-fault insurance benefits against her insurer, State Farm, in March of 2012, which was settled for all benefits incurred through October 15, 2012. The lawsuit was subsequently dismissed by way of a Stipulated Order for Dismissal.

Plaintiff subsequently filed a third party negligence action against the tortfeasor, as well as a claim for uninsured motorist benefits against State Farm. State Farm claimed that Plaintiff’s UM claim was barred by the Doctrine of Res Judicata. The trial court granted summary disposition in favor of Defendant
insurer, on the basis that Plaintiff’s UM claim “clearly could have been filed in the prior matter and was not, therefore, the claim is barred by res judicata.”

On appeal, the Court of Appeals reversed in a published opinion. The Court of Appeals noted that, given the “very divergent statutory treatment of these two very different types of no-fault claims,” a claim for first party no-fault benefits, which is ultimately settled, has no effect on a claim for uninsured motorist benefits.

Readers of this column will note that, in the past, there have been conflicting decisions from the Court of Appeals on this issue. It appears that the Michigan Court of Appeals has now resolved this conflict by way of this published opinion, which is now binding on subsequent panels of the Court of Appeals and on all lower courts.

If the claimant’s reduced income still exceeds the statutory maximum, the injured claimant can recover no wage loss benefits.

No-Fault Insurer, Which Had Issued Named Driver Exclusion, Not Responsible for Property Protection Insurance Benefits that Occurred when Named Excluded Driver was Operating Designated Vehicle

In Frankenmuth Ins Co v Poll, __ Mich App ___, __ NW2d __ (Court of Appeals docket no. 320674, rel’d 5/19/2015), one Leonard Poll was operating a motor vehicle owned by his mother, Ruth Heubel, and insured with Citizens. Mr. Poll had been designated as a named excluded driver on the policy. Nonetheless, while using the insured vehicle, he lost control of the vehicle and struck a home that was insured by Frankenmuth. After paying to repair the home, Frankenmuth sued Citizens to recover the monies expended to repair the property, under a Property Protection Insurance (PPI) claim. Citizens relied on its Named Excluded Driver exclusion in defense against the claim for reimbursement. In doing so, it relied on the policy language, which voided not only liability coverage (which is the only coverage specifically referenced in MCL 500.3009(2)), but all coverages, including Property Protection Insurance coverage. The Circuit Court granted Citizens’ Motion for Summary Disposition.

On appeal, the Court of Appeals reversed the decision of the Circuit Court and, applying the plain language of MCL 500.3107(1)(b), determined that the legislature specifically limited the amount of work loss benefits that would be payable which, in this case, was $4,878.00 per month. From the statutory maximum, the insurer would need to subtract the wage loss benefits that the injured Claimant had received during the same thirty-day period. If the claimant’s reduced income still exceeds the statutory maximum, the injured claimant can recover no wage loss benefits. The Court of Appeals observed that the insured high earner Plaintiff was not without a remedy – he could still file suit against the tort feasor to recover excess work loss benefits under MCL 500.3135(3)(c).

On appeal, the Court of Appeals reversed the decision of the Circuit Court and, applying the plain language of MCL 500.3107(1)(b), determined that the legislature specifically limited the amount of work loss benefits that would be payable which, in this case, was $4,878.00 per month. From the statutory maximum, the insurer would need to subtract the wage loss benefits that the injured Claimant had received during the same thirty-day period. If the claimant’s reduced income still exceeds the statutory maximum, the injured claimant can recover no wage loss benefits. The Court of Appeals observed that the insured high earner Plaintiff was not without a remedy – he could still file suit against the tort feasor to recover excess work loss benefits under MCL 500.3135(3)(c).

The author is troubled by the Court’s decision in this matter. First, the Court may have misread the actual holding in Bronson, supra. In that case, the Court of Appeals noted that there were three types of coverages that were mandated under MCL 500.3101 – Personal Protection Insurance (PIP), Property Protection Insurance (PPI) and Residual Liability Insurance. Because the owner of the vehicle involved in that case was also the Named Excluded Driver, he lacked the residual liability coverage mandated by MCL 500.3101(1). Therefore, he simply did not carry the “security required by section 3101” and his claim was barred pursuant to MCL 500.3113(b).

Furthermore, it appears that Frankenmuth overlooked the fact that Insurance Commissioner Bulletin 79-11 specifically limits the scope of voiding PIP coverage for a “named excluded driver” to owners of the vehicle involved in the accident. The Commissioner just issued a new bulletin on this issue (2015-19) which sets forth procedures to be utilized by insurers in light of the recent enactment of MCL 500.3113(d) and the scope of permissible exclusions.

Court of Appeals Rules that If Injured Person’s Earning Exceed the Statutory Maximum, No Work Loss Benefits Are Payable, Even Though Injured Claimant Undoubtedly Sustained Diminished Income As a Result of His Injuries

In Agnone v Home-Owners Ins Co, __ Mich __, __ NW2d __ (Court of Appeals docket no. 320196, rel’d 5/19/2015), Plaintiff was involved in a motor vehicle accident in December 2009. Prior to the accident, he had been earning between $183,000.00 and $200,000.00 per year. However, after the accident, his earnings dropped to approximately $140,000.00. He filed a claim for work loss benefits with his insurer. When his insurer refused to pay him the work loss differential, he filed suit. The Circuit Court ruled in favor of Plaintiff and the insurer appealed.

On appeal, the Court of Appeals reversed the decision of the Circuit Court and, applying the plain language of MCL 500.3107(1)(b), determined that the legislature specifically limited the amount of work loss benefits that would be payable which, in this case, was $4,878.00 per month. From the statutory maximum, the insurer would need to subtract the wage loss benefits that the injured Claimant had received during the same thirty-day period. If the claimant’s reduced income still exceeds the statutory maximum, the injured claimant can recover no wage loss benefits. The Court of Appeals observed that the insured high earner Plaintiff was not without a remedy – he could still file suit against the tort feasor to recover excess work loss benefits under MCL 500.3135(3)(c).

In our next edition, we will review some of the more interesting unpublished Court of Appeals decisions from the Michigan Court of Appeals and provide the reader with additional updates from the Supreme Court, if any.
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