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If you have an article idea for the Journal, please contact the editor, Christine Caswell at christine@caswellpllc.com

From the Chair: It's Fall Y'All (sorry, had to)

Patrick Crandell
Michigan Senate

This is my final column as Chair. And as I reflect on the last year, I'm encouraged by what we've accomplished. We hosted legislative and DIFS leaders for a discussion on state-wide insurance issues, we awarded a $5,000 scholarship to a law student, we reconnected at social events, and we learned from an expert panel on using artificial intelligence in our practices. We continue to move the Section forward, making it more fun, inviting, and informative.

Thank you to the entire Council for their hard work making this an incredible year. Specifically, thank you to Stephanie Brochert (Chair, Membership Committee), Elizabeth King (Chair, Scholarship Committee), and Melissa Hirn (Chair, Programming Committee) for their work strengthening and expanding the Section's committees. I encourage all Section members to consider joining one of those committees (you don't need to be on Council to work on a committee). It's a great way to get more from your membership, do work that matters to our practices, and propel yourself into Section leadership.

Thank you to Christine Caswell (our *Journal* editor). She took over from the legend, Hal Carroll, kept the *Journal* moving forward, and led the effort to transition the *Journal* to digital. She did this all while soliciting articles and making sure authors (looking at me) timely submitted their columns. If you haven't yet, I encourage you to consider writing an article for the *Journal*.

And thank you to our Section Administrator, Joan O'Sullivan. Joan effortlessly managed this 1000+ member Section, kept me on track, and made sure our events ran smoothly. We truly couldn't do this without her.

At our Annual Meeting, I will pass the torch (a gavel actually) to Chair-Elect Annie Earls. Annie has been a great partner this year, and she will be an excellent Chair! I encourage you to reach out to congratulate her and ask how you can be involved.

Finally, it wouldn't be my column unless I made a plug asking section members to get more involved. To get the most out of your membership, consider taking the next step – attend an event, join a committee, write an article for the journal, join the Council. It's been my absolute pleasure serving as your Chair and I look forward to seeing you all at future events!

The 2024-25 slate to be elected to the IIS at the October 28 IIS Annual Meeting is as follows:

Officers – 1 year term

- Chair – Ann-Marie Earls
- Chair Elect – Doug McCray
- Secretary – Jennifer Serwach
- Treasurer – Michael Spinazzola

Council Members (5 vacancies) – 2 year term

- Elizabeth Anne King (incumbent)
- Justin Gonzales
- Allison Koppin
- Anthony Snyder
- Amy Diviney

A Primer on Defending Insurance Agents and Other Professionals in DIFS Investigations

By Michael S. Hale, Clairmont Advisors, LLC and Hale & Hirn, PLC

In handling investigations of insurance agents, adjusters, and licensed insurance counselors in administrative actions and investigations pursued by the Department of Insurance Financial Services ("DIFS" or "the Department"), there is a lot to keep in mind. The purpose of this article is to share some tips with other practitioners on handling (or referring) insurance investigations and notices of administrative hearings brought by DIFS against insurance professionals, in particular, insurance producers.

According to the U.S. Bureau of Labor Statistics, there are 12,740 insurance sales agents in Michigan.[1] All such persons are subject to significant regulation and oversight as are their agency employers.

The Michigan Insurance Code provides broad authority to the Insurance Commissioner to investigate licensed insurance professionals such as agents, adjusters, counselors, managers, promoters, officers, and directors. This includes the examination of accounts, records, documents, and transactions pertaining to such persons.[2]

The Insurance Market Regulation section of the Department of Insurance and Financial Services website refers to the Department's right to audit agencies to "monitor[s] the business practices of insurance agencies, licensed producers (agents), and premium finance companies.," stating that "the goal of the section is to ensure sound business practices, offer guidance, and protect Michigan consumers."[3]

When agents or agencies run afoul of the mandates of applicable state regulation, or violate fiduciary responsibility, DIFS investigates and prosecutes such matters. This can stem from a random audit, or a complaint filed against the professional by an insurer, insured, or competitor. DIFS is regularly assessing fees (sometimes significant fees of $20,000 or more) as part of a resolution agreement.

In the experience of this author, DIFS investigators commonly look closely at the following kinds of situations, although there are a host of others:

a. return premium issues, particularly in light of the new requirement that an agency maintain separate fiduciary accounts;[4]

b. charging of fees is generally prohibited without an insurance counselor's license and, even then, must be per a written agreement;

c. rebating of commissions or other value to the client; and

d. mistakes on certificates of insurance.

Other issues include acting outside the scope of the credentials of the licensee such as involvement in adjusting claims or serving as surplus lines brokers which requires a separate license.

There are nine acts for which the Director is prohibited from issuing a producer license and may suspend or revoke an existing license. These include domestic violence, forging another's name on an application or other document, criminal sexual conduct, and misrepresenting the terms of an insurance contract.[5] It also includes failing to comply with child care support obligations as a basis for which the Director may refuse a license.[6]

Moreover, the license of the agency may be suspended, revoked or refused if it found after a hearing that one or more officers or managers knew or should have known of an individual licensee's violations and did not report it or take corrective action.[7]

There is a statutorily created position called a "Designated Responsible Licensed Producer" (DRLP) in Michigan that requires that an agency entity be overseen by a designated party (often the agency owner). These individuals are typically named in any notice of investigation or administrative hearings and are often assessed fines as well.

There are generally two parts to the investigation – 1) the technical Code violation such as commingling of premium dollars with general agency operations and 2) the good moral character of the agent involved.[8]

The following are some tips for attorneys handling such cases:

1. Consider when you should refer the matter to an insurance lawyer. The complexity of the law pertaining to insurance agent duties can be overwhelming. The Department employs experienced attorneys. In defending such investigations and audits, therefore, it is often helpful to retain an attorney who understands the intricacies of agency operations and coverage issues. There are attorneys who have a specialty in this area.
2. Alternatively, consider retaining an insurance expert to help put together a corrective action plan that the Department often looks for.
3. Have the insurance agency or other entity conduct its own investigation and document corrective actions being taken. This should include promptness of return premiums, certificates of insurance procedures and charging of fees. The Department often seeks to ensure no continuing violation that could affect the general public.
4. Depending upon the amount of the fine(s) imposed or requested by DIFS, this could create serious cash flow problems for a small agency / agent and for this reason, it is often advisable to attempt to produce the financials of the agency to the investigator as part of the negotiations.
5. Letters of support from existing clients as to the good moral character and fitness of the agent can be helpful.
6. Ethics training can also be helpful. In one recent case, it was agreed that the responding agent undergo 60 hours of ethics training in addition to that required by the general continuing education statute applicable to agents.
7. Summary suspensions can occur for egregious violations such as theft of premium dollars. In this case, the respondents have a right to an administrative hearing through the Michigan Office of Administrative Hearings and Rules ("MOAHR"), but the license is suspended or revoked during that time.
8. The Director is still able to impose a sanction, penalty, or remedy if the license is surrendered.[9]
9. Attorneys should be mindful of the fact that insurance agents and agencies are identifiable under the difs.state.mi.us website including the continuing education of the agents, the appointments and the qualifications of agents.
10. Informal conferences can often be requested with the Department and its counsel to show compliance and offer a corrective action plan.

About the Author

Michael Hale is a licensed attorney and licensed insurance producer in Michigan. He has represented numerous insurance agencies in matters before DIFS and also has served as an expert witness in many insurance-related cases.

Endnotes

1 https://data.bls.gov/oes/#/geoOcc/Multiple%20occupations%20for%20one%20geographical%20area

2 MCL 500.249

3 https://www.michigan.gov/difs/industry/insurance-mkt-regulation

4 MCL 500.1207(2)

5 MCL 500.1239 (1)

6 MCL 500.1239 (2)(f)

7 MCL 500.1239 (5)

8 MCL 500.1239 (3)

9 MCL 500.1239 (7)


Catching Up with the "Cousins":

Waiver, Equitable Estoppel, and Mend the Hold in the Context of Insurance Coverage in Michigan

Part II of II, continued from the July 2024 edition

Stephen M. Kelley and Elizabeth A. Downey

Equitable Estoppel Barring Assertion of an Insurer Statute-of-Limitations Defense

Equitable estoppel may be argued to bar an insurer's statute-of-limitations defense to an insured's claim where the insurer's conduct led an insured to delay filing suit. *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263 (1997); *Matti Awdish, Inc v Williams*, 117 Mich App 270 (1982); *Person v Tranz 1 Solutions, LLC*, 2024 Mich App LEXIS 2785, 2024 WL 1596886 (Mich St. App Docket No. 364494 decided April 11, 2024) (unpublished).

The very recent *Person* decision summarized the rule stated in *Cincinnati v Citizens, supra*:

> The [Supreme] Court first explained that the doctrine of equitable estoppel in this context "is essentially a doctrine of waiver that extends the applicable period for filing a lawsuit by precluding the defendant from raising the statute of limitations as a bar." *Id.* at 270. "One who seeks to invoke the doctrine generally must establish that there has been (1) a false representation or concealment of a material fact, (2) an expectation that the other party will rely on the misconduct, and (3) knowledge of the actual facts on the part of the representing or concealing party." *Id.* Generally, for the doctrine to apply, a defendant must engage in intentional or negligent conduct designed to induce the plaintiff to bring an untimely action. *Id*. "Negotiations intended to forestall" the plaintiff from bringing a timely suit can be sufficient under the right circumstances. *Id.* citing *Friedberg v Ins Co of N Am*, 257 Mich 291, 293; 241 NW 183 (1932).
>
> The Court explained that the first element of equitable estoppel was met in the case before it because the defendant made false or negligent representations to the plaintiff by suggesting that it would review any documents submitted by the plaintiff "to determine whether the loss was appropriate." *Cincinnati Ins*, 454 Mich at 271. The Court reasoned that the plaintiff relied on these representations to not bring suit sooner "for the convenience of [the defendant]," such that it would be "unjust to allow" the defendant to now assert a statute-of-limitations defense to avoid liability. *Id.*[1]

Thus, while equitable estoppel cannot be used to hold an insurer to a risk it did not assume, under appropriate factual circumstances it can be used generally to preclude an insurer from asserting a statute of limitations defense.

In the no-fault context and on the particular facts before the Court, a property protection insurance claim with alleged insurer "gamesmanship", the Court of Appeals in *Matti Awdish, supra*, concluded that the statute of limitations should not be a bar to allowing amendment of the complaint to add an insurer as the correct party defendant. 117 Mich App at 278. The Court of Appeals further stated, "given the fact that the insurer actually controlled the defense in this action, the policy behind recognizing a statute of limitations defense—the foreclosure of stale claims—is wholly inapplicable." *Id.* at 180.

Unrelated Other Estoppel Concepts

While Michigan law recognizes a variety of "estoppel" concepts, *this article discusses "equitable estoppel" concepts,* not separate other estoppel concepts.[2]

The Mend-the-Hold Doctrine

Last is Michigan's somewhat archaically named "mend-the-hold" doctrine, relatively unknown to Michigan practitioners and judges, including Michigan insurance practitioners and Michigan judges deciding Michigan cases.

Introduction

Even extremely experienced insurance attorneys have been heard to ask, "Mend the what?" Described as "a nineteenth-century wrestling doctrine," meaning to get a better grip (hold) on your opponent,[3] the mend-the-hold doctrine has been argued to bar an insurance company from – after a lawsuit has been filed – changing its pre-litigation tune about why it denied the claim. This contract doctrine, applicable only in contract cases, limits a party's defenses to those based on the pre-litigation explanation

for non-performance given to the other party.

In its seminal decision, *Ohio & Mississippi R Co v* McCarthy, 96 US 258, 267-268 (1877), the United States Supreme Court stated:

> Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law.

In *CE Tackels, Inc v Fantin*, 341 Mich 119, 124 (1954), the Michigan Supreme Court cited the United States Supreme Court's statement in *Ohio & Mississippi, supra*, with approval.

Michigan Mend-the-Hold Cases in the Context of Insurance

In *Childers v Progressive Marathon Ins Co*, 343 Mich App 257 (2022), the Michigan Court of Appeals summarized the mend-the-hold doctrine in Michigan as follows:

> 1. "MEND-THE-HOLD" DOCTRINE
>
> As an initial matter, we must consider whether Progressive's statute-of-limitations defense is barred by the "mend-the-hold" doctrine. In response to Progressive's argument that the claims of plaintiff and the MPCGA were untimely under the one-year limitations period set forth in MCL 500.3145(1), plaintiff and the MPCGA contend that Progressive was estopped from raising the statute-of-limitations defense by the "mend-the-hold" doctrine because Progressive did not identify that defense as a basis for rejecting plaintiff's claim in its October 2013 denial letter. We disagree.
>
> The "mend-the-hold" doctrine is an old concept, so we must repair to venerable precedent to explain how it operates. "'Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law.'" *CE Tackels, Inc v Fantin*, 341 Mich 119, 124 (1954), quoting *Ohio & M R Co v McCarthy*, 96 US (6 Otto) 258, 267-268 (1877). In 1926, our Supreme Court stated in the insurance context that
>
> > it must be accepted as the settled law of this State, that, when a loss under an insurance policy has occurred and payment refused for reasons stated good faith requires that the company shall fully apprise the insured of all of the defenses it intends to rely upon, and its failure to do so is, in legal effect, a waiver, and estops it from maintaining any defenses to an action on the policy other than those of which it has thus given notice. [*Smith v Grange Mut Fire Ins Co of Mich*, 234 Mich 119, 122-123 (1926).]
>
> Much more recently, we stated that "[t]he doctrine is essentially an equitable theory of estoppel designed to prevent a party from changing positions after litigation has commenced." *Hahn v Geico Indemnity Co*, unpublished per curiam opinion of the Court of Appeals, issued June 12, 2018 (Docket No. 336583), p 7. In other words, the "mend-the-hold" doctrine appears to be an amalgamation of what we today consider waiver and estoppel.
>
> But as with most legal concepts, there are some exceptions to the doctrine. For instance, it does not operate to "protect the insured against risks that were not included in the policy...." *Kirschner v Process Design Assoc, Inc*, 459 Mich 587, 594 (1999). And while it has been applied to no-fault insurance policies, see *Gividen v Bristol West Ins Co*, 305 Mich App 639, 646-647 (2014), the doctrine's applicability is limited to only those defenses that are based on the terms of the policy. *Ruddock v Detroit Life Ins Co*, 209 Mich 638, 652-655 (1920). In other words, the purpose of the doctrine is to prevent an insurance company from misleading an insured about the reasons for denying coverage under the terms of a policy. In those circumstances, the insurer is estopped from advancing new theories for denying coverage under the policy's provisions, particularly considering that the insurer is expected to be more intimately aware of the policy's terms.
>
> Here, plaintiff and the MPCGA cannot contend that Progressive misled them. Additionally, Progressive's statute-of-limitations defense is not predicated on the terms of the policy. Instead, Progressive's argument relies on statutes, and our Supreme Court has instructed courts not to employ equitable doctrines when they intersect and conflict with the edicts of our Legislature. See *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 406-407 (2007) p 4. In any event, considering the history of the "mend-the-hold" doctrine, it seems unwarranted to extend the doctrine beyond defenses that involve the terms of a policy. Moreover, plaintiff and the MPCGA were ultimately responsible for the timing of this action, even if that timing was eminently reasonable.

> Finally, we note that, under MCR 2.111(F)(3)(a), a statute of limitations is an affirmative defense that must be raised in a party's responsive pleading. The October 2013 denial letter was not issued during litigation. In its responsive pleadings, Progressive properly raised its statute-of-limitations defense. Consequently, the trial court did not err by refusing to apply the "mend-the-hold" doctrine, and thereby allowing Progressive to assert a statute-of-limitations defense.

Id. at 267-270 (footnotes omitted).[4]

Other States Use Different Approaches

Because there is no federal common law of insurance, practitioners are encouraged to consider early on which state's law is likely to apply to interpretation of the insurance policy. If another state's law applies, Michigan's approach to waiver, estoppel, and mend-the-hold may not apply.[5]

As examples, in California and Florida, there can be statutory waivers[6] and the burden of proof varies. In Illinois, proof of actual prejudice is required to sustain an estoppel argument and the mend the hold doctrine does not apply to changes made prior to litigation,[7] and in New York estoppel may arise by statute.[8] In some jurisdictions, an insurer's post-denial attempt to rely on a defense not stated, or at least reserved, in the insurer's denial letter may be argued as the basis for a bad faith or extracontractual damages claim.[9]

Practice Pointers

Practice pointer takeaways include:

- Waiver, estoppel, and mend the hold are equitable concepts, attempting to implement a fairness standard, not dependent on insurance policy language.
- Frequently these are "Hail Mary"-type arguments by policyholder counsel because, on careful examination, the insured did not actually purchase the insurance claimed.
- Waiver and estoppel ordinarily cannot be used to create coverage which did not exist under the insurance policy.
- Whether any of these arguments apply ordinarily is extremely fact specific.
- Insurer denial letters should be reasonably comprehensive, articulating all known bases for denying a defense and indemnification, not just relying on a seemingly obvious or easiest basis, in case the "easy one" turns out to not be factually sustainable as facts develop. If two defenses are articulated in the denial letter and one falls through, the second remains available. But if only one defense is stated and it falls through, the insurer may be held to have waived its other defenses and be estopped from relying on a second (or third, or fourth) defense.
- Equitable estoppel is not an independent cause of action.
- Absent an affirmative, material misrepresentation by the insurer, a Michigan trial court is unlikely to apply waiver or estoppel to require an insurer to defend or indemnify an insured for a risk not assumed by the insurer in the policy.
- Declination of coverage/denial letters ordinarily should reserve all of the insurer's rights, under the policy(ies) specifically referenced and otherwise, in addition to stating the specific basis(es) for the denial.

About the Authors

The authors have more than 75 years of combined Michigan insurance law experience.

There are nearly endless variations of claims, suits, and policy terms, raising many issues and nuances beyond the scope of this article, which is not intended to and does not constitute legal advice specific to any claim, suit, insurance policy, statute, or client and does not necessarily represent the position of any client, past or present, represented by our firm.

Endnotes

1 In *Person, supra*, the Court of Appeals rejected plaintiff's attempt to rely on the doctrine of equitable estoppel to toll the statute of limitations "because plaintiff cannot point to any intentional or negligent conduct by Old Republic that induced plaintiff to bring an untimely action." Slip Op at *7. "More generally, there is nothing in the record to suggest that Old Republic did anything to induce plaintiff to bring an untimely action." *Id.* at *8.

2 This article is not about similarly named but separate other civil procedure and evidentiary concepts:

"Collateral Estoppel", a civil procedure rule precluding relitigation of specific issues with an action, which requires "mutuality of estoppel", in contrast to res judicata, which involves preclusion of entire claims. *Mecosta County Medical Center v Metro Group Prop. & Cas. Ins Co*, 509 Mich 276, 282-283 (2022). For collateral estoppel to apply, "(1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel." *William Beaumont Hosp v Wass*, 315 Mich App 392, 398 (2016) (cleaned up). "Mutuality of estoppel requires that in order for a party to estop an adversary from relitigating an issue that party must have been a party, or in privy to a party, in the previous action." *Monat v State Farm Ins Co*, 469 Mich 679, 684 (2004) (cleaned up). Further, "[t]he issues must be identical, not merely similar, and the ultimate issues must have been both actually and necessarily litigated." *Board of County Road Comm'rs v Schultz*, 205 Mich App 371, 376-377 (1994) (cleaned up).

"Judicial Estoppel", typically an evidentiary concept. Judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Spohn v Van Dyke Public Schools*, 296 Mich App 470, 479 (2012) (cleaned up). The doctrine "precludes a party from adopting a legal position in conflict with a position taken earlier in the same or related litigation." *Wells Fargo Bank, NA v Null*, 304 Mich App 508, 537 (2014) (cleaned up). For judicial estoppel to apply, the party must have "unequivocally and successfully" advanced a "wholly inconsistent" theory. *Id*. (cleaned up). Because judicial estoppel promotes "truthfulness and fair dealing in court proceedings," a critical factor in determining its applicability is "whether the party seeking to assert an inconsistent position would derive an unfair advantage if not estopped." *Dep't of Transportation v Riverview-Trenton R Co*, 332 Mich App 574, 594 (2020) (cleaned up). The Sixth Circuit recently held that an equitable remedy was not barred by judicial estoppel; appellate court may consider a judicial estoppel claim *sua sponte*. *McGruder v Metro Gov't of Nashville*, ___ F4th ___; 2024 US App LEXIS 9283 at *2, *6 (6th Cir April 17, 2024).

"Evidentiary Estoppel", another evidentiary concept.

"Estoppel by Laches", a defense. As stated in *Home-Owners Ins Co v Perkins*, 328 Mich App 570, 589 (2019): "Estoppel by laches is the failure to do something which should be done under the circumstances or the failure to claim or enforce a right at a proper time." *Wells Fargo Bank, NA v Null*, 304 Mich App 508, 537 (2014). "To successfully assert laches as an affirmative defense, a defendant must demonstrate prejudice occasioned by the delay." *Id.* at 538. (quotation marks and citation omitted). Typically, "[l] aches is an equitable tool used to provide a remedy for the inconvenience resulting from the plaintiff's delay in asserting a legal right that was practicable to assert." *Knight v Northpointe Bank*, 300 Mich App 109,] at 115. A party "guilty of laches" is "estopped" from asserting a right it could have and should have asserted earlier. See *Presque Isle Cov Presque Isle Co Savings Bank*, 315 Mich 479, 489 (1946). The focus of this article is "equitable estoppel", a civil procedure rule variously applied in insurance cases.

3 *Harbor Ins Co v Continental Bank Corp*, 922 F2d 357, 362 (7th Cir 1990); Laurato, *Mending the Hold in Florida: Getting a Better Grip on an Old Insurance Doctrine*, 4 Fla. A&M U L Rev 73, 74 (2009) (available at http://commons.law.famu.edu/famulawreview/vol4/iss1/4). See also Sitkoff, *"Mend the Hold" and Erie: Why an Obscure Contracts Doctrine Should Control in Federal Diversity Cases*, 65 U. Chi. L. Rev 1059 (1998) (available at https://dash.harvard.edu/bitstream/handle/1/15038461/MendTheHold_1998.pdf?sequence=1).

4 Other recent Michigan mend-the-hold decisions include *Durham v Auto Club Group Ins Co*, 2016 Mich App LEXIS 2282, 2016 WL 7233319 (2016) (unpublished); *Hahn v Geico Indem. Co*, 2018 Mich App LEXIS 2618, 2018 WL 2944224 (2018) (unpublished); *Davis v Auto Owners Ins Co*, 2021 Mich App LEXIS 2499, 2021 WL 1589566 (2021) (unpublished); *Matigan v Member Select Ins Co*, 2021 WL 297264, 2021 Mich App LEXIS 606 at*11-*13 (PIP and UIM) (unpublished); *Alshamman v Home-Owners Ins Co*, 2023 Mich App LEXIS 2999; *Carter v Owners Ins Co*, 2022 Mich App LEXIS 2722, 2022 WL 1512045 (2022); 2023 WL 3133226 (unpublished); *Ridenour v Progressive Marathon Ins Co*, 2023 Mich App LEXIS 1465 at *13-16*, 2023 WL 2334722 (unpublished); and *BWB Reasonable & Reliable Transp, LLC v Empire Fire & Marine Ins Co*, 615 F Supp. 3d 632, 638-640 (ED Mich 2022).

5 For a more comprehensive current look at these issues nationally, consider accessing Strafford Publications' March 25, 2024 webinar, "Insurance Estoppel and Waiver Amid Conflicting Case Law: Safeguarding Coverage, Navigating Insurer's and Insured's Duties," and related materials, custserv@straffordpub.com.

6 Cal Ins Code §554 (in the property insurance context, absent prompt objection, delay in the presentation of notice or proof of loss is waived); Florida §627.426(1) specifies insurer acts which shall not be deemed a waiver, while §627.426(2) specifies circumstances where an insurer shall not be permitted to deny coverage based on a particular coverage defense.

7 Out-of-state cases discussing the mend-the-hold doctrine include *Village of Bellaire v Ohio Unemployment Comp Review Comm*, 2011 WL 4609185, 2011 Ohio App LEXIS 4251 at *13 (Ohio Ct App Sept 26, 2011) (unpublished) (citing *Grand Trunk Western R Co v HW Nelson Co*, 116 F2d 823, 840 (6th Cir. 1941)); *BNSF Railway Co v Probuild North LLC*, 2014 WL 2619015, 2014 Ill App Unpub LEXIS 1199 (Ill Ct App 2014) (the mend the hold doctrine does not apply to changes made before litigation begins) (citing *Larson v Johnson*, 1 Ill App 36, 45 (1953)); and *USF&G Co v Treadwell Corp*, 58 F Supp. 2d 77, 93 n 15 (SDNY 1999) (judicial estoppel, collateral estoppel, and mend the hold all inapplicable).

8 New York Ins Code §3420(d); *First Fin Ins Co v Jetco Contr Corp*, 1 NY 3d 64, 66 (2003) (insurer's unexcused delay in notifying policyholder of denial of coverage unreasonable as a matter of law under Insurance Law § 3420 (d), where the purpose of the delay was to investigate the existence of other sources of insurance) (answers to certified questions from the United States Court of Appeals for the Second Circuit).

9 *Harbor Ins Co v Continental Bank Corp.*, 922 F2d 357, 363 (7th Cir 1990) ("A party who makes up a phony defense to the performance of his contractual duties and then when that defense fails (at some expense to the other party) tries on another defense for size can properly be said to be acting in bad faith.") (applying Illinois law).

Independent Counsel: Who Gets to Choose?

By Andy Portinga

When a policyholder is sued and the claim is arguably covered by a liability policy, the insurer has the right and duty to defend the claim. In most cases, this means that the insurer gets to pick the insured's defense counsel. The ultimate liability, after all, lies with the insurer. Because the insurer bears the financial risk, the insurer gets to pick the lawyer.

Things are a little trickier when a complaint states both covered and uncovered claims. In this case, there is a conflict of interest between the insurer and the policyholder. The policyholder has the incentive to minimize liability on the uncovered claims and push any liability to the covered claims. The insurer has the opposite incentive. In this situation, who gets to pick the policyholder's defense counsel?

In Michigan, the answer is unclear. The Michigan Supreme Court has never directly addressed the issue.

The majority rule is that if the insurer reserves the right to deny coverage for part of a judgment, then a conflict of interest exists, and the policyholder gets to choose its counsel, with the insurer responsible for the reasonable expenses associated with the defense. This is the rule adopted by the *Restatement on Liability Insurance*, § 16. This arrangement, where the policyholder chooses its lawyer and the insurer pays the bills, is sometimes referred to as *Cumis* counsel or *Peppers* counsel, based on the California and Illinois cases, respectively, that required insurers to allow policyholders to pick their lawyers when there is a conflict of interest between the insurer and policyholder.

The closest that the Michigan Supreme Court has come to addressing this question is *Allstate Ins v Freeman*, 432 Mich 656, 704 n3 (1989). There, in a footnote in a concurrence joined by four other justices, Justice Boyle favorably cited the majority rule. But the issue of who gets to choose defense counsel was not squarely before the court, and Justice Boyle's footnote is dicta.

In *Fed Ins Co v X-Rite, Inc*, 748 F Supp 1223 (WD Mich 1990), Judge Bell declined to put much weight on Justice Boyle's footnote and predicted that the Michigan Supreme Court would not adopt the majority rule. Critical to Judge Bell's analysis is Michigan's rule that an attorney chosen by the insurer to represent a policyholder represents only the policyholder, not the insurer. *Atlanta Int'l Ins Co v Bell*, 181 Mich App 272, 274-75 (1989). That is, Michigan is a "single-client" state. Even when the insurer is paying the bills, insurer-appointed defense counsel does not represent the insurer. Other states are "two-client" states. In those states, courts hold that insurer-appointed defense counsel represents both the insurer and the policyholder.

A policyholder understandably might be uncomfortable with insurer-appointed defense counsel when there is a conflict of interest between the insurer and the policyholder. After all, defense counsel likely has a long-standing business relationship with the insurer, while defense counsel probably has little to no history with the policyholder. A skeptical policyholder might question whether appointed defense counsel will look out for its best interests and not the insureds.

The *X-Rite* court brushed these concerns aside: "To hold that the insurer who, under reservation of rights, participates in selection of counsel, automatically breaches its duty of good faith is to indulge the conclusive presumption that counsel is unable to fully represent its client, the insured, without consciously or unconsciously compromising the insured's interests. The Court is unable to conclude that Michigan law professes so little confidence in the integrity of the bar of this state." *X-Rite*, 748 F Supp at 1229.

On the other side of the state, in *Aetna Cas & Sur Co v Dow Chem Co*, 44 F Supp 2d 847 (ED Mich 1997), Judge Edmunds reached the opposite conclusion from *X-Rite.* There, the court favorably cited *Freeman* in support of its conclusion that Michigan would follow the majority rule, while acknowledging that the Michigan Supreme Court had not directly addressed the issue. There, the court stated: "When the insurer creates a conflict-of-interest situation, the insured obtains the right to control the defense, and the duty to provide defense services becomes a duty to reimburse independent counsel for the reasonable and necessary costs incurred in defending the insured."

After *Dow Chemical* and *X-Rite*, the issue was addressed again in *Cent Mich Univ v Employers Reinsurance Corp*, 117 F Supp 2d 627, 635 (ED Mich. 2000), Judge Lawson held that, even in a conflict of interest situation, "The insurer has no absolute right to select the attorney himself, as long as the insurer exercises good faith in its selection and the attorney selected is truly independent."

Whether a policyholder can select its own counsel in a conflict of interest situation is unresolved under Michigan law. The Michigan Supreme Court has not directly addressed the issue, and federal courts, sitting in diversity, are split. Even if an insurer has the right to select counsel, the insurer should be cautious in doing so. If the defense of the case goes badly, the policyholder may look to the insurer for damages caused by defense counsel's malpractice. Under the *Restatement*, an insurer is liable for the conduct of the defense of a case if the insurer did not exercise reasonable care in selecting defense counsel or if the insurer acted in a way that overrode counsel's duty to exercise independent professional judgment. *Restatement*, § 12. *Central Michigan University* likewise recognizes that an insurer may have liability to insurer-selected defense counsel is not truly independent or was not selected in good faith. Regardless of whether an insurer has the right to select counsel, the better practice is to involve the policyholder in the selection of counsel.

About the Author

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Editorial - Repeal the Forced Purchase of Insurance

By Martin R. Brown

All states and the District of Columbia ("DC") require owners of automobiles to purchase auto insurance. Individual state auto insurance requirements vary:

a) 21 states require car owners to purchase Bodily Injury liability ("BI") and Property Damage liability ("PD");

b) 11 states require BI, PD, Uninsured Motorist ("UM"), and Underinsured Motorist ("UIM"):

c) 2 states require BI, PD, UM, UIM and Medical Payments; and

d) 17 states require some combination of these coverages combined with some level of Personal Insurance Protection ("PIP").

"Minimum Auto Insurance Requirements by State (2024)," *AutoInsurance.Org*, Maria Hanson and Michael Leotta. Michigan is one of these latter 17 states, and defines "auto insurance" as PIP, property protection insurance ("PPI"), BI, PD, comprehensive insurance, collision insurance, UM, and UIM. MCLA 500.3101(1) and (3)(a), MCLA 500.2101(2), and DIFS Reg.500.1502.

Readers only familiar with the auto insurance system in Michigan may not realize that no other state forces drivers to purchase all these coverages or the high levels of PIP benefits. Sixteen other states have mandatory PIP coverage, the highest required limit being $50,000. *PIP Insurance (Personal Insurance Protection) and Car Insurance: The Ins and Outs*, Brad Cummins, InsuranceGeek.com, December 8, 2021. The available PIP options in Michigan are:

a) the default PIP coverage is **unlimited** medical benefits;

b) $500,000 for medical benefits;

c) $250,000 for medical benefits;

d) $50,000 for medical benefits when the insured has Medicaid, and other conditions are met; and,

e) $0 when the insured, and all family members, have a combination of Medicare, other auto insurance, or other Qualified Health Coverage.

MCLA 500.3107C, DIFS Bulletin 2023-11-INS, April 13, 2023.

The Michigan Supreme Court conditionally agreed that the Legislature could force the purchase of auto insurance by all drivers in Michigan so long as the Legislature also ensured that the cost for such auto insurance was "fair and equitable."

> "In choosing to make no-fault insurance compulsory for all motorists, the Legislature has made the registration and operation of a motor vehicle inexorably dependent on whether no-fault insurance is available at fair and equitable rates" *Shavers v Attorney General*, 401 Mich 554, 599, 267 NW2d 72 (1978).
>
> "We therefore conclude that Michigan motorists are constitutionally entitled to have no-fault insurance made available on a fair and equitable basis." *Id.*, at 600.
>
> "We are concerned that a person's interest in the registration and operation of a motor vehicle may be effectively suspended by the legislative requirement that registrants and operators of motor vehicles purchase no-fault insurance as a condition to the operation of a motor vehicle if no-fault insurance is not made available on a fair and equitable basis." *Id*. at 606.
>
> "Our holding the No-Fault Act's 'compulsory insurance' unconstitutional because of the inadequacies that exist in the present statutory system for making no-fault insurance available at fair and reasonable rates raises crucial jurisprudential and social considerations." *Id*. at 608.

The Court mentioned "fair and equitable rates" at least five times in the *Shavers* case, and the phrase "fair and equitable basis" at least twice, in connection with the Legislature's mandate forcing drivers to buy auto insurance as a condition of driving a car.

The *Shavers* Court also references the requirement that auto insurance rates not be "excessive, inadequate, or unfairly discriminatory." These are actuarial terms and are found in the insurance statutes of all states and DC, except for Illinois. These actuarial terms are defined by the Casualty Actuarial Society ("CAS") and are inextricably tied to cost-based insurance rate-making principles, but are not tied to a determination that Michigan drivers be charged "fair and equitable rates:"

> "Principle 4: A rate is reasonable and not excessive, inadequate, or unfairly discriminatory if it is an actuarially sound estimate of the expected value of all future costs associated with an individual risk transfer." *Statement of Principles Regarding P&C Casualty Insurance Ratemaking_2021.pdf (casact.org)*.

There is an apparent conflict between the *Shavers*' Court's requirement that auto insurance rates be "fair and equitable" and the actuarial concepts that auto insurance rates not be "excessive, inadequate, or unfairly discriminatory." The Court, overall, required that the actuarial terms be defined by either the Legislature or the predecessor of the Department of Insurance and Financial Services ("DFIS"). Neither the Michigan courts nor Legislature have defined the term "fair and equitable" in the context of auto insurance rates, though the term has been used in the context of property settlement in divorce cases. *Sparks v Sparks*, **440 Mich 141, 485 NW2d 893 (1992)**. The DFIS did define the terms "excessive rates," inadequate rates," and "unfairly discriminatory rates," following the guidance of the CAS principles of ratemaking. See DIFS Regulations 500.1501, et seq.

What did the *Shavers* court intend by its use of the phrase "fair and equitable rates?" The Court intended that mandatory auto insurance be affordable.

> "The no-fault insurance act was a radical restructuring of the rights and liabilities of motorists. Through comprehensive action, the Legislature sought to accomplish the goal of providing an equitable and prompt method of redressing injuries in a way which made the mandatory insurance coverage **affordable** to all motorists. See *Shavers v Attorney General*, 402 Mich. 554; 267 NW2d 72 (1978), *cert den* 442 U.S. 934 (1979)." (emphasis added) *Tebo v Havlik*, 418 Mich 350, 366-367, 343 NW2d 181 (1984).

The *Shavers* ruling that the No-Fault Act was constitutional only if "no-fault insurance is available at fair and equitable rates" has not been met.

The Federal Insurance Office ("FIO") released a study in which the FIO determined "auto insurance is presumed unaffordable within an AP ZIP Code if its Affordability Index is above two percent" of median household income in the ZIP Code. FIO defined "AP" as "traditionally underserved communities and consumers, minorities, and low- and moderate-income persons." *Study on the Affordability of Personal Automobile Insurance*, Federal Insurance Office, Department of the Treasury, pages 1-2 (2017) ("Study"). The Study also determined that Michigan had 77 Zip Codes in which the cost of auto insurance was greater than 2% of median household income for Affected Persons, accounting for approximately 17% of Michigan's total population. Study, Figure 4, page 12. The Study was based on pre-Covid costs and pre-Covid insurance rates. Auto accident costs increased tremendously during the Covid pandemic. Man Shocked to See Car Insurance Price Increased 25 Percent (msn.com), *Newsweek*, Suzanne Blake, July 9, 2024. Thus, according to the Study, auto insurance is not affordable for at least 17% of Michigan's citizens, violating the *Shavers* court's requirement that auto insurance rates be "fair and equitable." In urban areas of Michigan, auto insurance affordability is especially problematic, since "the average price of an auto policy in Detroit is $5,414, eating up 18 percent of the median household income of Detroiters." *Auto Insurance and Economic Mobility in Michigan: A Cycle of Poverty*, University of Michigan, Patrick Cooney, Elizabeth Phillips, and Joshua Rivera, page 5, March 2019.

The basic purpose of auto insurance is to protect the financial assets of the insurance buyer. Insurance 101: Definition, Components and Benefits (moneygeek.com). PIP protects the insured's assets if the insured is involved in an auto accident and requires medical treatment for injuries related to the accident, regardless of fault, and PPI does the same regarding damage to the insured person's car. From a public policy perspective, should a person with few or no assets decide for themselves whether to buy insurance versus buying food or paying rent? Since most people are not involved in an auto accident, does the cost of auto insurance outweigh the benefits for low-income persons?

There are at least four concerns related to the repeal of the forced purchase of auto insurance:

1. Numbers of Uninsured motorists – Approximately 15-20% of Michigan's drivers are currently uninsured (*Study*, p. 7). It is difficult to determine whether removing the forced purchase of auto insurance will increase the number of uninsured drivers. This is especially true since drivers are required by car lessors and lenders to have auto insurance if the driver leased the car or borrowed money to buy the car. Insured drivers are not likely to have additional out-of-pocket costs for auto accidents because of any possible increase in the number of uninsured drivers, since, for insured drivers, PIP and PPI pay for their medical and car damage costs related to auto accidents.
2. Michigan Catastrophic Claims Association ("MCCA") assessments – Currently, MCCA assessments are collected by

insurers as part of the collection of premiums from insureds. A concern might be a reduction in funds paid into the MCCA due to a decrease in the number of drivers paying the MCCA assessment if more drivers become uninsured. This is an existing problem due to the number of drivers who are currently uninsured. A more efficient and equitable way to collect the MCCA assessment is to make the assessment part of the license tag renewal process. Doing so would:

a. potentially collect more revenue for the MCCA since the MCCA assessment would be paid by every car with Michigan license plates, including persons who do not have auto insurance;
b. remove MCCA assessments from insurer rate-making procedures (see MCLA 500.3104(20); and
c. remove the cross-subsidy that currently exists since car owners who are currently insured are paying a higher MCCA assessment because of uninsured drivers who are not paying the assessment.

3. No criminal penalties for uninsured drivers - Over the last several years, the idea of removing at least some traffic-related violations from police enforcement has been an issue. Repealing mandatory auto insurance requirements would decriminalize what is, in essence, a financial decision for car owners. Thus, the police would not have to enforce the law that forces drivers to purchase auto insurance.
4. Payment of medical costs related to auto accidents for uninsured drivers – Medical costs for uninsured Michigan resident drivers injured in auto accidents are not paid within the PIP system, though uninsured passengers of an uninsured driver are paid through the Assigned Claims plan. MCLA 500.3113(b) and MCLA 500.3114(4). In other states, medical costs incurred by uninsured drivers related to auto accidents are paid through a combination of private health insurance, Medicare/Medicaid, or personal funds. Also, in other jurisdictions, persons who are not at fault in auto accidents pursue recovery of these costs through litigation, though this is largely not allowed in Michigan. MCLA 500.3135(2)(c).

All of this leads to the conclusion that reforms are needed to align the forced purchase of auto insurance in Michigan with sound public policy and the *Shavers* court's requirement that mandatory auto insurance rates be affordable. The only viable option is to eliminate the requirement to purchase auto insurance.

In summary:

1. The forced purchase of auto insurance violates the *Shavers*' court requirement that auto insurance rates be "fair and equitable;"
2. "Fair and equitable" auto insurance rates means "affordable" rates since the *Shavers*' court distinguished "fair and equitable rates" from cost-based rates that are not "excessive, inadequate, or unfairly discriminatory;"
3. For a significant percentage of Michigan households, auto insurance rates are not affordable;
4. Repealing the forced purchase of auto insurance will decriminalize what amounts to a financial decision by each driver;
5. Most Michigan drivers will continue to purchase auto insurance, and,
6. Since 15% to 20% of Michigan drivers are currently uninsured, removing the requirement forcing all drivers to purchase auto insurance may have little, or no, effect on the majority of Michigan drivers.

Below, I propose revisions to Michigan statutes that would eliminate the forced purchase of auto insurance by Michigan residents and decriminalize not purchasing auto insurance.

> 500.3101 Security for payment of benefits required; period security required to be in effect; definitions; policy of insurance or other method of providing security; filing proof of security; exclusion.
>
> Sec. 3101. (1) Except as provided in sections 3107d and 3109a, the owner or registrant of a motor vehicle required to be registered in this state ~~shall~~ need not maintain security for payment of benefits under personal protection insurance and property protection insurance as required under this chapter, and residual liability insurance. Security is only required to be in effect during the period the motor vehicle is driven or moved on a highway.
>
> 500.3102 Nonresident owner or registrant of motor vehicle or motorcycle to maintain security for payment of benefits; operation of motor vehicle or motorcycle by owner, registrant, or other person without security; penalty; failure to produce evidence of security; rebuttable presumption.
>
> Sec. 3102. (1) A nonresident owner or registrant of a motor vehicle or motorcycle not registered in this state shall not operate or permit the motor vehicle or motorcycle to be operated in this state unless the nonresident owner or registrant complies with the auto insurance requirements of the person's resident state. ~~for an aggregate of more than 30 days in any calendar year unless he or she continuously maintains security for the payment of benefits pursuant to this chapter. (2) An owner or registrant of a motor vehicle or motorcycle with respect to which security is required, who operates the motor vehicle or motorcycle or permits it to be operated upon a public highway in this state, without having in full force~~

~~and effect security complying with this section or section 3101 or 3103 is guilty of a misdemeanor. A person who operates a motor vehicle or motorcycle upon a public highway in this state with the knowledge that the owner or registrant does not have security in full force and effect is guilty of a misdemeanor. A person convicted of a misdemeanor under this section shall be fined not less than $200.00 nor more than $500.00, imprisoned for not more than 1 year, or both.~~

About the Author

Martin R. Brown worked on insurance regulatory matters for large insurance companies (State Farm, Foremost, and Farmers) for over 30 years. While Marty has worked on insurance matters throughout the country, he has worked specifically on Michigan insurance matters since the early 1990's. Marty retired in 2021.

RECENT OPINIONS

By Eric Cohn

Published Opinions

Recission of a policy is not based on a showing of intent to deceive

Sherman v Progressive Michigan Insurance Company – Michigan Court of Appeals

This case presents a common scenario that attorneys in this area encounter. The Plaintiff purchased insurance through Progressive Michigan Insurance Company for her two vehicles. She informed Progressive that she garaged the vehicles at a Clinton Township address, and that she was the sole individual who was over 14 years of age in her household and that she was the only regular driver of the vehicles. Despite those statements in her application (and in her subsequent renewal), the Plaintiff actually garaged her vehicles in Detroit and had other drivers in her household. The increase in premium but for the misrepresentations would have been 83.2%.

The Plaintiff was injured in a motor vehicle accident in July 2021 and sought PIP benefits. Progressive denied coverage and rescinded the policy *ab initio* based on the misrepresentations Plaintiff made in the application for benefits. The Plaintiff filed suit, Progressive moved for summary disposition, and the trial court denied it, finding that the policy should be reformed "to reflect the insurance premium that Progressive believes it would have been entitled to had the insured listed Detroit as the residence." Progressive appeals and the Court of Appeals reversed.

The Court of Appeals' analysis started with the basic concept that "an insurer has a reasonable right to expect honesty in the application for insurance." From there, it confirmed that a misrepresentation entitles an insurer to rescind a policy ab initio if the misrepresentation is material, meaning that the insurer would have rejected the risk or charged an increased premium had it been given the correct information. But the Court also recognized that the equitable right to recission is limited by situations where the result would be unjust or inequitable.

Importantly, the Court *rejected* Progressive's argument that there was fraudulent misrepresentation. However, the Court did find that there was innocent misrepresentation, and that alone was sufficient for recission, because intent does not matter. Instead, all that is required is that the insurer relied upon the misrepresentation. Progressive, through affidavits, was able to demonstrate reliance on the misrepresentation through a premium that was less than it otherwise would have been. Therefore, had the trial court balanced the equities, it should have ordered the policy rescinded instead of reformed.

Takeaway: Often fraud cases find themselves focused on intent, a difficult standard to prove. This case provides an off-ramp for defense attorneys who get bogged down in that. Likewise, this case also provides a lesson to plaintiff attorneys that are attempting to bring a case with potential silent misrepresentation. Instead of relying merely on an underwriter's affidavit, a wise attorney may choose to request the deposition before the motion is decided, or in the alternative, present a counter-affidavit on the impact (or not) of the misrepresentation to create a question of fact.

An injured person must mitigate through Medicare

Canty v Mason – Michigan Court of Appeals 365327

Plaintiff was involved in a motor vehicle accident in February 2021. Plaintiff filed suit against Defendant, claiming that Defendant was at-fault for the accident, and further, that Plaintiff was injured in the accident and received medical treatment for those injuries. Plaintiff further alleged that he elected not to receive PIP benefits under his auto insurance policy because he had qualified health coverage under Medicare. Plaintiff claimed in his complaint that he was entitled to recover the costs of his medical expenses from Defendant under MCL 500.3135(3)(c). Defendant filed a motion for partial summary disposition, claiming

that Plaintiff's recovery was limited to the recovery of allowable expenses, and further, that Plaintiff had a duty to mitigate damages by utilizing his Medicare coverage. The trial court ruled that Medicare is exempt from the no-fault act and, therefore, there was no duty to mitigate under the circumstances. The trial court also ruled that Plaintiff was required to show that his medical expenses were reasonable and necessary under MCL 500.3107(1)(a). Defendant appealed and the Court of Appeals affirmed in part and reversed in part in a 2-1 decision.

Interestingly, the Court of Appeals majority termed the appeal "fairly straightforward" despite the lack of unanimity. The Court of Appeals first weighed whether there was a limit to the amount of medical expenses sought and adjudged that issue in the affirmative based on standard statutory interpretation. The Court found that the phrase "without limit" found in MCL 500.3135(3)(c) cannot be read in a vacuum and must be interpreted consistent with MCL 500.3107(1)(a). Therefore, the Court made the determination that recovery of medical expenses for individuals that do not have PIP benefits must be for reasonably necessary services.

The Court also found that the No-Fault fee schedules also apply to individuals that are seeking the recovery of medical expenses in a traditional, third-party case. Again, the Court did this by reliance on standard statutory interpretation. In doing so, the Court noted that allowable expenses are "subject to the exceptions and limitations in this chapter" which encompass the fee schedules in MCL 500.3157.

The final question the Court answered pertain to the common law duty to mitigate damages. To begin its analysis, the Court noted that the No-Fault Act does not abrogate common law defenses in tort actions, including the duty to mitigate. The question becomes whether mitigation can occur knowing that the only available method for Plaintiff to mitigate is through Medicare, a federal program. The Court rejected that argument "that Medicare benefits cannot be taken into consideration on the issue of mitigation of damages because such benefits were not available to cover [Plaintiff's] medical expenses given that the case arises out of a no-fault act and Medicare is exempt from the act." Again relying on standard statutory interpretation, the Court found that because MCL 500.3109(1) includes benefits "provided… by the federal government" that ruling there was no duty to mitigate by pursuing federal benefits would undermine the Legislative mandate.

Takeaway: This decision was released on October 4, 2024. It is very likely to be appealed, therefore takeaways at this juncture are premature, which perhaps is a takeaway in and of itself. Until this case is settled, reliance on it may be misguided. Keep an eye on this case in the future.

Unpublished Opinions

Ignore bankruptcy claims at your own peril

Smith v Home-Owners Insurance Company – 366533

In March 2015, Plaintiff filed for Chapter 13 bankruptcy. While the bankruptcy proceeding was pending, Plaintiff was involved in an accident and suffered injuries. In December 2018, Plaintiff filed a complaint seeking PIP benefits arising out of his accident.

In April 2019, Plaintiff filed a form in the bankruptcy action and affirmatively stated that he did not have claims against third parties for payment. The form was signed as "true and correct" and under the penalty of perjury. Defendant filed a motion for summary disposition in the Circuit Court claiming that Plaintiff's claim was barred by judicial estoppel given the admissions made in the bankruptcy proceeding. The matter was later transferred to the district court because it did not meet the $25,000 jurisdictional threshold. The Defendant renewed its judicial estoppel motion for summary disposition in the district court, and the motion was granted. Plaintiff appealed to the Circuit Court, which affirmed the decision. The Circuit Court affirmed, and in November 2020, Plaintiff was discharged from the bankruptcy court.

Plaintiff then filed a subsequent case for the recovery of PIP benefits in the district court in January 2022. Defendant again filed a motion for summary disposition on the basis of judicial estoppel and the district court again granted the motion. The Circuit Court again affirmed the district court's ruling. The Court of Appeals granted leave and affirmed the ruling of the lower courts.

In affirming, the Court of Appeals underscored the importance of full and honest disclosure of information in bankruptcy proceedings. It emphasized that the failure to disclose potential claims can have significant repercussions on a debtor's ability to seek legal remedies should the need later arise. Therefore, the Court rejected Plaintiff's argument that the statement in bankruptcy court was due to "mistake or inadvertence" warranting relief from judicial estoppel. Instead, the Court found no evidence of inadvertence or mistake because Plaintiff had knowledge of his PIP claim yet failed to disclose it.

Takeaway: The intake process for a plaintiff's claim should be robust and ensure that other pending actions, including bankruptcy, divorce, etc., are known. These other actions, where other attorneys are diligently pursuing the interests of *your* potential client could have significant impact on *your* recovery. Therefore, coordinating arguments and maintaining open lines of communication are important.

Don't immediately resort to dismissal in discovery disputes

Kaizen Case Mgmt, LLC v Progressive Marathon Ins Co – 367579

Stop me if you've heard this before. Plaintiff filed a PIP case and refused to cooperate with discovery. Defendant filed motions to compel. Orders were entered. Plaintiff still did not cooperate. Defendant asked for dismissal of Plaintiff's case as a result. The trial court granted the motion to dismiss. Plaintiff filed a motion for reconsideration. The trial court denied the motion for reconsideration. Plaintiff appealed.

That this is a case nearly every practitioner has had once in his/her lifetime speaks to the need to examine (or reexamine) what should be done when faced with this situation. Here, after dismissal and reconsideration, Plaintiff properly appealed and properly argued that the trial court did not consider less drastic sanctions than dismissal. Therefore, the Court of Appeals reversed and remanded to the trial court to evaluate the matter relying on the factors outlined in *Dean v Tucker*.

Takeaway: The ubiquity of discovery dismissals is reason enough to examine this case, especially for those early in their careers. Dismissal is a drastic sanction, and often there are alternatives to dismissal that should be ordered. Therefore, a practitioner on the receiving end of a motion to compel/dismiss should take the matter seriously and, if unable to get his/her client to cooperate, should at least argue for lesser sanctions while those "come to Jesus" conversations are occurring. On the other side, defense counsel should *never* resort to a motion to dismiss out of the gate. You are doing your client a disservice because, even if the motion is granted, you are going to suffer through an appeal you will almost certainly lose, causing your client to incur needless costs and fees.


LEGISLATIVE UPDATE

While election day fast approaches, the Legislature is keeping busy!

By Christopher J. Petrick and Katharine Buehner Smith
Collins Einhorn Farrell PC

We are in the final stretch as the election approaches. House representatives will have their eyes on the election and finishing out their campaigns strong. At the same time, Democrats across the Legislature will likely be keen to ensure that they are capitalizing on their majority with the uncertainty of the election looming on the horizon.

Several bills have advanced since our last update:

- **HB 5192 –** amends section 4509 of the Insurance Code to replace "national association of insurance commissioners" with "National Association of Insurance Commissioners, the National Crime Bureau." ***Passed the House (106-4) on 06/25/2024; Referred to the Senate Finance, Insurance, and Consumer Protection Committee on 06/26/2024.***
- **HB 5193 –** amends section 2 of the Insurance Code to include an insurance company that provides personal protection insurance under chapter 31 of the insurance code of 1956, 1956 PA 218, MCL 500.3101 to 500.3179,519 as a health care insurer. ***Passed the House (106-4) on 06/25/2024; Referred to the Senate Finance, Insurance, and Consumer Protection Committee on 06/26/2024.***
- **HB 5196 –** amends the Insurance Code to clarify that a person who commits a fraudulent insurance act may be liable for a civil fine in addition to and not instead of any criminal penalty or restitution. ***Passed the House (106-4) on 06/25/2024; Referred to the Senate Finance, Insurance, and Consumer Protection Committee on 06/26/2024.***
- **HB 5197 –** amends the Insurance Code to require an insurer that reasonably believes or knows a fraudulent insurance act has occurred to report that act. ***Passed the House (106-4) on 06/25/2024; Referred to the Senate Finance, Insurance, and Consumer Protection Committee on 06/26/2024.***
- **HB 5694 –** amends the Insurance Code to modify the restrictions on gifts and other benefits that can be given to applicants for insurance by an insurance provider. ***Passed the House (106-4) on 06/26/2024; Referred to the Senate Finance, Insurance, and Consumer Protection Committee on 06/26/2024.***
- **SB 633 - 638 –** creates the Michigan health insurance exchange act, and amends the Insurance Code accordingly, to create a state-based health insurance exchange and provide guidance for its administration. ***Passed the Senate (20-18) on 06/26/2024; Referred to the House Insurance and Financial Services Committee on 06/26/2024.***

And there were a handful of new referrals to the House Insurance Committee:

- **HB 5891 –** amends the Insurance Code to prohibit denying or conditioning coverage of Medicare supplement policy under certain conditions.
- **HB 5950 –** amends the Insurance Code to provide a definition for peer-to-peer car sharing programs and allows an insurer to exclude coverage for a loss or injury occurring during a car sharing period.
- **HB 5956 –** amends the Insurance Code to prohibit an insurer from discrimination against a health professional acting within the scope of their license; however, it does not require the insurer to contract with any health professional willing to abide its terms and conditions.
- **HB 5971 –** amends the Insurance Code to prohibit an insurer from listing a particular health care service as a 'covered health care benefit' where the copayment or coinsurance for the service payable by the insured is greater than 50% of the cost of the health care service.
- **HB 6012 –** amends the Insurance Code to prohibit an insurer providing residential property liability insurance from considering the breed or mixture of breeds of any dog that resides at the insured property for purposes of cancelling or denying coverage, increasing the premium, or refusing to issue/renew the policy.