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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

Summer Fun and a Swinging Good Time Ahead!

Ann-Marie E. Earls
Melamed, Levitt, Milanowski & Earls, P.C.

I hope you're enjoying the sunshine and making the most of the summer so far.

To keep the good vibes going, I am excited to invite you to our upcoming summer networking event at **TopGolf in Auburn Hills** on **Thursday, August 21, 2025**. Join us for an evening of golf, great food, and fun connections. Whether you're a seasoned player or brand new to the game, this is a relaxed and welcoming setting to connect with fellow attorneys.

Event Details

TopGolf, Auburn Hills, MI
Event begins at 5:30 p.m. following a brief council meeting
$20 for members | $40 for non-members

Your registration includes access to the hitting bays, appetizers, sweets, and drinks. Complimentary clubs are available, or feel free to bring your own.

Questions? Contact Joan O'Sullivan at **josullivan3399@gmail.com**.
Registration link coming soon – stay tuned!

We hope to see you there!

Recap: Great Lakes Legal Conference at the Grand Hotel

From June 13–14, 2025, several of our members had the pleasure of attending the Great Lakes Legal Conference at the iconic Grand Hotel on Mackinac Island. Doug McCray, Anthony Snyder, and I represented our Section at this event, which brought together legal professionals from across the state for two days of learning, leadership, and connection.

The conference opened with remarks from Michigan Supreme Court Chief Justice Megan K. Cavanagh and State Bar President Joseph P. McGill. Justice Cavanagh delivered a thoughtful address on *justice, innovation, and institutional responsibility*, a powerful reminder of the evolving role of our profession in a changing world.

This year's keynote speaker, Sateesh Nori, is a nationally recognized attorney, law professor, and author. His presentation, "AI and the Future of the Legal Profession," focused on the transformative potential of artificial intelligence in law. Mr. Nori encouraged attorneys to "seize the AI moment," emphasizing that today's tools can help us practice more equitably, serve broader communities, and reimagine the legal system with accessibility at its core. His message was clear: AI isn't here to replace us—it's here to help us return to the heart of why many of us entered the legal field in the first place.

In addition to the keynote, we heard valuable updates from Bar leaders on current legislative and judicial developments. Breakout sessions offered insights into leadership, law practice management, and strategies for improving client service—all in the idyllic setting of Michigan's most storied island.

It was a memorable and enriching experience, and we look forward to building on what we learned in the months ahead.

Stay Involved and Make the Most of Your Membership

Our Section thrives because of the active participation and enthusiasm of members like you. We had a fantastic turnout at our most recent educational program, "ADR Processes During Pre-Litigation and Litigation," which featured an outstanding panel of attorneys and judges, including **Donn Fresard**, **Suzanne Stanczyk**, **Marcy Tayler**, and **Judges Edward Ewell**, and **Patricia Fresard**. The discussion offered valuable insights into how ADR can be effectively used at different stages of a case.

To continue that momentum, we encourage all members to stay engaged. Whether it's attending an event, joining a committee, writing an article for the *Journal*, or even joining the Council, there are so many meaningful ways to get involved and maximize the value of your membership.

If any of these opportunities interest you, please don't hesitate to reach out. I'd love to connect: **annieearls@mlmepc.com**.

We hope to see you at the next Section event!


The Current State of MCL 500.3135(3)(c) – A Further Look at the Michigan Court of Appeals Holding in *Canty v Mason*

By Christopher Best and Stephanie Strycharz
Zausmer P.C.

On October 4, 2024, the Michigan Court of Appeals issued a published opinion regarding the case of *Canty v Mason*, ____ Mich App _____ (2024). In that case the court of appeals was asked to construe the interplay between MCL 500.3135(3)(C), MCL 500.3109(1), MCL 500.3107(1)(a), MCL 500.3157, and a plaintiff's duty to mitigate damages. The case arose from an accident that occurred in February 2021. *Id.* Plaintiff Joseph Canty filed a complaint against Defendant Michael Chester Mason alleging that Mason negligently caused the accident by traveling too fast for conditions and failing to maintain proper distance, which resulted in Mason's vehicle skidding and rear-ending Canty's car. *Id.* Canty asserted that he sustained a threshold qualifying injury under MCL 500.3135 for pain and suffering damages as well as his economic medical expenses under MCL 500.3135(3)(c). *Id.* Canty was covered by automobile insurance, but he had elected to not maintain coverage for allowable expenses under MCL 500.3107(1)(a) because he was a Medicare recipient, in conformance with MCL 500.3107d. *Id.* The court took note that Canty was able to claim this under MCL 500.3135(3)(c) which states in relevant part:

> (3) Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101(1) was in effect is abolished except as to:
>
> (c) Damages for allowable expenses, work loss, and survivor's loss as defined in sections 3107 to 3110, including all future allowable expenses and work loss, in excess of any applicable limit under section 3107c[1] or the daily, monthly, and 3-year limitations contained in those sections, or without limit for allowable expenses if an election to not maintain that coverage was made under section 3107d[2] or if an exclusion under section 3109a(2)[3] applies…

The court also took note of MCL 500.3109 which states in relevant part:

> Benefits provided or required to be provided under the laws of any state or the federal government shall be subtracted from the personal protection insurance benefits otherwise payable for the injury under this chapter.

The court noted MCL 500.3157 which contains fee schedules that limit a medical provider's reimbursement amount. *Id.* In the lower court Mason moved for partial summary disposition under MCR 2.116(C)(10) and argued that the "without limit" language used in MCL 500.3135(3)(c) does not mean that there are no limits on Canty's recovery of allowable expenses. *Id.* Mason stated that "without limit" language in MCL 500.3135(3)(c) simply references the fact that there is no PIP coverage limit to exhaust before seeking damages from a tortfeasor, and not that an injured party is entitled to unlimited expenses form a tortfeasor. *Id.* He further argued that the medical charges had to be reasonable and incurred for reasonably necessary services so as to be in compliance with the definition of allowable expenses contained in MCL 500.3107(1)(a), which was incorporated into MCL 500.3135(3)(c). *Id.* Mason further contended that Canty and his healthcare providers had a duty to mitigate damages by utilizing Canty's Medicare coverage, which was not done. *Id.* Mason asked the court to dismiss claims of providers who did not even attempt to bill Medicare. *Id.* He additionally argued that any recovery of allowable expenses is also subject to further reduction based on the fee schedule. Canty argued that the "without limit" language contained in MCL 500.3135(3)(c) meant that he could seek economic damages without factoring in the limitations contained in the no fault act. *Id.* Canty also argued that he nor his medical providers were compelled to submit his claims to Medicare. *Id.* The lower court held that Canty had no duty to mitigate damages because "Medicare and Medicaid" are exempt from the no fault statute. *Id.* The lower court further determined that the charges had to be reasonable and necessary, but that the fee schedules did not apply. *Id.* Mason then filed an appeal to the Michigan Court of Appeals. *Id.*

The Michigan Court of Appeals reversed the lower court's ruling. The court of appeals found that the "without limit" language cannot be construed to mean that there are no parameters whatsoever on recovery. *Id.* The Michigan Court of Appeals found that the lower court properly found that the amounts needed to be reasonable and necessary, but that the lower court was incorrect in its assessment of its application of MCL 500.3109(1) and MCL 500.3157. *Id.* The Michigan Court of Appeals found that any claim for excess allowable expenses is subject to the fee schedule contained in MCL 500.3157. *Id.* The Michigan Court of Appeals observed that MCL 500.3107(1) states that the provisions found in that statute, which includes the definition of "allowable expenses" are "[s]ubject to the exceptions and limitations in this chapter[.]" *Id.* The court further observed that chapter is Chapter 31 of the Insurance code of 1956, MCL 500.100 et. seq. and Chapter 31 encompasses MCL

500.3157; therefore, MCL 500.3135(3)(c), by incorporating MCL 500.3107, necessarily also incorporates the fee schedules in MCL 500.3157. Therefore, the Michigan Court of Appeals found that the fee schedule amounts were applicable to any amounts for allowable expenses sought by Canty. *Id.* The Michigan Court of Appeals further held that because the no-fault act does not specifically abrogate the common-law principle that a plaintiff is obligated in tort to mitigate their damages that Canty and his medical providers were required to submit his medical bills to Medicare. Further, because MCL 500.3109(1) is incorporated into MCL 500.3135(3)(c) this further entitled Mason to a set off for any amounts covered by Medicare. *Id.* The Court of Appeals found that both MCL 500.3109(1) and the common law mitigation principles required Canty and his medical providers to submit his bills to Medicare. *Id.*

The Michigan Court's ruling clarifies the interplay between MCL 500.3135(3)(C), MCL 500.3109(1), MCL 500.3107(1)(a), MCL 500.3157, and a Plaintiff's duty to mitigate damages. However, a bigger takeaway from this case is that by the Michigan Court of Appeals reading that MCL 500.3135(3)(c)'s incorporation of MCL 500.3107's exceptions and limitations language should mean that all limitations to MCL 500.3107 now apply to any claims for damages under MCL 500.3135(3)(c). While the case dealt with the interplay between MCL 500.3135(3)(C), MCL 500.3109(1), MCL 500.3107(1)(a), MCL 500.3157, and a Plaintiff's duty to mitigate damages, the language utilized by the court is broad sweeping and all limitations to recover benefits under MCL 500.3107 should be a bar on a Plaintiff's claim for damages under MCL 500.3135(3)(c). For example, one of the disqualifying situations listed in MCL 500.3113 should be a bar on a Plaintiff's claim for economic damages under MCL 500.3135(3)(c). This case has a current pending application for leave to appeal to the Michigan Supreme Court. It is uncertain if the Michigan Supreme Court will take the matter, however, as it stands MCL 500.3135(3)(c) now incorporates all the limitations to MCL 500.3107 including MCL 500.3109(1) and MCL 500.3157.

About the Authors

Stephanie Strycharz *is a shareholder at Zausmer, P.C. She focuses on first-party insurance, third-party bodily injury, general negligence, insurance, and premises liability defense, as well as commercial litigation and insurance coverage disputes. She may be reached at sstrycharz@zausmer.com, www.Zausmer.com.*

Christopher Best *is an associate attorney at Zausmer, P.C. He focuses on first-party insurance, third-party bodily injury, general negligence, insurance, and premises liability defense, as well as commercial litigation and insurance coverage disputes. He may be reached at cbest@zausmer.com, www.Zausmer.com.*

Endnotes

1 MCL 500.3107(c) outlines that if certain requirements are met that an individual can select allowable expenses limits of $50,000, $250,000, $500,000 or maintain unlimited allowable expenses.

2 MCL 500.3107(d) outlines that an individual can opt out of allowable expenses entirely.

3 MCL 500.3109(a)(2) allows an individual to waive allowable expenses in order to reduce their premium.

MCL 691.991 and the Need for "FAIR" Indemnification in Michigan

By Dan Boss
Wayne State University Law School

Note: This article is an abridged version of a Note, *Deconstructing MCL 691.991, Michigan's Construction Anti-Indemnity Statute*, that will be published in Volume 71 (2025-26) of the *Wayne Law Review.*

I. Introduction

Construction projects involve a variety of risks. Among other things, construction project owners and contractors face the prospect of construction and design defects, permitting issues, property damage, natural disasters, theft of building materials and equipment, project delays, and injury to employees and third parties. It is common practice for participants in construction projects to use indemnity agreements to shift these risks to other businesses and individuals they hire. But because many construction firms are small businesses, issues of unequal bargaining power are prevalent in the construction industry. In this highly competitive industry, contractors may have no choice but to agree to terms that are undesirable or even patently unfair.[1] To compensate for disparities in bargaining power and prevent excessive risk shifting, the Michigan Legislature and its counterparts in other states[2] have limited the permissible scope of indemnity provisions in construction contracts.[3]

Michigan's construction anti-indemnity statute, MCL 691.991, comprises two operative subparagraphs. The first was adopted in 1966, amended in 2012, and covers private construction contracts:

> In [a wide range of defined construction and design contracts], a provision purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable.

The second was adopted in 2012 and covers construction contracts with public entities *other than a defined group of public colleges and universities*:

> When entering into [a wide range of defined construction and design contracts], a public entity shall not require the Michigan-licensed architect, professional engineer, landscape architect, or professional surveyor or the contractor to defend the public entity or any other party from claims, or to assume any liability or indemnify the public entity or any other party for any amount greater than the degree of fault of the [indemnitor]. A contract provision executed in violation of this section is against public policy and is void and unenforceable.

This article explores whether MCL 691.991, as currently written, adequately protects contractors and design professionals.

II. Background

A. The History of Construction Indemnity Agreements and Anti-Indemnity Statutes

Although construction indemnity agreements and anti-indemnity statutes typically apply to a variety of risks, their evolution has largely focused on worker injuries.[4] A surge in worker injuries brought on by the Industrial Revolution led Prussia, Great Britain, and later, U.S. states (including Michigan) to implement workers' compensation systems. Under these systems, in exchange for predictable "no-fault" benefits, employees generally give up their right to bring tort suits against their employers in connection with work-related injuries. In the 1960s and 1970s, to circumvent workers' compensation's limitations on recovery, courts found ways to continue to impose tort liability for worker injuries.[5] During those decades, tort suits brought by injured workers against property owners led to widespread use of indemnity agreements in the construction industry.[6]

Indemnity provisions in construction contracts typically take one of three forms: limited form, intermediate form, or broad form. Under all forms, the indemnitor must reimburse the indemnitee for losses that are solely the indemnitor's fault. Where the three forms of indemnity provisions differ is the extent to which the indemnitor must also reimburse the indemni-

tee for losses for which the indemnitee is partially at fault. Limited form indemnity requires the indemnitor to reimburse the indemnitee for losses only to the extent they are the indemnitor's fault. Intermediate form indemnity requires the indemnitor to reimburse the indemnitee for 100% of any loss other than one for which the indemnitee is solely at fault. Broad form indemnity requires the indemnitor to reimburse the indemnitee for all losses within the scope of the agreement, including those for which the indemnitee is solely at fault.

In the wake of courts' increased recognition of tort remedies for injured workers in the 1960s and 1970s, and the subsequent widespread use of indemnity agreements, most states have passed construction anti-indemnity statutes.[7] These statutes limit the permissible scope of indemnity for an indemnitee's negligence in construction contracts. States have two primary motives for doing so with respect to construction contracts specifically.[8] First, a party being indemnified for its own negligence may have less of an incentive to prioritize job site safety.[9] Second, unequal bargaining power may enable owners and general contractors to compel subcontractors to accept unfair indemnity provisions.[10]

B. Michigan Enacts a Construction Anti-Indemnity Statute: MCL 691.991

In 1966, the Michigan Legislature enacted MCL 691.991, Michigan's construction anti-indemnity statute, titled, "void construction contracts." The law took effect on March 10, 1967, and it remained unchanged for the next 45 years. As originally enacted, the statute applied only to contracts "relative to the construction, alteration, repair, or maintenance of a building, structure, appurtenance and [sic] appliance, including moving, demolition, and excavating connected therewith" (it would later be amended to apply to design contracts and contracts for a wider range of infrastructure projects as well). MCL 691.991 was initially permissive and favorable to indemnitees. The statute prohibited broad form indemnity agreements, but it still allowed indemnitees to require reimbursement for losses for which they were up to 99% at fault.

Although indemnity agreements can apply to a variety of construction risks, many of the cases invoking 691.991 have involved serious job site injuries or fatalities.[11] The 1987 case *Burdo v Ford Motor Co*[12] illustrates a typical job site injury situation implicating an indemnity agreement governed by 691.991. In that case, Ford hired a contractor to build a paint processing structure and other improvements at one of its plants.[13] One of the contractor's employees slipped and fell while pulling a machine through the plant, receiving major injuries to his back and neck.[14] A jury determined that the employee was 70% at fault for the injury and Ford was 30% at fault, and the U.S. District Court for the Eastern District of Michigan upheld an intermediate form indemnity agreement between the contractor and Ford, ruling that the contractor was required to completely indemnify Ford for its damages.[15] The United States Court of Appeals for the Sixth Circuit affirmed.[16]

C. 2012 Amendments to MCL 691.991 via HB 5466

In December 2012, the Michigan Legislature passed HB 5466 to amend MCL 691.991. Introduced by a predominantly Republican group of state representatives,[17] in relevant part, the bill added a subsection voiding intermediate form indemnity provisions in construction and design contracts with public entities *other than a defined group of public colleges and universities*. With respect to contracts with those colleges and universities and all private entities, MCL 691.991 still only prohibits broad form indemnity provisions and therefore permits intermediate form indemnity provisions.

III. Analysis

A. The Legislative Intent Behind HB 5466

In considering whether MCL 691.991 would benefit from further amendment, it is important to investigate what motivated the 2012 amendments. Documentation of the legislative intent behind HB 5466 is sparse. What is clear is that legislators felt that the existing statute permitted public entities to shift too much risk onto indemnitors. However, public records do not clearly explain what prompted the Legislature to pass HB 5466 or why the amendment increased restrictions on risk shifting in *certain* public construction contracts but not *all* construction contracts.

In a 2014 article covering then-recent amendments to several states' anti-indemnity laws, construction attorneys Asha Echeverria and Brian Zimmerman noted the bill's public versus private distinction and provided one possible explanation: "Reflecting the fact that most public projects are subject to competitive bidding, with little opportunity for contract negotiation, [MCL 691.991] prevents overreach by public entities by restricting both the assignment of liability and indemnification beyond a party's own fault."[18] That explanation certainly supports prohibiting intermediate indemnity provisions in contracts with public entities, but it does not support treating the same provisions in contracts with private entities or public colleges

and universities differently. While competitive bidding is the norm in public construction projects, it is also frequently used in private projects. Even in private projects where owners or general contractors do not employ competitive bidding processes, the potential for disparities in bargaining power still exists. An increased opportunity for negotiation of contract terms does not necessarily prevent an indemnitor from being taken advantage of. Stated differently, having greater bargaining *opportunity* does not necessarily equate to having greater bargaining *power*. Additionally, whatever the Michigan Legislature's reasoning for treating public and private construction indemnity agreements differently, worker safety should be no less of a concern in private projects than it is in public projects. Whether the indemnitee is a large private business or a state government agency, the more risk it is permitted to shift onto an indemnitor, the less incentive it has to take steps to ensure job site safety.

B. The Relationship Between Anti-Indemnity Statutes and Liability Insurance

The availability of liability insurance can complicate the analysis of anti-indemnity statutes. Subcontractors can often transfer contractually assumed liabilities to their insurers. Assuming the subcontractor's policy covers the indemnity agreement and the loss in question, the insurer, not the subcontractor, defends and indemnifies the indemnitee against third-party claims. At first glance, insurance may appear to solve the problem of excessive risk shifting. After all, an indemnitor who can transfer risk to an insurer no longer bears the direct burden of indemnifying the indemnitee. However, insurance does not fully address the two primary problems anti-indemnity statutes are generally enacted to prevent.

First, although insurance allows the indemnitor to transfer its contractual indemnity obligations to its insurer, it is still true that where the indemnitee is to be indemnified for its own negligence, financial responsibility for that negligence rests with some entity other than the indemnitee. On the other hand, even in the absence of an indemnity agreement, an owner or general contractor is free to maintain its own liability insurance policy. Some would argue that liability insurance inherently lessens a policyholder's incentive to act carefully and safely. While that may be true, it is unlikely that having liability insurance *completely* shields an owner or general contractor from the financial consequences of losses. At a minimum, the insurer might increase the premium at renewal, provide less favorable policy terms and conditions at renewal, or even elect to non-renew the policy. Avoiding those consequences through risk shifting would still represent a significant decrease in the owner or general contractor's incentives to ensure worker safety.

Second, liability insurance does not fully shield an indemnitor from the potential consequences of assuming excessive risk. Absent a provision to the contrary, an indemnitor would still have to defend and indemnify the indemnitee against any *uninsured* losses within the scope of the indemnity agreement. Additionally, an indemnitor will not necessarily be able to pass 100% of its insurance costs to the indemnitee, especially where the two parties are already in positions of unequal bargaining power.

C. Design Professionals

As it turns out, design professionals were central to the enactment of HB 5466.[19] They have an important interest in avoiding intermediate form indemnity agreements because of the unique liability associated with design work and some of the limitations of the insurance available to cover that liability. A key distinction between design professionals and other contractors is that design professionals primarily face liability for errors and omissions in creating the plans and specifications other contractors bring to fruition, and other contractors primarily face liability for losses occurring in the execution of those plans and specifications. Much like doctors, accountants, and lawyers, under common law, design professionals are held to a high standard of care with respect to the professional services they provide. Likewise, where a contractor primarily seeks to transfer liability to a general liability insurance policy, a design professional primarily seeks to transfer liability to a professional liability insurance policy.

One of the critical differences between general liability insurance and professional liability insurance is that general liability insurance policy forms are relatively standardized, and professional liability insurance policy forms are not. General liability policies often provide some coverage for claims for which the policyholder is liable solely by having assumed liability in a contract. In contrast, many professional liability policies covering architects and engineers explicitly exclude claims for which the policyholder has assumed liability in a contract, other than to the extent that the policyholder would have been liable in the absence of the contract.[20] In other words, professional liability policies may cover claims based on common law indemnity[21] or limited form indemnity, but they are unlikely to cover claims based on intermediate form indemnity. Accordingly, a design firm's contractual assumption of liability beyond its own degree of fault is most likely an uninsured obligation. Additionally, general liability policies often provide that the insurer's payment of defense costs does not erode the policy limits, whereas under most professional liability policies, the insurer's payment of defense costs *does* erode the policy limits.

Michigan owners, particularly public entities, have frequently required intermediate form indemnity provisions in construction contracts and design contracts.[22] Considering that professional liability insurance typically does not cover intermedi-

ate form indemnity obligations, the prevalence of such provisions in Michigan has had an especially strong impact on design professionals. At the same time, design firms typically do not carry significant assets, instead relying heavily on cash flow. Because of the limited assets and the unavailability of insurance coverage, compelling a design firm to enter into an intermediate form indemnity agreement accomplishes little. It is unlikely to result in greater protection for the owner, and it increases the likelihood that the design firm will become insolvent in the event of significant losses resulting from concurrent negligence.

Trade associations representing Michigan design professionals have urged the legislature to increase statutory protections against onerous indemnity provisions.[23] In 2004, in response to the trade associations' concerns, the Michigan Legislature enacted HB 5656, which prohibited the Michigan Department of Management and Budget from requiring an architect, engineer, or contractor to assume any liability or indemnify the state beyond the degree of the indemnitor's own fault. Although the bill provided some protection to design professionals and contractors, it was limited to one department within the state government.

After the enactment of HB 5656, intermediate form indemnity agreements persisted in design and construction contracts with many other public and private entities.[24] In response, trade associations urged the Legislature to pass what they referred to as the "FAIR Indemnification Bill."[25] Although the unique challenges facing design professionals provided the impetus for the bill, it would also benefit other contractors, and it attracted their support.[26] As originally proposed, the bill would have prohibited intermediate form indemnity provisions in construction and design contracts with all public and private entities.[27] However, public higher learning institutions and private businesses urged the Legislature to grant them exemptions, which it ultimately did when enacting the final version of the bill.[28] Since the 2012 amendment, MCL 691.991 has created an awkward middle ground: an indemnity agreement that would run contrary to public policy when entered into with most public entities is acceptable when the indemnitee is instead a private entity or a qualifying public college or university.

IV. Conclusion

The current iteration of MCL 691.991 represents a compromise. While the 2012 amendment was a step in the right direction, the statute as amended still does not go far enough to protect small construction and design firms. The Legislature should amend MCL 691.991 again to prohibit intermediate form indemnity provisions in all public and private construction contracts. Doing so would promote worker safety, protect small construction and design firms, and better allocate the financial consequences of losses to the parties who caused them.

Endnotes

1 *See* Haskell Shelton, *Michigan's Murky Law of Contractual Indemnity*, 75 Mich BJ 1182, 1182 (1996) ("Indemnity contracts typically arise when general contractors insert an indemnity provision and demand that subcontractors accept the proffered language. Most often, indemnity clauses are presented on a "take it or leave it" basis, with no room for negotiation.").

2 *See generally* 3 Bruner & O'Connor Constr Law § 10:100.

3 Mich Comp Laws § 691.991 (1966).

4 *See* Dwight G. Conger, et al., Constr Accident Litig § 6:1 (2d. Ed 2023) ("While the goal of tort liability expansion was to open new sources of recovery for injured construction workers (which many of their counterparts in industrial and commercial settings do not enjoy) and enhance job site safety, the result has been the proliferation of indemnity and insurance agreements in the construction industry.").

5 *Id*.

6 *Id.* (citing *Willey v Minnesota Mining & Mfg Co*, 755 F2d 315 (3d Cir 1985) for the proposition that numerous suits against premises owners prompted the owners to shift risk onto contractors and subcontractors).

7 3 Bruner & O'Connor Constr Law § 10:108.

8 2 Randy Maniloff, et al., General Liability Insurance Coverage: Key Issues in Every State 85 (5th ed 2021).

9 *Id*. (citing *Jankele v Texas Co*, 45 P2d 425, 427 (Utah 1936)).

10 *Id*. (citing *Brooks v Judlau Contracting, Inc*, 898 NE2d 549, 551 (NY 2008)).

11 *See, e.g., Fischbach-Natkin Co v Power Process Piping, Inc*, 157 Mich App 448 (1987) (subcontractor's employee was seriously injured when a hydraulic machine tipped over on him during installation at an auto manufacturer's plant); *Redfern v RE Dailey & Co*, 146 Mich App. 8 (1985) (contractor's employee sustained fatal injuries while attempting to retrieve a broken component from an agitator

at a wastewater treatment facility); *Giguere v Detroit Edison Co*, 114 Mich App. 452 (1982) (contractor's employee was killed in a fall when a utility pole he was working on broke); Peeples v City of Detroit, 99 Mich App. 285 (1980) (subcontractor's employee sustained injuries in fall from scaffold).

12 828 F2d 380 (6th Cir 1987).

13 *Id.* at 381.

14 *Id.*

15 *Id.* at 382.

16 *Id.* at 384.

17 HB 5466, 96th Leg, Reg Sess (Mich. 2012) ("Introduced by Reps. Heise, Haugh, Potvin, Wayne Schmidt, Horn, Knollenberg, Pettalia, Huuki and Haveman").

18 Asha A. Echeverria & Brian R. Zimmerman, *Construction Bills: Recent Changes to Construction Laws*, 34 CONSTR. LAW. 1, 3 (2014).

19 Telephone interview with Gary D. Quesada, Principal Attorney, Cavanaugh & Quesada, PLC (Jan. 27, 2025).

20 *Id*.

21 *Id.*; *see also* 3 Bruner & O'Connor on Constr. Law § 10:3 (discussing common-law indemnity at length).

22 Telephone Interview with Gary D. Quesada, *supra* note 19.

23 *Id.*

24 *Id*.

25 *Id.*

26 *Id.*

27 *Id.*

28 Telephone Interview with Gary D. Quesada, *supra* note 19.

Using Images to Enhance Your Mediation Practice – Part I

By Sheldon J. Stark, Mediator and Arbitrator (Retired)

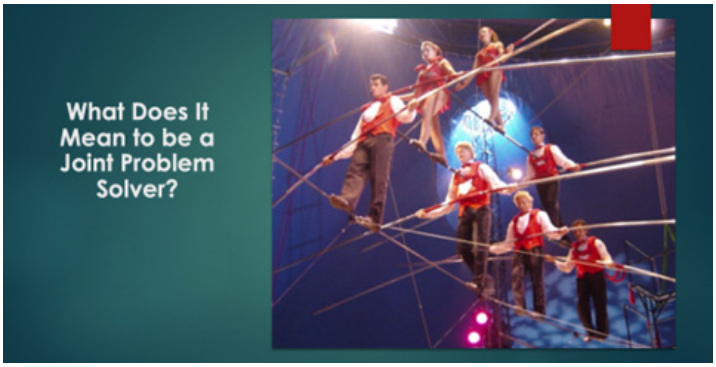
Everyone is familiar with that old adage: "a picture is worth 1000 words." According to the application Perplexity:

The phrase … means that a single image can convey complex ideas or tell a story more effectively than a large amount of … text. It emphasizes the power of visual communication over verbal descriptions, suggesting that images can evoke emotions and convey information more quickly and deeply than words alone.

How true. And don't ignore its application in Mediation. During the years of my mediation practice – especially after COVID when most sessions took place over Zoom – I built a collection of images into PowerPoint slides for use at the mediation table. By screen sharing, the images enhanced communication, provided important insights quickly and effectively, and engaged participants meaningfully in the process. In this paper, I will share my favorite images with you along with why and when I put them to use.

Preliminary Matters

At the start of every mediation, I went around the table asking each party and counsel individually if they would set aside traditional zealous advocacy and assume the role of joint problem solvers during the course of mediation. A joint problem solver, I explained, listens with an open mind, doesn't try to score every point, makes reasonable concessions, treats everyone with respect, allows each side to say their piece without interruption, and uses the language of diplomacy. If the dispute isn't resolved, everyone is free to resume zealous advocacy "tomorrow." I then showed the following image:

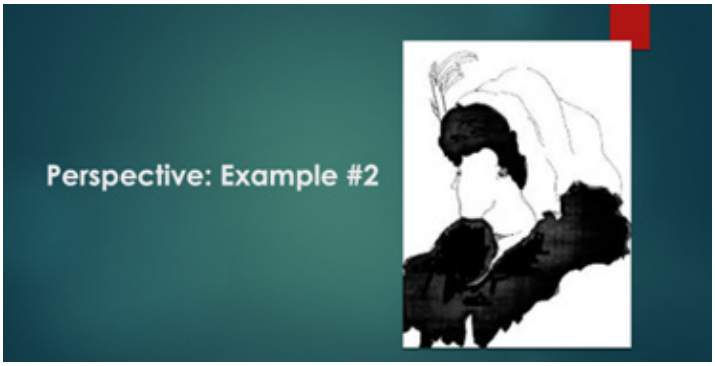


The image almost always causes laughter and a good-natured commitment to civility and good behavior. Should anyone start to escalate, a gentle reminder that we all made a commitment to joint problem solving generally will end unproductive behavior.

I also made a practice of advising participants that when the caucus/shuttle diplomacy stage of the mediation is reached, I anticipate being asked to leave a caucus room from time to time while that party and counsel deliberate over a proposal, hash over new information, or formulate a counter-proposal. If so, I promised to send two valuable data points by text message: when I leave the room and when I return. Each side then knows how much time I actually spend with the other, information that might provide useful insight into what's going. Here's the image for that:

Changing Perspective

Sometimes parties get deeply entrenched in their own story line, unable to allow even for the possibility of another honest perspective. I have a collection of three images for that. "What do you see?" I ask:



Trying to explain the point in words can lead to consternation and defensiveness. By the third "now what do you see?" even the most stubborn participant is smiling. The point doesn't need further elaboration.

Pivoting to the Future

At some point in the mediation, hashing over past grievances can become frustrating and counterproductive. Good mediators know when it is time to look ahead to focus on resolution. I initiate that pivot by asking if anyone has anything new they need to address before we start looking toward the future. If there is any hesitancy, I bring out the next image. It's hard to argue with Thomas Jefferson!

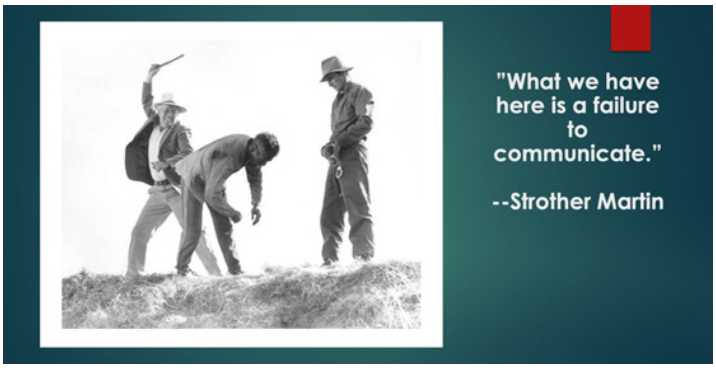
I have a second image that makes a similar but related point. I suggest the participants consider an analogy to the windshield and rearview mirror of their automobile. "Mediation is a forward looking process," I say. "The rearview mirror is analogous to the issues and events that lead us up to the present point. The windshield is analogous to the issues we need to address going forward to think about the future. The proportions are right."

Interventions: Good Faith or Bad

It is rarely a good sign when one side begins to question the good faith of the other, especially without cause. This image sometimes helps:

Failure to Communicate

One of the most common causes for a dispute to develop is when parties misunderstand one another or make reasonable but unwarranted assumptions. Here's an image from the movie "Cool Hand Luke" most people recognize, despite its vintage:



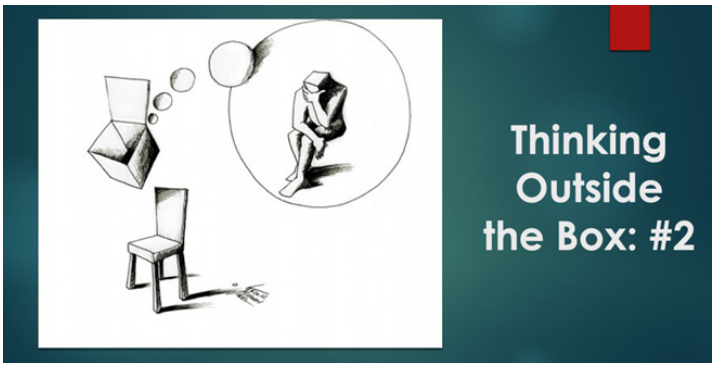
I introduce the next image with the words: "Here's something we all learned in the fifth grade. Do you remember how this goes?"

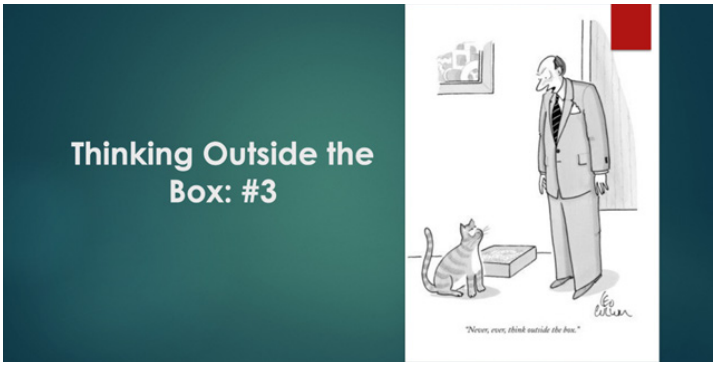
Brainstorming Fresh Ideas

When acceptable options for resolution are not forthcoming, I like to invite everyone to engage in a creative "brainstorming session," either in caucus or joint session depending on how things are moving. The purpose is to identify possible resolution options. The rules for brainstorming are simple:

- Focus on quantity;
- Withhold criticism until all options have been identified;
- Options need not be reasonable;
- Suggesting an option doesn't mean it is being offered;
- Options can be tweaked or combined at the end.

Once options have been written down on a flip chart, we go through them one at a time to see if any might be helpful. I have a series of images to assist parties in "thinking outside the box."





These images help participants relax, share a laugh, and get into the spirit of brainstorming as a process.

Conclusion

Images are a priceless tool for moving the mediation process forward. They are often worth *more* than a thousand words delivered verbally by the mediator. Images enhance the mediation process for most participants. Used to supplement your mediation techniques and interventions, they can be very constructive: they relax the parties, draw a laugh, build relationships and gain trust. They make your job as mediator easier because they make your points effectively. Is there an occasional participant who thinks they're hokey? Perhaps. If your images do not appear to be hitting home, don't show any more. In my experience, before the end of the process, most participants see the power of visuals, especially as they embody a key concept you're attempting to communicate.

It will be well worth your time and effort to build a collection of your own. Incorporate images into your tool kit. Identify images that *you* find compelling. Think of scenes from movies *you* have loved. Use AI to ask for image suggestions to make your favorite points.

It is rare that participants are unfamiliar or uncomfortable with PowerPoint. The ubiquity of PowerPoint is to your advantage. Images work! The screen sharing tool on Zoom is perfect for projecting your images.

In Part II, I will provide another set of images that have worked constructively in my own mediation practice.

The Implied Covenant of Good Faith and Fair Dealing: *Kircher v Boyne USA, Inc:* Maintaining the Scope of the Implied Covenant of Good Faith and Fair Dealing - Part 2

By Mitchell Zolton

On March 27, 2025, the Michigan Supreme Court issued a unanimous per curiam opinion in *Kircher v Boyne USA, Inc*, definitively clarifying the scope and application of the implied covenant of good faith and fair dealing (the Implied Covenant) under Michigan law. As reaffirmed in *Kircher*, under Michigan law, the Implied Covenant exists in every contract and is applied as an interpretive tool to evaluate how parties should perform their contractual obligations, particularly when a contract grants one party discretionary authority over the manner of performance. This approach contrasts with other jurisdictions, like California, where the Implied Covenant may create independent obligations and protect parties' reasonable expectations – even in the absence of express contractual terms.

A Family Business Dispute

The dispute in *Kircher* involved Boyne USA, Inc. (the Company), a family-owned ski business founded by Everett Kircher in 1947. The Plaintiff, Kathryn Kircher, is a shareholder in the Company, the founder's daughter, and former employee of the Company. After family disagreements culminated in Kathryn's termination in 2012, the parties reached a settlement agreement in 2014.

The 2014 settlement agreement established a specific framework for annually redeeming Kathryn's shares, "until such time as Plaintiff has redeemed all of her shares." The agreement tied share value to a formula based on the company's EBITDA minus total company debt: [6.5 times an Average of EBITDA) minus the Total Company Debt] multiplied by 80% and divided by total outstanding shares. Central to the dispute, the settlement agreement allowed for alternative valuation methods if "otherwise agreed by the Parties."

Initially, the formula produced substantial share values—$773 per share in 2018. However, that year the Company borrowed approximately $300 million to purchase real estate and assets it had previously leased. This transaction fundamentally altered the company's debt structure, causing the 2019 calculation to result in a *negative* share value, effectively eliminating Kathryn's ability to receive value for her shares. Kathryn claimed that the Company's failure to "otherwise agree[]" to an alternative formula constituted a breach of the Implied Covenant.

The Court of Appeals' Analysis

The Michigan Court of Appeals divided Kathryn's claims of breach of the Implied Covenant into two distinct bases: (1) the Company's decision to take on significant debt, given the impact on the share value under the agreement's formula, and (2) the Company's refusal to consider an alternative share valuation method.

With respect to the first basis, the Court of Appeals agreed with the defendants that the settlement agreement placed no restrictions on the Company's business decisions. Thus, its decision to take on the debt did not violate the agreement. However, the Court of Appeals found that the plaintiff had stated a viable claim on the second issue, reasoning that the phrase "unless otherwise agreed by the Parties" created discretionary authority on the part of the Company, which was required to be exercised in good faith.

The Supreme Court Reverses the Court of Appeals, Finding No Contractual Obligation to Modify the Parties' Agreement

In *Kircher*, the Michigan Supreme Court unanimously reversed the Court of Appeals on whether the plaintiff's discretionary authority theory stated a valid claim for breach of the Implied Covenant. The Court's analysis centered on established Michigan precedent that the Implied Covenant "does not give rise to an independent cause of action" and "does not override or replace any express contractual term."

Initially, the Supreme Court found that the agreement did not make calculating the redemption price a matter of discretion. Instead, it was found that the parties had agreed to use a negotiated formula that "unambiguously tied plaintiff's redemption price to Boyne USA's EBITDA and debt." Because the parties had "unmistakably expressed their respective rights" regarding redemp-

tion-price calculation, the Company was not contractually obligated to use a different formula under the Implied Covenant.

The Supreme Court rejected the Court of Appeals' interpretation of the phrase "unless otherwise agreed by the Parties." Rather than finding that such phrase created an implied duty to negotiate an alternative formula, the Court held that this phrase "merely permitted the parties to amend the contract at a future date, reflecting the bedrock principle that parties to a contract always have the ability to mutually modify their existing agreements after the original contract has been executed." Because the phrase "created no discretionary duty or obligation to depart from [the] agreed-upon formula," it did not contain an "underlying contractual duty or obligation" to which the Implied Covenant applied.

The *Kircher* Opinion Maintains Michigan's Narrower Application of the Implied Covenant Relative to Other Jurisdictions

The Supreme Court's holding in *Kircher* maintains Michigan's established precedent that the Implied Covenant serves as an "interpretive tool" by which a party's performance under existing contractual duties is "measured and judged," particularly where the manner of a parties' performance is discretionary. This approach emphasizes parties' freedom of contract while preventing bad faith abuses of discretionary authority.

The principle was explained by the Court of Appeals in *Gorman v American Honda Motor Co, Inc*, which established that the Implied Covenant is "not an independent duty, but rather a modifier that requires a subject to modify." In *Gorman*, the Court of Appeals emphasized that "the obligation of good faith has no application apart from some other contractual obligation." However, when a contractual obligation makes the manner of a party's performance a matter of that party's discretion, the Implied Covenant requires that such discretion be exercised "honestly and in good faith" rather than in a manner that destroys or injures the other party's right to receive the benefits of the contract. In other words, "the law does not hesitate to imply the proviso that such discretion be exercised honestly and in good faith." This principle became crucial for understanding when the implied covenant applies.

As discussed in Part 1, Michigan's approach to the Implied Covenant differs from some other jurisdictions in that "Michigan does not recognize a claim for breach of an implied covenant of good faith and fair dealing" as an independent cause of action. *Belle Isle Grill Corp v City of Detroit*. In maintaining this approach to the Implied Covenant, the Supreme Court declined to adopt broader application of the Implied Covenant used elsewhere, such as in California.

In deciding *Kircher*, the Supreme Court specifically requested that the parties compare the application of the Implied Covenant in *Gorman* to that in *In re Vylene Enterprises, Inc*, a case out of the Central District of California. The *Vylene* case, applying California law, represents a broader application of the Implied Covenant, by which it may impose obligations and restrictions beyond the contractual terms in order to protection parties' "reasonable expectations."

In *Vylene*, the Ninth Circuit found that a franchisor violated the Implied Covenant with respect to its franchisee in two distinct ways: first, by offering a "commercially unreasonable" renewal agreement that it knew the franchisee would reject, and, second, by constructing a competing restaurant within 1.5 miles of the franchisee's location.

Although the parties' contract did not provide the franchisee any protected territory (and thus, by its terms, did not prohibit the franchisor from placing a new restaurant within an agreed-upon proximity to the franchisee), the Court found that the franchisor nonetheless violated the Implied Covenant. The California Court reasoned that the new restaurant had "the potential to not only hurt [the franchisee], but also to reduce [the franchisor's] royalties," making it an act of bad faith. Unlike under Michigan's approach, the California Court did not identify an express duty or obligation under the parties' contract that was the franchisor breached by constructing a restaurant within 1.5 miles of the franchisee. For that reason, this application of the Implied Covenant effectively creates rights and obligations beyond the language of a contract to protect parties' reasonable expectations.

The Implied Covenant's Application to Insurance Contracts in Michigan

Kircher addressed the application of the Implied Covenant to contractual terms generally, and not specifically with respect to any particular industry or area of law in Michigan. This is potentially notable as case law has developed with respect to the application of the Implied Covenant in distinct contexts. For example, courts have routinely declined to recognize an action for breach of the Implied Covenant in the employment relationship. Another application of the Implied Covenant has been with respect to insurers settling or litigating claims, particularly where the insurer's actions are alleged to have caused the insured to be liable for a judgment in excess of applicable policy limits. Dating back to the 1929 case of *Wakefield v Globe Indem Co*, courts have recognized that "[g]ood faith and fair dealing are correlative obligations and the insurer owes to the insured some duties in the matter of the settlement of claims covered by the policy."

As explained by the Michigan Supreme Court in *Commercial Union Insurance Co v Medical Protective Co*," it is clear that the insurer owes the insured a duty of good faith," and "the insured has a direct cause of action against the insurer for a breach of this duty which exposes him to excess liability."

The *Commercial Union* Court defined bad faith (in the context of an insurer litigating an insured's claim) as "arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty" and articulated twelve factors for evaluating bad faith claims. The Supreme Court also clearly clarified that bad faith "should not be used interchangeably with either 'negligence' or 'fraud.'"

The *Commercial Union* framework reflects the principle that when insurers assume defense of claims, they exercise discretionary authority over litigation decisions that must be performed in good faith. On the one hand, because the right to assume such defense is provided for in the parties' contract, the principle arguably aligns with the Implied Covenant rule maintained in *Kircher*, which is that the Implied Covenant is a tool to "measure and adjudge" a party's performance of its discretionary authority granted it under the terms of a contract.

More recently, in *Stryker Corp v XL Ins Am, Inc* (albeit, an unreported case), the Federal District Court for the Western District of Michigan addressed whether an insurer's decision to settle one claim before paying another could constitute a breach of the Implied Covenant when the parties' contract lacked any term addressing the order that claims may be paid. The District Court held in the affirmative.

The *Stryker* Court noted that "generally, the duty of good faith arises when the contract leaves the manner of performance by a party to their discretion." However, in deciding *Stryker*, the District Court observed that, "[w]hile it is true that an implied duty of good faith cannot override the express terms of a contract," the defendant failed to point to an express term of the insurance policy ***that would override*** the plaintiff's allegation of breach of the Implied Covenant. In other words, because the contract was silent with respect to the order in which claims would be paid, the insurer's decision in that regard could form the basis of a claim for breach of the Implied Covenant.

In support of its holding, the *Stryker* Court, found that there was "nothing unusual about extending the duty of good faith" in that instance because the "insurance contract ***implicitly*** gives the insurer discretion to choose the order in which to pay the claims against the insured." (emphasis added). Ironically, according to the *Stryker* Court, because the insurance contract at issue did not give the insurer "unfettered discretion to make such a choice," the contract therefore did not preclude the insured from asserting a bad faith claim relating to the insurer's actions in that regard.

Relating the Insurance Cases to the Implied Covenant Under *Kircher*

On the one hand, the *Kircher* decision is consistent with and supportive of an insurer's obligation to settle, pay, and litigate claims in good faith, as articulated in *Commercial Union* and *Stryker*. *Kircher* recognizes the principle underlying insurers' good faith duties when it cites the Court of Appeals' "longstanding holding that '[w]here a party to a contract makes the manner of its performance a matter of its own discretion, the law does not hesitate to imply the proviso that such discretion be exercised honestly and in good faith.'" *Burkhardt v City Nat'l Bank of Detroit*. *Kircher's* endorsement of this discretionary performance principle reinforces that when insurance contracts grant insurers discretionary authority over performance, such discretion must be exercised in good faith. *Commercial Union* sets forth the standard of how to "measure and adjudge" whether good faith has been exercised in the context of insurer's performance of discretionary authority under insurance contracts when assuming a party's defense.

On the other hand, the general approach to the Implied Covenant in Michigan, reaffirmed in *Kircher*, relates interestingly with the "implicit" grant of discretion in *Stryker*. Again, in *Stryker*, the plaintiff's allegation of breach of the Implied Covenant arose from the defendant's decision with respect to the order of claims being paid, which was not addressed in the parties' contract. The *Stryker* Court relied on the fact that the parties' contract was ***silent*** on the matter when finding that the plaintiff stated a claim for breach of the Implied Covenant. Put differently, the Implied Covenant was not alleged to have been breached based on the defendant's manner of performance of a duty or obligation provided under the contract.

The principle that the Implied Covenant applies to ***implicit*** discretion created by a contract's silence may be read as a broader application of the Implied Covenant than that described under *Kircher*, which limits application of the Implied Covenant to "where a party to a contract makes the manner of its performance a matter of its own discretion" with respect to a "contractual duty or obligation." Whether Courts refer to *Kircher* to cabin their applications of the Implied Covenant to express duties or obligations, or imply from a contract's silence discretion to which the Implied Covenant may apply remains to be seen.

It should be noted that *Kircher* did not involve an insurance contract, and the Supreme Court did not discuss the bad faith standard espoused in *Commercial Union* and its progeny. The bad faith standard discussed in *Wakefield* and *Commercial Union*

was applied specifically due to the nature of the insurance relationship. Accordingly, to the extent historic applications of the Implied Covenant to bad faith claims in insurance contracts are distinguishable from the application of the Implied Covenant more broadly, *Kircher*'s impact may be minimal.

Practical Considerations and Impacts Following *Kircher*

Contract Drafting

Ensure that contract language explicitly imposes desired obligations or restrictions to protect clients' interests. Following *Kircher*'s affirmation of Michigan's relatively narrower application of the Implied Covenant as merely an interpretive tool, rather than a standalone duty, parties should not rely on the Implied Covenant to protect their interests beyond the contract's express terms. Any desired restrictions on a contract parties' conduct, or reservation of rights, should be explicitly set forth in the contract.

Business Operations

The *Kircher* decision provides assurance to parties relying on the express language of their contracts. Businesses may generally operate according to the express terms of their contracts without the threat of being challenged through Implied Covenant claims. General allegations of unfairness without connection to a specific contractual term will be more difficult for plaintiffs to sustain. Provided, parties must still be wary of exercising their discretionary authority in good faith.

Conclusion

In *Kircher v Boyne USA, Inc*, the Supreme Court maintained the general standard that the Implied Covenant is applied as an interpretive tool for measuring and adjudging of underlying contractual obligations and declined to expand the Covenant to provide a source of independent duties. In the insurance context specifically, *Commercial Union*'s standard remains intact based on insurers assuming defense (by their authority explicitly granted in the contract), while *Stryker* relied on implicit discretion from contractual silence. *Stryker*'s approach of finding implicit discretion may face scrutiny under *Kircher*'s emphasis on underlying contractual duties and obligations. Whether courts will require more explicit contractual language when applying the Implied Covenant, or whether the unique context of the insurer-insured relationship will continue to support implicit discretion findings, remains to be seen.

About the Author

Mitchell Zolton *is an associate attorney in the Business Franchise Group at Fahey Schultz Burzych Rhodes PLC, based in Okemos, Michigan. Mr. Zolton's practice focuses on franchising, commercial and real estate transactions, mergers and acquisitions, intellectual property, wage and hour compliance in the hospitality industry, and liquor law.*

Insurance Practice Tips for Adverbs

By Jennifer Serwach
Karmer Corbett Harding & Dombrowski, Royal Oak

It is a piece of advice repeated throughout high school and college to avoid the use of adverbs in writing. However, in the high-volume world of insurance litigation this advice is quickly forgotten. In this quarter's column of insurance practice tips, I will focus on writing and address the use of adverbs in insurance practice.

One common mistake when taking a previous template is to find a motion from a contentious case where fraud is an issue. This is not inherently bad as it is common for fraudulent cases to proceed to the litigation stage, but taking these same templates and applying them to every case can confuse the real issue. For instance, an attorney can accuse a plaintiff of being involved in an alleged accident and seeking alleged medical treatment in a case where the real issue is lack of insurance coverage. However, each use of the word "allegedly" can diminish the author's credibility and come across as if the defense attorney does not believe in automobile accidents as all. Further, a reader does a mental pause when the word "allegedly" appears and this can interrupt the flow of internal reading and come across as unwieldy when read aloud. Even in cases where there is a staged accident and medical treatment that is being billed and not actually provided, it is better to use the word "allegedly" once per sentence and address these serious issues with the weight and emphasis they deserve.

On both sides of the aisle, a common adverb that gets overused is "clearly." Plaintiff is clearly liable. Plaintiff's injuries are clearly objectively manifested. This can come across as haughty and does not add to the meaning of the sentence. The more writers swears they are honest, the more a reader may subconsciously question why the writers insist upon their veracity. It is the goal of every writer to prove that their side is honest and that the other person's side is wrong, but, sometimes, a constant repetition of contentious language can have the opposite effect.

On the plaintiff side of insurance litigation, it is more common to see adverbs used for change of life proof. A plaintiff might find a procedure extremely painful. Life might be very difficult. However, there are other ways to convey a plaintiff's severe pain and a specific example may be more helpful. Most often, a medical provider may be assisting in this process already by using diagnoses such as "myofascial pain syndrome" or documenting radiating pain complaints indicative of neuropathy. Another tool could be to use the pain scale when a doctor asks a patient to rate their pain on a scale of zero to ten. Although it is tempting to use adverbs to describe something as nebulous as pain, in most instances, specific language from the medical records is more effective.

Obviously, there are certain places where adverbs are appropriate. Taking a pause to use an adverb as a transition word can help the reader switch to the next paragraph or different idea within the same paragraph. Additionally, adverbs are sometimes used in legal phrases of art and cannot be avoided such as the "objectively manifested impairment" requirement in bodily injury cases that is now codified in a statute. However, the necessity of using adverbs in certain legal phrases simply affirms the need to avoid superfluous adverbs in factual descriptions.

Most of these tips are simply stylistic preferences and motions may be granted even with an excessive number of adverbs. However, court dockets continue to increase and judicial staff are busier than ever. Taking the time to parse a document for extra words can make a difference between a motion being granted or denied. Newer attorneys in particular are hesitant to alter a template due to fear of removing key language. But taking the time to edit and revise can save time in preparation for oral argument even if no changes are made. That is why I recommend taking a deeper look and thinking about adverbs when coming across an unfamiliar motion. The results may surprise you.


LEGISLATIVE UPDATE

Summer Heats Up and the Legislature Cools Off!

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

As the heat ramps up, summer is upon us which means there are only a few scheduled session days remaining over the next couple of months. The recess allows legislators to spend more time in their districts. The Legislature will resume regular session in September. Between now and then, there won't be much committee work.

Several bills have advanced since our last update:

- **SB 0004** – amends the Insurance Code to require that any insurer providing prescription drug coverage must comply with section 12 of the prescription drug and affordability review act. This bill is tie barred with SB 0003 which creates the prescription drug and affordability review act. ***Passed the Senate (20-15) on 4/24//2025. Referred to the House Government Operations Committee on 4/24/2025.***
- HB 4071 – 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, increasing value limit for gifts to $50 from $5. It would also allow an insurer to offer or provide value-added products or services, for free or at a discounted price, if the product or service relates to the insurance coverage and is primarily designed to satisfy certain objectives. ***Passed the House (108-1) on 5/7/2025. Referred to the Senate Finance, Insurance, and Consumer Protection Committee on 5/13/2025.***
- **HB 4178** – amends the Insurance Code to create a carryover system for continuing education credits for insurance producers who belong to a professional insurance association. ***Passed the House (108-1) on 5/7/2025. Referred to the Senate Finance, Insurance, and Consumer Protection Committee on 5/13/2025.***
- **HB 4179** – amends the Insurance Code to increase (from $5 to $50) the cap on gifts of merchandise that life insurers can provide applicants for a life insurance policy, to allow the gifts to be given to policyholders as well as to applicants, and changes the cap to apply annually and not on a one-time or cumulative basis. ***Passed the House (108-1) on 5/7/2025. Referred to the Senate Finance, Insurance, and Consumer Protection Committee on 5/13/2025.***
- **HB 4207 and HB 4208** – amend the Insurance Code to provide that the terms "health insurance policy" and "health benefit plan," when used in Chapter 37 (Small Employer Group Health Coverage) or in the code, respectively, do not include coverage that is only for excepted benefits as described under federal law. ***Passed the House (106-0) on 4/23/2025. Referred to the Senate Health Policy Committee on 4/29/2025.***

A handful of new bills made their way to the insurance committees:

- **SB 245** – amends the Insurance Code to expand the conduct included in the unfair methods of competition and unfair or deceptive acts or practices in the business of insurance.
- **SB 329** – amends the Insurance Code to eliminate penalties for a lapse of no-fault insurance policy in the six months preceding the application for or renewal of a policy.
- **HB 4464** – amends the Insurance Code to clarify which provisions of the federal Patient Protection and Affordable Care Act, codified into state law, do not apply to retiree-only health care coverage or non-grandfathered health plan coverage.
- **HB 4496** – amends the Insurance Code to require that any insurer providing coverage for prescription contraceptives must include coverage for a 12-month supply to be dispensed at one time, unless the insured or prescriber requests otherwise; must also provide coverage for related services necessary to prescribe (if they are covered for other prescription drugs under the policy).
- **HB 4666** – amends the Insurance Code to remove references to "colored people" and instead provides that a life insurer shall not make any distinction or discrimination between individuals based on race or color. Also updates the fines for violations of this section.

RECENT OPINIONS

By Eric Cohn
Fahey Schultz Burzych Rhodes PLC

Published Court of Appeals Decisions

Moving vehicle determines coverage over parked vehicle exception

Joseph v National General Insurance Company
Docket No. 364798

Diyaa Joseph was injured in two incidents during a single encounter while working as a commercial truck driver. First, while Joseph was sleeping in a parked Freightliner semitruck, a Volvo semitruck struck the vehicle, causing Joseph to fall from the sleeper berth. In the second incident, as Joseph approached the Volvo driver who was attempting to flee, Joseph stepped onto the moving truck's running board and eventually fell, sustaining additional injuries. The trial court granted summary disposition to both Progressive (insuring the Freightliner) and National General (insuring Joseph's personal vehicles), finding no coverage under either policy.

The Court of Appeals reversed in part, holding that when a moving vehicle strikes a parked vehicle, MCL 500.3105 applies based on the operation of the moving vehicle, not the parked vehicle exception under MCL 500.3106. Following established precedent in *Kalin*, the Court explained that when accidental bodily injury results from a collision between a moving motor vehicle and a parked motor vehicle, the injury necessarily arises out of the operation of the moving vehicle as a motor vehicle, making the parked vehicle exception irrelevant unless the moving vehicle's involvement is merely incidental. Regarding the second incident, the Court found genuine issues of material fact existed concerning whether either Joseph or the Volvo driver intentionally caused the injuries, distinguishing cases like *Thornton* and *Bourne* where vehicles served merely as locations for assaults.

Takeaway: The parked vehicle exception does not apply when a claimant's injuries arise from a collision between a moving and parked vehicle, as coverage is determined by the moving vehicle's operation. This may run counterintuitive to how some view no-fault law and *Joseph* serves as an important reminder to refer (often) to the act when presented with unique situations.

Courts can apportion MACP benefits but cannot award unincurred expenses

Michigan Head & Spine Institute, et al v Nationwide Mutual Fire Insurance Company
Docket No. 367681

Daniel Crane suffered catastrophic injuries in a motor vehicle accident, resulting in partial quadriplegia and extensive medical treatment from Michigan Head & Spine Institute. Because Crane lacked no-fault insurance, his claim was assigned to Nationwide under the MACP with benefits capped at $250,000. When medical providers' claims and Crane's claims exceeded this limit, Nationwide sought interpleader and court-ordered apportionment under MCL 500.3112. The trial court found Crane "medically indigent" and awarded 90.7% of benefits to Crane and 9.3% to the providers, while also treating Crane's future attendant care expenses as "incurred" for apportionment purposes.

The Court of Appeals reversed in part, holding that Crane was not medically indigent under MCL 400.106(1)(b)(ii) because PIP benefits remained available to him through the MACP at the time providers received Medicaid payments, even though benefits were limited in amount. The Court affirmed the trial court's authority to apportion benefits under MCL 500.3112 when genuine doubt exists about proper distribution, noting that the Legislature's 2019 amendments creating finite MACP benefits necessarily contemplated situations requiring equitable apportionment. However, the Court found error in treating future attendant care expenses as "incurred," explaining that under MCL 500.3110(4) and *Andary*, PIP benefits accrue only as expenses are actually incurred, and the trial court cannot use legal fiction to treat future expenses as presently incurred.

Takeaway: Trial courts possess broad equitable discretion under MCL 500.3112 to apportion limited MACP benefits among competing claimants but cannot award benefits for expenses not yet incurred. The availability of limited PIP benefits precludes a finding of medical indigency even when benefits are insufficient to cover all medical expenses.

Complete provider write-offs eliminate "incurred" expense liability

Estate of Delmond Richards v Grange Insurance Company
Docket No. 369905

Delmond Richards died from complications of a traumatic brain injury sustained in a motor vehicle accident. His estate sought PIP benefits from Grange Insurance for treatment at Spectrum Butterworth Hospital, DMC Harper Hutzel Hospital, and DMC Rehabilitation Institute of Michigan. The billing ledgers showed different payment scenarios: Spectrum's ledger reflected a total write-off with entries showing "Generic AUTO Legal Write Off -451,112.43" and a negative balance of $902,280.86, while DMC facilities showed "PAY THIS AMOUNT 0.00." However, Andrea Prevost, a DMC billing representative, submitted an affidavit stating that DMC was expecting payment from Grange, not from Richards personally.

The Court of Appeals affirmed summary disposition regarding Spectrum Hospital because the uncontroverted evidence showed the bill had been completely written off, relieving Richards of any legal responsibility. However, the Court reversed regarding DMC facilities, finding that Prevost's affidavit created a genuine issue of material fact about whether the providers were expecting payment from the insurer rather than pursuing collection from the plaintiff directly. The Court emphasized that under *Proudfoot* and related cases, expenses remain "incurred" under the no-fault act only when the insured retains legal responsibility for payment, but that a plaintiff's liability is not altered merely because providers expect payment from the insurer.

Takeaway: Medical expenses are "incurred" only when the insured remains legally liable for payment. Complete write-offs by providers eliminate this liability, but provider expectations of insurer payment rather than patient collection may preserve the incurred status of expenses where genuine factual disputes exist about the provider's collection intentions.

Fraudulent insurance acts require only knowledge, not intent

Whigham v Farm Bureau Mutual Insurance Company
Docket No. 367404

Ronald Whigham was injured while riding a motorized scooter and applied for PIP benefits through the MACP, which assigned his claim to Farm Bureau. Whigham submitted household services statements claiming Kim Readus provided daily services from August 1, 2021 (four days before the accident) through December 31, 2021, including services during his hospitalizations and claiming Readus performed window washing, vacuuming, and ironing. However, Readus testified he was a state-assigned caregiver for Whigham's wife who had been providing the same services to her for approximately two years before the accident, with no change after the accident. Readus denied performing window washing, vacuuming, or ironing, and denied completing any service forms for Whigham.

The Court of Appeals affirmed summary disposition for Farm Bureau, applying the *Candler* test and finding that Whigham committed fraudulent insurance acts by knowingly submitting false information material to his claim. The Court noted that MCL 500.3173a(4) requires only knowledge that statements contain false information concerning material facts, not fraudulent intent per *Bakeman*. The Court found undisputed evidence that Whigham knew his statements were false because he admitted Readus was already providing services to his wife before the accident, knew services weren't provided on the pre-accident dates claimed, and knew Readus didn't perform specific services like window washing.

Takeaway: Fraudulent insurance acts under MCL 500.3173a(4) require only knowledge of false material information, not intent to defraud. MACP claimants become ineligible for benefits when they knowingly submit false supporting documentation, regardless of their subjective motivations or the characterization of errors as "clerical."

Minor children's domicile follows parents' domicile as a matter of law

FD Minor v Auto Club Insurance Association
Docket No. 370748

The FD minors lived with their aunt Mary O'Neal during weekdays from November 2020 through the January 2021 while their parents John Davis and Kelly O'Neal stayed at an extended-stay motel. The arrangement began when Kelly was placed on bed rest during pregnancy, and the children had beds, belongings, and attended virtual school at Mary's home while their parents maintained legal custody and visited regularly. After the children were injured in an accident while occupying Mary's vehicle, which was insured by Auto Club, Auto Club denied coverage claiming the children were not domiciled with Mary. The trial court applied the *Workman*/*Dairyland* factors and found the children were domiciled with Mary.

The Court of Appeals reversed, holding that under *Grange Ins Co v Lawrence*, minor children lacking legal capacity to acquire a domicile of choice have the same domicile as their parents regardless of living arrangements or the *Workman/Dairyland* factors. The Court explained that because the FD minors were unemancipated and their married parents retained legal custody while not being domiciled in Mary's household, the children were domiciled with their parents as a matter of law. The *Workman/Dairyland* multifactor test applies only to adults with legal capacity to choose their domicile.

Takeaway: Under *Grange*, the domicile of unemancipated minor children is determined by their parents' domicile as a matter of law, making temporary residence arrangements irrelevant. The *Workman/Dairyland* multifactor test applies only to adults capable of choosing their own domicile, not to minor children regardless of their living circumstances.

"Business of transporting passengers" requires fact-specific primary versus incidental analysis

Sandoval v Farmers Insurance Exchange
Docket No. 361166

Ana Sandoval was injured while riding a shuttle bus operated by Henry Ford Health System (HFHS). The shuttle system used 12 buses operating within one square mile to transport employees and patients between HFHS buildings and parking lots at no charge. After Sandoval applied for MACP benefits, Farmers (the assigned insurer) sought summary disposition arguing that Zurich, as HFHS's insurer, was the higher priority insurer because the shuttle was "operated in the business of transporting passengers" under MCL 500.3114(2). The trial court granted summary disposition for Farmers before discovery was complete.

The Court of Appeals reversed, finding that while the parties agreed the shuttle bus was primarily used to transport passengers, genuine issues of material fact remained whether the transportation service was an incidental or small part of HFHS's overall healthcare business operation. Under the *Farmers Ins Exch v AAA of Mich* primary purpose/incidental nature test, the Court noted that although HFHS employed 30,000 people throughout Michigan and treated approximately two-million patients annually, it was unknown how many employees and patients used the 12-bus shuttle service, creating factual disputes that precluded summary disposition.

Takeaway: The "operated in the business of transporting passengers" analysis under MCL 500.3114(2) requires fact-specific inquiry into whether passenger transportation constitutes a primary versus incidental component of the operator's overall business. Summary disposition is inappropriate when discovery is incomplete and usage data necessary for this determination is unavailable.

Settlement releases with provider restrictions strictly enforced as written

Williams v Farm Bureau Mutual Insurance Company
Docket No. 368564

Chevilla Williams was injured in a 2012 accident and entered two settlement agreements with Farm Bureau. The 2017 release required her to seek medical treatment first through DMC facilities, with a refusal-to-pay exception allowing treatment elsewhere if DMC refused to pay for "particular treatment." The release also required attendant care only through properly licensed agencies without financial relationships to Willams' family or friends. The 2020 release incorporated these same limitations while settling claims through June 15, 2020. Williams later sought PIP benefits for post-June 2020 medical care received outside DMC and attendant care provided by her daughter.

The Court of Appeals affirmed summary disposition for Farm Bureau, holding that the plain language of the releases was unambiguous and must be enforced as written. The Court found that Williams never presented evidence that she actually sought treatment from DMC after June 15, 2020, or that defendants received and refused to pay any DMC bills during the relevant period. Williams's affidavit claiming DMC refused treatment was inadmissible hearsay based on alleged conversations between DMC and defendants. The Court also noted that the refusal-to-pay exception applied only to medical expenses, not attendant care, which required licensed agencies regardless.

Takeaway: Settlement agreement releases with specific provider restrictions must be strictly enforced according to their plain language. Refusal-to-pay exceptions require actual presentation and denial of bills from compliant providers and cannot be established through inadmissible hearsay about alleged provider communications with insurers.