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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

Doug McCray

As I write this, we are three weeks into Summer, the temperature has been in the 80's and 90's, and the sun does not set until after 9 pm. What a wonderful contrast to Michigan's cold and dreary winters. My suggestion: get out there and enjoy it!

As always, thanks to all who have gotten involved in the Insurance and Indemnity Section ("IIS"), including those who attended our May 20, 2026 joint presentation (with the Environmental Law Section), "Environmental Claims in Michigan" at the Oak Pointe Country Club, in Brighton. We had nearly 50 registrants, and both the program and forum were fantastic. Hats off to the head of our Program Committee, Melissa Hirn, who worked with ELS Section Chair Kyle Konwinski to put this event together, as well as our speakers Theresa Bodwin, Matt Eugster, and Brad Moyer.











(Left to right) Theresa Bodwin, Matt Eugster, and Brad Moyer speak at the May 20 event

The Great Lakes Legal Conference

Every year, the IIS sponsors two or three Council members to attend the Great Lakes Legal Conference at the Grand Hotel on Mackinac Island. In addition to the plenary sessions, guests can attend break-out sessions in the "leadership," legal update," and "litigation" tracks conducted by prominent members of the legal community, all of whom are accomplished speakers. Among others, this year's presenters included Michigan Chief Justice Megan Cavanaugh (one of, I think, four or five Supreme Court justices attending the conference). And of course, the island and Grand Hotel are beautiful. It is an event every Michigan attorney should try to attend at least once. The take home message? Get involved in the Council and go to the GLLC!



Doug McCray, Melissa McCray, Jordan Lindsey, and Carl Thorwell on the porch at the Grand Hotel



Doug McCray, Peter Cunningham, and Melissa Hirn

Law students and the yearly scholarship competition

The IIS Section also conducts a yearly writing competition for law students. Recently, we began offering a choice of three insurance-related essay topics, which this year relate to artificial intelligence, the meaning of causation, and the role of risk management. The IIS will award a $5,000 scholarship to the law student submitting the best article, and, depending on the number and quality of submissions, may also have second and third place awards. Entries may also be published in our quarterly journal. The competition presents an opportunity for students to demonstrate their knowledge and writing skills to the legal community (including potential employers) while offsetting that ugly law school tuition. Submissions are due in late September, so if you know a student who might be interested, please have them contact us (and remember that section membership is free for current Michigan law students).

Upcoming dates

Our next business meeting and social mixer is scheduled for August 13, 2026, at The Yard at Corktown. There will be no admission, and the mixer will probably begin around 4 pm, immediately following the business meeting. In what will likely be late October, we will hold our annual meeting and have another educational seminar, the specific details of which are still being hammered out.

The Journal

As always, we are looking for articles for the next quarterly installment of the *Journal of Insurance & Indemnity Law*. This is a great opportunity for members to discuss insurance-related topics with more than 1,000 other Michigan insurance attorneys. Those interested should email Christine Caswell at ccaswell461@gmail.com.

Concluding thoughts

Every Michigan attorney whose practice involves insurance issues should be a member of the IIS, which affords access to educational seminars, networking opportunities, and our well-regarded quarterly publication, the *Journal of Insurance & Indemnity Law*. Membership may be even more beneficial to law students contemplating a career involving insurance, especially given the price (i.e., free to students). If you know a student who might be interested, please have them email me (doug@mccraylawoffice.com) or our administrator Joan O'Sullivan (josullivan3399@gmail.com). All are welcome.

Civil RICO: A Tool of Advocacy

By James A. Johnson and Thomas Cranmer

> "In the immortal words of Louis Nizer, Preparation makes the dull lawyer bright; the bright lawyer brilliant; and the brilliant lawyer steady."
>
> – Nizer, My Life in Court (New York: Doubleday & Co 1961)

The Racketeer Influenced and Corrupt Organizations Act ("RICO") was enacted as Title IX of the Organized Crime Control Act of 1970.[1] The Act sought to eradicate organized crime in the United States by providing enhanced and novel legal tools. Apart from governmental intervention, civil RICO cases rarely have anything to do with organized crime. Since 1985, RICO has become the weapon of choice for civil plaintiffs because of the broad and liberal construction of the statute and the availability of treble damages, as well as attorney fees' and costs.

Civil RICO is a tool of advocacy for a bevy of cause of actions such *as insurance,* contracts, torts, intellectual property and employment. Organizations and individuals are facing increased risk related to cybercrime activities. Cyber insurance is written to mitigate risks related to cyber-attacks and data breaches. As the frequency and sophistication of cyber-attacks grow together with extortion/ransomware, business interruption, funds transfer fraud, phishing emails and legal expenses cyber insurance should be a part of risk management plans. However, these policies have specific exclusions. Common exclusions often involve deliberate or criminal acts by the insured party and terrorism.

Who May Sue

Civil RICO can be utilized by institutions, corporations, banks, brokerage firms, and a bevy of other individuals and associations, as plaintiffs and counterclaims by defendants. The civil RICO cause of action is created by 18 U.S.C § 1964(c):

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustained and cost of the suit, including a reasonable attorney fee.[2]

The purpose of this article is to provide guidance and an advance starting point on civil RICO claims. Civil RICO is intended for use by general practitioners, private law firms, in-house corporate law departments, and government agencies. This article touches the high points and sets out specific details of prosecuting and defending a RICO claim. Additionally, the information herein is designed to invoke the question by plaintiffs–is there a RICO claim or count in the facts of my case? And a similar question by defendants–how can I dismiss this RICO count?

The civil racketeering provisions of RICO involve three main sections of the statute: section 1961 provides the definitions; section 1962 describes the prohibited conduct; and section 1964 details the remedies. Federal subject matter jurisdiction is conferred by section 1964(c) which creates the civil RICO cause of action. Personal jurisdiction is conferred by section 1965 which authorizes nationwide service of process. Section 1965(a), the principal venue provision, permits a party to institute a civil RICO action in any district in which a defendant resides, is found, has an agent, or transacts his affairs. Nationwide jurisdiction hinges on whether at least one defendant has minimum contacts with the forum state. If there is more than one defendant, 1965(b) governs service over out-of-district defendants and requires at least one defendant have minimum contacts with the forum state.[3] This is the majority view of the 2nd, 3rd, 6th, 7th, 10th and DC Circuits. Civil RICO actions are subject to a four-year statute of limitations. The limitation period accrues no later than the date the plaintiff first knew or should have known of its injury.[4]

The term *person* is broadly defined in section 1961(3) to include "any individual or entity capable of holding a legal or beneficial interest in a property." To determine who may bring suit, RICO has been liberally construed to include not only people, partnerships, corporations, and joint ventures but also domestic state governmental units.[5] However, a showing of injury for a civil RICO claim requires proof of a concrete financial loss and not mere injury to a valuable intangible property interest.[6] In addition, the *"by reason of"* language of section 1964 (c) imposes a proximate cause requirement on the plaintiff The section 1962 violations must proximately cause the plaintiff's injury to business or property.[7] *Money is a form of property.*[8]

Sedima

The U.S. Supreme Court's 1985 decision in *Sedima*[9] is the most frequently cited RICO precedent. It eliminated a bevy of defense arguments and set out the minimal pleading standards a civil racketeering claim must meet. For example, the U.S. Supreme Court overruled earlier lower court decisions that the defendant must have been convicted of criminal offenses constituting the predicate acts, or that the plaintiff must have suffered a "racketeering injury" distinct from the harm inflicted by the predicate acts. A RICO based complaint must be drafted with the following instructions from *Sedima* as a guide.

A violation of section 1962(c), the section on which *Sedima* relies, requires: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. The plaintiff must allege each of the elements to state a claim. They are all equally essential components, and the complaint will fail if any one of them is not adequately pleaded. In particular, RICO claims based on mail or wire fraud must comport with Federal Rule of Civil Procedure 9(b)'s requirement that allegations involving fraud be pled with particularity. The practitioner, through his pleadings, must articulate with great care and attention a viable racketeering claim. In addition, sections 1962(a), (b) and (c) are limited in scope to conduct involving enterprises engaged in or the activities of which affect interstate commerce. *It is the activities of the enterprise, not each predicate act that must affect interstate or foreign commerce.* RICO requires no more than a slight effect upon interstate commerce.[10] Even a minimal effect on interstate commerce satisfies this jurisdictional requirement.[11]

Litigating 1962(c) Claims

The most prominently litigated subsection of 1962 is section 1962(c). A plaintiff only has standing to sue if he has been injured in his business or property by conduct constituting the violation. The violation requires that (1) the *"person" and the "enterprise"* be distinct, (2) what constitutes being *"associated with"* an enterprise and (3) what it means *"to conduct or participate*...in the conduct of the enterprise's affairs."

Section 1962(c) requires that the "person" who violates this section must be distinct from the "enterprise" whose affairs that person is allegedly conducting or participating. It is because only the person and not the enterprise that can be liable under section 1962(c). The "person" and "enterprise" must be separate entities. The violator of section 1962(c) who commits the pattern of predicate racketeering acts must be distinct from the enterprise of predicate racketeering acts whose affairs are thereby conducted.[12] Therefore, the unlawful enterprise itself cannot also be the person the plaintiff charges with conducting it.[13] However, the U.S. Supreme Court unanimously decided to narrow, but not eliminate, the concept that a person" for purposes of RICO had to be clearly and completely different from the RICO *"enterprise."* In reversing the Second Circuit's decisions in *Bennett*[14] and *Riverwoods Chappaqua,*[15] the Supreme Court in *Cedric Kushner* determined that an individual who owns a corporation "is distinct from the corporation itself."[16] The Court reached its decision by applying the traditional analysis that a corporation as a legal fiction is an entity different from its owners. It is also noteworthy that the Eleventh Circuit never enforced the person/enterprise distinction under 1962(c).[17]

Notwithstanding the distinctness requirement of the person and enterprise, the circuits are split as to the distinctness. It appears that the District of Columbia Circuit[18] and the Fourth Circuit[19] follow *Cedric Kushner*.[20] However, the Eighth Circuit in *Atlas Pile Driving Co v DiCon Fin Co*,[21] took an opposite view in holding that a defendant may be a member of an associated-in-fact enterprise without disturbing the required distinction of 1962(c).

The federal mail fraud statute is one of the most frequently utilized federal criminal statutes and is also one of the predicate offenses for RICO purposes. The statute provides, in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud or for obtaining money or property by means of false or fraudulent pretenses, representations…places in any post office or authorized depository for mail matter….to be sent or delivered by the Postal Service…shall be fined under this title or imprisoned not more than 20 years, or both.[22]

The mail fraud statute prohibits any person from knowingly causing the use of the mail or private carrier services like Federal Express for the purpose of executing any scheme or artifice to defraud. The actual violation is the mailing, which must relate to the underlying fraudulent scheme. Section 1964(c) requires proof that the pattern of mail fraud violations caused the plaintiff's injury to business or property and not some other act.[23]

RICO's broad definition of racketeering activity and the Act's reference to mail and wire fraud as predicate offenses begs the question: Why not RICO? Or should the plaintiff consider adding a RICO count to an existing state cause of action? Moreover, since an action under RICO arises under Federal law, a plaintiff can elect to have access to federal court. Civil RICO is so broad

and liberal that a defendant or plaintiff can take almost any given set of facts and fashion his or her pleadings and create a viable civil racketeering claim. The key is to make certain that each of the four critical elements previously set out are properly plead.

Damages

To recover damages requires proof of concrete financial loss and not injury to a valuable intangible property interest. The measure of damages is the harm caused by the predicate acts constituting the pattern of racketeering activity. A compensable injury is the harm caused by predicate acts sufficiently related to constitute a pattern. Plaintiffs are required to set out a reasonable basis of recovery by competent proof and not mere speculation.[24] Only damages to *"business or property" occurring "by reason of"* and proximately caused by the RICO violations are compensable under section 1964(c). Personal and emotional injuries are not compensable under section 1964(c). Under *Sedima,* the plaintiff's compensable injury is the harm caused by the predicate acts.[25] Future damages may be appropriate to the extent that the plaintiff can establish with reasonable certainty that future damages will occur as a result of the defendant's RICO violation.

Section 1964(c) dictates the award of treble damages for civil RICO violations. It provides that the plaintiff *"shall recover threefold the damages he sustains"* in addition to costs and attorney's fees. Imposition of treble damages is required by RICO.[26]

Defenses

In order to state a case in RICO the plaintiff must allege the substantive components of an *"enterprise"* and *"pattern"* with specificity.[27] The plaintiff must also allege facts sufficient to support each of the statutory elements for at least two of the pleaded predicate acts and that each defendant knowingly agreed to participate in the conspiracy. However, the court must read the facts alleged in the complaint in the light most favorable to the plaintiff.[28] But a plaintiff who is unable to identify the enterprise, satisfy the pattern requirement, or plead other statutory elements with sufficient specificity can be subject to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). To the extent that any predicate acts sound in fraud the pleading of those acts must satisfy the particularity requirements of Rule 9(b) of the Federal Rules of Civil Procedure. Federal Rule Civ P. 9(b) provides:

Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally. The complaint must describe the predicate acts with specificity and state the time, place and content of the alleged communications perpetrating the fraud.[29] All elements of the RICO cause of action must be set out factually and with sufficient specificity to permit the court to ascertain whether a viable claim exists and whether the plaintiff has standing to pursue it. Moreover, section 1961 requires that a RICO Plaintiff establish that a defendant could be convicted for violating any of its predicate statutes. RICO is fundamentally a criminal statute and civil RICO is dependent upon a defendant committing criminal RICO acts as set out in section 1962.[30] To be criminal, the defendant's conduct must be committed with the *mens rea* appropriate to the offense. The defendant must possess the specific intent associated with the various underlying predicate offenses.[31] The plaintiff must prove that the defendant acted with the appropriate *mens rea*.

In addition, *pari delicto*—the doctrine that there is a bar for recovery of damages because of a wrong the litigant participated in—is an available defense to a RICO claim.

Aiding and Abetting Liability

There remains a question whether one who aids and abets a violation of §1962 has personally violated the statute and whether that person can be named a defendant in a civil RICO claim under section 1964(c). In order to establish aiding and abetting for civil RICO purposes, the plaintiff must prove that the:

1. defendant was associated with wrongful conduct
2. participated in it with the intent to bring it about, and
3. demonstrated by conduct to make it succeed.[32]

There must be evidence of an overt act by the defendant designed to aid in the success of the venture.[33] In addition, the defendant must have aided and abetted in at least two acts forming a pattern of racketeering activity.[34]

Data Theft

Civil RICO applies to data theft and provides a significant remedial advantage over the federal Computer Fraud and Abuse Act ("CFAA").[35] The CFAA is limited to compensatory damages. Civil RICO provides for treble damages and attorney fees.[36] The threshold question is whether the data thief was acting through a RICO enterprise. The statute defines enterprise as any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.[37]

The element of *racketeering activity* is defined by the statute to include a specified list of state and federal crimes upon which the RICO action may be predicated.[38] The criminal acts that apply to data theft are mail fraud,[39] wire fraud,[40] and interstate transportation and receipt of stolen property, the value of which is $5,000 or more.[41] That the property is intangible computer data does not make it any less property protected by the mail and wire fraud statutes.[42] The use of the mails or interstate wires such as e-mailing from state to state in furtherance of the scheme, provides federal jurisdiction for the crime.

Courts disagree on whether intangible computer data can be property stolen or received in violation of section 2314 and 2315. However, where there has been some tangible item stolen, such as a disk upon which the data is stored and the disk is taken to another state, the theft violates section 2314. The U.S. Court of Appeals for the 2nd Circuit rejects this distinction between tangible and intangible property and applies the statutes to the theft of computer data.[43] Astute counsel should check the appropriate circuit before filing a RICO action based on violations of sections 2314 or 2315.

Jury Instructions

Consulting jury instructions is an important part of any civil RICO practice because they focus the jury on the specific issues and laws applicable to the case being tried. They also are a valuable tool for practitioners when thinking through the substantive requirements to make out a viable RICO claim, along with what they will need to establish through discovery and case development. Because jury instructions lay out the "end point" of any litigation, they are a great primer for lawyers starting from scratch on a new case and as they think through what will ultimately need to be shown/defended against as the case proceeds. As with any case, jury instructions should guide the jury in plain English regarding the legal principles they are to apply. A proper verdict requires understandable jury instructions. The U.S. Court of Appeals for the Eleventh Circuit's Model Jury Instructions are helpful in this regard. Instruction 7.1 provides:

> To succeed on [a RICO] claim, [name of plaintiff] must prove each of the following four facts by a preponderance of the evidence:
>
> First, you must find that [name of defendant] derived income, either directly or indirectly, from a pattern of racketeering activity.
>
> Second, you must find that [name of defendant] participated as a principal in the pattern of racketeering activity.
>
> Third, you must find that some part of that income, or proceeds of that income, was used to acquire or maintain an interest in, or to operate, an enterprise.
>
> And fourth, you must find that the enterprise engaged in, or had some effect on, interstate or foreign commerce.

The instructions also explain in detailed fashion how the jury can find in favor of a plaintiff in a civil RICO claim, by specifying the following:

- A "racketeering activity" refers to a violation of a specific statute. For the first element, the plaintiff can show a "pattern of racketeering activity" by pointing to at least two distinct but related predicate acts. A related predicate act is where in both crimes there is evidence showing the "same or similar purposes, results, participants, victims, or methods." A plaintiff is also required to show "continuity" by either showing that the "predicate acts" extended over a "substantial period of time" or that the conduct by its nature "is likely to be repeated into the future."
- For the second element, the instructions provide that a plaintiff prove the defendant "participated as a principal" by either committing (or aiding, abetting counseling commanding, inducing or procuring) two or more alleged predicate acts or "willfully caused" the commission of the predicate acts.
- For the third element, a plaintiff needs to prove that some part of the income or proceeds derived from the racketing activity was "used to acquire, maintain an interest in, or operate an enterprise."
- The fourth and final element requires proof that the "enterprise" engaged in or had an effect on interstate (or foreign commerce).

It is vital for a practitioner to have a handle on the damage element for a RICO claim, as damages are only recoverable to the extent they are caused by the use of the racketeering income to cause injury to an individual, business, or property.

Conclusion

RICO's prohibitions may be enforced in both criminal and civil contexts. RICO creates a private cause of action by 18 USC § 1964(c): Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district and shall recover threefold the damages he sustained and cost of suit, including a reasonable attorney fee…

To state a civil RICO claim, a plaintiff must allege (1) 2 or more predicate racketeering offenses,[44] (2) the existence of an enterprise affecting interstate commerce, (3) a connection between the racketeering offenses and (4) the injury by reason of the above.

Civil RICO is very broad. It applies to data theft and a plethora of tort and contract claims, so long as the core facts fit § 1961 and at least two predicate acts are presented together with the other requirements set out herein. Because of RICO'S broad definition of racketeering activity and the Act's reference to mail and wire fraud as predicate offenses, the plaintiff must plead factual allegations sufficient to meet the dictates of Federal Rule of Civil Procedure 8 ("short and plain statement") and its interpretation by the U.S. Supreme Court in *Iqbal* and *Twombly*, and if fraud is alleged, with sufficient particularity. Further, Rule 11 imposes an obligation on a lawyer not to assert a claim absent a good faith belief in the validity of the claim.

The defendant has a bevy of weapons to combat a RICO claim. Initially, they may bring a 12(b)(6) motion for failure to plead with sufficient plausibility and particularity to satisfy the standards outlined under Supreme Court precedent in *Iqbal*, *Twombly*, and/or Rule 9(a). If that fails, the defense can fashion a RICO based counterclaim against a given plaintiff arising out of the same facts that the plaintiffs initially advanced against them. And, after discovery is complete, a Rule 56 Motion for Summary Judgment remains an appropriate vehicle to dismiss unfounded claims.

RICO is analogous to "A Tale of Two Cities"–it can be the best of times or the worst of times. Therefore, civil RICO should be a tool of advocacy in every trial lawyer's tool box, for both plaintiff and defendant.

Takeaway: Civil RICO can be utilized by institutions, corporations, brokerage firms, individuals and associations as plaintiffs and by defendants as counterclaims. Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and costs of the suit, including a reasonable attorney fee.

About the Author

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Endnotes

1 Pub L No 91-452, 84 stat 922, 941 (1970) codified at 18 USC §§ 1961 *et seq*.

2 18 USC § 1964(c).

3 *Peters Broad Eng'g, Inc v 24 Capital, LLC*, No. 21-3849 (6th Cir July 13, 2022).

4 *Rotella v Wood,* 528 US 549 (2000).

5 *County of Oakland v City of Detroit,* 866 F 2d 839 (6th Cir 1989).

6 *Patterson v Mobil Oil Corp,* 335 F 3d 476, 492 (5th Cir 2003).

7 *Bridge v Phoenix Bond & Indem Co,*128 S Ct 2131, 2134 (2008); *General Motors, LLC v FCA US, LLC*, (6th Cir Aug.11, 2022)-defendants' motion to dismiss granted because GM failed to establish that the alleged RICO violations proximately caused its injuries.

8 *Reiter v Sonotone Corp,* 442 US 330, 342 (1979), *Canyon County v Syngenta Seeds, Inc,* 519 F 3d 969, 976 (9th Cir) *cert denied,* 129 S Ct 458 (2008).

9 *Sedima, SPR v Imrex Co, Inc,* 473 US 479, 105 S Ct 3275 (1985).

10 *United States v Robinson,* 763 F2d 778 (6th Cir 1985).

11 *United States v Garner,* 463 F3d 445, 458-59 (6th Cir 2006)*; United States v Beasley,* 72 F3d 1518 (11th Cir), *cert denied,* 518 US 1027 (1996); *RAGS Couture, Inc v Hyatt,* 774 F2d 1350 (1985).

12 *Bennett v United States Trust Co,* 770 F2d 308 (2nd Cir 1985), *cert denied,* 474 US 1058 (1986); *Gasoline Sales, Inc v Aero Oil Co*, 39 F3d 70, 72-73 (3d Cir 1994).

13 *United States v Turkette,* 452 US 576, 583, 101 S Ct 2523, 2529 (1981); *Riverwoods Chappagua Corp v Marine Midland Bank, NA,* 30 F3d 339, 344 (2nd Cir 1994)*; Old Time Enters, Inc v International Coffee Corp,* 862 F2d 1213 (5th Cir 1989).

14 *Supra*, n.11

15 *Supra*, n.12

16 *Cedric Kushner Promotions, Ltd v King,* 533 US 158, 161 (2001).

17 *Cox v Administrator,* 17 F3d 1386 (11th Cir 1994).

18 *Yellow Bus Lines, Inc v Drivers Chaffeurs & Helpers Local Union,* 639, 913 F2d 948 (DC Cir 1990) *(en banc) cert denied,* 501 US 1222 (1991).

19 *Entre Computer Centers, Inc v FMG of Kansas City, Inc,* 819 F2d 1279 (4th Cir 1987).

20 *Supra,* n.15.

21 *Atlas Pile Driving Co v DiCon Fin Co,* 886 F2d 986 (8th Cir 1989); See *Boyle v US,* 129 S Ct 2237 (2009) (resolving a split in the circuits that an associated-in-fact enterprise must have an ascertainable structure. The Supreme Court rejected the argument that a structure must bear a resemblance to business-like entities).

22 18 USC § 1341 (2012).

23 *Bridge v Phoenix Bond & Indem Co,* 128 S Ct 2131, 2138 (2008); *Beard v Sachnoff & Weaver, Ltd,* 941 F2d 142 (2nd Cir 1991).

24 *Fleischhauer v Feltner,* 879 F2d 1290, 1299 (6th Cir 1989), *cert denied,* 493 US 1074 (1990).

25 *Supra,* n.8

26 *Abell v Potomac Ins Co,* 858 F 2d 1104 (5th Cir 1998).

27 *Montesano v Seafirst Commercial Corp*, 818 F 2d 423 (5th Cir 1987); *Lipin Enterprises Inc v Lee,* 803 F2d 322 (7th Cir 1986).

28 *HJ Ins v Northwestern Bell Tel Co,* 492 US 229, 245 (1989).

29 *Picard Chemical Inc Profit Sharing Plan v Perrigo Co,* 940 F Supp 110 (WD Mich 1996); *Schmidt v Fleet Bank,* 16 F Supp 2d 340 (SDNY 1998); *Jackson v Sedgwick Claims Management Services, Inc, Coca Cola Enterprises Inc,* (6th Cir Nov 2, 2012); *Wall et al v Mich Rental et al*; 852 F3d 492 (6th Cir 2017).

30 *Snowden v Lexmark,* 237 F3d 620, 624 (6th Cir 2001).

31 *Gentry v Resolution Trust Corp,* 937 F2d 899, 908 (3d Cir 1991), *United States v Biasucci, 786 F2d 504* (2nd Cir), *cert denied, 479 US 82 (1986);* See also *Keesling v Beegle, 880 NE2d 1202*I (Ind 2008) (Indiana law imposes liability on anyone who participated in a racketeering enterprise).

32 *Armco Indust Credit Corp v SLT Warehouse Co,* 282 F 2d 475 (5th Cir 1986).

33 *In re Sahlen & Assocs, Inc Sec Litig,* 773 F Supp 342 (SD Fla 1991); *Schultz v Rhode Island Hosp Trust Nat'l Bank,* NA, 94 F 3d 721, 731 (1st Cir 1996).

34 *Banks v Wolk,* 918 F 2d 418 (3d Cir 1990).

35 18 USC §1030 (g).

36 18 USC §1964 (c).

37 18 USC §1961 (4).

38 18 USC §1961 (1).

39 18 USC §1341.

40 18 USC §1343.

41 18 USC §§2314, 2315.

42 *Carpenter v US*, 484 US 19, 26 (1987).

43 *US v Farraj,* 142 F Supp 2d 484, 489 (SD NY 2001).

44 *Grow Mich, LLC v LT Lender, No.2:20-cv-11391 (6th Cir Oct. 7, 2022).*



INSURANCE AND INDEMNITY 101

Anti-Assignment Clauses in Insurance Policies

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Insurance policies are generally considered personal contracts between the insured and the insurer. Because an insurer underwrites, assesses risks, and calculates premiums explicitly based on an individual's specific risk profile, history, and traits, policies cannot be transferred or assigned to another person without the insurer's formal written consent.[1] This prohibition against assignment of policies applies regardless of whether the assignment occurs before or after a loss.

This means that the policy insures the specific named insured against loss, not the physical property, peril, or exposure itself. Consequently, the policy does not automatically transfer when property ownership changes. For example, if an insured sells his or her home, the homeowners insurance policy can't (and shouldn't) be transferred to the new buyer.

Due to the unique underwriting nature of each prospective insured, insurance policies often contain anti-assignment clauses which prohibit an insured from transferring his or her insurance policy without first obtaining the insurer's written consent. Anti-assignment clauses are generally enforceable when it comes to transferring the *policy* itself, but clauses that seek to restrict an insured's right to assign a *claim* under the policy are not enforceable. When determining whether an assignment is valid, the focus must always be on what specifically is being assigned: the policy or the claim.

Because insurance policies are contracts, they are primarily governed by standard contract principles. "Under general contract law, rights can be assigned unless the assignment is clearly restricted."[2] "Michigan law recognizes the validity of contractual provisions against assignment of contracts, including insurance policies."[3] When an "antiassignment clause is unambiguous, it must be enforced unless it violates the law or public policy."[4]

Anti-assignment clauses that require an insured to obtain consent before transferring a policy are generally enforceable, and do not violate public policy, because insurers naturally need to be aware of the risks they're agreeing to insure. In this context, anti-assignment clauses help insurers recognize any potential changes in risk associated with a transferred insurance policy. If an insured does assign a policy in violation of an applicable anti-assignment clause by doing so without consent, this constitutes an invalid assignment, and any coverage under that policy will likely be voided.[5]

Alternatively, anti-assignment clauses that seek to prohibit an insured from assigning a claim under the policy are unenforceable because they violate public policy.[6] Anti-assignment clauses in this context are unenforceable because an accrued claim is essentially an accrued cause of action. Under Michigan law, "[g]enerally, all legitimate causes of action are assignable."[7] Once a loss occurs, no policy provision may restrict the insured's right to assign his or her accrued claim:

> The assignment having been made after the loss did not require consent of the company. The provision of the policy forfeiting it for an assignment without the company's consent is invalid, so far as it applies to the transfer of an accrued cause of action. It is the absolute right of every person—secured in this state by statute—to assign such claims, and such a right cannot be thus prevented.[8]

The moral of the story: Generally, policies can't be assigned, but a claim can, and a claim assignment doesn't require the insurer's consent.[9]

About the Author

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Endnotes

1 While most property and casualty policies are strictly personal and can't be transferred or assigned, life insurance policies can generally be assigned or transferred to another owner because the risk is based on the insured's life, not who owns the policy.

2 *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 197; 920 NW2d 148 (2018) (citation omitted).

3 *Century Indem Co v Aero-Motive Co*, 318 F Supp 2d 530, 539 (WD Mich, 2003) (citations omitted).

4 *Shah*, *supra*, 324 Mich App at 198 (citation omitted).

5 See *Employers Mut Liab Ins Co v Mich Mut Auto Ins Co*, 101 Mich App 697, 702; 300 NW2d 682 (1980).

6 See *Shah*, *supra*, 324 Mich App at 200, citing *Roger Williams Ins Co v Carrington*, 43 Mich 252; 5 NW 303 (1880).

7 *Grand Traverse Convention and Visitor's Bureau v Park Place Motor Inn, Inc*, 176 Mich App 445, 448; 440 NW2d 28 (1989) (citation omitted).

8 *Roger Williams, supra*, 43 Mich at 254.

9 This article discusses assignment of policies and claims only. In future articles, I will discuss anti-assignment clauses in settlement agreements.





LEGISLATIVE UPDATE

A Burst of Energy Heading into the Tail End of This Legislative Session! State Senate 35th District

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

After almost 500 days vacant and a special election for the 35th District Senate Seat on May 5, the seat went to a Democrat, which means that the Democrats will finish out this legislative cycle with a 20-18 majority. The Republicans maintain their 58-52 advantage in the House, though, so bipartisan action will be required to pass any new legislation. There's been a lot of action since our last update with almost 500 new bills—350 in the House and 124 in the Senate.

A package of bills were introduced, already passed by the Senate, and are now in the House before the House Insurance Committee:

- **SB 973 – 978** – amend the Insurance Code to create a State-based insurance exchange (SBE) which would serve as a market for qualified health and dental insurance plans in the State. ***Passed by the Senate on 06/18/2026 (20-16).***

A few bills were reported from 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 328** – amends the Insurance Code to require an insurer that newly issued or renewed an automobile insurance policy to reduce the total premium charged for the policy by 10% without reducing any requested coverage.

And a few new bills made their way to the insurance committees:

- **SB 910** – amends the Insurance Code to create an Insurance Coverage and Affordability Task Force to review proposed mandates to determine social impact, financial impact, and medical efficacy.
- **SB 914** – amends the Insurance Code to require insurers to include amounts for prescription drugs paid by an enrollee in a non-HDHP when calculating the insured's out-of-pocket maximum.
- **SB 922** – amends the Insurance Code to require insurers to provide coverage for infertility, including fertility diagnostic care, fertility treatment, fertility preservation services, egg retrievals, and embryo transfers and related costs.
- **SB 944** – amends the Insurance Code to let insurance premium finance companies charge/pass through payment-processing fees when the insured chooses to pay by credit card, debit card, EFT, electronic check, or another electronic method.
- **HB 5580** – amends the Insurance Code to prohibit insurers from considering the breed or mixture of breeds of any dog that resides at the insured property when canceling or refusing to provide coverage, determining the rate, or refusing to issue or renew a policy.
- **HB 5886** – amends the Insurance Code to include an option for no PIP medical/allowable-expense coverage, and to allow insurers to offer additional coverage levels beyond the current statutory options. It also updates the MCCA, priority, tort-liability, and assigned-claims provisions to account for those reduced/no-coverage elections, and would repeal the current § 3107d health-coverage-based opt-out effective July 1, 2028. ***Tie barred with HB 5887-5889.***
- **HB 5887** – amends the Insurance Code to make an insured's coverage level to carry forward as long as the insured remains with the same insurer or the insured opts to change it. This change would apply to automobile insurance, including residual liability insurance, personal protection and property protection insurance, uninsured and underinsured motorist, comprehensive coverage, and collision coverage. ***Tie barred with HB 5886, 5888-5889.***
- **HB 5888** – amends the Insurance Code to roll back Michigan's minimum bodily-injury liability limits for auto policies issued after June 30, 2027, from the current default $250,000/$500,000 to $25,000/$50,000, while keeping the $10,000 property-damage minimum. ***Tie barred with HB 5886-5887, 5889.***

- **HB 5889** – amends the Insurance Code to align the car-sharing insurance statute to conform to the proposed elimination/reduction of no-fault PIP coverage options in the tie barred bills. The car sharing program would not have to ensure PIP benefits for an owner who lawfully selected no PIP/allowable-expense coverage under the companion no-fault bills. ***Tie barred with HB 5886-5888.***
- **HB 5904** – amends the Insurance Code to require insurers to provide coverage for infertility, including fertility diagnostic care, fertility treatment, fertility preservation services, egg retrievals and embryo transfers and related costs. ***House Companion to SB 922.***
- **HB 5980** – amends the Insurance Code to revise the no-fault medical-provider fee schedule in MCL 500.3157, especially for catastrophic/long-term care. It creates specific reimbursement rules for residential rehabilitation services, in-home attendant care/personal caregivers, and certain non-Medicare-covered items like home/vehicle modifications, case management, transportation, and supplies.
- **HB 5981** – amends the Insurance Code to extend the required average PIP premium reductions through policies effective before July 2, 2028, keyed to the selected PIP coverage level, and would require additional insurer rate filings for policies issued/renewed in the year beginning July 1, 2026.
- **HB 5988** – amends the Insurance Code to add detailed limits on step therapy protocols for health insurers and utilization-review organizations, requiring protocols to be based on clinical guidelines and giving providers a clear exception process. It would require exceptions to be granted in specified circumstances and would impose urgent decision deadlines, with missed deadlines treated as granted.
- **HB 5993 and 5994** – amend the Insurance Code to allow certain entities involved in insurance transactions to charge or pass along electronic payment processing fees to insured individuals who choose to make payments using a credit card or other electronic payment method.
- **HB 6019** – amends the Insurance Code to require that insurers consider the closure of a health system or the removal of a health system from the insurer's network as a qualifying event for a special enrollment period.
- **HB 6030** – amends the Insurance Code to require that insurers consider the closure of a health system or the removal of a health system from the insurer's network as a qualifying event for a special enrollment period. It would also let affected insureds terminate coverage without penalty, require insurers to offer coverage to people affected by another insurer's network disruption, and credit prior deductibles/out-of-pocket payments if they switch.
- **HB 6097** – amends the Insurance Code to exempt title insurers from Michigan's single-risk exposure limits in MCL 500.640, effectively eliminating the current cap on how much title-insurance risk an insurer may retain on one risk or hazard.
- **HB 6101** – amends the Insurance Code to require health insurers to cap the insured's copay or coinsurance for selected insulin products at no more than $35 for each 30-day supply.



RECENT NOTABLE NO-FAULT OPINIONS

By Eric Cohn
Fahey Schultz Burzych Rhodes PLC

Published Court of Appeals Decisions

Gorgis v Auto Club Insurance Association (AAA of Michigan) and MemberSelect Insurance Company
COA Docket No. 375123

A truck driver who works exclusively for one company qualifies as an "employee" under the economic reality test, making the insurer of the employer-furnished vehicle first in priority under MCL 500.3114(3).

Yousif Gorgis was driving a truck for Transport Systems on an interstate auto-parts run when he struck a deer in Missouri on September 14, 2022. The truck was owned by a Transport Systems principal and insured by Carolina Casualty; Gorgis also maintained a personal AAA policy. He drove exclusively for Transport Systems roughly six days a week, took load assignments from a dispatcher, was paid weekly on a per-load 1099 basis with no withholding (routed through his brother's company), used his own phone but ran the company's mandated logging application, and drove the company's truck and trailers. Carolina moved for summary disposition, arguing Gorgis was an independent contractor outside MCL 500.3114(3); the trial court agreed and held AAA first in priority.

The Court of Appeals reversed. Applying the economic reality test, the Court emphasized that no single factor controls and that the parties' labels, including a 1099 designation, are relevant but not dispositive. Gorgis worked exclusively and continuously for one company, depended on that work for his livelihood, was terminable at will, performed work integral to a cargo-transport business, and used equipment the company furnished; his discretion over routes and breaks was incidental to the work.

Distinguishing *Adanalic* and following *Duckworth*, the Court held the economic reality was an employer-employee relationship. The "Independent Contractor Waiver of Coverage"—principally a workers'-compensation document that Gorgis disputed signing—did not control, because courts look to substance over self-styled labels. Because Gorgis was an employee, Carolina, as insurer of the employer-furnished vehicle, was first in priority under MCL 500.3114(3).

Takeaway: Frequent readers of this article will likely recall the emphasis placed on knowing other areas of the law within No-Fault litigation, and this case serves as another reminder why. The intersection of employment law (particularly the definition of an "employee" versus an "independent contractor") comes up frequently in auto negligence cases. Here, the lesson is to look past the paperwork; when faced with a question regarding the status of a worker, develop the record on exclusivity, dependence, control, integration, and who supplied the vehicle, and treat "independent contractor" waivers as one factor rather than a trump card.

Unpublished Court of Appeals Decisions

Bronson Health Care Group, Inc v Progressive Michigan Insurance Company
COA Docket No. 371480

A medical provider may recover remaining allowable expenses from a lower-priority insurer after the highest-priority insurer's capped PIP coverage is exhausted

In July 2022, Nicholas Deanda was killed when his motorcycle collided with a vehicle insured by Geico under a capped $250,000 PIP policy. Deanda's own Progressive policy carried unlimited PIP medical coverage but was lower in priority. After Geico paid out and exhausted its limit, Bronson—left with roughly $255,000 unpaid—sought the balance from Progressive, which denied the claim on the ground that it was not the highest-priority insurer.

The trial court granted Progressive summary disposition, but the Court of Appeals reversed. The order of priority was undisputed: Geico, as insurer of the involved motor vehicle, was highest under MCL 500.3114(5)(a), and Progressive was next under (5)(c). Bound by *Mary Free Bed Rehab Hosp v Esurance Prop & Cas Co* under MCR 7.215(C)(2), the Court held that

once a highest-priority insurer's capped coverage is exhausted, a claimant or provider may recover remaining allowable expenses from a lower-priority insurer whose policy provides higher available coverage.

The Court explained that the 2019 amendments, which first allowed insureds to select capped PIP coverage under MCL 500.3107(c), can leave a highest-priority policy insufficient, and that the priority provisions do not categorically bar recovery down the ladder in that situation.

Takeaway: Treat the MCL 500.3114(5) ladder as a sequence, not as a "one-size-fits-all" mutually exclusive list. In catastrophic cases, identify every policy across the priority order and put each insurer on notice, because a capped top-priority limit will often be exhausted.

Citizens United Reciprocal Exchange v Witt
COA Docket No. 373487

Rescission of optional collision coverage requires admissible proof that the misrepresentation was material to coverage of the vehicle at issue

Celinda Witt's CURE policy included optional collision coverage on a Kia and a Nissan, and her application misstated the Nissan's ownership: her grandson, not Witt, was the sole owner. After an accident damaged the Kia, CURE refused collision coverage and brought a declaratory action to void the policy *ab initio* based on the Nissan misrepresentation.

The defendants moved for summary disposition under *Howard v LM Gen Ins Co*, while CURE relied on a rescission letter and an underwriting manager's affidavit. The Court of Appeals affirmed summary disposition for the defendants. Because collision coverage is optional, rescission is governed by the policy, but Howard still requires the insurer to show that the misrepresentation was material to coverage of the vehicle at issue, here, the Kia.

CURE's proofs failed: the rescission letter was inadmissible hearsay generated after the loss, and the underwriting affidavit was contradicted by CURE's own binding request-for-admission response acknowledging that it does insure non-owners. Distinguishing *Sherman v Progressive Mich Ins Co*, where an affidavit establishing a 75.5% premium increase was unrebutted, the Court found no genuine issue of material fact on materiality.

Takeaway: A motion for reconsideration was recently filed in this case, making it one to watch. As it stands, this case stands for the proposition that to rescind optional coverage, an insurer should tie the misrepresentation to the specific vehicle at issue with admissible, vehicle-specific underwriting proof. And mind your admissions—an affidavit cannot manufacture a fact question by contradicting a prior binding admission.

Michigan Ambulatory Surgical Center v Progressive Marathon Insurance Company
COA Docket No. 373314

Conflicting and internally inconsistent deposition testimony created a genuine issue of material fact on a named insured's domicile

Providers, as assignees of Jameresha Campbell, sought PIP benefits from Progressive for a July 2021 accident. Campbell was not a named insured, so coverage turned on whether the named insured, Cindy Wells (Campbell's relative), was domiciled with Campbell at a Redford address. Wells's deposition was internally inconsistent: she testified that she had married and moved to Birmingham, yet also that she kept her belongings and received mail in Redford, sometimes paid rent there, was listed on the 2021 lease, and held a driver's license listing the Redford address. Campbell testified that Wells lived with her in Redford at the time of the accident.

The trial court granted Progressive summary disposition, deeming Campbell's testimony self-serving, but the Court of Appeals majority reversed. Domicile is generally a question of fact that is evaluated under numerous factors. The Court distinguished *Fuhr v Trinity Health Corp* (and *Scott v Harris*): the "blatantly contradicted" exception applies only where independent evidence flatly refutes a party's account, not where the rebuttal is a single, internally inconsistent deposition, and Wells's testimony was not "self-serving" because she was not Progressive's agent.

Because the trial court had improperly weighed credibility and overlooked the policy and the driver's license, a fact question remained. The dissenting opinion stressed that intent is the preeminent concern and that Wells's marriage, her move, and her unequivocal testimony that she lived in Birmingham left no genuine issue of material fact.

Takeaway: Domicile rarely resolves on summary disposition. Build the record with documentary corroboration—license, policy, lease—and frame inconsistent testimony as a question for the factfinder rather than conceding it. Furthermore, resolving inconsistent deposition testimony during the deposition (when possible), will increase the chances of success at the summary disposition stage.

Dolph v Auto Owners Insurance Company
COA Docket No. 369825

Evidence of a claimant's alleged fraud was admissible as relevant to credibility even after she abandoned the related claim

Jamie Dolph sought PIP benefits after a 2019 rear-end collision. Auto Owners initially paid, then investigated and denied the claims as fraudulent after surveillance showed her performing activities she claimed she could not perform, including replacement-services claims covering an eight-day trip to Disney World. She abandoned her replacement-services claim before trial, pursuing only medical and wage-loss benefits.

Over Dolph's objection, the trial court admitted the fraud evidence, instructed on fraud, and, at her own counsel's request, limited the verdict-form question to replacement-services fraud. The jury found no accident-related injury and no fraud. The Court of Appeals affirmed: the fraud evidence was relevant to credibility, which is always at issue, and was not unfairly prejudicial, and Dolph could not assign as error a verdict-form limitation her own counsel had requested.

The Court rejected Dolph's argument that *Meemic* and *Williams* bar denying a post-procurement-fraud claim: those decisions limit antifraud-provision rescission to fraud in the inducement, but an insurer may still deny claims it believes fraudulent, and the factfinder may so find. Any error was harmless because the jury found no fraud. The Court also rejected challenges to defense counsel's conduct, the mid-trial dismissal of a juror, and the mitigation instruction.

Takeaway: Abandoning a fraud-tainted category of benefits does not bury the underlying misrepresentations. They survive and can come in on credibility of the witness(es). And a party who shapes the verdict form cannot later complain of that framing on appeal.

Brown v Allstate Insurance Company
COA Docket No. 374501

Dismissal was a proper discovery sanction after the trial court's careful consideration of the *Dean v Tucker* factors

Eric Brown sought PIP benefits from Allstate following a hit-and-run. Despite a scheduling order and a January 2024 stipulated order setting deadlines, Brown never filed the required supplemental initial disclosures and completed his medical authorizations months late. When Allstate moved to dismiss, Brown's counsel neither responded to the motion nor appeared at the hearing.

The trial court analyzed the *Dean v Tucker* factors and dismissed, and the Court of Appeals affirmed. Courts may dismiss for noncompliance with discovery orders (MCR 2.504(B)(1)) and possess inherent authority to do so. The violation was willful—a conscious, non-accidental failure—even if premised on a mistaken belief that the initial disclosures sufficed, because willfulness does not require wrongful intent.

The court also found a history of delay and noncompliance, prejudice, and that lesser sanctions would be insufficient, expressly weighing and rejecting alternatives including attorney fees. Brown could not shift responsibility for his non-appearance to opposing counsel, and his claimed misunderstanding about the hearing date found no support in the record. Dismissal fell within the range of reasonable and principled outcomes.

Takeaway: This is a tale as old as time and cuts across both sides of the "v": process can be dispositive. Calendar every discovery deadline, comply fully and on time, and never let a dispositive motion go unanswered—willfulness here required only a conscious act, not bad faith.