2020–2021 CONTRACTS SURVEY ARTICLE

LAURA E. BIERY[†]

I. INTRODUCTION

The following cases reflect developments in contract law in the state of Michigan for the 2020–2021 *Survey* period: May 31, 2020, through June 1, 2021. This Article provides a survey of legal developments in Michigan case law for practitioners, but this Article does not purport to address every change in contract law during the *Survey* period. The discussion below discusses reported opinions issued by the Michigan Supreme Court and Court of Appeals during the *Survey* period.

† Litigation Associate, Honigman LLP, Detroit; B.A., 2012, University of Chicago; J.D., 2018, Wayne State University Law School.

II. ENFORCEABILITY OF CONTRACTUAL PROVISIONS IN THE CONTEXT OF BENEFITS UNDER THE NO-FAULT ACT

A. Validity of Fraud Exclusion Provisions in Insurance Policies

The issue of whether an insurer could void a personal protection insurance ("PIP") policy under an antifraud provision based on postprocurement fraud has only recently become significant in Michigan. Before the court of appeals' decision in *Bahri v. IDS Property Casualty Insurance Co.*,[1] no court had held that false statements by a no-fault insured, except those relevant to fraud in the inducement, sufficed to rescind a policy. The *Bahri* court provided minimal analysis in support of its holding barring PIP coverage based on insured's fraud.[2] Instead, the court relied exclusively on a fire insurance case applying a different statute, which not only permitted antifraud provisions in fire insurance policies, but required them.[3] Thus, the inclusion of an antifraud clause in a fire insurance policy adheres to the controlling statute.[4] But the court of appeals failed to consider or otherwise explain why this reasoning should translate to the No-Fault Act, which contains no language about antifraud provisions.[5] Indeed, the legislature's deliberate omission of such language in the No-Fault Act suggests that it intended a different approach. By concluding that a lone misrepresentation during a claim for PIP benefits could justify denial of all benefits and rescission of the policy, *Bahri* declared a rule of law without basis in law or statute.

Since *Bahri*, it has become commonplace for no-fault insurers to assert fraud claims against insureds.[6] Four cases during the *Survey* period considered the application of antifraud provisions in no-fault insurance policies, detailed below.

Though the Michigan Supreme Court referred to *Bahri* in *Meemic Insurance Co. v. Fortson*, it declined to determine whether *Bahri* survived its holding in *Meemic*.[7] Because there was no allegation of fraud in relation to the initial benefits claim, and the case involved fraud by someone other

---

1. 308 Mich. App. 420, 424–25, 864 N.W.2d 609, 612–13 (2014).

2. *Id.* at 424–26.

3. *See* Mina v. Gen Star Indem. Co., 218 Mich. App. 678, 555 N.W.2d 1 (1996), *rev'd in part on other grounds,* 455 Mich. 866, 568 N.W.2d 80 (1997); MICH. COMP. LAWS § 500.2833 (1990).

4. *See* § 500.2833.

5. *See generally Bahri*, 308 Mich. App. at 424–26, 864 N.W.2d at 612–13.

6. *See, e.g.*, Williams v. Farm Bureau Mut. Ins. Co. of Mich., 335 Mich. App. 574, 967 N.W.2d 869 (2021), *appeal filed.*

7. *See* Meemic Ins. Co. v. Fortson, 506 Mich. 287, 307 n.15, 954 N.W.2d 115, 125 n.15 (2020), *reh'g den.*, 506 Mich. 912, 948 N.W.2d 80 (2020).

than the claim beneficiary, the court did not address "whether and to what extent fraud related to proof of loss can justify voiding the policy" or "whether a clause voiding a policy for postprocurement fraud would be valid as applied to fraud by an individual who is *both* a policyholder and the claim beneficiary."[8]

In *Williams v. Farm Bureau Mutual. Insurance Co. of Michigan*, the court of appeals considered what remained of its holding in *Bahri* after the supreme court decided *Meemic*.[9] It concluded that *Bahri* remains good law, but only as much as it aligns with the No-Fault Act and the supreme court's holding in *Meemic*—that is to say, *Bahri* only applies to fraud in the inducement.[10]

1. Meemic Insurance Co. v. Fortson*, 506 Mich. 287, 293, 954 N.W.2d 115,* reh'g denied *506 Mich. 912, 948 N.W.2d 80 (2020)*

In *Meemic Insurance Co. v. Fortson*, Meemic Insurance Company sought to void its policy with defendants Louise and Richard Fortson to stop paying no-fault benefits to their son, Justin.[11] Meemic sought to avoid its statutory obligation to pay such benefits by enforcing the antifraud provision in its policy with defendants.[12] The supreme court considered the extent to which a contractual defense, here the parties' antifraud provision, is valid and enforceable when applied to mandatory coverage under the No-Fault Act.[13]

Justin Fortson was involved in a serious accident in 2009 and suffered brain damage requiring long-term care.[14] At the time, Meemic provided no-fault coverage to Justin as an "insured person" under the "resident relatives" provision of Louise and Richard's policy.[15] Under the policy, Meemic agreed to pay $11 per hour for care services for Justin and, from 2009 to 2014, Louise and Richard submitted monthly bills documenting actual hours spent providing care.[16] But in 2013, Meemic began to investigate Justin's care, which revealed that Justin had been in jail and

8. *Id.* (emphasis in original).
9. *See Williams*, 335 Mich. App. at 580–81, 967 N.W.2d at 872–73.
10. *Id.*
11. *Meemic,* 506 Mich. at 293, 954 N.W.2d at 117–18.
12. *Id.*
13. *Id.*; MICH. COMP. LAWS § 500.3101 *et seq.* (2019).
14. *Meemic,* 506 Mich. at 293, 954 N.W.2d at 117–18.
15. *Id.* at 293–94, 954 N.W.2d at 118.
16. *Id.* at 294, 954 N.W.2d at 118.

rehab for much of that time.[17] Yet Justin's parents billed Meemic for long-term care services during that entire period.[18]

Meemic sued the Fortsons to void its policy under the antifraud provision, which provided that the entire policy was "void if any **insured person** has intentionally concealed or misrepresented any material fact or circumstance relating to: A. This insurance; B. The Application for it; C. Or any claim made under it."[19]

Meemic moved for summary disposition, which was first denied by the trial court under the innocent-third-party rule.[20] The innocent-third-party rule stood for the proposition that an insurer could not rescind a contract because of fraud to avoid liability for benefits owed to innocent third parties.[21] The court of appeals then issued its opinion in *Bazzi v. Sentinel Insurance Co.*, holding that the innocent-third-party rule was not good law and an insurer entitled to rescind a policy based on fraud need not pay benefits to an innocent third party.[22] Meemic accordingly moved for reconsideration of its motion for summary disposition, which was granted.[23]

But the court of appeals reversed, concluding that its decision in *Bazzi* did not apply because defendants' alleged fraud did not occur in the procurement of the policy and thus the fraud did not influence the policy's validity.[24] The court of appeals held that the policy's antifraud provision was invalid because it would allow Meemic to circumvent its statutory obligations under the No-Fault Act.[25]

On appeal, the supreme court considered the interplay between the No-Fault Act and coverage under insurance policies.[26] The No-Fault Act governs its mandated coverage, and the insurance policy controls optional coverage.[27] The court reiterated that "unless a contract provision violates law or one of the traditional defenses to the enforceability of a contract

---

17. *Id.*

18. *Id.*

19. *Id.* at 294–95, 954 N.W.2d at 118–19 (emphasis in original).

20. *Id.* at 295, 954 N.W.2d at 118–19.

21. *Id.*

22. Bazzi v. Sentinel Ins. Co., 315 Mich. App. 763, 891 N.W.2d 13 (2016), *aff'd in part, rev'd in part,* 502 Mich. 390, 919 N.W.2d 20 (2018).

23. *Meemic*, 506 Mich. at 295, 954 N.W.2d at 118–19.

24. *Id.* at 296, 954 N.W.2d at 119.

25. *Id.*

26. *Id.* at 297–98, 954 N.W.2d at 119–20.

27. *Id.* (quoting Rohlman v. Hawkeye-Security Ins. Co., 442 Mich. 520, 525 n.3, 502 N.W.2d 310, 313 n.3 (1993) ("The policy and the statutes relating [] must be read and construed together as though the statutes were a part of the contract . . . the parties contracted with the intention of executing a policy satisfying the statutory requirements, and intended to make the contract . . . .")).

applies, a court must construe and apply unambiguous contract provisions as written."[28] Citing *Bazzi*, the court stated that common-law defenses, where available, may apply to claims for mandatory coverage under the No-Fault Act.[29]

Turning to Meemic's contractual fraud defense, the court stated that "[i]t would make little sense to say that an insurer can invoke common-law defenses when sued but cannot place those defenses in its contract."[30] To determine whether Meemic could properly invoke its contractual defense, the court had to first determine whether the defense was available under the No-Fault Act, or whether it was an available common-law defense.[31] Meemic's defense must fall under either category to be valid.[32]

Meemic's defense was unavailable under the No-Fault Act, which does not provide a fraud defense to benefits coverage.[33] The court also explained that applying such a provision to mandatory coverage imposed by the act would undermine the entire system, stating, "[t]o allow such provisions would reduce the scope of the mandatory coverage required by the [N]o-[F]ault [A]ct, as supplemented by the common law. It would in short, vitiate the [A]ct."[34]

Because there was no defense under the No-Fault Act, Meemic's case hinged on whether its defense was available at common law.[35] Michigan contract law recognizes several common law doctrines that may afford a party a remedy if a contract is *obtained* as a result of fraud.[36] The rationale for these doctrines is that "'[o]ne who has been fraudulently induced to enter into a contract has not assented to the agreement since the fraudulent conduct precludes the requisite mutual assent' to form a contract."[37] That said, the court recognized that a contract may also be rescinded based on postprocurement fraud, such as a party's failure to perform a substantial part of the contract or essential term.[38] But a mere contract breach

28. *Id.* at 299, 954 N.W.2d at 121 (quoting Rory v. Continental Ins. Co., 473 Mich. 457, 461, 703 N.W.2d 23, 26 (2005)).

29. *Id.* at 300, 954 N.W.2d at 121 (citing Bazzi v. Sentinel Ins. Co., 502 Mich. 390, 400–01, 919 N.W.2d 20, 25 (2018)).

30. *Id.* at 302, 954 N.W.2d at 122.

31. *Id.* at 303, 954 N.W.2d at 123.

32. *Id.*

33. *Id.* at 303–04, 954 N.W.2d at 123–24.

34. *Id.* at 302, 954 N.W.2d at 122.

35. *Id.* at 304, 954 N.W.2d at 123–24.

36. *Id.* at 304–05, 954 N.W.2d at 123–24

37. *Id.* at 306–07, 954 N.W.2d at 124–25 (quoting WILLISTON ON CONTRACTS § 69:1 (4th ed. 1993)).

38. *Id.* at 307, 954 N.W.2d at 125.

generally cannot avoid a contract at common law because facts which warrant rescission must ordinarily exist at contract formation.[39]

Meemic's fraud defense failed because it was not the type of common-law fraud that would allow for rescission of the contract.[40] Louise and Richard's fraudulent activity did not relate to the contract's formation; the fraudulent bills they submitted did not induce Meemic to enter into the policy nor did they deceive Meemic as to its contents; Meemic did not rely on any fraudulent misrepresentation when it agreed to insure the Fortsons in 2009 because the fraudulent misrepresentations had not yet been made; and Meemic failed to show or otherwise argue that the Fortsons' misrepresentations constituted a failure to perform a substantial part of the contract or essential term.[41]

Because Meemic's antifraud provision was not founded on either a statutory or an available common law defense, the court held that it was invalid and unenforceable.[42]

2. Williams v. Farm Bureau Mutual Insurance Co. of Michigan*, 335 Mich. App. 574, 967 N.W.2d 869 (2021)*

The supreme court's decision in *Meemic* informed the court of appeals' analysis of another no-fault insurance policy antifraud provision as applied to postprocurement fraud in *Williams v. Farm Bureau Mutual Insurance Co. of Michigan*.[43] Plaintiff sued defendant, her no-fault insurer, after defendant denied her claim for PIP benefits following a 2016 automobile collision.[44] Defendant moved for summary disposition because plaintiff violated an antifraud provision in the policy by making false statements about her employment, the extent of her injuries and her need for assistance.[45] The antifraud provision stated:

> The entire policy will be void if, whether before or after a loss, you, any family member, or any insured under this policy has:
>
> > 1. Intentionally concealed or misrepresented any material fact or circumstance;

39. *Id.* at 308, 954 N.W.2d at 125–26.
40. *Id.* at 310, 954 N.W.2d at 126–27.
41. *Id.* at 309–10, 954 N.W.2d at 126.
42. *Id.* at 316, 954 N.W.2d at 130.
43. 335 Mich. App. 574, 967 N.W.2d 869 (2021).
44. *Id.* at 576, 967 N.W.2d at 870.
45. *Id.*

> 2. engaged in fraudulent conduct; or
>
> 3. made false statements;
>
> relating to this insurance or to a loss to which this insurance applies.[46]

Defendant did not claim that plaintiff fraudulently induced it into entering into the policy.[47] Nor did defendant claim that the evidence surrounding plaintiff's accident, injury, and treatment, when seen in the light most favorable to plaintiff, did not support the administration of PIP benefits.[48] Defendant's argument hinged solely on its allegations of postprocurement fraud.[49] The trial court granted the motion.[50]

Soon after, the supreme court issued its decision in *Meemic*.[51] The supreme court's holding in *Meemic* required the court of appeals to reverse the trial court's decision, because the allegedly fraudulent statements were made after plaintiff procured the insurance policy and accordingly could not have induced defendant to enter into the policy.[52]

3. Haydaw v. Farm Bureau Insurance Co.*, 332 Mich. App. 719, 957 N.W.2d 858 (2020),* appeal denied*, 507 Mich. 959, 959 N.W.2d 528 (2021)*

In *Haydaw v. Farm Bureau Ins. Co.*, the court of appeals considered a matter of first impression on whether false statements made during discovery provide grounds to void an insurance policy based on the policy's fraud provision.[53] The case arose "out of a motor vehicle accident in which plaintiff claims to have sustained injuries to his back, neck, and shoulders."[54] Plaintiff sued his no-fault insurer alleging that it wrongfully withheld PIP benefits he was entitled to under his policy and the No-Fault Act.[55] During discovery, defendant obtained plaintiff's medical records, which showed intermittent complaints of back, neck, and shoulder pain

---

46. *Id.* at 577, 967 N.W.2d at 871.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 577–78, 967 N.W.2d at 871–72.
51. *Id.*
52. *Id.* at 586–87, 967 N.W.2d at 876.
53. Haydaw v. Farm Bureau Ins. Co., 332 Mich. App. 719, 957 N.W.2d 858 (2020), *appeal denied*, 507 Mich. 959, 959 N.W.2d 528 (2021).
54. *Id.* at 721, 957 N.W.2d at 860.
55. *Id.*

pre-dating the accident.[56] Defendant moved for summary disposition asserting that the policy's fraud provision applied to bar plaintiff's claims because plaintiff had testified falsely during his deposition and falsely represented in medical examinations that he had no issues before the accident.[57]

Because the court of appeals had not yet addressed this issue in a published opinion, it adopted the reasoning first found in the United States Supreme Court's 1871 decision *Republic Fire Insurance Co. v. Weides*, in which the Court held that trial testimony does not implicate an insurance policy's fraud provision.[58] Following this holding, the court of appeals reasoned that false statements made during discovery could not provide grounds to void a policy.[59] Defendant was, in effect, seeking to dismiss plaintiff's claim based on discovery misconduct.[60] But by discovery, the insurance claim had been denied and the parties were adversaries in litigation.[61] At this stage, what is true or false matters to the fact-finder, and "the parties' duties of disclosure are governed by the rules of civil procedure, not the insurance policy."[62] If plaintiff had testified falsely, it was up to the court to determine what sanction, if any, may be proper.[63] Thus, statements made during litigation cannot satisfy the elements of voiding a policy based on post-loss fraud.[64]

4. Fashho v. Liberty Mutual Insurance Co.*, 333 Mich. App. 612, 963 N.W.2d 695 (2020),* appeal denied*, 507 Mich. 959, 959 N.W.2d 530 (2021)*

In *Fasho v. Liberty Mutual Insurance Co.*, the court of appeals again considered the application of a fraud exclusion provision in the context of no-fault insurance coverage.[65] Following a 2017 motor vehicle accident, plaintiff sought PIP benefits from defendant, his no-fault insurer.[66] Defendant's investigation revealed plaintiff was still working at his business with no apparent physical limitations.[67] Defendant accordingly

56. *Id.*
57. *Id.*
58. Republic Fire Ins. Co. v. Weides, 81 U.S. 375, 382–83 (1871).
59. *Haydaw*, 332 Mich. App. at 726–27, 957 N.W.2d at 863.
60. *Id.* at 727, 957 N.W.2d at 863.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 728, 957 N.W.2d at 864.
65. Fashho v. Liberty Mut. Ins. Co., 333 Mich. App. 612, 963 N.W.2d 695 (2020), *appeal denied,* 507 Mich. 959, 959 N.W.2d 530 (2021).
66. *Id.* at 614, 963 N.W.2d at 696.
67. *Id.*

terminated plaintiff's benefits in early 2018.[68] Plaintiff sued to recover payment of his benefits, and defendant moved for summary disposition on the basis that plaintiff's claim was barred by the policy's fraud exclusion.[69]

Shortly after the trial court granted summary disposition to defendant, the court of appeals issued its opinion in *Haydaw*.[70] Because the trial court in *Fashho* relied extensively on plaintiff's deposition testimony in deciding to grant summary disposition, the court of appeals ordered supplemental briefing to discuss *Haydaw*'s effect.[71] The court of appeals determined that its ruling in *Haydaw* did not affect the outcome of this case because *Haydaw* did not serve as a categorical bar to the use of evidence of fraud obtained after litigation commenced.[72] *Haydaw*'s holding merely meant that "the evidence must relate to fraud that took place before the proceedings began."[73]

Contrary to *Haydaw*, plaintiff made his misrepresentation *before* litigation, and defendant denied plaintiff's claim after obtaining surveillance evidence *before* litigation.[74] Though plaintiff made additional false statements after the litigation commenced, defendant's denial of benefits was unrelated to those later statements.[75] Thus, the trial court properly granted summary disposition to defendant.[76]

B. Enforceability of Anti-assignment Provisions Under the No-Fault Act.

In *Michigan Ambulatory Surgical Center. v. Farm Bureau General Insurance Co. of Michigan*, the court of appeals considered whether an anti-assignment clause in a settlement agreement was enforceable to prevent an insured from assigning accrued claims for no-fault benefits.[77] The main issue in the case was whether the trial court erred when it concluded that the anti-assignment clause was invalid under the court of appeals' holding in *Jawad A. Shah, M.D., PC v. State Farm Mutual Auto Insurance Co.*[78]

---

68. *Id.* at 615, 963 N.W.2d at 696.
69. *Id.*, 963 N.W.2d at 696–97.
70. *Id.*, 963 N.W.2d at 697.
71. *Id.* at 619, 963 N.W.2d at 698.
72. *Id.*, 963 N.W.2d at 699.
73. *Id.*
74. *Id.* at 621, 963 N.W.2d at 700.
75. *Id.*
76. *Id.* at 622, 963 N.W.2d at 700.
77. *See generally* Michigan Ambulatory Surgical Ctr. v. Farm Bureau Gen. Ins. Co. of Mich., 334 Mich. App. 622, 965 N.W.2d 650 (2020).
78. *Id.* at 625–26, 965 N.W.2d at 652; Jawad A. Shah, M.D., PC v. State Farm Mut. Auto. Ins. Co., 324 Mich. App. 182, 200, 920 N.W.2d 148, 159 (2018).

The court first considered whether the anti-assignment provision contravened any portion of the No-Fault Act.[79] Though the No-Fault Act prohibits assignment, nothing in the Act prohibits agreements *not* to assign benefits.[80]

Second, the court analyzed whether the anti-assignment provision violated public policy, like in *Shah*.[81] In *Shah*, the court of appeals held that an anti-assignment clause in an insurance policy was unenforceable to prohibit assignment of an accrued claim because that prohibition violates Michigan public policy.[82] The *Shah* court *"*concluded that public policy compelled a judicial redrafting of the terms of the respective insurance policies because doing so would not increase an insurer's liability[.]"[83] The court determined that this case did not present the same public policy concerns as in *Shah.*[84] A judicial redrafting of the settlement agreement would not increase defendant's liability under the policy but might increase defendant's liability under the settlement agreement.[85] Instead, public policy favored the freedom to contract and encouraged settlement, which would be frustrated if the court deemed the anti-assignment clause unenforceable.[86] As a result, the trial court erred in concluding that the agreement's anti-assignment provision was invalid.[87]

C. Viability of Indemnification Provisions in the Context of No-Fault Benefits.

In *Bronner v. City of Detroit*, the supreme court considered whether an insurer may legally contract with a vendor for indemnification for the cost of no-fault benefits that the insurer is statutorily obligated to pay when the vendor's negligence caused the injury at issue.[88]

The City of Detroit self-insures its buses under the No-Fault Act.[89] In 2014, a bus was in an accident with a garbage truck operated by GFL Environmental USA Inc.[90] A passenger on the bus later filed a claim with the City for PIP benefits.[91] Though the City at first made benefit payments,

79. *Michigan Ambulatory Surgical Ctr.*, 334 Mich. App. at 627, 965 N.W.2d at 652.
80. *Id.*, 965 N.W.2d at 652–53.
81. *Id.* at 629, 965 N.W.2d at 653.
82. *Id.* (citing *Jawad A. Shah, M.D., PC*, 324 Mich. App. at 200, 900 N.W.2d at 159).
83. *Id.* at 629–30, 965 N.W.2d at 653.
84. *Id.* at 629, 965 N.W.2d at 654.
85. *Id.* at 629–30, 965 N.W.2d at 654.
86. *Id.* at 631, 965 N.W.2d at 654–55.
87. *Id.* at 633, 965 N.W.2d at 655.
88. Bronner v. City of Detroit, 507 Mich. 158, 163, 968 N.W.2d 310, 312 (2021).
89. *Id.*
90. *Id.*
91. *Id.*

it eventually stopped and the passenger sued.[92] Under GFL's contract with the City, GFL agreed to indemnify the City against:

> [A]ny and all liabilities, obligations, damages, penalties, claims, costs, charges, losses and expenses . . . that may be imposed upon, incurred by, or asserted against the City . . . to the extent caused by . . . any negligent or tortious act, error, or omission attributable in whole or in part to GFL or any of its Associates.[93]

Shortly after the passenger sued, the City filed a third-party complaint seeking indemnification from GFL.[94]

The question before the court was whether the Insurance Code precluded the City's indemnification agreement with GFL—specifically, whether the agreement ran "'afoul of the public policy of the state' in the form of 'the policies that . . . are reflected in . . . our statutes,' such as the Insurance Code."[95] Though the court of appeals had noted that there is no provision in the Code that prohibits such an agreement, it construed the provision as a variation on the type of liability-shifting that prior cases have prohibited.[96] These cases, when read together, show that the Code's regulation of no-fault insurance seeks to ensure that there is insurance for accidents and that benefits are paid.[97] The supreme court found the lower court's analysis of this precedent flawed given that the agreement at issue did not jeopardize the availability of insurance or the payment of benefits and accordingly fell outside the anti-shifting rule.[98]

The court further determined that the court of appeals misconstrued the provisions of the Code allowing insurers to seek reimbursement for payment of certain benefits as implicitly excluding all other reimbursement methods.[99] The court of appeals had identified several provisions that instead respond to specific problems unrelated to the issue in dispute.[100]

---

92. *Id.*
93. *Id.* at 163–64, 968 N.W.2d at 312–13 (omissions in original).
94. *Id.* at 158, 164, 968 N.W.2d at 310, 313.
95. *Id.* at 165, 968 N.W. 2d at 313 (internal citation omitted).
96. *Id.* at 166, 968 N.W.2d at 314; *see e.g.*, Citizens Ins. Co. of Am. v. Federated Mut. Ins. Co., 448 Mich. 225, 531 N.W.2d 138 (1995); State Farm Mut. Auto. Ins. Co. v. Enterprise Leasing Co., 452 Mich. 25, 549 N.W.2d 345 (1996); Universal Underwriters Ins. Co. v. Kneeland, 464 Mich. 491, 628 N.W.2d 491 (2001); Cruz v. State Farm Mut. Auto. Ins. Co., 466 Mich. 588, 648 N.W.2d 591 (2002).
97. *Bronner*, 507 Mich. at 166, 968 N.W.2d at 314.
98. *Id.* at 172–73, 968 N.W.2d at 317.
99. *Id.* at 173.
100. *Id.*, 968 N.W.2d at 317–18.

Because the City's indemnification agreement with GFL did "not alter the relationship between the insurer and its insured or its beneficiaries, and [did] not transform the benefits paid . . . into something else," the court found that it did not conflict with the Insurance Code.[101]

III. ENFORCEABILITY OF ARBITRATION PROVISION IN ATTORNEY-CLIENT ENGAGEMENT AGREEMENTS

In *Tinsley v. Yatooma*, plaintiffs retained defendants in a malpractice lawsuit.[102] The parties entered into an engagement agreement that provided for binding arbitration, including claims for attorney malpractice.[103] The agreement also provided that plaintiffs waived their right to submit disputes to a court for determination and also waived their jury trial right.[104] Plaintiffs then sued defendants alleging malpractice in the underlying malpractice suit, claiming defendants forced them to settle for less than the case's true value.[105] Defendants moved for summary disposition under MCR 2.116(C)(7), contending that the arbitration agreement required dismissal.[106] Plaintiffs argued

> [T]hat the arbitration provision was unconscionable and unenforceable because it violated Michigan Rule of Professional Conduct (MRPC) 1.8(h)(1), which prohibits a lawyer from "mak[ing] an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement[.]"[107]

Plaintiffs further claimed that defendants violated their ethical duties under this Rule and State Bar of Michigan Ethics Opinion R-23 (July 22, 2016) by failing to fully explain the consequences of the arbitration provision in writing or to advise plaintiffs to consult independent counsel.[108]

Though contracts that violate ethical rules contravene public policy and are thus unenforceable, it was undisputed that the plaintiff, Tinsley,

---

101. *Id.* at 176, 968 N.W.2d at 319.
102. Tinsley v. Yatooma, 333 Mich. App. 257, 258, 964 N.W.2d 45, 46 (2020), *appeal denied,* 507 Mich. 893, 955 N.W.2d 895 (2021).
103. *Id.* at 259, 964 N.W.2d at 46.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 259–60, 964 N.W.2d at 46–47.

was a sophisticated businessman and that he had a chance to review the arbitration provision with experienced independent counsel before voluntarily signing the engagement agreement.[109] For those reasons, the court of appeals found a compelling need to enforce the arbitration provision.[110] The court was not convinced that Rule 1.8(h)(1) applies to arbitration provisions, considering that the Rule explicitly references an agreement minimizing the *lawyer's liability*.[111] The court questioned whether arbitration limits liability.[112] That said, even if the Rule were implicated, plaintiffs were independently represented in entering the agreement, and that is all the Rule requires.[113]

IV. CONSTRUCTION OF NON-SOLICITATION PROVISION IN EMPLOYMENT AGREEMENTS

Total Quality, Inc. v. Fewless involved purported breaches of a non-solicitation clause in employment agreements.[114] Terry Fewless founded Total Quality, Inc. ("TQI"), a transportation logistics company, in 1992.[115] In 2008, Terry Fewless, Nathan Fewless, and Kris Fewless sold their interest in TQI.[116] Terry and Nathan each signed an employment agreement enabling them to keep working at TQI.[117] Both agreements contained a non-solicitation clause that provided:

> 7. Non-Solicitation. During the Employment period and continuing for two years thereafter, the Executive shall not directly or indirectly through another Person . . . (iii) directly or indirectly call on, solicit, or service any customer, supplier, distributor, or other business relation of [TQI] in order to induce or attempt to induce such Person to cease doing business with [TQI], or in any way directly or indirectly interfere with the relationship between any such customer, supplier, distributor, or

109. *Id.* at 264, 964 N.W.2d at 49.
110. *Id.*
111. *Id.* at 264–65.
112. *Id.* at 265.
113. *Id.*
114. Total Quality, Inc. v. Fewless, 332 Mich. App. 681, 685, 958 N.W.2d 294, 297 (2020), *appeal denied*, 507 Mich. 899, 956 N.W.2d 190 (2021).
115. *Id.*
116. *Id.*, 958 N.W.2d at 297–98.
117. *Id.*, 958 N.W.2d at 298.

> other business relation and [TQI] (including making any disparaging statements about any member of [TQI]).[118]

Terry and Nathan continued working at TQI and both employment agreements expired in March 2014, after which they worked as at-will employees.[119] Terry resigned in October 2014.[120] In February 2015, Terry and Kris formed QLSL, and following Nathan's resignation from TQI in April 2015, QLSL's operating agreement was executed.[121] From May to August 2015, QLSL began involving other personnel, three of which were previously affiliated with TQI before and during 2015. QLSL also began servicing three of TQI's former customers.[122]

TQI sued Terry, Nathan, and QLSL alleging that Terry and Nathan breached their non-solicitation provisions by hiring the three former TQI employees and by soliciting or servicing its customers.[123] The trial court denied defendants' motion for summary disposition, stating that the clause was violated only "where the calling on, soliciting, or servicing of a business relation of TQI occurs for the purpose of inducing that business relation to cease doing business with TQI" and that "[t]he intent of the provision is to prohibit Nathan and Terry from actively disrupting TQI's relationship with its customers so that those customers would take the business it does with TQI elsewhere, whether a percentage of the business or the business in its entirety."[124]

On appeal, defendants argued that their non-solicitation clause did not prevent them from responding to customer-initiated requests and instead only precluded intentional solicitation designed to induce a person to terminate business with TQI or to otherwise interfere with the business relationship.[125] Defendants also asserted that the agreement defined the prohibited solicitation narrowly and did not prohibit Nathan and Terry from competing with TQI without intent to induce TQI's customers to stop doing business with it.[126]

Because the employment agreement failed to define "solicit," the court of appeals looked to the plain and ordinary meaning of the term.[127] The court cited the *Merriam-Webster's Collegiate Dictionary*, which defines

---

118. *Id.* at 689, 958 N.W.2d at 300.
119. *Id.* at 686, 958 N.W.2d at 298.
120. *Id.*
121. *Id.*
122. *Id.* at 687, 958 N.W.2d at 299.
123. *Id.* at 687–88, 958 N.W.2d at 299.
124. *Id.* at 690, 958 N.W.2d at 300.
125. *Id.* at 693, 958 N.W.2d at 302.
126. *Id.* at 693–94, 958 N.W.2d at 302.
127. *Id.* at 695, 958 N.W.2d at 303.

"solicit" as "to make petition to[.]"[128] The court also cited *The American Heritage Dictionary of the English Language*, which defines "solicit" as "[t]o seek to obtain by persuasion, entreaty, or formal application[.]"[129] The evidence showed that Terry and Nathan "made a petition" to at least one of TQI's customers to award QLSL business when they replied to a request for proposal with a bid.[130] The court further reasoned that it was irrelevant that TQI's customer issued the request for proposal because Terry's and Nathan's submission of a bid was an affirmative act to solicit work from TQI's customer, in violation of the non-solicitation clause.[131] Indeed, defendants did not simply accept the customer's business, but submitted a bid for work that they knew TQI serviced, and QLSL would have received no work without having submitted the bid.[132] Because defendants assumed an active role in the customer's decision-making process, there was a sufficient question of fact about whether they had solicited TQI's customer, and the trial court appropriately denied their motion for summary disposition.[133]

V. CONCLUSION

Though the Michigan courts addressed numerous issues during the *Survey* period that did not drastically change the state's contract law, they did address an issue of first impression as to whether false statements made during discovery provide grounds to void an insurance policy based on the policy's fraud provision and clarified issues regarding the validity of certain contractual provisions in insurance policies under the Michigan no-fault statute, the enforceability of arbitration provisions in attorney-client engagement agreements, and the applicability of non-solicitation clauses in employment agreements.

128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 697, 958 N.W.2d at 304.
133. *See id.*