INSURANCE LAW

JAMES T. MELLON[†]
DAVID R. DYKI[‡]
DAVID A. KOWALSKI[†‡]

I. INTRODUCTION 455
II. DECISIONS OF THE MICHIGAN COURT OF APPEALS 456
A. Agency 456
B. Commercial Insurance 459
C. Insurance Regulation 469
D. Uninsured Motorists 471
E. No-Fault 472
1. MICH. COMP. LAWS ANN. Section 3105 – Accidental Bodily Injury 472
2. MICH. COMP. LAWS ANN. Section 3107 – Allowable Expenses 473
3. MICH. COMP. LAWS ANN. Section 3113 – Personal Protection Insurance Benefits when Vehicle is Taken Unlawfully 475
4. MICH. COMP. LAWS ANN. Section 3135 – Serious Impairment of Body Function 477
5. MICH. COMP. LAWS ANN. Section 3145 – One Year Back Rule 478
6. MICH. COMP. LAWS ANN. Section 3148 – Attorney Fees 479
7. MICH. COMP. LAWS ANN. Section 3157 – Lawfully Rendering 481
8. MICH. COMP. LAWS ANN. Section 3163 – Non-Admitted Insurer 481
F. Further Cases from the Michigan Court of Appeals 483
III. DECISIONS OF THE MICHIGAN SUPREME COURT 484
IV. DECISIONS OF THE UNITED STATES DISTRICT COURTS 496
V. DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT 501
VI. CONCLUSION 504

I. INTRODUCTION

Most Michigan Court of Appeals decisions regarding insurance law continue to be unpublished and not precedential. Unpublished decisions are beyond the scope of this Article. The Michigan Supreme Court continued to be actively involved in the shaping of Michigan insurance law during the *Survey* period.

Insurance is pervasive in modern society. It is difficult to imagine a functional economy without insurance. The importance of insurance is hard to underestimate. The cost of private and social insurance in the United States exceeds $1.5 trillion ($1,500 billion) per annum. Insurance law decisions, whether interpreting a policy of insurance or a statute mandating or regulating insurance, set the parameters for resolution of insurance disputes between insurers, insureds and third parties.

II. DECISIONS OF THE MICHIGAN COURT OF APPEALS

A. Agency

Whose agent is an insurance agent?

This question was perhaps answered in *Genesee Foods Services, Inc. v. Meadowbrook, Inc.*[1] The majority strained to achieve what it no doubt felt was the fair result. *Genesee Foods* dealt with two insurance agent employees of Meadowbrook who secured property insurance for Genesee Foods with Citizens Insurance Company of America.[2] Meadowbrook had an agency agreement with Citizens, which identified Meadowbrook as an agent of Citizens and its related insurers.[3] The agency agreement "gave Meadowbrook the authority to accept and bind contracts of insurance that Citizens was licensed to write."[4]

In 2003, a fire destroyed most of Genesee Foods' business property and contents. Genesee Foods entered into a "Compromise Settlement Release and Hold Harmless Agreement"[5] with Citizens which provided not only for the release of Citizens, but also its agents.[6]

---

† Principal, Mellon Pries, P.C. and Adjunct Professor, University of Detroit School of Law. B.A., 1967, University of Detroit; M.A., 1970, University of Detroit; J.D., 1973, University of Detroit; L.L.M., 2003, Wayne State University Law School. Mr. Mellon has been conferred the designation Charter Property Casualty Underwriter (CPCU) from the American Institute for Property & Liability Underwriters and the designation Associate in Risk Management (ARM) from the Insurance Institute of America.

‡ Associate, Cory & Associates. B.A., 2000, Michigan State University; J.D., 2003, Wayne State University School of Law.

†‡ Associate, Mellon Pries, P.C. B.A., 2004, University of Michigan; J.D., 2007, University of Detroit Mercy School of Law.

1. 279 Mich. App. 649, 760 N.W.2d 259 (2008).
2. *Id.* at 650, 760 N.W.2d at 260.
3. *Id.* at 650-51, 760 N.W.2d at 260.
4. *Id.* at 651, 760 N.W.2d at 260.
5. *Id.* at 651-52, 760 N.W.2d at 260-61.
6. The settlement agreement in pertinent part provided:

> [T]he Undersigned do hereby release and forever discharge the Citizens Insurance Company of America and each of its servants, agents, adjusters, employees, attorneys, related companies, parent companies and subsidiaries

Thereafter, Genesee Foods brought suit against Meadowbrook and the two Meadowbrook insurance agents claiming that they "failed to ensure that the insurance policy that they arranged for plaintiffs to purchase would provide plaintiffs with sufficient coverage in the event of a loss."[7]

The principals of Genesee Foods asserted that it was not their intent to release Meadowbrook and that Meadowbrook and its employees were its agents and not agents of Citizens. They also asserted that they were unaware of the Agency Agreement between Citizens and Meadowbrook.[8]

Meadowbrook and its employees moved for summary disposition asserting that any claim against them was barred by the settlement agreement between Citizens and Genesee Foods.[9] The trial court concluded that there was a question of fact "regarding whether defendants were agents of Citizens or plaintiffs" and, hence, denied the motion.[10] However, the trial court stayed the case pending an appeal and the court of appeals granted leave.[11] Judge Owens' majority opinion, in which then-Chief Judge Saad concurred, acknowledged "[the court] must ascertain the parties' intentions from the plain, ordinary meaning of the language of the release."[12] The majority also acknowledged that, pursuant to the Agency Agreement, "Meadowbrook was authorized to act for, or on behalf of, Citizens for purposes of accepting and binding Citizens to insurance contracts."[13] Employing perhaps questionable "logic," the majority concluded that Meadowbrook owed its "primary

---

(hereinafter 'Citizens Releasees') of and from any and all claims, debts, dues, actions, causes of actions and demands, whatsoever, which the Undersigned now have or may have against the Citizens Releasees for or on account of any matter or thing that has at any time heretofore occurred, particularly, but without limiting the generality hereof all claims and demands arising out of its policy number 01 MPC 0560795 issued to Genesee Foods Services, Inc., for the premises located at G-4309 South Dort Highway, Burton, Michigan, by reason of fire, smoke, water or other loss to property described within the said Policy occurring on or about June 30, 2003 and August 15, 2003 and all claims and demands arising out of anything said or done by Citizens Releasees, in investigating the said claims, the causes thereof, and/or any other claims of the Undersigned including claims for bad faith, consequential and/or punitive damage.

Id. at 652, 760 N.W.2d at 261.

7. *Genesee Food Servs.*, 279 Mich. App. at 653, 760 N.W.2d at 261.

8. *Id.* at 652, 760 N.W.2d at 261-62.

9. *Id.* at 653-54, 760 N.W.2d at 261-62.

10. *Id.* at 653, 760 N.W.2d at 261-62.

11. *Id.*, 760 N.W.2d at 262.

12. *Id.* at 655, 760 N.W.2d at 262-263 (quoting Gortney v. Norfolk & W.R. Co., 216 Mich. App. 535, 540-41, 549 N.W.2d 612, 615 (1996)).

13. *Genesee Food Servs.*, 279 Mich. App. at 656, 760 N.W.2d at 263.

fiduciary duty of loyalty" to Genesee Foods and, therefore, only was an agent of Genesee Foods.[14] The court noted that "[t]he primacy of this relationship between an insured and an independent insurance agent is reflected in Michigan caselaw, which . . . holds that 'the independent insurance agent or broker is considered an agent of the insured rather than an agent of the insurer.'"[15]

The majority found that the defendants were not agents of Citizens and, therefore, Meadowbrook and its employees were not released.[16] This decision was clearly results-orientated:

> Were we to hold otherwise, we would have to conclude that plaintiffs, in signing the release of Citizens and its agents, intentionally released their own agents (defendants) regarding the very transaction for which defendants owed plaintiffs the primary duty of loyalty and expertise. Such a conclusion would violate reason and common sense.[17]

---

14. *Id.*

15. *Id.* (quoting W. Am. Ins. Co. v. Meridian Mut. Ins. Co., 230 Mich. App. 305, 310, 583 N.W.2d 548, 550 (1998)). It seems obvious that an insurance agency which has an agency agreement identifying it as the agent of the insurer is acting as a dual agent, both on behalf of the insured and the insurer, when placing a policy of insurance. While it follows that an exclusive agent, working for only one insurer, may be considered the agent of the insurer, does it follow that an independent agent is the agent of the insured and not the agent of an insurer under such circumstances? This general citation is based upon questionable authority. The majority cites *West American Insurance Co. v. Gutekunst*, 230 Mich. App. 305, 583 N.W.2d 548 (1998), which cites *Auto-Owners Insurance Co. v. Michigan Mutual Insurance Co.*, 223 Mich. App. 205, 215, 565 N.W. 2d 907, 912 (1997). However, that case simply cites *Harwood v. Auto-Owners Insurance Co.*, 211 Mich. App. 249, 254, 535 N.W.2d 207, 209 (1995), which in turn cites *Mayer v. Auto-Owners Insurance Co.*, 127 Mich. App. 23, 26, 338 N.W.2d 407, 409 (1983), which appears to be the genesis of the statement. *Mayer* simply cites APPLEMAN, INSURANCE LAW AND PRACTICE §8871, at 322-24 (1981). However, *Mayer* was a bench trial where the trial court concluded that Kirkpatrick was an agent of the insurer and was not negligent. *Mayer*, 127 Mich. App. at 26, 338 N.W.2d at 409. In *Mayer*, the courts of appeals simply concluded that the trial court erred in finding that insurance agent Kirkpatrick was an agent of Auto-Owners where Kirkpatrick "testified that he acted as the agent of the insured." *Id.* The court of appeals did not conclude in *Mayer* that an insurance agent is always an agent of the insured. While beyond the scope of this article, the oft-cited principle originating in *Mayer* may have been built on a shaky foundation.

16. *Genesee Food Servs.*, 279 Mich. App. at 657, 760 N.W.2d at 264.

17. *Id.* at 657, 760 N.W.2d at 263. Is the majority really concluding that the settlement agreement was ambiguous, but not wanting to say so? Isn't the majority, in not wanting to conclude that Genesee Foods intentionally released the defendants, violating its own stated rule that the parties' intentions are ascertained "from the plain, ordinary meaning of the language of the release?" *Id.* at 658, 760 N.W.2d at 264. The majority

Judge Kelly dissented "because the terms of the settlement agreement and release are unambiguous and should be enforced as written."[18] She relied upon the same principles of interpretation of a release as had been relied upon by the majority in coming to the opposite conclusion.[19] Judge Kelly noted that the lawsuit was filed about two weeks after the settlement agreement was executed and pointed out that the plaintiffs could have excepted the anticipated claim from the release. If the job of the appellate court is to protect a party from its own mistakes and reach equitable results, perhaps the majority got it right.

In *Unibar Maintenance Services, Inc. v. Saigh*,[20] defendant insurance agents Saigh and Wells, licensed insurance agents in Michigan, sought to raise for the first time on appeal that plaintiff's release with a company which they ran released them "because the release of an agent releases the principal from liability."[21] The court of appeals' opinion noted, however, that defendants were not allowed to raise the release issue since it was an affirmative defense which they never raised.[22] The court therefore concluded "[the] argument waived" and "voice[d] no opinion on th[e] argument's merits."[23]

The plaintiff in *Unibar* hired an insurance agent to secure healthcare coverage.[24] That agent recommended UltraMed which was recommended by Thiteca, a licensed insurance agent who sold for Financial Healthcare Systems which was "run by defendants Saigh and Wells as partners . . . ."[25] Apparently, plaintiff settled with Thiteca and FHS and signed a release. The terms of the release were not disclosed.[26]

B. Commercial Insurance

When in doubt as to whether or not an expert witness is needed, especially in a case with substantial damages, it is best to employ an expert. In the generally well-reasoned opinion of *Zaremba Equipment,*

---

obviously considered extrinsic evidence, but was it entitled to do so under *Klapp v. United Insurance Group Agency, Inc.* 468 Mich. 459, 663 N.W.2d 447 (2003)?

18. *Genesee Food Servs.*, 279 Mich. App. at 658, 760 N.W.2d at 264.

19. *Id.* at 658-59, 760 N.W.2d at 264.

20. 283 Mich. App. 609, 769 N.W.2d 911 (2009) (per curiam) (deciding the case were Judges Donofrio, Beckering and Kelly, who dissented in *Genesee Foods*).

21. *Id.* at 620, 769 N.W.2d at 919.

22. *Id.*

23. *Id.*

24. *Id.* at 612, 769 N.W.2d at 914.

25. *Id.* at 612, 769 N.W.2d at 915.

26. *Unibar*, 283 Mich. App. at 620, 769 N.W.2d at 919-20.

Inc. v Harco National Insurance Co., [27] Judge Elizabeth Gleicher addressed the obligation of an insurance agent with a special relationship to the insured, the comparative negligence of the insured in failing to read its insurance policy, and whether or not expert testimony is necessary to establish an insurance agent's standard of care, among other issues. The insured presented the agent with an insurance proposal and asked the agent to "meet or beat" it and expressed a desire to be "fully insured."[28] The agent used a software program which calculated the building value at $494,449 and the building coverage limit was increased to $525,000.[29] The replacement cost of the building following a fire was $1,192,000, significantly above the policy's building coverage limit.[30] While the policy in question had not yet been delivered to the insured at the time of the loss, the two prior policies with the same insurer provided a $525,000 building limit.[31] The agent did not deny that the insured made a request to be fully insured and conceded that he intended to insure "[p]laintiff for the cost of replacing the building."[32]

The jury awarded separate verdicts for breach of contract and for negligence, fraud or innocent misrepresentation and promissory estoppel.[33] The majority analyzed the *Harts*[34] "general no-duty-to-advise rule"[35] but correctly noted that, "[w]hen a special relationship exists, an agent assumes a duty to advise the insured regarding the adequacy of insurance coverage."[36] The defendants agreed that whether the agent had adequately advised the insured was a question for the jury; hence, a special *Harts* jury instruction was provided.[37] The jury found a special relationship.[38]

The Michigan Court of Appeals reaffirmed that "as a general rule, an insured must read his or her insurance policy."[39] Judge Gleicher reasoned that comparative negligence applied to plaintiff's tort-based claims and that the "plaintiff's admitted failure to read the policy could qualify as

27. Zaremba Equip., Inc. v Harco Nat'l Ins. Co., 280 Mich. App. 16, 761 N.W.2d 151 (2008).

28. *Id.* at 23, 761 N.W.2d at 157.

29. *Id.*

30. *Id.*

31. *Id.* at 24, 761 N.W.2d at 157.

32. *Id.* at 23, 761 N.W.2d at 157.

33. *Zaremba Equip.*, 280 Mich. App. at 25, 761 N.W.2d at 157-58.

34. Harts v. Farmers Ins. Exch., 461 Mich. 1, 597 N.W.2d 47 (1999).

35. *Zaremba Equip.*, 280 Mich. App. at 27, 761 N.W.2d at 159.

36. *Id.* at 28, 761 N.W.2d at 159 (citing *Harts*, 461 Mich. at 10-11, 597 N.W.2d at 51).

37. *Id.* at 28, 761 N.W.2d at 159.

38. *Id.* at 29, 761 N.W.2d at 159-60.

39. *Id.* at 29, 761 N.W.2d at 160.

comparative negligence and that the trial court should have permitted the jury to consider whether plaintiff unreasonably failed to read the . . . policy, . . . the application and, ...the . . . insurance quotation."[40] Thus, a jury could have found the failure to read the policy a proximate cause of the insured's failure to clarify the policy limits before the fire.[41]

However, the court rejected the argument that comparative negligence applied to the claim of negligently calculating replacement costs.[42] Logically, reading the policy would not uncover whether or not the agent's calculations were accurate. Because all of the negligence theories were submitted to the jury as one, reversal was required.[43] Accordingly, the court held that:

> when an insurance agent elects to provide advice regarding coverage and policy limits, the agent owes a duty to exercise reasonable care. The insured had a duty to read its insurance policy and to question an agent if concerns about coverage emerge. A jury should consider these corresponding duties in the crucible of comparative negligence.[44]

The court also concluded that the trial court's jury instruction regarding procuring coverage that met or exceeded all of the plaintiff's expectations was erroneous.[45] "Instead," said the court, "the law only required Musall to procure the coverage actually ordered by plaintiff."[46]

The court also agreed "with defendants that as a matter of law, plaintiff cannot prevail on a fraud or innocent misrepresentation theory premised on Musall's representations regarding the policy limits."[47] However, the court concluded that the record could support the necessary reliance for a fraud or negligent misrepresentation claim dealing with the calculation of replacement costs.[48] Again, because separate questions were not asked on the verdict form, a new trial was required.[49]

---

40. *Id.* at 33, 761 N.W.2d at 162.
41. *Zaremba Equip.*, 280 Mich. App. at 34, 761 N.W.2d at 162.
42. *Id.* at 35, 761 N.W.2d at 164.
43. *Id.*
44. *Id.* at 36, 761 N.W.2d at 164.
45. *Id.* at 38, 761 N.W.2d at 164.
46. *Id.*
47. *Zaremba Equip.*, 280 Mich. App. at 40, 761 N.W.2d at 165.
48. *Id.* at 40-41, 761 N.W.2d at 166.
49. *Id.* at 41, 761 N.W.2d at 166. This case highlights the problem of lumping together multiple claims. Had the claims been separated with a careful explanation that the separation would not multiply the damages, the jury may well have awarded the same damages on each individual claim, thus, not requiring reversal on this basis.

The court also rejected the promissory estoppel claim because "Musall[']s alleged representations that plaintiff had 'full coverage' or 'replacement cost coverage' were not promises, but 'words of assurance or statements of belief . . . .'"[50] The court also addresses the oft-debated issue of whether or not expert testimony is needed in an insurance agent errors and omissions (E&O) case. Safe practitioners avoid the issue by hiring an insurance agent as an expert witness. Both the majority and the dissent appear to agree that sometimes an expert is necessary and sometimes one is not.[51] The majority and the dissent, relying on the same case law, come to different conclusions as to whether or not expert testimony was necessary in this case.[52] While they seem to agree upon the same standard, it was applied differently. After looking at one unpublished Michigan case,[53] an oft-cited Minnesota case,[54] and an Iowa case,[55] the majority concluded that it:

> agree[d] with the analyses in *Atwater Creamery* and *Humiston Grain* that the need for expert testimony in an insurance coverage case should be determined on a case-by-case basis and depends on the nature of the underlying claims of negligence raised against the agent. If the duty alleged to have been breached falls beyond the understanding of the average juror, a trial court may require that the party alleging negligence produce expert testimony supporting the claim. This is entirely consistent with longstanding Michigan caselaw holding that when the claimed negligence involves 'a matter of common knowledge and observation,' no expert testimony is required.[56]

Perhaps in the weakest part of the majority's analysis, it then concludes that no expert testimony is required for any of plaintiff's four negligence claims, thus, saving plaintiff's negligence allegations for

---

50. *Id.*

51. *Id.* at 44, 761 N.W.2d at 168 ("[T]he need for expert testimony in an insurance coverage case should be determined on a case-by-case basis.").

52. *Id.* at 46-47, 50-52, 761 N.W.2d at 166-70, 171-72.

53. Nofar v. Eikenberry, No. 197231, 1998 WL 1989500 (Mich. App. Oct. 30, 1998).

54. Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co., 366 N.W.2d 271 (Minn. 1985).

55. Humiston Grain Co. v. Rowley Interstate Transp. Co., Inc., 512 N.W.2d 573 (Iowa 1994).

56. *Zaremba Equip.*, 280 Mich. App. at 44-45, 761 N.W.2d at 168 (quoting Daniel v. McNamara, 10 Mich. App. 299, 310, 159 N.W.2d 339, 344 (1968)).

retrial.[57] In fact, the majority went so far as to indicate that the trial court was free to allow expert testimony on retrial.[58]

Judge O'Connell's dissent highlights the risk a practitioner takes in not calling an expert. He disagrees with the majority's conclusion that an expert was not necessary except "[t]o the extent that the question before a jury is whether the insurance agent did not provide the type of coverage requested . . . ."[59] He asked a number of question related to the negligence claim, the answers to which "fell far outside a layperson's general knowledge."[60]

Tenneco, Inc. v. Amerisure Mutual Insurance Co. highlights the risk an insured takes in providing late notice of occurrence, late notice of suit or claim, and settling without the consent of the insurer.[61] Tenneco, as successor to Monroe Auto Equipment Company sought recoupment of environmental cleanup costs under general liability and umbrella policies issued by Michigan Mutual Insurance Co. (subsequently Amerisure) from 1956 to 1978.[62] Monroe's manufacturing facilities in Georgia, Arkansas and Nebraska, as well as landfills in Arkansas and Nebraska, became contaminated with TCE and TCA (Trichloroethylene and Trichloroethane) from the use of solvents containing the compounds in manufacturing auto parts. [63] The environmental claims were resolved by Monroe without any request that the insurer participate in that resolution.[64]

The insurer argued that Monroe had breached policy conditions by failing to provide it with either notice of occurrence or notice of claim, that Monroe had made a voluntary payment without the insurer's consent and that the no-action clause barred the action.[65] The court noted a difference that practitioners should well heed between notice of occurrence and notice of claim or suit. While the court felt that the letters from Monroe's legal counsel to the insurer arguably provided notice of occurrence, it felt that the unrebutted evidence established breach of the

57. *Id.* at 46, 761 N.W.2d at 169.

58. *Id.* at 47, 761 N.W.2d at 169 ("[S]hould the court conclude that expert testimony will 'assist the trier of fact to understand the evidence or to determine a fact in issue,' it certainly remains free to permit the testimony, in accordance with [Michigan Rule of Evidence] 702.").

59. *Id.* at 51, 761 N.W.2d at 171 (O'Connell, J., dissenting).

60. *Id.* at 52, 761 N.W.2d at 172.

61. Tenneco Inc. v. Amerisure Mut. Ins. Co., 281 Mich. App. 429, 761 N.W.2d 846 (2008).

62. *Id.* at 431, 761 N.W.2d at 850-51.

63. *Id.* at 432, 761 N.W.2d at 851.

64. *Id.* at 431-32, 761 N.W.2d at 851.

65. *Id.* at 433, 761 N.W.2d at 851.

notice of claim or suit condition.[66] An insurer has the burden of establishing that it was prejudiced by the failure of the insured to provide either notice.[67] After reviewing a number of the important cases in the area which established the reason for providing the notice and how an insurer may suffer prejudice, the court noted:

> An insurer suffers prejudice when the insured's delay in providing notice materially impairs the insurer's ability to contest its liability to the insured or the liability of the insured to a third party . . . . Although the question of prejudice is generally a question of fact... it is one of law for the court when only one conclusion can be drawn from the undisputed facts . . . . Further, "Michigan law does *not* require an insurer to prove that but for the delay it would have avoided liability."[68]

State and federal governmental environmental cleanup demands are seen in Michigan as "the functional equivalent of a suit brought in a court of law."[69] The court concluded that the insurer was prejudiced as a matter of law when it did not receive notice of suits or demands.[70] The court further held that "[p]rejudice to defendant is clear because plaintiff waited years after its liability had been cemented by its own settlements, stipulations, and consent decrees before seeking reimbursement from defendant. The trial court erred by not granting defendant summary disposition on this basis."[71]

As if this were not enough, the court then went on to conclude that all events, save one, were filed after the expiration of the six year statute of limitations, that the insured's claims were barred by laches, and were independently barred by the voluntary payment and no action clauses.[72]

---

66. *Id.* at 455, 761 N.W.2d at 858-59 (quoting Koski v. Allstate Ins. Co., 456 Mich. 439, 444, 572 N.W.2d at 639 ("[A]n insurer who seeks to cut off responsibility on the ground that its insured did not comply with a contract provision requiring actual notice immediately or within a reasonable time must establish actual prejudice to its position.") (internal quotation omitted).

67. *Id.* at 449, 761 N.W.2d at 860.

68. *Id.* at 448. 761 N.W.2d at 859 (quoting and approving the analogous late notice environmental insurance coverage case of *West Bay Exploration Co. v. AIG Specialty Agencies of Texas, Inc.*, 915 F.2d 1030 (6th Cir. 1990)).

69. *Id.* at 450, 761 N.W.2d at 860.

70. *Id.* at 450-51, 761 N.W.2d at 860.

71. *Id.* at 454, 761 N.W.2d at 862.

72. *Id.* at 472, 761 N.W.2d at 872.

In another commercial insurance coverage case, we find Judge Gleicher again writing the majority opinion with Judge O'Connell dissenting.[73] The following factual scenario was at issue in the case:

> On April 9, 2004, an elbow in the PVC line "blew out." A Holiday Inn maintenance man repaired it, but did not turn off the Rola-Chem "feeder system" while completing the repair. Gases created by the continuously flowing chlorine and muriatic acid formed in the PVC lines. When the maintenance man successfully repaired the elbow and powered the system back on, a cloud of the gas traveled through the PVS lines, entering the pool area, and injured the Bronkema family.[74]

Auto-Owners declined to defend the Holiday Inn, instead instituting a declaratory judgment action.[75] The trial court determined, on competing motions for summary disposition, that coverage was provided to the insured under the heating equipment exception to the comprehensive general liability insurance policies of pollution exclusion.[76] The pollution exclusion provided in part:

> This insurance does not apply to:
>
> f. (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:
>
> (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured.[77]

However, the exclusion was replaced by the Building Heating Equipment Endorsement, which stated that the insurance did not apply to:

> f. (1) "Bodily injury" or "property damage" arising out of the actual, alleged, or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

---

73. Auto-Owners Ins. Co. v. Ferwerda Enters., Inc., 283 Mich. App. 243, 771 N.W. 2d 434 (2009), *rev'd* 485 Mich. 905, 773 N.W.2d 17 (2009).

74. *Id.* at 246, 771 N.W.2d at 437.

75. *Id.*

76. *Id.* at 247, 771 N.W.2d at 438.

77. *Id.* at 249, 771 N.W.2d at 439.

> (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to any insured. However, this subparagraph, (a), does not apply to "bodily injury" if sustained within a building at such premises, site or location and caused by smoke, fumes, vapor or soot from equipment used to heat a building at such premises, site or location.[78]

While the policy's pollution exclusion nowhere uses the word "absolute," Michigan courts have adopted the insurance industry characterization of the exclusion as the absolute pollution exclusion.[79] The majority quotes from an earlier court of appeals decision that "[m]ost courts that have examined similar exclusions have concluded that they are clear and unambiguous and are just what they purport to be — absolute."[80]

The majority concluded that there existed a "genuine issue of material fact concerning whether the gases formed within the PVC lines, not within the Rola-Chem feeder, and dispersed only after the maintenance man re-powered the entire pool filtration and heating system . . . ."[81] Concluding that the policy language fairly admitted two different interpretations, the majority declared the policy ambiguous, leaving the meaning of the policy to the fact finder.[82] Apparently ignoring a body of Michigan law dealing with the pollution exclusion and what is a pollutant, the majority cited foreign law referencing the absurd results doctrine without acknowledging that such has been abolished in Michigan.[83] The majority then seems to be attempting to avoid the limited application of contra proferentem when it stated:

> In summary, a rational person viewing the circumstances of this case in light of the policy language in subsection f(1)(d)(i) could reasonably conclude either that no coverage exists because the Bronkemas suffered injury from pollutants that Holiday Inn brought onto its premises, or that plaintiff owes coverage because Holiday Inn did not import onto its premises the toxic gas cloud that injured the Bronkemas. In this situation, a fact-

---

78. *Id.*

79. *Id.* at 251, 771 N.W.2d at 439-40.

80. *Id.* (quoting McGuirk Sand & Gravel, Inc. v. Meridian Mut. Ins. Co., 220 Mich. App. 347, 354, 559 N.W.2d 93, 97 (1996)).

81. *Auto Owners*, 283 Mich. App. at 252, 771 N.W.2d at 441.

82. *Id.* at 253, 771 N.W.2d at 441.

83. *Id.* at 254 n.3, 771 N.W.2d at 442. *See* Wilkie v. Auto-Owners Ins. Co., 469 Mich. 41, 60, 664 N.W.2d 776, 786 (2003).

> finder must make the relevant determination regarding the scope of coverage.[84]

In dissent, Judge O'Connell concludes that the trial court's grant of summary disposition should be affirmed because, "[t]he parties also agree that smoke, fumes or vapor from this heating unit and its attachments may have been responsible for the bodily injury sustained by the individual defendants."[85] Judge O'Connell would have left for another day the determination of whether or not "cleaning agents such as chlorine, muriatic acid, bleach detergents, drain cleaner or other type of disinfectants are pollutants . . . ."[86] He did, however, concur with the majority, which looked to the use for which a product was put to determine whether or not the product was a pollutant.[87] He noted that "[s]tated another way, the use of a product may make the terms of an insurance contract ambiguous to the ordinary reader."[88] Judge O'Connell asked some questions that have since plagued numerous courts dealing with the so-called absolute pollution exclusion including: "In what context is a chemical a pollutant?. . . Is it possible to define a product as a pollutant for some purposes and as a non-pollutant for other purposes? . . . When does a chemical become a pollutant?"[89]

Judge O'Connell offered an example to better explain his questions. He elaborates:

> Under some insurance policies, fluoride would be considered a pollutant. If fluoride were dumped in large quantities into a stream, lake, or unapproved landfill, state and federal agencies would complain, the guilty party would be prosecuted, and any insurance policy would exclude coverage for the resulting harm to the environment. In this case, fluoride would be a contaminant. However, if a city or municipality were to add fluoride to its municipal water system, few people would claim that the city or municipality had polluted the drinking water supply, even though cities are prohibited from adding pollutants to drinking water. In certain amounts and among certain

84. *Auto Owners,* 283 Mich. App. at 255-56, 771 N.W.2d at 442.
85. *Id.* at 258 n.4, 771 N.W.2d at 444 n.4.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*

> populations, the addition of this chemical into the water serves a purpose (preventing tooth decay) and is desired.[90]

Interestingly, the discussion regarding what is a pollutant was not necessary to determine whether or not the pollution exclusion applied because of the building heating equipment exception.[91] Additionally, the court does not discuss the consequences of Auto-Owners' failure to defend after the underlying case was tendered to it, or the trial court's, award of attorney fees, not only to Holiday Inn's counsel but the Bronkemas' counsel.[92] The Michigan Supreme Court subsequently unanimously reversed the court of appeals and reinstated the circuit court's judgment "because the subject policy unambiguously provided coverage for the defendants' claim," but remanded to the court of appeals "for consideration of whether the trial court properly assessed attorney fees and penalty interest against plaintiff Auto-Owners Insurance Company."[93]

A commercial insurance policy's definition of "occurrence" and its application was at play in *Liparoto Construction, Inc. v. General Shale Brick, Inc.*[94] Liparoto contracted to build a house using exterior brick manufactured by General Shale and supplied by Lincoln Brick.[95] The bricks became discolored, even more so when wet.[96] The manufacturer attributed the problem to a contra-indicated acid cleaner, while State Auto's expert "concluded that the problem was attributable to a latent defect that occurred during manufacturing or warehousing."[97]

While Liparoto's suit was against General Shale, Lincoln Brick and its commercial general liability insurer State Auto Property and Casualty Insurance Company, this discussion will analyze Liparoto's claim against its insurer only. The court affirmed the trial court's grant of summary disposition based in favor of State Auto based on the policy definition of "occurrence."[98] However, the court implicitly posited an alternative interpretation when it stated that "[h]ere plaintiff did not

---

90. *Auto* Owners, 283 Mich. App. at 258 n.4, 771 N.W.2d at 444 n.4. If the same substance may or may not be a "pollutant" depending upon its use or concentration, is there any such thing as an absolute pollution exclusion?

91. *Id.* at 247-51, 771 N.W.2d at 438-40.

92. *Id.* at 256-572, 44-45, 771 N.W.2d at 443, 436.

93. 485 Mich. 905, 773 N.W.2d 17 (2009).

94. Liparoto Constr. Inc. v. Gen. Shale Brick, Inc., 284 Mich. App. 25, 772 N.W.2d 801 (2009).

95. *Id.* at 28, 772 N.W.2d at 804.

96. *Id.*

97. *Id.*

98. *Id.* at 29, 772 N.W.2d at 804-05.

allege, and presented no evidence, that there was damage beyond its own work product. Accordingly, the trial court did not err by concluding that plaintiff failed to establish an occurrence within the meaning of the policy."[99]

In reaching its ultimate conclusion, the court addressed the frequently cited cases[100] for the generally accepted proposition that, while an insured's defective workmanship is not covered, damage to the property of others is generally covered.[101] This general rule, however, is based upon not only the definition of "occurrence," but also the application of the exclusions.[102]

C. Insurance Regulation

Business and industry is regulated by government in various ways; for example, employment practices, safety practices, taxes and securities. The McCarran-Ferguson Act, 15 U.S.C.S. section 1011, *et. seq.* gave states the opportunity to regulate the "business of insurance."[103] Every state accepted the invitation, passing insurance legislation or codes.[104] Regulation takes place through statutory mandates and through actions of a State's Insurance Commissioner.[105] Two recent Michigan Court of Appeals cases illustrate insurance regulation.

---

99. *Id.* at 38-39, 772 N.W.2d at 809. The court noted that "occurrence" was defined, like in *Radenbaugh v. State Farm General Insurance Co. of Michigan*, 240 Mich. App. 134, 610 N.W.2d 272 (2000), as "an accident including continuous or repeated exposure to substantially the same general harmful conditions." *Liparoto Constr.*, 284 Mich. App. at 37, 772 N.W.2d at 808 (quoting *Radenbaugh*, 240 Mich. App. at 140, 610 N.W.2d at 276). Was the court correct in concluding there was no occurrence or is the real basis for its decision the unstated your work exclusion?

100. Bundy Tubing v. Royal Indem. Co., 298 F.2d 151 (6th Cir. 1962); Hawkeye-Sec. Ins. Co. v. Vector Constr. Co., 185 Mich. App. 369, 460 N.W.2d 329 (1990); *Radenbaugh,* 240 Mich. App. 134, 610 N.W.2d 272; Calvert Ins. Co. v. Herbert Roofing and Insulation Co., 807 F. Supp. 435 (E.D. Mich. 1992).

101. *Liparoto Constr.*, 284 Mich. App. at 38, 772 N.W.2d at 908.

102. *Id.* at 38-39, 772 N.W.2d at 809.

103. 15 U.S.C. §1012(b) (West 2010).

104. *See, e.g.*, MICH. COMP. LAWS ANN. § 500.3101 (West 2010).

105. *See* KENNETH ABRAHAM, INSURANCE LAW AND REGULATION 108 (4th ed. 2005). ("In addition to rate regulation, most Insurance Commissioners have other authority. Most importantly, all Insurance Commissioners have the authority to license, set standards for, and monitor the solvency of insurers. Most also have authority to disapprove policy forms or provisions if they are inequitable or deceptive."). For additional state codes enacted pursuant to the McCarran-Ferguson Act, *see,* for example, CAL. INS. CODE § 795.5 (West 2010); FLA. STAT. ANN. § 627.643 (West 2009); N.Y. Ins. Law § 3201 (McKinney 2004); TEX. INS. CODE § 1153.051 (West 2009). Most states also authorize Commissioners to regulate other unfair or deceptive practices under versions of the Unfair Insurance Practices Act. *See, e.g.*, CONN. GEN. STAT. § 38a-815-8732 (West

In *Citizens v. Secura Insurance*, Citizens issued an auto policy to Gilespie and Secura issued an auto policy to his mother.[106] Gilespie drove his mother's vehicle, perhaps under the influence, and was at fault in an auto accident that led to the death of two individuals and critical injuries to two others.[107] This dispute centered on whether or not Secura had a duty to defend and indemnify Gilespie in the underlying negligence lawsuit.[108] Surprisingly, while a copy of Citizens' policy was in the lower court record, Secura's policy was not.[109] However, in this case, the court of appeals was able to decide the issue because of a statutory insurance mandate, which required that the policy do the following:

> insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle....[110]

Therefore, the trial court and the court of appeals, without even having read Secura's policy, were able to assume that it complied with the statutory mandate.[111]

In what Judge Zahra described as "a very rare occurrence in this [c]ourt,"[112] three judges of the Michigan Court of Appeals issued three separate opinions in a case that highlights the role of the Insurance Commissioner in insurance rate regulation.[113] Insurance companies used credit score reports as a factor in determining policyholder rates.[114] An insured with a better credit score received a larger percentage discount

---

2010); Unfair Trade Practices Act, National Association of Insurance Commissioners, Model Insurance Laws, Regulations and Guidelines V-880-1 (2003).

106. Citizens v. Secura Ins. Co., 279 Mich. App. 69, 755 N.W.2d 563 (2008).

107. *Id.* at 71, 755 N.W.2d at 565.

108. *Id.*

109. *Id.* at 72-73, 755 N.W.2d at 565-66. Practitioners need to carefully decide what to include in the trial court record because generally it cannot be expanded on appeal. Booth Newspapers, Inc. v. Univ. of Mich. Bd. of Regents, 444 Mich. 211, 234, 507 N.W.2d 422, 432 (1993) ("Issues raised for the first time on appeal are not ordinarily subject to review.").

110. 279 Mich. App. at 73, 755 N.W.2d at 566 (quoting MICH. COMP. LAWS ANN. §257.520(b)(2) (West 2010)).

111. *Citizens Ins. Co.*, 279 Mich. App. at 74, 761 N.W.2d at 566.

112. Ins. Inst. of Mich. v. Comm'r of the Office of Fin. & Ins. Servs., 280 Mich. App. 333, 761 N.W.2d 184 (2008).

113. *Id.*

114. *Id.* at 335-39, 761 N.W.2d at 186-87.

than one with a poor credit score.[115] This practice of "insurance scoring" was the subject of a Commissioner's Bulletin, public hearings, and the issuance of regulations prohibiting the use of insurance scoring.[116] No one reading this case could escape the conclusion that the business of insurance is highly regulated.[117]

D. Uninsured Motorists

Uninsured motorist (UM) coverage in Michigan is not statutorily mandated. Accordingly, insurers are free to, and generally do, offer uninsured motorist coverage under widely varying policy forms. This is definitely one area where all policies are not created equal. Some motor vehicle accidents are allegedly caused by insured motorists, some by uninsured motorists and some by both. *Berkeypile v. Westfield Insurance Co.* involves a scenario where a plaintiff settled a lawsuit against three insured drivers and then sought uninsured motorist benefits from Westfield Insurance Company for "the alleged negligence and liability of the two unidentified hit-and-run drivers" who were not referenced in the first lawsuit.[118] The court, as it should have, focused on the wording of the UM endorsement analyzing its six different sections.[119] Westfield argued that plaintiff's settlement with the insured parties prohibited any claim for UM benefits.[120] The court construed Section D(2) of the UM endorsement as "an anti-duplication clause and not a reduction-in-benefits clause" and, therefore, concluded that the endorsement only prohibited the plaintiff from a double recovery for the same loss.[121]

Judge Murphy reviewed case law from other jurisdictions, acknowledging that while there were cases that supported Westfield's position, "we find the reasoning in those cases unpersuasive."[122] He also

115. *Id.* at 339 n.1, 761 N.W.2d at 187 n.1.

116. *Id.*

117. Referenced in the case are such regulations as the Essential Insurance Act, MICH. COMP. LAWS ANN. § 500.101, *et. seq.* (West 2010); MICH. COMP. LAWS ANN. § 500.2106, MICH. COMP. LAWS ANN. § 500.2430 and MICH. COMP. LAWS ANN. § 500.2628 ("[R]ates "shall not be excessive, inadequate or unfairly discriminatory."); MICH. COMP. LAWS ANN. § 500.2111 (West 20010) (providing a list of rating factors for use by auto and home insurers); MICH. COMP. LAWS ANN. § 500.210 (West 2010) (including the Commissioner's promulgation of rules and regulations).

118. Berkeypile v. Westfield Ins. Co., 280 Mich. App 172, 175, 760 N.W.2d 624, 627 (2008).

119. *Id.* at 178-83, 760 N.W.2d at 629-31.

120. *Id.* at 90, 760 N.W.2d at 634-35.

121. *Id.* at 195, 760 N.W.2d at 637.

122. *Id.* at 193 n.17, 760 N.W.2d at 636 n.17.

reviewed Michigan law and likewise concluded that those cases "are easily distinguished."[123]

As illustrated by this case, insurance coverage opinions often make statements to the effect that "if this is what the insurer intended, it could have so stated." Thus, in *Berkeypile*, the court said that "[i]f this is what Westfield intended, expressing this intent in the policy was not accomplished."[124] Therefore, the court of appeals reversed the trial court which automatically gave Westfield a set-off for the entire amount of the settlement with the insured parties and limited any applicable offset against any UM benefits that may be awarded.[125]

E. No-Fault

1. MICH. COMP. LAWS ANN. Section 3105 – Accidental Bodily Injury

According to Michigan law, an auto insurer is liable to pay personal injury protection (PIP) benefits "for accidental bodily injury arising out of the operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of M.C.L.A. section 3105.[126]

In *University Rehabilitation Alliance v. Farm Bureau Insurance Co. of Michigan*, Farm Bureau Insurance Co. initially denied no-fault benefits to an insured who was either pushed from or jumped out of a moving motor vehicle and suffered severe brain injuries.[127] Affirming the trial court, the court of appeals held that the denial was unreasonable.[128] The court limited and distinguished earlier cases, including one from a supreme court decision that "assaults occurring in a motor vehicle are not closely related to the transportational function of a motor vehicle."[129] The court distinguished the prior assault cases, concluding that the insurer's position "requires this language to be read totally out of context."[130] In fact, the court declared that "[t]here is . . . no rule precluding PIP benefits

123. *Id.* at 199, 760 N.W.2d at 639.

124. *Berkeypile*, 280 Mich. App. at 201, 760 N.W.2d at 640-41.

125. *Id.* at 202, 760 N.W.2d at 641 ("[A]ny offset pertains only to duplicate payments for the same noneconomic and excess economic losses. Westfield would be liable for UM benefits equivalent to the difference by which any overall damages award exceeds the sum of the settlement proceeds.").

126. MICH. COMP. LAWS ANN. § 500.3105(1) (West 2010).

127. Univ. Rehab. Alliance Inc. v. Farm Bureau General Ins. Co. of Mich., 279 Mich. App. 691, 693, 760 N.W.2d 574, 576 (2008).

128. *Id.* at 703-04, 760 N.W.2d at 587-82.

129. *Id.* at 695, 760 N.W.2d at 577-78 (quoting McKenzie v. Auto Club Ins. Ass'n, 458 Mich. 214, 222, 580 N.W.2d 424, 427 (1998)).

130. *Univ. Rehab.*, 279 Mich. App. at 695-96, 760 N.W.2d at 578.

for injuries resulting from an assault."[131] The court also recognized the relationship of the transportational function of the motor vehicle referenced in the Supreme Court's *McKenzie v. Auto Club Insurance Association* decision, noting the relationship between the movement of the vehicle and the injury sustained. [132]

2. MICH. COMP. LAWS ANN. Section 3107 – Allowable Expenses

Section 3107(1) provides in pertinent part that " (1) Except as provided in subsection(2), personal protection insurance benefits are payable for the following: (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation."[133]

Allowable expenses were the subject of *Hoover v. Michigan Mutual Insurance Co.*[134] which had been remanded by the Michigan Supreme Court to the court of appeals "for consideration as on leave granted."[135] Judge Murphy, who authored the majority opinion in *Hoover*, also authored the court of appeals opinion in *Reed v. Citizens Insurance Co. of America* dealing with allowable expenses.[136] *Reed* was overruled in the four-three Michigan Supreme Court decision in *Griffith v. State Farm Mutual Automobile Insurance Co.*[137] In fact, Judge Murphy cited *Reed*, stood by it even though overruled, encouraged the Supreme court to reconsider its decision in *Griffith*[138] and, according to the dissent, engaged in an "expansive application of *Griffith*"[139]

---

131. *Id.* at 696, 760 N.W.2d at 578.

132. *Id.* at 697, 760 N.W.2d at 578 (citing *McKenzie*, 458 Mich. 214, 580 N.W.2d 424).

133. MICH. COMP. LAWS ANN. § 500.3107 (West 2010).

134. Hoover v. Mich. Mut. Ins. Co., 281 Mich. App. 617, 761 N.W.2d 801 (2008).

135. Hoover v. Mich. Mut. Ins. Co., 478 Mich. 865, 731 N.W.2d 695 (2007).

136. 198 Mich. App. 443, 499 N.W.2d 22 (1993).

137. 472 Mich. 521, 697 N.W.2d 895 (2005).

138. *Hoover*, 281 Mich. App. at 623-24, 761 N.W.2d at 805 ("We are of the opinion that *Reed* was correctly decided and that it honored the language in MCL 500.3107(1)(a). We note that the Supreme Court, without dissent, denied the application for leave to appeal in *Reed* . . . and the opinion stood and was accepted for 12 years until being overruled by a four-to-three decision in *Griffith*. We encourage our Supreme Court to revisit and reconsider its decision in *Griffith*. *See* People v. Mitchell, 428 Mich 364, 370, 408 N.W.2d 798 (1987) (stating that the Court of Appeals may properly express its belief that a Supreme Court opinion was incorrectly decided.)").

139. *Hoover*, 281 Mich. App. at 638, 761 N.W.2d at 814 (Schuette, J., concurring in part dissenting in part) (citing *Griffith*, 412 Mich. 521, 697 N.W.2d 895).

Hoover dealt with such claimed allowable expenses as property taxes, home owners insurance, maintenance costs, electricity, ADT security system, elevator, dumpster, snow removal and telephone bills.[140] Michael Hoover was a ventilator-dependent quadriplegic who had been injured in 1985, at the age of two, by a drunk driver.[141] Michael's parents built a new home, an entire wing of which was specially designed to provide for Michael's care, and without which, Michael would need to be placed in an institution.[142] The insurance company conceded that benefits to cover the expenses for a backup generator, television monitoring system, and medical alert pendant should be fully covered, but claimed that expenses related to maintaining a dumpster (Michael's wing required some two hours of cleaning daily to maintain a sterile environment) and elevator inspection should not be covered.[143] The court concluded that the dumpster was necessitated by Michael's condition and is therefore fully covered, even though some garbage removal costs can be attributed to other sources.[144] The court further found that the fact the home even had an elevator was due to Michael's bodily injury, and consequently, the costs to inspect that elevator are also attributed to the injury and are covered.[145] The majority turned the Michigan Supreme Court's holding into a "but for" analysis and then proceeded to express its opinion on each of the claimed expenses before remanding the case to the trial court for additional evidence "under the analytical framework outlined here and as required by *Griffith*."[146] The dissent concluded that while plaintiffs were entitled to payment for some of the expenses, various expenses were not reasonably necessary for the injured party's care, recovery or rehabilitation.[147] Implicitly, if not overtly, the majority was lobbying for the overturn of *Griffith*.[148]

---

140. *Hoover*, 281 Mich. App. at 621, 761 N.W.2d at 804.

141. *Id.* at 620-22, 761 N.W.2d at 805.

142. *Id.*

143. *Id.* at 633-36, 761 N.W.2d at 811-13.

144. *Id.* at 634-35, 761 N.W.2d at 811 (analogizing the expense to that of specialized dietary requirements, for which the Michigan Supreme Court allowed full recovery in *Griffith ex rel. Griffith v. State Farm Mutual Automobile Insurance Co.*, 472 Mich. 521, 537-38, 697 N.W.2d 895, 9903-04 (2005)).

145. *Hoover*, 281 Mich. App. at 633-34, 761 N.W.2d at 811.

146. *Id.* at 636, 761 N.W.2d at 812 (citing *Griffith*, 472 Mich. 521, 697 N.W.2d 895).

147. *Hoover*, 281 Mich. App. at 641, 761 N.W.2d at 815.

148. In fact, on September 25, 2009, the Michigan Supreme Court granted leave to appeal including "whether *Griffith v. State Farm Mutual Automobile Ins. Co.*, 472 Mich. 521; 697 N.W.2d 895 (2005), was correctly decided." Hoover v. Mich. Mut. Ins. Co., 485 Mich. 881, 881, 772 N.W.2d 338, 338 (2009).

3. MICH. COMP. LAWS ANN. Section 3113 – Personal Protection Insurance Benefits when Vehicle is Taken Unlawfully

In pertinent part, Section 3113 provides that:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> > (a) The person was using a motor vehicle or motorcycle which he or she had taken unlawfully, unless the person reasonably believed that he or she was entitled to take and use the vehicle.
> >
> > (b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect.
> >
> > (c) The person was not a resident of this state, was an occupant of a motor vehicle or motorcycle not registered in this state, and was not insured by an insurer which has filed a certification in compliance with section 3163.[149]

Three court of appeals cases address this section.[150]

In *Amerisure Insurance Co.*, Judge Kelly, also writing for Judge Whitebeck, concluded that a proper inquiry under Section 3113(a) requires a two-part inquiry.[151] First, the court considered whether the taking was in fact unlawful.[152] The court found the car was taken unlawfully and proceeded to consider whether the vehicle was taken with a reasonable belief of entitlement to both take *and* use the vehicle.[153] Though Rae Plumb contended that an unidentified man had given her the keys, there was no evidence that the unidentified man was the "owner" who was in the process of purchasing the vehicle, and therefore, Plumb lacked consent to take the vehicle.[154] Though Plumb's conduct might

149. MICH. COMP. LAWS ANN. § 500.3113 (West 2009).

150. *See* Amerisure Ins. Co. v. Plumb, 282 Mich. App. 417, 766 N.W.2d 878 (2009); Cooper v. Jenkins, 282 Mich. App. 486, 766 N.W.2d 671 (2009); Detroit Med. Ctr. v. Titan Ins. Co., 284 Mich. App. 490, 775 N.W.2d 151 (2009).

151. *Amerisure Ins. Co.*, 282 Mich. App. at 425, 766 N.W.2d at 883.

152. *Id.* at 425-28, 766 N.W.2d at 883-85.

153. *Id.* at 425-26, 766 N.W.2d at 883-85.

154. *Id.* at 426-27, 766 N.W.2d at 884.

well be accurately considered joyriding, as she did not intend to permanently deprive anyone of the vehicle, a joyriding exception to an unlawful taking applies only when the taking is between family members.[155] Though the court concluded there was a material question of fact as to whether the belief as to the taking was reasonable, Plumb could not have reasonably believed she was entitled to use the vehicle because her license was suspended.[156]

In *Cooper*, the plaintiff was injured while driving an uninsured vehicle owned by his girlfriend; following the injury, plaintiff was prescribed attendant care, which was provided by his girlfriend.[157] State Farm, the insurer to whom the claim was assigned, claimed that it was illogical to pay benefits to the very person — the uninsured, vehicle-owning girlfriend — from whom State Farm is permitted to seek reimbursement.[158] While it is true that M.C.L.A. section 500.3177(1) *permits* an insurer to seek reimbursement from the uninsured vehicle owner in such situations, that permission does not relieve the insurer of its *mandate* to pay benefits.[159] Thus, while the insurer may seek reimbursement, via appropriate legal process, from an uninsured vehicle owner, that ability to seek reimbursement does not equate to an ability to withhold benefits.[160] In other words, the Legislature has chosen a policy of pay first, then seek reimbursement, and the court cannot change that policy, even if it may seem illogical.

In *Detroit Medical Center*, the insurer contended that the hospital should not be allowed to recover for an injured party's medical expenses, pursuant to Section 3113(b), because the injured party was the "owner" of an uninsured vehicle.[161] Maria Jimenez was injured in an automobile

155. *Id.* at 427, 766 N.W.2d at 884; *see* Allen v. State Farm Mut. Auto. Ins. Co., 268 Mich. App. 342, 346, 708 N.W.2d 131, 133-35 (concluding that a judicially-created exception to an unlawful taking, when the conduct can be classified as joyriding — that is, conduct that does not intend to permanently deprive the owner of the vehicle — applies only when the taking occurs between family members).

156. *Amerisure Ins. Co.*, 282 Mich. App. at 431-32, 766 N.W.2d at 886-87. The court further noted that Plumb was intoxicated at the time she used the vehicle, but confined its holding as to the reasonable belief to use to Plumb's knowledge that her license was suspended. *Id.*

157. *Cooper*, 282 Mich. App. at 487, 766 N.W.2d at 672.

158. *Id.* at 487, 766 N.W.2d at 672-73.

159. MICH. COMP. LAWS ANN. § 500.3177(1) (West 2010); *Cooper*, 282 Mich. App. at 490, 766 N.W.2d at 674.

160. *Cooper*, 282 Mich. App. at 490, 766 N.W.2d at 674 (citing MICH. COMP. LAWS ANN. § 500.3177(1) (West 2010)).

161. Detroit Med. Ctr. v. Titan Ins. Co., 284 Mich. App. 490, 490, 775 N.W.2d 151, 152 (2009).

accident.[162] The uninsured car which she was driving was titled to Jose Gonzales, the father of her two children.[163] Gonzalez may have been living with Jimenez, and the vehicle was kept at Jimenez's residence.[164] Even though she used the car several times over the course of a month, Jimenez always needed to get permission and the keys from Gonzalez.[165] The court of appeals found that non-regular use of the car, combined with the need to obtain permission before use distinguished the case from prior case law.[166] The trial court, therefore, did not err in finding that Jimenez could not be classified as an "owner."[167]

4. MICH. COMP. LAWS ANN. Section 3135 – Serious Impairment of Body Function

In pertinent part, Section 3135 provides that "[a] person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement."[168]

Previously, the Michigan Supreme Court has found that a plaintiff suing under the motor vehicle exception to governmental immunity — M.C.L.A. section 691.1405 — must still show a serious impairment of body function in order to recover noneconomic damages.[169]

In *Allen v. Bloomfield Hills School District*, the court of appeals considered a case involving a Bloomfield Hills School District bus driver who suffered post traumatic stress disorder as a result of his bus colliding with a train.[170] Charles Allen, the bus driver, sued the school district seeking to recover noneconomic damages for his alleged serious impairment of body function.[171] Allen claimed that M.C.L. section 500.3135 controlled, and that he was therefore not required to show a

---

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 491-94, 775 N.W.2d at 152-53 (distinguishing the case from Ardt v. Titan Ins. Co., 233 Mich. App. 685, 593 N.W.2d 215 (1999) and Chop v. Zielinski, 244 Mich. App. 677, 624 N.W.2d 539 (2001)).

167. *Detroit Med. Ctr.*, 284 Mich. App. at 490, 775 N.W.2d at 153. For the court of appeals' conclusion as to attorney fees, see Section II(E)(6), *infra* at p. 469.

168. MICH. COMP. LAWS ANN. § 500.3135(1) (West 2010).

169. Hardy v. County of Oakland, 461 Mich 561, 566, 607 N.W.2d 708, 720 (2000) (citing MICH. COMP. LAWS ANN. § 691.1405 (West 2010)).

170. Allen v. Bloomfield Hills School Dist., 281 Mich. App. 49, 50-52, 760 N.W.2d 811, 812 (2008).

171. *Id.* at 51, 760 N.W.2d at 812.

"bodily injury" within the meaning of the motor vehicle exception to governmental immunity because he had a serious "impairment of body function." The court of appeals agreed with the trial court that, in order to recover noneconomic damages, Allen was required to show *both* "bodily injury" within the meaning of the motor vehicle exception to governmental immunity *and* "serious impairment of body function" within the meaning of section 3135 of the No Fault Act.[172] The appellate court further found that evidence of an injury to the brain creates a question of material fact as to whether a "bodily injury" has occurred.[173] The court concluded "there should be no difference medically or legally between an *objectively* demonstrated brain injury, whether the medical diagnosis is a closed head injury, PTSD, Alzheimer's, brain tumor, epilepsy, etc. A brain injury is a 'bodily injury.'"[174]

5. MICH. COMP. LAWS ANN. Section 3145 – One Year Back Rule

Recoverable damages under the No-Fault Act are limited by the so-called "one-year-back rule" which states that a "claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced."[175]

The court of appeals had an opportunity to apply the Michigan Supreme Court's recent *Cooper* decision in *Johnson v. Wausau Inurance Co.*[176] A case involving a dispute over attendant care benefits where an insurance agent allegedly failed to inform a caregiver that she was entitled to attendant care benefits paid at an hourly rate was before the court of appeals.[177] Applying *Cooper*, the court of appeals concluded that the no-fault and fraud claims were distinct causes of action, and therefore, the "one-year-back rule" of M.C.L.A. section 500.3145(1) did not apply to the fraud action.[178] However, the court concluded that the fraud action must fail because, even assuming the statements by the insurance agent did amount to a fraudulent misrepresentation, the caregiver had the means to determine the truthfulness and accuracy of the insurance agent's statements.[179] Therefore, the caregiver could not establish reliance on the alleged misrepresentation.[180]

---

172. *Id.* at 55-56, 760 N.W.2d at 814.
173. *Id.* at 57-60, 760 N.W.2d at 815-17.
174. *Id.* at 60, 760 N.W.2d at 816-17.
175. MICH. COMP. LAWS ANN. § 500.3145(1) (West 2010).
176. Johnson v. Wausau Ins. Co., 283 Mich. App. 636, 769 N.W.2d 755.
177. *Id.* at 639-40, 769 N.W.2d at 756-57.
178. *Id.* at 645 n.4, 769 N.W.2d at 760 n.4.
179. *Id.* at 645-46, 769 N.W.2d at 760-61.
180. *Id.*

6. MICH. COMP. LAWS ANN. Section 3148 – Attorney Fees

In certain instances, a no-fault claimant is entitled to recover attorney fees. In pertinent part, section 500.3148 provides:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.[181]

Three court of appeals opinions address this provision.[182]

In *University Rehabilitation*, the court examined the reasonableness of a delay in making payments.[183] The Michigan Supreme Court previously concluded that an insurer can meet its burden of justifying a refusal or delay in making payments by "showing that the refusal or delay is the product of a legitimate question of statutory construction, constitutional law, or factual uncertainty."[184] Farm Bureau General Insurance originally denied benefits because it contended that the injury was due to an assault, which it claimed was outside the No-Fault Act's benefit scheme.[185] The court of appeals concluded that there is no rule categorically excluding personal protection insurance benefits in the case of an assault.[186] The injured party was "out of the motor vehicle while it was in motion and being used for transportation."[187] Because a moving vehicle is "'quite obviously engaged in a transportational function[,]'" it did not matter whether the injured party fell or was pushed out of the

181. MICH. COMP. LAWS ANN. § 500.3148(1) (West 2010).

182. Univ. Rehab. Alliance, Inc. v. Farm Bureau Gen. Ins. Co. of Mich., 279 Mich. App. 691, 760 N.W.2d 574 (2008); Hoover v. Mich. Mut. Ins. Co., 281 Mich. App. 617, 761 N.W.2d 801 (2008); Detroit Med. Ctr. v. Titan Ins. Co., 284 Mich. App. 490, 775 N.W.2d 191 (2009).

183. *Univ. Rehab. Alliance*, 279 Mich. App. at 698-704, 760 N.W.2d at 579-82.

184. Ross v. Auto Club Group, 481 Mich. 1, 11, 748 N.W.2d 552, 558 (2008).

185. *Univ. Rehab. Alliance*, 279 Mich. App. at 695, 760 N.W.2d at 577.

186. *Id.* at 696, 760 N.W.2d at 578.

187. *Id.* The case was thus distinguishable from *Bourne v. Farmers Insurance Exchange*, 449 Mich. 193, 534 N.W.2d 491 (1995), where the motor vehicle was merely used to transport the injured party to the site of the assault, and from *Thornton v. Allstate Insurance Co.*, 425 Mich. 643, 391 N.W.2d 320 (1986), where the victim was injured by a gunshot which just happened to have been inflicted in an automobile.

vehicle.[188] As a result, the insurance company had no reasonable basis for refusing to provide benefits. The court then considered the reasonableness of the fee awarded by the trial court, which was based on a contingent fee agreement.[189] The court found that even though the amount awarded calculated to over $1,600 per hour, there was no abuse of discretion.[190] The court concluded that whether a fee agreement is contingent is just one factor at which to look, and is not itself determinative.[191] The court further noted that the award could be partly justified on the fact that it was the insurance company's own conduct that created the circumstances, which prompted the contingent fee arrangement.[192]

The facts of *Hoover* have already been discussed, in Section II(E)(2) of this Article. As to the attorney fees related to the benefits for the expenses which the insurance company conceded were covered, and for the dumpster and elevator inspections, the refusal to pay was unreasonable, and therefore, the claimant was entitled to attorney fees.[193] For the factual background of *Detroit Medical Center*, see Section II(E)(3) of this Article. There, the trial court properly declined to award attorney's fees because the benefits were "reasonably in dispute" and therefore, not overdue.[194] Given that there was some indication that Jimenez was the owner, and a "legitimate question of statutory construction," the denial of benefits was not unreasonable.[195]

---

188. *Univ. Rehab. Alliance,* 279 Mich. App. at 697, 760 N.W.2d at 578 (quoting McKenzie v. Auto Club Ins. Ass'n,, 458 Mich. 214, 221, 580 N.W.2d 424, 427 (1998)) (finding that in either event, "there is no evidence that Sterling intended to hurt herself, and her injuries were directly related to the use of the vehicle as a mode of transportation").

189. *Univ. Rehab. Alliance*, 279 Mich. App. at 698, 760 N.W.2d at 579.

190. *Id.*

191. *Id.* The court noted the current relevant rule of professional conduct, MICH. RULES OF PROF'L CONDUCT 1.5(a)(8) (2008), and applied a multiple factor analysis which looked to "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." *Univ. Rehab. Alliance*, 279 Mich. App. at 699, 760 N.W.2d at 579 (quoting Liddell v. Detroit Auto. Inter-Ins. Exch., 102 Mich. App. 636, 651-52, 302 N.W.2d 260, 267 (1981) (*overruled on other grounds by* Moore v. Secura Ins., 482 Mich 507, 759 N.W.2d 833 (2008)); *see* Wood v. Detroit Auto. Inter-Ins. Exch., 413 Mich. 573, 588, 321 N.W.2d 653, 661 (1982).

192. *Univ. Rehab. Alliance*, 279 Mich. App. at 702, 760 N.W.2d at 581.

193. *Hoover*, 281 Mich. App. at 637, 761 N.W.2d at 813.

194. *Detroit Med. Ctr.*, 284 Mich. App. at 495, 775 N.W.2d at 154.

195. *See Ross*, 481 Mich. at 11, 748 N.W.2d at 558.

7. MICH. COMP. LAWS ANN. Section 3157 – Lawfully Rendering

Section 3157 provides in pertinent part that "[u]p to the amount customarily charged in cases not involving insurance, physician, hospital, clinic or other person or institution lawfully rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance, and a person or institution providing rehabilitative occupational training following the injury, may charge a reasonable amount for the products, services and accommodations rendered.[196]

In *Psychological Service Association P.C. v. State Farm Mutual Automobile Insurance Co.*, the court of appeals had the opportunity to pass on whether a healthcare provider which was allegedly in violation of the Public Health Code, M.C.L.A. section 333.1101 *et seq.*, and the Professional Service Corporation Act, M.C.L.A. section 450.221 *et seq.*, was "lawfully rendering treatment."[197] In order to lawfully provide services, a healthcare provider must be in compliance with licensing requirements, "[h]owever, services might be lawfully rendered even if a particular service is 'excluded' from the scope of the provider's licensed field."[198] A service would be unlawfully provided, though, if it "constituted the practice of another field without a license" — i.e. if the service is exclusively the province of another licensed practice.[199] The court of appeals concluded that a genuine issue existed for the lower court as to whether the particular service at issue fell "exclusively within the scope of psychology," a licensed practice, and in which the health care provider had no licensed member.[200]

8. MICH. COMP. LAWS ANN. Section 3163 – Non-Admitted Insurer

Section 3163 requires:

> [a]n insurer authorized to transact automobile liability insurance and personal and property protection insurance in this state shall file and maintain a written certification that any accidental bodily injury or property damage occurring in this state arising from the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle by an out-of-state resident who is

196. MICH. COMP. LAWS ANN. § 500.3157 (West 2010).

197. Psychosocial Service Assoc. P.C. v. State Farm Mut. Auto. Ins. Co., 279 Mich. App. 334, 338, 761 N.W.2d 716, 719 (2008).

198. *Id.*

199. *Id.* at 339, 761 N.W.2d at 719.

200. *Id.* at 345, 761 N.W.2d at 722.

> insured under its automobile liability insurance policies, is subject to the personal and property protection insurance system under this act.[201]

Furthermore, a nonadmitted insurer is permitted, but not required, to file the certification voluntarily.[202] With limited, explicit exceptions, if a certification is filed by either an authorized insurer or a nonadmitted insurer, and the certification "applies to accidental bodily injury or property damage" then the following results:

> [T]he insurer and its insureds with respect to that injury or damage have the rights and immunities under this act for personal and property protection insureds, and claimants have the rights and benefits of personal and property protection insurance claimants, including the right to receive benefits from the electing insurer as if it were an insurer of personal and property protection insurance applicable to the accidental bodily injury or property damage.[203]

In *Tevis v. AMEX Assurance Co.*, the court of appeals found the statute to be "clear and unambiguous," and therefore not requiring or permitting judicial construction.[204] It was not disputed that AMEX, an out-of-state insurer, filed the Section 3163 certificate, thus "subjecting itself to, and availing itself of, Michigan's no-fault system."[205] A Michigan resident was injured by an out-of-state vehicle, insured by AMEX, an out-of-state insurer.[206] The court addressed a very narrow issue: "[W]hether no-fault benefits are payable by an out-of-state insurer to, or on behalf of, a *Michigan* resident injured in an accident resulting from its nonresident insured's ownership of a motor vehicle."[207] The court concluded that no language exists in the statute limiting the liability to bodily injury of the out-of-state insurer's insured.[208] The statute makes the entire No-Fault Act applicable to an insurer filing a section 3163 certificate, including M.C.L.A. section 500.3114, which governs

---

201. MICH. COMP. LAWS ANN. § 500.3163(1) (West 2010).
202. *Id.* § 500.3163(2).
203. MICH. COMP. LAWS ANN. 500.3163(3) (West 2010).
204. Tevis v. AMEX Assurance Co., 283 Mich. App. 76, 85, 770 N.W.2d 16, 22 (2009).
205. *Id.* at 83, 770 N.W.2d at 20.
206. *Id.*
207. *Id.* at 84, 770 N.W.2d at 21.
208. *Id.*

priority.[209] In the case at hand, since AMEX insured the "owner or registrant of the motor vehicle involved in the accident[,]" it was first in priority for paying benefits.[210]

F. Further Cases from the Michigan Court of Appeals

Two additional cases round out the discussion of the Michigan Court of Appeals cases. In *Smith v. Parkland Inn/Casualty Reciprocal Exchange,*[211] the court was called upon to determine whether or not the Michigan Property & Casualty Guarantee Association (MPCGA) was an "insurer" under the Michigan Worker's Disability Compensation Act.[212] Under M.C.L.A. section 500.7911(1), "the MPCGA is an association of all insurers authorized to engage in the business of insurance" (other than life or disability insurance) in Michigan.[213] It is called into play when an insurer is insolvent and unable to meet its obligations.[214] The Second Injury Fund based its argument on the doctrine of *ejusdem generis*, whereas the court felt that the applicable doctrine was *expressio unius est exclusio alterius*.[215] Because MPCGA was determined to be an "insurer" under the applicable statutory language, it was entitled to reimbursement from the Second Injury Fund.[216]

The court of appeals addressed the meaning of "being constructed" in a policy of insurance in *Sherman-Nadiv v Farm Bureau General Insurance Co. of Michigan.*[217] There, the plaintiffs had rented out one of their rental homes; however, the tenant did not pay them rent and moved out.[218] Subsequently, extensive water damage was discovered.[219] The jury determined that the house had been vacant for more than thirty consecutive days before the loss.[220] While the policy covered "accidental discharge or overflow of water or steam from within a plumbing . . . or

209. *Id.* at 85, 770 N.W.2d at 21-22.

210. *Tevis*, 283 Mich. App. at 85, 770 N.W.2d at 21-22 (quoting MICH. COMP. LAWS ANN. § 500.3114(5)(a) (West 2010)).

211. Smith v. Parkland Inn/Casualty Reciprocal Exch., 279 Mich. App. 642, 760 N.W.2d 544 (2008).

212. MICH. COMP. LAWS ANN. § 418.101 (West 2010); MICH. COMP. LAWS ANN. § 518.372(1)(b) (West 2010).

213. *Smith*, 279 Mich. App. at 645, 760 N.W.2d at 556.

214. *Id.*

215. *Id.* at 646 n.1, 760 N.W.2d at 556 n.1.

216. *Id.* at 647-48, 760 N.W.2d at 557.

217. Sherman-Nadiv v. Farm Bureau Gen. Ins. Co. of Mich., 282 Mich. App. 75, 761 N.W.2d 872 (2008).

218. *Id.* at 76, 761 N.W.2d at 874.

219. *Id.* at 77, 761 N.W.2d at 874.

220. *Id.*

from within a household appliance,"[221] the policy qualified that "[t]his peril does not include loss . . . on the Described Location, if the dwelling has been vacant for more than 30 consecutive days immediately before the loss. A dwelling being constructed is not considered vacant."[222]

The insured argued that some "repairs, remodeling or renovation work" was being undertaken and, therefore, the house was being constructed.[223] Applying the plain and ordinary meaning rule, the court rejected the insured's interpretation finding that the policy language was unambiguous and "being constructed" was the equivalent to being erected.[224] Because policies of insurance can and do differ, the prudent person should review his own policy, especially when a secondary residence is involved.

III. DECISIONS OF THE MICHIGAN SUPREME COURT

The Michigan Supreme Court delivered five published decisions and two published Orders of significance. No-fault interpretations dominated. When an appeal is taken to the Michigan Court of Appeals, any three of the twenty-eight court of appeals judges could be assigned to hear and decide the appeal. However, when the Michigan Supreme Court considers an appeal, all seven Justices normally participate.

Not all plaintiffs who prevail after an insurer's denial of no-fault benefits are entitled to attorney's fees as indicated in *Ross v. Auto Club Group.*[225] Ross "was the sole shareholder and sole employee of Michigan Packing Company, Inc."[226] Michigan Packing was an IRS subchapter S corporation which, because shareholders of a subchapter S corporation are taxed essentially as partners and because the company operated at a loss for a number of years, neither Ross nor his wife paid any income tax on Ross' W-2 earnings for 2001 to 2003.[227]

Ross was disabled from working as a result of an automobile accident and sought wage loss no-fault benefits from Auto Club.[228] Auto Club denied Ross' claim for benefits asserting he had no "loss of income from work."[229] Auto Club relied upon *Adams v. Auto Club Insurance*

221. *Id.* at 78-79, 761 N.W.2d at 875.
222. *Id.*
223. *Sherman-Nadiv*, 282 Mich. App. at 79, 761 N.W.2d at 875.
224. *Id.*
225. *Ross*, 481 Mich 1, 748 N.W.2d 552.
226. *Id.* at 4, 748 N.W.2d at 554.
227. *Id.*
228. *Id.*
229. M.C.L.A. section 500.3107(b) provides in part:

Ass'n[230] in setting forth the so-called "benefit calculation methodology."[231] The trial court granted Ross' summary disposition and awarded statutory attorney's fees.[232] The court of appeals affirmed, finding Auto Club's denial of no-fault benefits "unreasonable" and determined that the facts of *Adams* were dissimilar.[233] Justice Kelly authored the opinion in which Justices Taylor, Cavanagh and Young concurred.[234] The majority affirmed the award of work loss benefits, but reversed the award of attorney's fees.[235] The majority viewed the issue of "one of first impression."[236]

As justices of the Michigan Supreme Court are want to do, Justice Kelly spent a considerable portion of the opinion analyzing and rejecting Justice Corrigan's dissent.[237] Perhaps lost in this is the important point that an insurer can avoid the payment of attorney's fees even if the plaintiff prevails in the claim for no-fault benefits "by showing that the refusal or delay is the product of a legitimate question of statutory construction, constitutional law or factual uncertainty."[238] Although distinguishing *Adams*, the majority felt that Auto Club's "reliance on *Adams* was reasonable."[239]

Justice Weaver would have affirmed the award of attorney's fees, concluding that the insurer's failure to pay was unreasonable.[240] Justice Corrigan dissented in part and, in an opinion joined in by Justice Markman, noted that Ross had no actual income and paid no income tax.[241] She pointed out that "[t]he no-fault act explicitly recognizes the

---

> Work loss consisting of loss of income from work an injured person would have performed during the first 3 years after the date of the accident if he or she had not been injured. Work loss does not include any loss after the date on which the injured person dies. Because the benefits received from personal protection insurance for loss of income are not taxable income, the benefits payable for such loss of income shall be reduced 15% unless the claimant presents to the insurer in support of his or her claim reasonable proof of a lower value of the income tax advantage in his or her case, in which case the lower value shall apply.

MICH. COMP. LAWS ANN. § 500.3107(b) (West 2010).

230. Adams v. Auto Club Ins. Ass'n, 154 Mich. App. 186, 397 N.W.2d 262 (1986).
231. *Ross*, 481 Mich. at 5, 748 N.W.2d at 555.
232. *Id.* at 4, 748 N.W.2d at 554.
233. *Id.* at 6, 748 N.W.2d at 555.
234. *Id.* at 15, 748 N.W.2d at 560.
235. *Id.*
236. *Id.*
237. *Ross*, 281 Mich. at 9, 748 N.W.2d at 556.
238. *Id.* at 11, 748 N.W.2d at 558.
239. *Id.* at 14, 748 N.W.2d at 559.
240. *Id.* at 16, 748 N.W.2d at 560.
241. *Id.*

relationship between income from work and taxable income in MCL 500.3107(1)(b), which provides that, generally, '[b]ecause the benefits received from personal protection insurance for loss of income are not taxable income, the benefits payable for such loss of income shall be reduced 15% . . . .'"[242]

Justice Corrigan felt that allowing no-fault benefits to Ross would "subsidize his preexisting business losses; it would not compensate him for actual loss of income from work."[243] She also noted that a subchapter S corporation was treated more like a partnership, and felt that *Adams* was applicable.[244] Because Auto Club presented expert accounting testimony, a question of fact existed and, in her opinion, the matter should be remanded to the trial court for a factual inquiry.[245]

It may be that practitioners in no-fault cases will now more frequently make fraud allegations against insurers to get around the "one-year back rule" to extend how far back plaintiffs can claim no-fault benefits prior to filing suit.[246] In *Devillers v. Auto Club Insurance Ass'n*, the majority rejected any judicial tolling and enforced this provision as written.[247] The supreme court held in *Cooper v. Auto Club Insurance Association* that the "one-year-back rule" did not apply to a common law fraud action against an insurer.[248] Justice Markman authored the majority opinion, joined by then-Chief Justice Taylor and Justices Corrigan and Young.[249] Justices Cavanagh, Weaver and Kelly concurred only in the result.[250] Justice Markman pointed out that the court had previously, in *Devillers*, commented that "this Court may exercise its equitable power to avoid the application of the one-year-back rule if there are allegations of fraud, mutual mistake or other unusual circumstances."[251] He went on to caution trial courts to "exercise special care in assessing these types of fraud claims . . . ."[252] His guidance to the trial courts included that "fraud is not lightly presumed, but must be clearly proven . . . by clear,

242. *Id.* at 16-17, 748 N.W.2d at 560-61.

243. *Ross*, 281 Mich. at 16-17, 748 N.W.2d at 560-61.

244. *Id.* at 19, 748 N.W.2d at 562.

245. *Id.* at 27-28, 748 N.W.2d at 566-67.

246. M.C.L.A. section 500.3145(1) in pertinent part provides: "However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced." MICH. COMP. LAWS ANN. § 500.3145(1) (West 2010).

247. Devillers v. Auto Club Ins. Ass'n, 473 Mich 562, 564, 702 N.W.2d 539, 542 (2005).

248. *Cooper*, 481 Mich. 399, 751 N.W.2d 443.

249. *Id.* at 400, 751 N.W.2d at 445.

250. *Id.* at 417, 751 N.W.2d at 453.

251. *Id.* at 413, 751 N.W.2d at 450.

252. *Id.* at 414, 751 N.W.2d at 451.

satisfactory and convincing evidence."[253] He then went on to delineate the six elements of fraud. He opined that insureds could not have reasonable reliance on misrepresentations "that clearly contradict the terms of their insurance policies" which the insureds have a duty to read.[254]

While ordinarily an insured could not make out the reliance element during "the claims handling and negotiation process, because during these processes the parties are in an obvious adversarial position and generally deal with each other at arm's length"[255] the insureds would have better arguments where "the process involves information and facts that are exclusively or primarily within the insurers' 'perceived "expertise" in insurance matters, or facts obtained by the insurer(s) in the course of (their) investigation and unknown' to the insureds."[256]

Justice Markman also cautioned trial courts to distinguish between "statements of fact or existing fact, rather than future promises or good-faith opinions."[257] The insureds would also have to establish the "intent to defraud" and that they were "injured as a consequence."[258] In light of this, it would not be surprising in subsequent cases to see allegations of fraud and references to information exclusively or primarily known by the insurer or references to the insurer's expertise.

Justice Markman again wrote the lead opinion in *Miller v. Allstate Insurance Co.* which was again joined by then-Chief Justice Taylor and Justices Corrigan and Young with Justices Cavanagh,[259] Weaver and Kelly concurring in the result only.[260] The court had the assistance of eight amicus curiae briefs.[261] Allstate argued that PT Works, Inc. was "unlawfully incorporated under the BCA because PT Works was required to incorporate under the Professional Services Act (PSCA), MCL 450.221 et. seq."[262] The No-Fault Act states that PT Works may charge for lawfully rendered treatment.[263] Justice Markman concluded

253. *Id.*
254. *Cooper*, 481 Mich. at 414, 751 N.W.2d at 451.
255. *Id.*
256. *Id.*at 415-16, 751 N.W.2d at 452.
257. *Id.*
258. *Id.*
259. Miller v. Allstate Ins. Co., 481 Mich 601, 601, 751 N.W.2d 463, 463 (2008).
260. *Id.*
261. *Id.* at 603, 751 N.W.2d at 465.
262. *Id.* at 605, 751 N.W.2d at 466.
263. M.C.L.A. section 500.3157 provides:

> A physician, hospital, clinic or other person or institution lawfully rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance, and a person or institution providing rehabilitative occupational training following the injury, may charge a

that Allstate had no statutory standing to make the claim.[264] Only the Attorney General could challenge a corporation that was presumably lawfully formed.[265] Justice Markman expressed the concern that "[i]ndeed, if the legality of every Michigan corporation were subject to continual assault by any person, it would be difficult to see how a stable economic climate could ever exist."[266] Justice Weaver's concurring opinion, joined in by Justice Kelly, expressed her disagreement that:

> [the] strained discussion of the standing test erroneously created by the majority of four (Chief Justice Taylor and Justices Corrigan, Young, and Markman) in *Lee v Macomb Co Bd of Comm'rs*... In those cases, the majority of four systematically dismantled Michigan's law on standing and replaced years of precedent with its own test that denies Michigan citizens access to the courts.[267]

In a case that probably will be subsequently remembered by the court shake-up which occurred after it was decided, the Michigan Supreme Court analyzed the authority of the Michigan Catastrophic Claims Association (MCCA) in *United States Fidelity Insurance & Guarantee Co. v. Michigan Catastrophic Claims Ass'n*.[268]

Because insurers may be obligated to pay benefits for an injured party's lifetime and benefits are to some extent unlimited, payments of no-fault benefits can involve staggering sums in the face of catastrophic injuries. Therefore, disputes between insured and insurer can arise for a

---

> reasonable amount for the products, services and accommodations rendered. The charge shall not exceed the amount the person or institution customarily charges for like products, services and accommodations in cases not involving insurance.

MICH. COMP. LAWS ANN. § 500.3157 (West 2010).

264. *Miller*, 481 Mich. at 616, 751 N.W.2d at 472.

265. *Id.* at 611, 751 N.W.2d at 469.

266. *Id.* at 616, 751 N.W.2d at 471.

267. *Id.* at 617, 751 N.W.2d at 472.

268. U.S. Fidelity Ins. & Guarantee Co. v. Mich. Catastrophic Claims Ass'n., 482 Mich. 414, 759 N.W.2d 154 (2008). This case will probably be remembered as a stark example of what happens when the makeup of the supreme court changes causing a philosophical shift among the Justices. During the *Survey* period, Chief Justice Clifford Taylor lost his re-election bid to Wayne County Circuit Court Judge Diane Hathaway who replaced him as a Justice to the court. This case was decided on December 29, 2008. *Id.* Justice Hathaway voted to grant rehearing and, on July 21, 2009, a new majority of the supreme court reversed its prior decision without further argument or briefing. U.S. Fidelity Ins. & Guarantee Co. v. Mich. Catastrophic Claims Ass'n., 484 Mich. 1, 773 N.W.2d 243 (2009). No doubt this shift in the court's philosophical alignment will be more prevalent during next year's *Survey* period.

significant period of time. This case presented two claims where the Michigan Catastrophic Claims Association rejected the insurers' claims for reimbursement.[269] The issue for the court's consideration was whether MCCA had to indemnify an insurer for attendant care expenses for the amount paid or for the amount that the MCCA deemed reasonable.[270]

The majority opinion was authored by Justice Young with concurrence from then-Chief Justice Taylor and Justices Corrigan and Markman.[271] Justice Markman also wrote a separately concurring opinion. Justice Weaver's dissent was joined by Justices Cavanagh and Kelly.[272]

Justice Young acknowledged that "MCL 500.3104 does not expressly authorize the MCCA to review claims submitted by member insurers."[273] However, in addition to its express powers, the MCCA was entitled to "perform other acts not specifically enumerated in this section that are necessary or proper to accomplish the purposes of the association and that are not inconsistent with this section or the plan of operation."[274]

In the two consolidated cases, the insurers entered into settlement agreements with their respective insureds and then sought reimbursement from MCCA.[275] The court did not determine whether the charges were reasonable, only whether MCCA could "refuse to indemnify unreasonable charges."[276] The majority held that:

> [W]hen a member insurer's policy provides coverage only for "reasonable charges," the MCCA has authority to refuse to indemnify unreasonable charges. If the policy provides broader coverage, the MCCA must review for compliance with the broader coverage and indemnify claims within that coverage, but it may reject claims in excess of that coverage. Claims in excess of the member insurer's PIP coverages are not "sustained under personal protection insurance coverages." Thus, those claims do

269. *U.S. Fidelity Ins. & Guarantee Co.*, 482 Mich. at 417, 759 N.W.2d at 156; MICH. COMP. LAWS ANN. § 500.3104 (West 2010) (providing for the MCCA which reimburses each insurer paying no-fault coverage once the insurer has met a dollar threshold which varies per year; the threshold was $250,000 beginning on July 1, 2002 and had increased to $420,000 beginning on July 1, 2007).

270. *Id.* at 417, 759 N.W.2d at 156.

271. *Id.* at 417, 434, 759 N.W.2d at 156, 166.

272. *Id.* at 439, 759 N.W.2d at 168.

273. *Id.* at 423, 759 N.W.2d at 160.

274. MICH. COMP. LAWS ANN. § 500.3104(8)(g) (West 2009).

275. *U.S. Fidelity Ins. & Guarantee Co.*, 482 Mich. at 418, 759 N.W.2d at 157.

276. *Id.* at 432, 759 N.W.2d at 164.

> not meet the three statutory requirements of *§ 3104(2)* and they do not trigger the MCCA's obligation to indemnify "100%" of the claimed loss. Rather, the MCCA is only obligated to indemnify "100%" of the portion of the claimed loss that meets all three requirements of § 3104(2). Accordingly, we remand these cases to the trial court to determine the PIP coverages provided by the individual policies at issue in these cases and, if appropriate, whether the attendant care charges were reasonable.[277]

In dissent, Justice Weaver did not find any statutory "reasonableness standard" and that determining "reasonableness" was not one of MCCA's purposes.[278] Under the dissent, the MCCA would essentially have to automatically reimburse the insurer "for 100% of the amount of ultimate loss sustained under personal protection insurance coverage[279] in excess of the statutory threshold."[280]

As Justice Young noted, "both policy arguments are compelling."[281] It should be noted that, while the majority and dissent differed on statutory interpretation, the payments made to the insureds in the two cases at issue, if litigated, may have been determined to be reasonable in any event.

An assessment of no-fault attorney fees was the subject matter of *Moore v. Secura Insurance.*[282] Justice Corrigan authored the majority opinion and Justice Kelly authored the dissent in this four to two decision.[283] In *Moore*, the insurer argued that the no-fault benefits awarded by the jury were not overdue under M.C.L.A. section 500.3142(2) and that the discontinuance of benefits was reasonable under M.C.L.A. section 500.3148(1).[284] This case involved a plaintiff who had

---

277. *Id.* at 432, 759 N.W.2d at 164-65.

278. *Id.* at 439, 759 N.W.2d at 168.

279. MICH. COMP. LAWS ANN. § 500.3104(2).

280. *U.S. Fidelity Ins. & Guarantee Co.*, 482 Mich. at 439, 759 N.W.2d at 169.

281. *Id.* at 432, 759 N.W.2d at 165. In the day-to-day handling of no-fault claims and claims litigation, insurers often compromise disputed claims. Insurers may be hesitant to do so if they felt that the MCCA may not reimburse them for amounts in excess of the statutory threshold. On the other hand, the MCCA must calculate a premium per vehicle for "expected losses and expenses of the Association." M.C.L.A. section 500.3104(7)(d), must concern itself with possible insurer insolvencies, M.C.L.A. section 500.3104(5). One could only imagine the actuarial nightmare which might take place should insurers decide to simply settle their catastrophic claims for substantial upfront payments before the no-fault benefits were incurred.

282. Moore v. Secura Ins., 482 Mich. 507, 759 N.W.2d 833 (2008).

283. Justice Cavanagh did not participate.

284. *Moore*, 482 Mich. at 523, 759 N.W.2d at 841-42.

bilateral osteoarthritis of her knees and had discussed knee surgery with her orthopedic surgeon before the motor vehicle accident.[285] Following the motor vehicle accident, her orthopedic surgeon performed right knee surgery and subsequently he opined that she "would never be able to return to her normal employment as a custodian."[286] The insurer had the plaintiff examined twice by an orthopedic surgeon who, following his second examination "concluded that plaintiff had severe osteo-arthritic degeneration in both knees that predated the accident, and that the accident had not exacerbated plaintiff's underlying osteoarthritis."[287] Based upon the insurer's selected examining physician's second report, the insurer discontinued no-fault benefits.[288] At trial, plaintiff sought work loss benefits, replacement services and penalty interest.[289] The jury concluded that plaintiff was entitled to $42,772 for work loss, nothing for replacement services and penalty interest for overdue payments of $98.71.[290] Subsequently, the trial court awarded no-fault attorney fees and costs in the amount of $79,415.[291]

The Michigan Court of Appeals affirmed in a two-to-one decision with Judge Wilder dissenting.[292] The majority concluded that the denial of benefits was unreasonable because the insurer "made no inquiry beyond the opinion of its own IME doctor."[293] The court determined that an insurer's failure to reconcile the opinion of a doctor with a contrary opinion of treating physicians was unreasonable.[294]

Judge Wilder, in dissent, pointed out that $98.71 in penalty interest was for one week of work loss benefits that was paid before the litigation.[295] Thus, he concluded that the jury did not award any overdue benefits.[296]

Initially, Justice Corrigan set forth the prerequisites for an award of attorney fees by indicating:

---

285. *Id.* at 512, 759 N.W.2d at 841-42.
286. *Id.* at 513, 759 N.W.2d at 836.
287. *Id.*
288. *Id.* at 514, 759 N.W.2d at 836.
289. *Id.*, 759 N.W.2d at 836.
290. *Moore*, 842 Mich. at 514, 759 N.W.2d at 837. Plaintiff sought more than $11,000 in penalty interest at trial.
291. *Id.* at 514.
292. *Id.* at 515, 759 N.W.2d at 837.
293. *Id.* at 514, 759 N.W.2d at 837.
294. *Id.* at 521, 759 N.W.2d at 840.
295. *Id.* at 515, 759 N.W.2d at 837.
296. *Moore*, 842 Mich. at 515, 759 N.W.2d at 837.

> First, the benefits must be overdue, meaning "not paid within 30 days after [the] insurer receives reasonable proof of the fact and of the amount of the loss sustained." MCL 500.3142(2). Second, in postjudgment proceedings, the trial court must find that the insurer "unreasonably refused to pay the claim or unreasonably delayed in making proper payment." MCL 500.3148(1).[297]

She then proceeded to analyze the jury instructions, the verdict form and the jury award before concluding: "the jury decided that only one week of work loss benefits was overdue."[298] The majority relied upon *Liddell v. Detroit Automotive Inter-Insurance Exchange.*[299] Justice Corrigan rejected the majority's position and rejected *Liddell*, concluding that "[n]othing in the plain language of *MCL 500.3148(1)*, however, requires an insurer to reconcile conflicting medical opinions. Moreover, nothing otherwise implicit in the statute requires an insurer to reconcile competing medical opinions."[300]

Because *Liddell* was contrary to the plain language of M.C.L.A. section 500.3148(1), it was overruled.[301] The plain language of the No-Fault Act did not impose any additional duties beyond those set forth in the statute and that an insurer "need not resort to a 'tie breaker' to resolve conflicting medical reports, but we note that an insurer acts at its own risk in terminating benefits in the face of conflicting medical reports."[302]

The majority concluded that, because the benefits were not overdue, no attorney fees could be awarded.[303] Then-Chief Justice Taylor and Justices Young and Markman joined in Justice Corrigan's opinion.[304]

Justice Kelly, relying upon essentially the same case law, felt the majority was speculating and "cannot claim to have insight into the minds of the jurors."[305] She agreed that the majority's analysis of the penalty interest award was a "logical explanation" but still felt this was speculation. She would not overrule *Liddell* and noted that the "defendant did not even attempt to reconcile the competing medical opinions of the IME and plaintiff's doctors. More importantly, defendant

297. *Id.* at 517, 759 N.W.2d at 838.
298. *Id.* at 519, 759 N.W.2d at 839.
299. *Liddell*, 182 Mich. App. 636, 302 N.W.2d 260.
300. *Moore*, 482 Mich. at 521, 759 N.W.2d at 840.
301. *Id.*
302. *Id.* at 522, 759 N.W.2d at 841.
303. *Id.* at 527, 759 N.W.2d at 843.
304. *Id.*
305. *Id.* at 530, 759 N.W.2d at 845.

did not provide plaintiff's doctors with the results of the IME that conflicted with their medical opinions."[306]

Without saying so, Justice Kelly seemed to imply that it may be unreasonable to rely upon an IME doctor as opposed to a treating doctor, stating:

> In my view, an insurer should not be able to create a bona fide factual uncertainty by choosing to reject plaintiff's doctor's credible opinion and rely solely on the doctor's "independent medical report." To allow insurers to terminate benefits on this basis alone contradicts the requirement that the factual uncertainty be "bona fide."[307]

She concluded that there was no abuse of discretion in the attorney fees award and expressed her fear that "the majority opinion provides further opportunity for insurers to abruptly deny claims by holding plaintiffs to a higher standard than the 'reasonable proof' requirement of MCL 500.3142(2)."[308]

If an insurer cannot rely upon the conclusions of an examining physician then no insurer could deny no-fault benefits as long as the treating doctor provided support for the claim. Justice Kelly's view seems to be that the IME's doctor's report should be sent to the treating doctor and, if the treating doctor's "credible opinion" is contrary to that of the IME doctor, then there is no "bona fide factual uncertainty."

This case may be an aberration. The miniscule penalty and interest awarded by the jury was the genesis of the dispute. Wouldn't most jurors conclude that the benefits it awarded were overdue?

In pertinent part, M.C.L.A. section 500.3105(1) provides:

> Under personal protection insurance, an insurer is liable to pay benefits for accidental bodily injury *arising out of* the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter.[309]

In an order in *Scott v. State Farm Mutual Automobile Insurance Co.*,[310] the Michigan Supreme Court debated the causation test under this

306. *Moore*, 482 Mich. at 534, 759 N.W.2d at 847.

307. *Id.* at 536, 759 N.W.2d at 848.

308. *Id.* at 539, 759 N.W.2d at 850.

309. MICH. COMP. LAWS ANN. § 500.3105 (1) (West 2009).

310. Scott v. State Farm Mutual Auto. Ins. Co., 482 Mich. 1074, 758 N.W.2d 249 (2008).

statutory provision and, in lieu of granting leave, vacated that portion of the court of appeals opinion which referenced "almost any causal connection or relationship will do,"[311] commenting: "[t]o the extent of that description of the required causal connection, those cases are inconsistent with the other authorities relied on by the court of appeals, such as *Putkamer v Transamerica Insurance Corporation of America . . . Thornton v Allstate Insurance Co. . . .* and *Kochoian v Allstate Insurance Co. . . . .*"[312] Otherwise, the court denied the application for leave.

Justice Markman, in his concurring Opinion, noted that the cases relied upon by the dissent, *Shinabarger v. Citizens Mutual Insurance. Co.*[313] and *Bradley v. Detroit Auto Inter-Insurance Exchange*[314] preceded the Michigan Supreme Court decisions in *Thornton* and *Putkamer*.[315] The causation test adopted in those two supreme court cases applied to "incidental, fortuitous or but for" as opposed to "almost any causal connection will do" which the court of appeals had relied upon.[316] He reasoned that, had the Supreme Court intended the latter test, it would have been referenced in either *Thornton* or *Putkamer,* but was not.[317]

Justice Kelly dissented with Justice Weaver joining.[318] She would have granted the application.[319] In her view, the two statements addressing causation were "mutually compatible."[320] She acknowledged that both referred to "incidental, fortuitous or but for" language.[321] She felt that the two standards "logically build on one another and stand for the same basic proposition. Taken together, they mean that evidence establishing almost any causal connection will suffice when it is more than merely fortuitous, incidental or but for. The level of proof could be described as a scintilla of proximate cause."[322]

Does it follow these statements build on each other? How would the jury instruction read?

---

311. Scott v. State Farm Auto. Ins. Co., 278 Mich. App. 578, 585, 751 N.W.2d 51, 56 (2008).

312. *Scott*, 482 Mich. at 1074, 758 N.W.2d at 249 (internal citations omitted).

313. Shinabarger v. Citizens Mutual Ins. Co., 90 Mich. App. 307, 282 N.W.2d 301 (1979)

314. Bradley v. Detroit Auto. Inter-Ins. Exch., 130 Mich. App. 34, 343 N.W.2d 506 (1983).

315. *Scott*, 482 Mich. at 1074, 758 N.W.2d at 249.

316. *Id.*

317. *Id.*

318. *Id.* at 1074, 758 N.W.2d at 250.

319. *Id.*

320. *Id.*

321. *Scott*, 482 Mich. at 1074, 758 N.W.2d at 250.

322. *Id.*

After the seating of new Justice Diane M. Hathaway, the Supreme Court granted plaintiff's Motion for Reconsideration and, on June 5, 2009, the December 3, 2008 Order was vacated and the Court of Appeals decision was affirmed. This was after the *Survey* period.

On another order of significance, the Michigan Supreme Court denied Application for Leave to Appeal the court of appeals case discussed *supra* in *Genesee Food Services, Inc. v. Meadowbrook, Inc.*[323] Chief Justice Kelly issued a concurring opinion while Justices Corrigan and Markman dissented.[324] Justice Kelly avoided calling the agreement between Citizens and Meadowbrook an agency agreement, whereas Justice Corrigan repeatedly referred to the "agency agreement."[325] Justice Kelly found the court of appeals decision in *West American Insurance Co.*[326] persuasive, accepting the argument that the party to whom one owes his, her or its primary fiduciary duty determines agency.[327] Does this follow?

The trial court was impressed because the insured apparently was not aware of the agency agreement.[328] This also impressed Chief Justice Kelly.[329] Wouldn't any reasonable business be aware that there had to be some connection between Citizens and Meadowbrook for Meadowbrook to be able to procure a policy of insurance through Citizens? Justice Corrigan agreed with the court of appeals dissenter, Kirsten Frank Kelly. In Justice Corrigan's mind, there was no doubt that Meadowbrook was an agent of Citizens.[330] She commented, "I agree with Judge Kelly. Unambiguous contracts are enforced as written unless a contractual provision violates law or public policy."[331] Because Meadowbrook was an agent of Citizens, the release that referred to the release of Citizens' "agents" would apply to Meadowbrook.[332]

---

323. *Genesee Food Servs.*, 483 Mich. 907, 762 N.W.2d 165 (2009). *See* discussion *supra* notes 1-19 and accompanying text.

324. While Chief Justice Kelly's opinion had no concurring Justices, Justices Young and Markman concurred with Corrigan and Justices Corrigan and Young concurred with Markman.

325. *Genesee Food Servs.*, 483 Mich. at 907, 762 N.W.2d at 167.

326. West Am. Ins. Co. v. Meridian Ins. Co., 230 Mich. App. 305, 583 N.W.2d 548 (1998).

327. *Genesee Food Servs.*, 483 Mich. at 907-08, 762 N.W.2d at 166.

328. *Id.* at 907, 762 N.W.2d at 165-66.

329. *Id.*

330. *Id.* at 907, 762 N.W.2d at 166.

331. *Id.* at 907, 762 N.W.2d at 167.

332. *Id.* at 908, 762 N.W.2d at 166.

Justice Markman pointed out that "Meadowbrook wrote and sold insurance policies for Citizens . . . [that the agency agreement stated that] 'by signing this agreement you become an agent' . . . ."[333]

He also rejected the "primary fiduciary duty test" in determining an agent because the pertinent question was "only whether Meadowbrook is Citizens' 'agent'."[334] He further rejected the argument which he felt was legally unsupported "that the party signing a release must *know* who all of the other party's agents are in order to release all those agents from liability."[335] Thus, he felt that the majority was violating the prohibition against rewriting parties' contracts.[336]

If the insured's intent was not to release Citizens, then why didn't it do as is usually done and insert a statement into the release simply stating that the release did not apply to and did not release any of the insured's claims against Meadowbrook? While Meadowbrook did not prevail in securing summary disposition based upon the release wording, the insured had to engage in substantial appellate litigation on a dispute that could have been avoided through more careful document drafting.

IV. DECISIONS OF THE UNITED STATES DISTRICT COURTS

Many insurance cases involving insurance disputes are filed in federal courts and/or removed there based upon diversity jurisdiction. Generally, the substantive law of the forum state applies. State Farm was involved in two such cases in which State Farm issued a personal umbrella policy to its insureds.

In *Michigan Municipal Risk Management Authority (MMRMA) v. State Farm Fire & Casualty Co.*, both MMRMA and State Farm initially defended a township clerk because there was a dispute as to whether or not the alleged wrongful conduct was within the individual's official duties as a township clerk. [337] Curiously, State Farm withdrew its defense after the trial court denied the defendant's motion for summary disposition in state court because genuine issues of material fact existed.[338] Subsequently, when State Farm refused to contribute toward a settlement, MMRMA settled the case and then brought suit against State

333. *Genesee Food Servs.*, 483 Mich. at 907, 762 N.W.2d at 168.
334. *Id.*
335. *Id.*
336. *Id.*, 762 N.W.2d at 168-69.
337. Mich. Mun. Risk Mgmt. Auth. (MMRMA) v. State Farm Fire & Cas. Co., 559 F.Supp.2d 794 (2008).
338. *Id.* at 804.

Farm in state court.[339] The case was removed by State Farm to federal court.[340]

U.S. District Court Judge Nancy Edmunds reviewed the Michigan duty to defend and State Farm's umbrella policy and concluded that the allegations met State Farm's definition of personal injury, which included "libel, slander, defamation of character or invasion of rights of privacy."[341] State Farm argued that its business pursuits and specific intent exclusions barred coverage.[342] The court found no allegations in the underlying complaint that the clerk's conduct involved "pursuing her business as an elected official with the [t]ownship."[343] Further, the underlying trial court concluded that "material questions of fact still existed for trial."[344] State Farm was obligated to resolve any doubt in favor of its insured but failed to do so. Accordingly, the court determined that the business pursuits exclusion was inapplicable.[345] The court further concluded that the specific intent exclusion did not apply because "'specific intent' is not required for the slander/libel/defamation offenses" and because of the allegations in the underlying complaint and first amended complaint.[346] Judge Edmunds also concluded that "Michigan law does recognize an implied contractual duty on the part of the insured to act in good faith when investigating an insurance claim and when negotiating a settlement so that it falls within policy limits."[347] Citing *Aetna Casualty & Surety Co. v. Dow Chemical Co.*[348] the court concluded that "[b]ecause State Farm breached its duty to defend, it was liable for all foreseeable damages flowing from that breach, including the amount Michigan Municipal paid to settle the underlying lawsuit."[349]

State Farm faired a little better in *State Farm Fire & Casualty Co. v. Liberty Insurance Underwriters, Inc.*[350] There, the founder, CEO and chairman of Lumbermen's, Inc. (Henry Bouma), was traveling with his wife, close personal friend and former vice president of the company and

339. *Id.* at 797.
340. *Id.* at 802.
341. *Id.* at 804.
342. *Id.* at 806.
343. *MMRMA*, 559 F. Supp.2d at 806.
344. *Id.*
345. *Id.* at 807.
346. *Id.* at 807.
347. *Id.* at 809.
348. Aetna Cas. & Sur. Co. v. Dow Chemical Co., 883 F.Supp. 1101, 1111 (E.D. Mich. 1995).
349. *MMRMA*, 559 F. Supp.2d at 804.
350. State Farm Fire & Cas. Co. v. Liberty Ins. Underwriters, Inc., 613 F. Supp.2d 945 (W.D. Mich. 2009).

his wife to a football game between Michigan and Notre Dame.[351] He stopped his motor vehicle at a rest stop.[352] The wives exited the vehicle, however, the two men stayed in the vehicle continuing to talk.[353] Bouma, unfortunately, then exited his vehicle without putting it in park.[354] He then attempted to step on the brake but instead stepped on the accelerator resulting in a pedestrian being severely injured.[355] The pedestrian's claim was settled with a primary insurer paying $1 million, State Farm paying its personal liability umbrella policy limit of $3 million and Liberty paying $5 million of its $10 million commercial liability umbrella policy limit.[356]

Applying Michigan law, the court addressed two issues. First, "[w]as the driver of the vehicle, Bouma, an insured based on his conduct at the time of the accident?"[357] Second, did "the 'excess coverage' clauses of the State Farm and Liberty policies render the State Farm policy primary vis-à-vis Liberty's policy[?]"[358] After reviewing the facts, the court could not conclude as a matter of law that Bouma "was acting within the scope of his (self-appointed) duties as CEO and Chairman of the Board of Lumbermen's."[359]

The opinion, by Western District Chief Judge Paul L. Maloney, has a good discussion of a federal court's application of state law, precedential value of Michigan decisions and Michigan law dealing with other insurance clauses.[360] Bouma would only be an insured under Liberty's policy if he was acting within the scope of his duties as an officer of Lumbermen's.[361] Judge Maloney noted that "[t]he Michigan Supreme Court would probably hold that one acts within the scope of one's duties when one is furthering the employer's interest, perhaps with the qualifier that the employee's trip or activity must have been *primarily* intended to further the employer's interest."[362]

The court went on to analyze the other insurance provisions of the State Farm and Liberty policies, answering the hypothetical question as to what would happen if the jury determined that Bouma was a Liberty

351. *Id.* at 949.
352. *Id.*
353. *Id.*
354. *Id.*
355. *Id.*
356. *State Farm Fire & Cas. Co.*, 613 F. Supp.2d at 950.
357. *Id.* at 947.
358. *Id.* at 948.
359. *Id.* at 947.
360. *Id.* at 945.
361. *Id.* at 948.
362. *State Farm Fire & Cas. Co.*, 613 F. Supp.2d at 957.

insured.[363] Ultimately, the court concluded that both policies were excess policies, which could not be reconciled and, accordingly, hypothetically would be prorated.[364] Because there was $13 million in available coverage, if prorated, State Farm's ratio would be three to thirteen and Liberty's ten to thirteen.[365]

Interestingly, the opinion concludes with a comment that a jury trial was scheduled to commence, however, the court was notified "that after the issuance of the instant opinion resolving their summary-judgment motions, they will enter a 'settlement' of sorts of the remaining issues so that they can presently appeal this decision to the Sixth Circuit."[366]

Judge Maloney authored another opinion in *Amerisure Mutual Insurance Co. v. Carey Transportation, Inc.*[367] That lengthy opinion primarily dealt with Amerisure's care, custody or control exclusion in a commercial trucker's insurance policy issued to Carey.[368] Carey's tractor was attached to a trailer full of goods being transported to a Walgreen's in Florida.[369] As often happens in declaratory judgment actions, there was an underlying case, which was stayed pending the resolution of the coverage issues.[370] This case discusses Michigan law dealing with an insurer's duty to indemnify, waiver and estoppel, and illusory contracts before analyzing the two exclusions relied upon by Amerisure.[371] Ultimately, the court concluded that Amerisure owed no duty to indemnify either the tractor trailer or goods within the trailer because Amerisure's policy did not apply to "'Property damage' to or 'covered pollution costs or expense' involving property owned or transported by the 'insured' or in the 'insured's' care, custody or control."[372] The court, however, concluded that Amerisure owed a duty to defend up to the court's grant of Amerisure's motion for summary judgment.[373] Amerisure had argued, unsuccessfully, that it was entitled to recoup the expense it incurred in defending its insured.[374]

---

363. *Id.* at 961.
364. *Id.* at 962.
365. *Id.* at 949.
366. *Id.* at 970.
367. Amerisure Mut. Ins. Co. v. Carey Transportation, Inc., 578 F. Supp.2d 888 (W.D. Mich. 2008).
368. *Id.* at 892.
369. *Id.* at 894.
370. *Id.* at 894 n.2.
371. *Id.* at 892-95.
372. *Id.* at 892.
373. *Amerisure Mut. Ins. Co.*, 578 F. Supp.2d at 893.
374. *Id.* at 892.

Judge Avern Cohn concluded that the Michigan no-fault insurance law applied when a United States Postal truck struck a bicyclist in *Premo v. United States*.[375] He concluded, however, that non-economic damages were not allowed because the plaintiff had not suffered either permanent serious disfigurement or serious impairment of body function.[376] Subsequently in the same case, he granted plaintiff summary judgment for her medical expenses, but denied plaintiff's request for no-fault attorney fees.[377]

In a mix of state and federal law, Judge Rosen determined that state law applied to plaintiff's claim for short term disability benefits, whereas ERISA applied to plaintiff's claim for long term disability benefits in *Bragg v. ABN Amro North America, Inc.*[378]

Under ERISA, if an employee benefit plan gives discretion to the plan administrator in the determination of eligibility for benefits, courts review the administrator's decision under an arbitrary and capricious standard that is highly deferential.[379] Judge Rosen commented that:

> Michigan courts permit employers and insurers to retain complete discretion to determine eligibility for disability benefits... However, Michigan courts construe policy language purporting to grant discretionary authority to insurers and claim administrators more narrowly than the federal courts. Specifically, the Michigan courts have rejected the Sixth Circuit's determination in *Perez* that "satisfactory proof of loss" language is sufficient to confer discretionary authority on claims administrators and trigger an "arbitrary and capricious" standard of review.[380]

The court concluded that the employer's short-term disability (STD) plan was a "non-ERISA" plan and, accordingly, the administrator's denial of STD benefits was subject to a de novo review.[381] However, the court's de novo review as to the STD decision and its arbitrary and capricious standard review of the LTD denial led to the same conclusion – the plaintiff had not met her burden under either standard.[382]

---

375. Premo v. United States, 580 F.Supp.2d 562 (E.D. Mich. 2008).
376. *Id.* at 570.
377. 2009 U.S. Dist. LEXIS 8444.
378. Bragg v. ABN Amro North America, Inc., 579 F.Supp.2d 875 (E.D. Mich. 2008).
379. *Id.* at 889.
380. *Id.* at 890.
381. *Id.* at 896.
382. *Id.* at 897.

Two ERISA cases show the impact of the United State Supreme Court's recent decision in *Metropolitan Life Ins. Co. v. Glenn.*[383] Two Western District of Michigan Judges, Judge Jonker in *DeGennaro v. Liberty Life Assurance Co.*[384] and Judge Neff in *Kufner v. Jefferson Pilot Financial Insurance Co.*,[385] declined to grant summary judgment to disability insurers using as a factor the conflict of interest that might arise when the same party that determines the claim is also the payer of the claim.[386]

Judge Cohn upheld a preexisting condition exclusion in *Kovitch v. UNUM Life Insurance Co. of America.*[387] This was another ERISA claim arising from the insurer's denial of a long term disability claim.[388] The evidence of the pre-existing condition was clear and the court had no trouble applying the exclusion as written.[389]

V. DECISIONS OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

During this *Survey* period, the Sixth Circuit Court of Appeals addressed the interplay of federal procedure on Michigan law, dual or concurrent causation as applied to property damage and whether or not federal law barred the Michigan OFIS Commissioner from prohibiting discretionary clauses in policies of insurance issued in Michigan.

The plaintiff unfortunately discovered that federal procedure trumped a provision of the Michigan no-fault law in *Shropshire v. Laidlaw Transit, Inc.*[390] There, the claim was that a minor sustained a closed-head injury while a seat-belted passenger in a van which was struck by a school bus.[391] Defendant moved for summary judgment on the basis that the minor had not sustained a serious impairment of body function.[392] In opposition, plaintiff submitted an affidavit from a neurologist that met the dictates of Section 3135, which in part provided

383. Metropolitan Life Ins. Co. v. Glenn, 128 S. Ct. 2343 (2008).

384. DeGennaro v. Liberty Life Assurance Co., 561 F. Supp.2d 811 (W.D. Mich. 2008).

385. Kufner v. Jefferson Pilot Financial Ins. Co., 595 F. Supp.2d 785 (W.D. Mich. 2009).

386. These cases are interesting studies on how a disability insurer determines whether or not to deny benefits and how different judges bring different perspectives to their decisionmaking.

387. Kovitch v. UNUM Life Ins. Co. of Am., 581 F. Supp.2d 794 (E.D. Mich. 2008).

388. *Id.* at 795.

389. *Id.* at 801.

390. Shropshire v. Laidlaw Transit, Inc., 550 F.3d 570 (6th Cir. 2008).

391. *Id.* at 570-71.

392. *Id.* at 572.

that "for a closed-head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury."[393]

The district court concluded that the affidavit was inadmissible and, therefore, no factual dispute existed regarding serious impairment of body function.[394] The Sixth Circuit affirmed noting that the purpose of the no-fault provision in question was "to allocate decision-making authority between the judge and jury, a quintessentially procedural determination."[395] The court concluded that the provision did not create "an altogether new means of recovery."[396] The court then went on to review the balance of the evidence under the Michigan Supreme Court case of *Kreiner v. Fischer*,[397] ultimately concluding that plaintiff had not created a genuine issue of material fact on the serious impairment issue.[398] This case evidences the fact that procedural law does make a difference because, here, plaintiff could not avoid summary judgment in federal court, whereas, she could have avoided summary disposition in state court on the same facts.

The Sixth Circuit also decided whether or not Michigan followed the doctrine of efficient proximate cause in *Iroquois on the Beach, Inc. v. General Star Indemnity Co.*[399] In the case, a seasonal hotel on Mackinac Island, originally built in 1903 with an addition in 1979 or 1980, sustained water damage in part because the building's frame "failed to protect the building in windy conditions, the inappropriateness of the existing cladding system for the site's extreme climatic conditions, and the too high or sloped existing grade around the building."[400] The hotel spent a substantial amount of money on repairs and subsequently made a claim with its property insurer General Star.[401] General Star relied upon five exclusions.[402] The trial court, however, granted summary judgment on the basis of the "seepage or leakage of water" exclusion and the Sixth Circuit affirmed.[403]

---

393. MICH. COMP. LAWS ANN. § 500.3135(2)(a)(ii) (West 2010).
394. *Shropshire*, 550 F.3d at 571.
395. *Id.* at 573.
396. *Id.* at 575.
397. Kreiner v. Fischer, 471 Mich. 109, 683 N.W.2d 611 (2004).
398. *Shropshire*, 550 F.3d at 578.
399. Iroquois on the Beach, Inc. v. Gen. Star Indem. Co., 550 F.3d 585 (6th Cir. 2008).
400. *Id.* at 586.
401. *Id.* at 587.
402. *Id.*
403. *Id.* at 587-88. The exclusion provided: "B. Exclusions 2. We will not pay for loss or damage caused by or resulting from any of the following: ... f. [c]ontinuous or

On appeal, the hotel's counsel argued what has been called "efficient or proximate cause" or "dual cause" which is a theory which "applies when 'two or more identifiable causes, at least one of which is covered under the policy and at least one of which is excluded thereunder, contribute to a single loss.'"[404] The insured argued that seepage of water was excluded but wind storms were covered and that wind storms were the efficient proximate cause of the loss.[405]

The Sixth Circuit, however, based upon *Vanguard Insurance Co. v. Clarke,*[406] concluded that Michigan had rejected the doctrine of dual or concurrent causation and, therefore, the exclusion applied to preclude coverage.[407] However, one could read *Vanguard* as determining where coverage under an auto policy begins and coverage under a homeowner's policy ends.

The Sixth Circuit dealt with "Insurance Industry" challenged rules promulgated by the Commissioner of the then-Michigan Office of Financial Insurance Services (OFIS),[408] to prohibit "discretionary clauses in policies of insurance" in *American Council of Life Insurers v. Ross.*[409] The insurance industry viewed this as a case of great significance because of the frequent use of discretionary clauses especially in life, health and disability policies.

The insurance industry sought to preclude the use of the commissioner's rules based upon ERISA preemption as applied to employee benefit plans under ERISA.[410] The trial court had granted summary disposition in favor of the commissioner.[411] The parties agreed that the commissioner's rules "relate to an employee-benefit plan, and therefore fall under ERISA's express preemption clause."[412]

Accordingly, the rules would be preempted unless they fit within the "savings clause" which provided "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking or securities."[413] The Sixth Circuit

---

repeated seepage or leakage of water, or the presence or condensation of humidity, moisture or vapor, that occurs over a period of 14 days or more."

404. *Id.* at 587.

405. *Iroquois on the Beach, Inc.*, 550 F.3d at 587.

406. Vanguard Ins. Co. v. Clarke, 438 Mich. 463, 475 N.W.2d 48 (1991).

407. *Iroquois on the Beach, Inc.*, 550 F.3d at 588.

408. Now called Office of Financial and Insurance Regulation (OFIR).

409. Am. Council of Life Insurers v. Ross, 558 F.3d 600 (6th Cir. 2009).

410. *Id.* at 602.

411. *Id.*

412. *Id.* at 604.

413. *Id.*

applied the *Miller* two-prong test[414] which provided: "first, 'the state law must be specifically directed toward entities engaged in insurance,' and second, 'the state law must substantially affect the risk-pooling arrangement between the insurer and the insured[s].'"[415] The court, after analysis, concluded that both prongs were met and that, accordingly, the rules fell within the savings clause.[416]

The court also rejected the argument that the rules conflicted with the purpose of ERISA, which "does not mandate a particular standard of review for reviewing benefit denials."[417] While not directly stated, what stood to be voided was an arbitrary and capricious standard of review and internal administrative review procedures commonly found in ERISA disability plans ever since *Firestone Tire & Rubber Co. v. Bruch*.[418] That case stood for the proposition that if the plan administrator had discretion to interpret the plan, then a court reviewing a denial of benefits would do so under an arbitrary and capricious standard which was very difficult, although not impossible, for a claimant to meet.

Without the application of a discretionary clause, the probability is that disability insurance beneficiaries will receive benefits longer, it will be more difficult to deny or terminate benefits, the cost of providing disability insurance will increase, premiums for such coverage will rise and employers will have to make a business decision whether to cut back or cease to provide such coverage.

Most ERISA disability cases are decided on the arbitrary and capricious standard. If the policy provisions giving the plan administrator discretion, and thus eliminating an arbitrary and capricious review, are eliminated, then the courts will be reviewing on a de novo basis and the deference given to the plan administrator's decision will no longer be available.

VI. CONCLUSION

Insurance is pervasive and insurance disputes are frequently litigated. Many of these cases continue to involve no-fault disputes. During this *Survey* period, the impact of a philosophical shift in the in Michigan Supreme Court caused by the reelection defeat of then-Chief Justice Clifford Taylor was apparent. No doubt that philosophical shift will have

414. *Ky. Ass'n of Health Plans v Miller*, 538 U.S. 329 (2003).
415. *Am. Council of Life Insurers*, 558 F.3d at 605.
416. *Id.* at 605-07.
417. *Id.* at 608.
418. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989).

an even greater impact on insurance law reported in the next *Survey* period.