CONTRACTS AND COMMERCIAL LAW

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I. INTRODUCTION

This article addresses recent developments in contract and commercial law in the state of Michigan for the *Survey* period of June 1, 2009, through May 31, 2010. The purpose of this article is to provide a survey of commercial and contract law for Michigan practitioners; however, this article does not address every change in these areas of law during this time period. Part II of this article discusses significant developments in the area of commercial law, and Part III addresses significant developments in the area of contract law.

II. COMMERCIAL LAW

A. Account Stated

The Retail Installment Sales Act[1] (RISA) was enacted to regulate retail sales transactions and agreements, as well as to provide penalties

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1. Retail Installment Sales Act, MICH. COMP. LAWS ANN. §§ 445.851-.873 (West 2002).

for violation of the RISA.[2] A "retail sales transaction" is a transaction where a buyer purchases goods or services from a retail seller pursuant to a retail charge agreement, where the buyer agrees to pay for the goods or services, including interest on the unpaid balance, in installments.[3] A "retail charge agreement" is an instrument that prescribes the terms governing a secured or unsecured retail installment transaction that may be made periodically pursuant to the instrument. The terms also provide for interest, which is referred to as a "time price differential," and is computed in relation to the buyer's unpaid balance.[4] Specifically, section 12(a) of RISA provides in pertinent part:

> A retail charge agreement shall be in writing and signed by the buyer or the authorized representative of the buyer. A retail charge agreement shall be considered signed and accepted by the buyer if after a request for a retail charge account the agreement or application for a retail charge account is in fact signed by the buyer or if the retail charge account is used by the buyer or by another person authorized by the buyer.[5]

In *Unifund CCR Partners v. Riley*,[6] the Michigan Court of Appeals was asked to reverse the district court's issuance of a summary disposition and award of damages, as well as the circuit court's affirmance of that summary disposition.[7] *Unifund* involved an unpaid balance allegedly owed by the defendant, Nishawn Riley, pursuant to a retail charge agreement in the name of the defendant.[8]

In *Unifund*, the allegations were that the defendant had opened a credit card account with Citibank pursuant to a retail charge agreement.[9] Charges and payments were made on the account, allegedly by the defendant, which the defendant denied, thereby establishing that the debt was owed.[10] An unpaid balance remained on the account, which was assigned by Citibank to the plaintiff.[11] The plaintiff sent a notice of

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2. MICH. COMP. LAWS ANN. §§ 445.851-.873 pmbl.
3. MICH. COMP. LAWS ANN. § 445.852(f).
4. MICH. COMP. LAWS ANN. §§ 445.852(h), (g).
5. MICH. COMP. LAWS ANN. § 445.862(a).
6. Unifund CCR Partners v. Riley, No. 287599, 2010 WL 571829 (Mich. Ct. App. Feb. 18, 2010).
7. *Id.* at *1.
8. *Id.*
9. *Id.* at *4.
10. *Id.*
11. *Id.* at *1.

assignment to the defendant and subsequently brought this action against the defendant for breach of contract under the theory of account stated.[12]

At trial, the plaintiff presented copies of monthly billing statements that reflected charges and payments that were made on the account and sent to the address of the defendant.[13] In addition, the plaintiff presented as evidence an affidavit, which set forth the debt allegedly owed to Citibank by the defendant, as well as the assignment of the debt by Citibank to the plaintiff.[14] The defendant denied that she owed the debt, claiming that she was a victim of identity theft.[15] In support of her claim, the defendant presented documents indicating that she had successfully disputed the debt and that it had been removed from her credit report.[16]

After dispensing with procedural arguments raised by the parties, the court proceeded to the substantive issues presented by the defendant on appeal. On appeal, the principal argument raised by the defendant was that the district court erred by granting summary disposition in favor of the plaintiff.[17] The court of appeals agreed.[18]

The plaintiff's claim of breach of contract proceeded on the theory of account stated.[19] The Restatement (Second) of Contracts provides:

> (1) An account stated is a manifestation of assent by debtor and creditor to a stated sum as an accurate computation of an amount due the creditor. A party's retention without objection for an unreasonably long time of a statement of account rendered by the other party is a manifestation of assent.
>
> (2) The account stated does not itself discharge any duty but is an admission by each party of the facts asserted and a promise by the debtor to pay according to its terms.[20]

The court explained that "'[w]here a plaintiff is able to show that the mutual dealings which have occurred between two parties have been

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12. *Unifund*, 2010 WL 571829, at *3.
13. *Id.* at *5.
14. *Id.* at *6.
15. *Id.* at *4.
16. *Id.*
17. *Id.* at *2.
18. *Unifund*, 2010 WL 571829, at *3.
19. *See* BLACK'S LAW DICTIONARY 19 (9th ed. 2009) (defining "account stated" as "[a] balance that parties to a transaction or settlement agree on, either expressly or by implication. The phrase also refers to the agreement itself or to the assent giving rise to the agreement.").
20. RESTATEMENT (SECOND) OF CONTRACTS § 282 (1981).

adjusted, settled, and a balance struck, the law implies a promise to pay that balance.'"[21] Further, "'[t]he conversion of an open account into an account stated, is an operation by which the parties *assent* to the sum as the correct balance due from one to the other; and whether this operation has been performed or not, in any instance, must depend upon the facts.'"[22] The court explained that assent may be the result of an expressed agreement, or failure by the debtor to object within a reasonable time.[23] In addition, by making payments on the balance, the debtor admitted the correctness of the account stated.[24] The court further stated that the existence of an account stated does not prevent challenging the propriety of the account on the basis of fraud or mistake.[25]

In *Unifund*, the court noted that the evidence before the district court showed that there was an open account in the defendant's name, and that charges and payments were made to the account.[26] However, because there was no evidence that the defendant was either aware of the opening of the account or used, authorized the use of, or made payments to the account, there was insufficient evidence to show that the open account was transformed into an account stated.[27] The court further stated that the defendant's claim of being a victim of identity theft, as well as submitting evidence that showed that she contested the accuracy of the account with the credit reporting service—including initiating a fraud alert on the account—raises questions of fact precluding a grant of summary disposition.[28]

Accordingly, the court of appeals held that the district court erred in granting plaintiff's motion for summary disposition and the circuit court erred in affirming the district court's order.[29]

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21. *Unifund*, 2010 WL 571829, at *3 (internal citations omitted).

22. *Id.* (internal citations omitted).

23. *Id.* at *3 (quoting Corey v. Jaroch, 229 Mich. 313, 315 (1924)) ("[W]hen an account is stated in writing by the creditor and accepted as correct by the debtor, either by payments thereon without demur or by failure within a reasonable time to question the state of the account as presented, it becomes an account stated . . . .").

24. *Id.*

25. *Id.*

26. *Id.* at *4.

27. *Unifund*, 2010 WL 571829, at *4.

28. *Id.* at *5.

29. *Id.*

B. Michigan Consumer Protection Act

The Michigan Consumer Protection Act[30] (MCPA) was enacted to prohibit certain acts and practices within trade and commerce as well as to provide for investigations and prescribe penalties for violations of the MCPA.[31] However, the MCPA does not does not regulate all trades and industries. The MCPA does not apply to any "transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of [the State of Michigan] or the United States."[32]

In *Akers v. Bankers Life and Casualty Co.*,[33] the Michigan Court of Appeals was asked to determine whether certain conduct of Bankers Life, an insurance company governed by the Michigan Insurance Code,[34] was exempt from liability under the MCPA.[35]

In 1999, Bankers Life employed Margaret Zimmerman, who later sold Akers an insurance policy.[36] In April 2002, Bankers Life terminated Zimmerman's employment for "unethical activities related to her job."[37] Bankers Life informed Akers "that Zimmerman 'no longer represent[ed]' the company, but [did not tell Akers] that Zimmerman had been terminated or the reasons for her termination."[38] In May 2002, Zimmerman contacted Akers and advised her, among other things, to invest in an "Internet kiosk" opportunity which was later revealed to be a Ponzi scheme.[39] "In January 2006, Zimmerman pleaded guilty to criminal fraud and was sentenced to serve 57 to 120 months in prison[.]"[40] Zimmerman was also ordered to pay restitution in the amount of $867,504.49, of which $224,967 was to be paid to Akers.[41] However, as of February 2008, Akers had only received $77,834.24 in restitution and was unable to collect on the remainder.[42]

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30. Michigan Consumer Protection Act, MICH. COMP. LAWS ANN. §§ 445.901-.922 (West 2002).

31. MICH. COMP. LAWS ANN. §§ 445.901-.922 pmbl.

32. MICH. COMP. LAWS ANN. § 445.904(1)(a).

33. *Akers v. Bankers Life Cas. Co.*, No. 283771, 2009 WL 1767617 (Mich. Ct. App. June 23, 2009).

34. MICH. COMP. LAWS ANN. §§ 500.100-8302.

35. *Akers*, 2009 WL 1767617, at *3.

36. *Id.* at *1.

37. *Id.*

38. *Id.* (alterations in original).

39. *Id.*

40. *Id.*

41. *Akers*, 2009 WL 1767617, at *1.

42. *Id.*

Akers filed a lawsuit against Bankers Life and two other individual parties alleging, among other things, a violation of the MCPA.[43] Akers asserted that Bankers Life was liable under the MCPA for engaging in "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce"[44] for failing to inform her that Zimmerman was terminated and the reasons for that termination because Bankers Life was a company "engaged in trade or commerce in the State of Michigan . . . ."[45] However, the court of appeals pointed out that the MCPA does not apply to "any 'transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of [the State of Michigan] or the United States.'"[46] And, because the Insurance Code regulates the insurance industry within Michigan, Bankers Life was exempt from liability under the MCPA.[47]

Akers did not accept the court of appeals' position, and claimed that specific parts of the Insurance Code, most notably chapter 20,[48] were intended to limit the exemption provided in section 4 of the MCPA.[49] The court of appeals, however, did not agree with Akers' position and showed that when the two acts are read together Akers' position is incorrect. As stated above, the MCPA does not apply to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States."[50] Within the Insurance Code, chapter 20 identifies several business activities which are prohibited under the Insurance Act. Moreover, the purpose of the Insurance Code is to regulate the insurance industry and to prohibit "all such practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices[.]"[51] Thus, the court of appeals pointed out that within the "statement of its purpose, [the Insurance Code explicitly] governs the [same] conduct within the insurance industry that the MCPA seeks to govern within non-regulated industries."[52]

Still, Akers argued that, even if the MCPA does not apply to the insurance industry, her claims did not arise out of a transaction or

43. *Id.*
44. MICH. COMP. LAWS ANN. § 445.903.
45. *Akers*, 2009 WL 1767617, at *3.
46. *Id.* (quoting MICH. COMP. LAWS ANN. § 445.904(1)(a)).
47. *Akers*, 2009 WL 1767617, at *3.
48. MICH. COMP. LAWS ANN. §§ 500.2001-93.
49. MICH. COMP. LAWS ANN. § 445.904 (2010); *Akers*, 2009 WL 1767617, at *3.
50. MICH. COMP. LAWS ANN. § 445.904(1)(a).
51. MICH. COMP. LAWS ANN. § 500.2002.
52. *Akers*, 2009 WL 1767617, at *3.

conduct regulated by the Insurance Code.[53] Because of this, Akers contended that Bankers Life may not be exempt for its conduct.[54] However, as stated by the Michigan Supreme Court in *Smith v. Globe Life Insurance Co.*[55] and later in *Liss v. Lewiston-Richards, Inc.*,[56] "'the relevant inquiry is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited.'"[57] Therefore, because Bankers Life notified Akers "that Zimmerman 'no longer represent[ed]' the company,"[58] as was specifically authorized by the Insurance Code, Akers' claim that Bankers Life was liable under the MCPA was without merit.[59]

C. Agency—Apparent Authority

"[I]n its broadest sense agency 'includes every relation in which one person acts for or represents another by his authority.'"[60] An agent may have either actual or apparent authority.[61] Apparent authority arises when acts and appearances may lead a third party to reasonably believe that an agency relationship does in fact exist even though there has not been an agreement between the principal and the actor.[62] However, the apparent authority must be traceable to the principal in order to bind the principal; apparent authority cannot be created by an agent's actions or conduct.[63] But, if an agent exceeds his actual or apparent authority, this act may still bind the principal if the principal ratifies the act.[64]

In *Verizon Directories Services v. Allied Home Mortgage Capital Corp.*,[65] the Michigan Court of Appeals was asked to determine whether Allied's branch manager, Mike Anderson, had the apparent authority to

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53. *Id.*
54. *Id.*
55. 460 Mich. 446, 465 (1999).
56. 478 Mich. 203, 210 (2007).
57. *Akers*, 2009 WL 1767617, at *3.
58. *Id.* at *1.
59. *Id.* at *3.
60. St. Clair Intermediate Sch. Dist. v. Intermediate Educ. Ass'n/Mich. Educ. Ass'n, 458 Mich. 540, 557 (1998) (quoting Saums v. Parfet, 270 Mich. 165, 171 (1935)).
61. Meretta v. Peach, 195 Mich. App. 695, 698 (1992).
62. *Id.* at 698-99.
63. Smith v. Saginaw Sav. & Loan Ass'n, 94 Mich. App. 263, 271 (1979).
64. Echelon Homes, L.L.C. v. Carter Lumber Co., 261 Mich. App. 424, 432 (2003), *rev'd in part on other grounds*, 472 Mich. 192 (2005) (quoting David v. Serges, 373 Mich. 442, 443-44 (1964)).
65. Verizon Directories Servs. v. Allied Home Mort. Capital Corp., No. 284577, 2009 WL 2448162 (Mich. Ct. App. Aug. 11, 2009).

enter into agreements with Verizon.[66] In 1999, Anderson entered into several contracts with Verizon Directories to advertise Allied's services in Verizon Directories' yellow pages.[67] Allied paid Verizon Directories for these services from November 2, 1999, through January 21, 2003, after which Allied became delinquent on its payments to Verizon Directories.[68] This prompted Verizon Directories to file the lawsuit at issue against Allied for $194,958.15 for advertising services provided to Allied from December 2003 through April 2006.[69] In its defense, Allied claimed that Anderson had no authority to enter into the underlying agreements at issue and that he was strictly forbidden in his employment contract from entering into such agreements.[70] The trial court found that Allied was in fact bound by these contracts and, therefore, liable to Verizon Directories because Anderson had apparent authority to enter into these contracts on Allied's behalf.[71]

On appeal, Allied argued that Anderson did not have actual authority to enter into the underlying agreements with Verizon Directories and that the trial court's ruling that Anderson had apparent authority constituted reversible error.[72]

The court of appeals pointed out that Allied "*tendered payment on the contracts for over three years*, thereby ratifying the actions of its agent [Anderson]."[73] The court explained, that "['a principal is bound by an agent's actions within the agent's actual or apparent authority.'"[74] Moreover, apparent authority arises when acts and appearances reasonably lead a third party to believe that there is an agency relationship; however, apparent authority cannot be established only by the acts and appearances of the agent.[75]

In this case, Verizon Directories relied on more than Anderson's statements to perceive his authority. "[B]y tendering payment to [Verizon Directories, Allied] 'cloak[ed] [its] agent with apparent authority to do an act not actually authorized, the principal is bound thereby.'"[76] These payments resulted in Allied ratifying Anderson's actions, making Allied liable for Anderson's actions even though

66. *Id.* at *1.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Verizon Directories Servs.*, 2009 WL 2448162, at *1.
72. *Id.*
73. *Id.* at *3 (emphasis added).
74. *Id.* (quoting James v. Albers, 464 Mich. 12, 15 (2001)).
75. *Id.* (citing Alar v. Mercy Mem'l Hosp., 208 Mich. App. 518, 528 (1995)).
76. *Id.* (quoting Cutler v. Grinnell Bros., 325 Mich. 370, 376 (1949)).

entering into the contracts was outside of the express authority granted to Anderson by Allied. Since Allied ratified the contracts, the court of appeals found that Verizon Directories "was reasonable in its reliance on Anderson's apparent authority to enter into contracts for advertising on behalf of [Allied]."[77]

D. Warranties—Express and Implied

A warranty is a "promise that something in furtherance of the contract is guaranteed by one of the contracting parties . . . ."[78] There are two types of warranties—express and implied. An express warranty cannot be enforced unless it is created and may be created by "[a]n affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain[,]"[79] "[a] description of the goods which is made part of the basis of the bargain[,]"[80] or "[a] sample or model which is made part of the basis of the bargain[.]"[81] As such, an express warranty can only be made between a buyer and a seller and only when there has been a contract between the parties.[82] Once made, however, an express warranty will become a term of the underlying contract.[83]

On the other hand, the implied warranty of merchantability[84] and the implied warranty of fitness for a particular purpose[85] are not specific terms of a contract and, instead, arise from an operation of law.[86] Furthermore, in certain situations, a plaintiff who does not have privity of contract with a manufacturer may still enforce an implied warranty against that manufacturer.[87]

In *Heritage Resources*, the Michigan Court of Appeals had to determine whether several express and implied warranties were created in a transaction between the parties and, if they were created, whether those warranties were breached.[88]

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77. *Verizon Directories Servs.*, 2009 WL 2448162, at *3.

78. BLACK'S LAW DICTIONARY 1725 (9th ed. 2009).

79. MICH. COMP. LAWS ANN. § 440.2313(1)(a).

80. MICH. COMP. LAWS ANN. § 440.2313(1)(b).

81. MICH. COMP. LAWS ANN. § 440.2313(1)(c).

82. Heritage Res., Inc. v. Caterpillar Fin. Servs. Corp., 284 Mich. App. 617, 637 (2009).

83. *Id.* at 634.

84. MICH. COMP. LAWS ANN. § 440.2314.

85. MICH. COMP. LAWS ANN. § 440.2315.

86. MICH. COMP. LAWS ANN. § 440.2314; MICH. COMP. LAWS ANN. § 440.2315.

87. Piercefield v. Remington Arms Co., 375 Mich. 85, 97-98 (1965); Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 126-35 (1958).

88. *Heritage Res.*, 284 Mich. App. at 632-33.

Heritage Resources was owned by two brothers, Kirk and Kim Velting, and was in the business of heavy aggregate mining.[89] Heritage Resources entered into discussions with Paul McCourt, a representative of Michigan Tractor & Machine Co. (MCAT), about possibly purchasing a rock classification machine.[90] McCourt and Kirk Velting traveled to Kansas to examine a rock classification machine that was manufactured by Gencor.[91] Kirk Velting believed that the rock classification machine he looked at in Kansas would be suitable for Heritage Resources' operations as long as Gencor built the machine to certain specifications.[92] McCourt was not sure if Gencor could build a rock classification machine to these certain specifications and arranged a meeting with himself, Kirk Velting, and Michael Dunne, a Gencor sales representative in December 2000.[93]

Kirk Velting claimed that Dunne "represented that Gencor could fully satisfy [Heritage Resources'] requirements by manufacturing a machine that [met] all the desired specifications at this meeting."[94] Dunne showed Kirk Velting a Gencor rock classification machine brochure which "described [the machines] as 'portable,' 'heavy duty,' 'low maintenance,' able to produce 'from 100 to 1000 tons per hour,' able to be loaded from the rear by dump trucks, and able to function automatically without a human operator."[95] At trial, Kirk Velting testified that Dunne guaranteed that the machine would be able to work at and sustain a certain rate of production.[96] Finally, the men also discussed when the machine could be delivered and whether it could be delivered to Heritage Resources in time for the 2001 spring season.[97] But, importantly, no written agreement of any sort was produced at this meeting, they did not discuss pricing, and Kirk Velting did not agree to buy anything from or pay anything to MCAT or Gencor.[98] Moreover, the trial court stated that "'no contract was finalized or entered into' at the . . . meeting[.]"[99]

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89. *Id.* at 619.

90. *Id.*

91. *Id.*

92. *Id.* at 619-20 ("[Kirk] Velting expressed that [Heritage Resources] would be interested in purchasing a Gencor rock classification machine (1) with hydraulic legs . . . , (2) with chutes or bins rather than a conveyor system, (3) with flared, hinged sides . . . , and (4) with a front 'stopper plate' . . . .").

93. *Id.* at 620.

94. *Heritage Res.*, 284 Mich. App. at 620.

95. *Id.* at 620-21.

96. *Id.* at 621.

97. *Id.*

98. *Id.* at 620.

99. *Id.* at 621.

On January 5, 2001, Heritage Resources received a quote from MCAT for the rock classification machine.[100] However, this quotation did not contain certain things that Kirk Velting had stated were promised to him by Dunne at the December 2000 meeting. But, even though the quote "expressly stated that it excluded '[a]ny item not definitely specified[,]'"[101] no one acting on behalf of Heritage resources questioned the quote or asked that it be changed to include those things that were deemed to be important.[102]

Despite these discrepancies, Heritage Resources and MCAT still entered into a "Sales and Security Agreement" on January 15, 2001.[103] In this agreement there was a space provided for either party to list any warranties to be made by MCAT; however, this space was left blank.[104]

In March of 2001, Heritage Resources received "as built" drawings of the Gencor machine it had purchased and realized it had been built with a curved back rather than the flat back Kirk Velting wanted.[105] Again, no one acting on behalf of Heritage Resources raised any issue about the non-conformity to MCAT or Gencor and no effort was made to cancel the order.[106]

Heritage Resources and MCAT entered into another "Sales and Security Agreement" for the machine on March 7, 2001.[107] The arrangement also provided a space for the parties to specify different warranties they wanted MCAT to make.[108] In this agreement, "Std. Man. Warranty" was hand written.[109]

In July 2001, the machine was delivered to the Battle Creek customs yard, not to Heritage Resources as agreed by the parties.[110] Kirk Velting and McCourt inspected the machine at the Battle Creek customs yard and could easily see that the machine had a sloped back as depicted in the drawing and not the flat back that Kirk Velting wanted, but, without actually operating the machine, they were not able to determine if the machine was consistent with what Heritage Resources had ordered.[111] However, McCourt told Kirk Velting to "'take it or leave it, as is,'

100. *Heritage Res.*, 284 Mich. App. at 621.
101. *Id.* at 622 (first alteration in original).
102. *Id.*
103. *Id.*
104. *Id.* at 623.
105. *Id.*
106. *Heritage Res.*, 284 Mich. App. at 623.
107. *Id.* at 624.
108. *Id.*
109. *Id.*
110. *Id.* at 625.
111. *Id.* at 625-26.

because it was the last rock classification machine to be manufactured . . ."[112] McCourt also told Kirk Velting "that MCAT would be willing to 'work with [Heritage Resources]' regarding the machine" and Heritage Resources accepted the machine.[113] But, there was not a Gencor representative present and Gencor made no promises or guarantees about the machine.[114]

After transporting the machine to their site, "the Veltings realized that the machine failed to conform with their wishes in several other respects [other than the sloped back]."[115] While the machine was running, other problems arose causing frequent breakdowns, which Heritage Resources claimed caused other losses, such as lost profits and wages paid to its employees during these breakdown times.[116] To fix these problems, Heritage Resources turned to MCAT, which did perform numerous repairs.[117] However, after MCAT stopped repairing the machine, Heritage Resources continued to repair the machine at its own expense.[118] Eventually, the machine was made usable.[119] It is noteworthy that Heritage Resources never attempted to sell the machine and continued to use the machine at least through the time of the trial.[120]

Heritage Resources sued Gencor, MCAT, and CAT Financial[121] stating several claims, "including breach of contract, breach of express warranty, breach of the implied warranty of fitness for a particular purpose, and breach of the implied warranty of merchantability."[122]

Because this was a contract for a transaction in goods, the issues of the creation of a contract or warranty must be evaluated under Article 2[123] of the Uniform Commercial Code (UCC).[124] "An express warranty

112. *Heritage Res.*, 284 Mich. App. at 625-26.

113. *Id.* at 626.

114. *Id.*

115. *Id.* ("For instance, the machine did not have flared and hinged sides, it did not have chutes or bins underneath to collect the processed material, the front 'stopper plate' was not high enough to prevent rocks from being pushed underneath the machine, it had been built with the unwanted conveyor system that Kirk Velting had seen on the Gencor machine he observed in Kansas, and the hydraulic system or power source was too weak to allow the hydraulic legs to raise the machine sufficiently.").

116. *Id.* at 626.

117. *Id.* at 626-27.

118. *Heritage Res.*, 284 Mich. App. at 627.

119. *Id.* at 627.

120. *Id.*

121. *Id.* ("[It is] noted [that] MCAT and CAT Financial are not parties to this appeal. Before trial, plaintiff entered into separate settlement agreements with MCAT and CAT Financial and released all present and potential claims and causes of action against both entities in exchange for certain enumerated consideration.").

122. *Id.*

123. MICH. COMP. LAWS ANN. §§ 440.2101-.2725.

may be created only between a seller and a buyer, and any such express warranty becomes a term of the contract itself."[125] Section 2-313 of the UCC[126] limits express warranties to "statements, descriptions, representations, samples, and models that are 'made part of the basis of the bargain.'"[127] Due to this statutory language, the court of appeals "conclude[d] that where there is no contract, and therefore no 'bargain,' there can be no express warranty under [section 2-313 of the UCC[128]]."[129] Because there was no contract between the parties, Gencor was unable to make any express warranties directly to Heritage Resources, and, therefore, could not have breached any express warranties.[130]

But, Gencor *did* enter into a contract with MCAT and Gencor could have made express warranties to MCAT in that contract.[131] Specifically, in the March 7, 2001 agreement, "MCAT assigned to [Heritage Resources], 'TO THE EXTENT ASSIGNABLE, ANY WARRANTIES OF THE EQUIPMENT BY ITS MANUFACTURER, PROVIDED THAT ANY ACTION TAKEN BY BUYER BY REASON THEREOF SHALL BE AT THE EXPENSE OF BUYER.'"[132] Warranties, like other rights created by a contract, can be assigned unless that assignment is restricted in some way.[133] Therefore, the court noted, as long as those warranties were assignable, Heritage Resources could have enforced any express or implied warranties that Gencor made to MCAT.[134]

The first step in determining whether express warranties have been created is to look to the terms of the contract at issue.[135] However, Heritage Resources failed to produce the contract entered into between Gencor and MCAT, and the contract was not in the trial court's record.[136] Without this contract, the court of appeals was unable to determine whether Gencor made any express warranties to MCAT.[137] Regardless of

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124. *See* MICH. COMP. LAWS ANN. § 440.2102; MICH. COMP. LAWS ANN. § 440.2105(1).

125. *Heritage Res.*, 284 Mich. App. at 634.

126. MICH. COMP. LAWS ANN. § 440.2313.

127. *Heritage Res.*, 284 Mich. App. at 635 (quoting MICH. COMP. LAWS ANN. § 440.2313).

128. MICH. COMP. LAWS ANN. § 440.2313 (2001).

129. *Heritage Res.*, 284 Mich. App. at 635.

130. *Id.*

131. *Id.* at 635.

132. *Id.* at 635-36.

133. Burkhardt v. Bailey, 260 Mich. App. 636, 652 (2004).

134. *Heritage Res.*, 284 Mich. App. at 636.

135. *Id.*

136. *Id.*

137. *Id.*

Heritage Resources' failure to produce the contract, the court of appeals declined to rule on this issue because Heritage Resources did not pursue the issue of whether any warranties were assigned to it.[138] "In short, [Heritage Resources] failed to prove that any express warranties were actually made by Gencor in this case,"[139] and therefore Gencor could not have breached any express warranties.

Heritage Resources also claimed that the implied warranties of merchantability and fitness for a particular purpose accompanied Gencor's sale of the machine; however, the court of appeals held that any claim that these warranties were breached was barred by Heritage Resources' settlement with MCAT.[140] Based on this settlement, the court noted that it did not need to reach the ultimate issue of whether the lack of privity between Heritage Resources and Gencor barred Heritage Resources from enforcing these implied warranties against Gencor.[141]

"Although the implied warranties of merchantability and fitness for a particular purpose arise by operation of law, both . . . may be excluded or disclaimed by the seller."[142] Since Heritage Resources failed to produce the contract between Gencor and MCAT, the court of appeals was unable to determine whether these implied warranties accompanied the sale, or whether Gencor disclaimed these warranties.[143] Therefore, the court was unable to determine whether these implied warranties ran from Gencor to Heritage Resources.[144]

"Notwithstanding the presence of any implied warranties . . . , however, [the court held] that the language of the settlement agreement executed between [Heritage Resources] and MCAT was sufficiently broad to release and discharge any outstanding implied-warranty claims that [Heritage Resources] may have had against Gencor."[145] Specifically, Heritage Resources agreed in the settlement agreement between itself and MCAT to release and discharge MCAT and to also completely release and discharge "*any other person, firm, business entity or corporation charged or chargeable with responsibility which is or may be derivative from* [*MCAT*] . . . from *any and all actual or potential claims* . . . ."[146] Because Heritage Resources primarily looked to MCAT for redress in this case (Gencor was not named as an original defendant),

138. *Id.*
139. *Id.* at 638.
140. *Heritage Res.*, 284 Mich. App. at 638.
141. *Id.* at 640.
142. *Id.* (citations omitted).
143. *Id.*
144. *Id.*
145. *Id.* at 641-42.
146. *Heritage Res.*, 284 Mich. App. at 642 (alteration in original).

within the meaning of the settlement agreement, Gencor was only "charged or chargeable with responsibility which is or may be derivative from [MCAT.]"[147] Due to the extremely broad language contained in the settlement agreement, the court of appeals found that the settlement agreement released and discharged Heritage Resources' implied-warranty claims against Gencor.[148]

III. CONTRACT LAW

A. Modification of Divorce Settlement—Mutual Mistake Doctrine

In *Joyce v. Joyce*,[149] the defendant, Dennis Joyce, asked the Michigan Court of Appeals to vacate a trial court's decision to modify the divorce consent judgment between the defendant and plaintiff, Nancy Joyce.[150] The defendant believed the consent judgment was improperly modified in order to provide additional pension benefits to the plaintiff.[151]

In this case the plaintiff and defendant entered into a property settlement in conjunction with their grant of divorce.[152] The consent judgment provided for the equal division of the marital pension benefits earned by the defendant while employed at General Motors.[153] The dispute arose as a result of the consent judgment describing the benefits to be divided as "early retirement subsidies."[154] Under most pension plans, as well as the Employee Retirement Income Security Act[155] (ERISA), early retirement subsidies are defined to include both early pension subsidies as well as other pension distributions, including "early pension supplements."[156] At the time the parties entered into the consent judgment, neither Nancy Joyce nor Dennis Joyce were aware that—unique to the General Motors pension plan—subsidies and pension supplements were defined as separate and distinct benefits.[157] Therefore, finding no evidence that the parties had intended to exclude any portion

147. *Id.* at 642-43.
148. *Id.* at 643.
149. Joyce v. Joyce, No. 281175, 2009 WL 3929961, at *1 (Mich. Ct. App. Nov. 19, 2009).
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. 29 U.S.C. §§ 1001-1461 (2006).
156. *Joyce*, 2009 WL 3929961, at *1.
157. *Id.*

of the pension benefits, the trial court modified the consent judgment to include the distribution of the "early pension supplements."[158]

The defendant argued that the modification of the consent judgment was improper because there was no evidence that a mutual mistake occurred.[159] The Michigan Court of Appeals reviewed the trial court's decision on a motion for abuse of discretion pursuant to Michigan Court Rule 2.612.[160]

The Michigan Court of Appeals, citing *Gramer v. Gramer*,[161] stated that "[j]udgments, including settlement agreements, entered pursuant to the agreement of the parties are a contract and are to be construed and applied as such."[162] The court further noted that "[i]n general, a property settlement provision in a judgment of divorce is final and cannot be modified by the trial court. . . . [a]bsent fraud, duress or mutual mistake . . ."[163] The court continued to state that a mutual mistake occurs when the parties to an agreement have a common intention; however, the common intention is induced by a common error.[164]

Reviewing the record, the court found no evidence to demonstrate that use of the term "early retirement subsidies" was intended to include the early pension supplements.[165] However, the record did reflect that the parties intended an equal division of the martial pension benefits.[166] Further, it appeared from the record that "neither party understood that the early retirement subsidy referenced in the consent judgment and the early retirement supplement were separate and distinct components of the pension."[167] Therefore, the court concluded that the trial court's finding of mutual mistake was not erroneous and did not constitute an abuse of its discretion.[168]

B. Joint Annuity Contract—Vesting of Beneficiary Rights

In *Helms v. LeMieux*,[169] the Michigan Court of Appeals affirmed summary disposition in favor of the plaintiff, Christine Helms, and

158. *Id.*
159. *Id.*
160. *Id.* (citing MICH. CT. R. § 2.612).
161. 207 Mich. App. 123, 125 (1994).
162. *Joyce*, 2009 WL 3929961, at *2.
163. *Id.* (quoting Quade v. Quade, 238 Mich. App. 222, 226 (1999)).
164. *Id.* (quoting Quade v. Quade, 238 Mich. App. at 226).
165. *Joyce*, 2009 WL 3929961, at *2.
166. *Id.*
167. *Id.*
168. *Id.*
169. 286 Mich. App. 381 (2009).

defendant, Standard Life Insurance Company of Indiana (Standard Life), in a declaratory action concerning the vesting of beneficiary rights pursuant to a joint annuity contract.[170]

The dispute concerned an annuity policy issued September 17, 2002,[171] jointly to Francis and Ruth LeMieux by Standard Life Insurance Company of Indiana in the amount of $100,000.[172] The annuity application and the annuity policy were in conflict as to the description of Francis and Ruth's status under the terms of the annuity contract.[173] Both the annuity application and the annuity policy described Ruth as the "Joint Annuitant Owner" and the "Annuitant" and described Francis as the "Joint Owner."[174] Moreover, the annuity application provision describing Francis also included the phrase "if different than the annuitant" as well as "Joint Annuitant."[175]

The annuity policy designated Francis and Ruth's revocable living trust as a beneficiary.[176] In October 2002, Francis and Ruth changed the beneficiary from the trust to the plaintiff and granddaughter, Christine Helms.[177] However, the plaintiff was unaware of this change.[178]

Subsequent to Ruth's death in May 2006, Standard Life sent a letter to Francis that identified Francis as the beneficiary, seeking information necessary to process the claim.[179] No copy of the letter or similar notice was received by the plaintiff.[180] In response, Francis requested a lump-sum distribution of the annuity, which Standard Life declined to process without consent of the plaintiff.[181]

The plaintiff's father, defendant Robert LeMeiux, a beneficiary of the revocable living trust, sent forms to the plaintiff for her to sign in order for the annuity to continue in Francis' name, which plaintiff refused to sign.[182] The plaintiff, now aware that she was the beneficiary of the annuity, requested a lump-sum payment in her name from Standard Life in December 2006.[183]

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170. *Id.* at 383.
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Helms*, 286 Mich. App. at 383.
176. *Id.*
177. *Id.* at 383-84.
178. *Id.* at 384.
179. *Id.*
180. *Id.*
181. *Helms*, 286 Mich. App. at 384.
182. *Id.*
183. *Id.*

In January 2007, Francis died.[184] Defendant Robert LeMeiux, believing he was the sole heir of Francis's estate, argued he was entitled to the annuity.[185] Unable to reach an agreement as to who was entitled to receive the annuity, the plaintiff brought this action seeking declaratory relief against defendants, Robert LeMeiux and Standard Life.[186] Defendant, Robert LeMeiux, then cross claimed against Standard Life, alleging that it had acted negligently and had breached the annuity contract.[187]

On appeal, the defendant argued that, as "owner" and "annuitant" under the contract, Francis had full dominion and authority over the annuity.[188] Therefore, defendant claimed that the trial court erred when it ruled that Francis' rights as owner of the annuity policy were extinguished and the right to the proceeds of the annuity vested in the plaintiff upon the death of Ruth.[189]

In reaching its conclusion that the trial court did not err by granting summary disposition for the plaintiff,[190] the court of appeals had to determine the status of Francis and Ruth under the contract as a result of the conflicting language contained in the annuity application and the annuity policy.[191] The court began by stating Michigan common law conventions concerning contract interpretation.[192] Citing *Rory v. Continental Insurance Co.*[193] and *Robert A. Hansen Family Trust v. FGH Industries, L.L.C.*,[194] the court stated its goal "is to discern and enforce the parties' intent using the clear language of the contract."[195] It further stated that "[w]hen a contract's language is plain and unambiguous, its terms must be applied as written and construction of the contract is not permitted."[196]

The Court noted that the annuity contract was comprised of the annuity application, which was completed and signed by both Francis and Ruth LeMieux, as well as the annuity policy, which "explicitly state[d] that the application and 'this [annuity] policy' comprise the

184. *Id.*
185. *Id.* at 385.
186. *Id.*
187. *Helms*, 286 Mich. App. at 385.
188. *Id.* at 387.
189. *Id.* at 386-87.
190. *Id.* at 390.
191. *Id.* at 387.
192. *Id.*
193. 473 Mich. 457, 468 (2005).
194. 279 Mich. App. 468, 476 (2008).
195. *Helms*, 286 Mich. App. at 387.
196. *Id.*

entire annuity contract."[197] The Court further stated that "'[w]here one writing references another instrument for additional contract terms, the two writings should be read together.'"[198]

Reading the annuity application and the annuity policy as a single agreement, the court noted that the annuity application described Ruth as the "Joint Annuitant Owner" and Francis as the "Joint Owner."[199] Furthermore, "the provision identifying Francis also include[d] the phrase '[i]f different from [a]nnuitant[.]'"[200] However, the annuity policy identified Ruth as the "Annuitant" and Francis as the "Joint Annuitant."[201] In cases "where . . . there are 2 conflicting clauses or provisions [in an instrument], the first shall be received as controlling and the latter one rejected."[202] The court noted the holding of *Omnicom of Michigan v. Giannetti Investment Co.*,[203] which recognized "the rule of construction requiring that a contract entered into later in time will supersede, and rescind, any inconsistencies in an earlier contract[.]"[204] In contrast to *Omnicom*, the court stated that "the application standing alone does not constitute a contract and is more properly treated as a document containing additional contractual provisions, as incorporated by the policy[,]" thus finding *Omnicom* inapplicable.[205]

The court, noting that the application preceded the creation of the policy, concluded that the annuity application prevailed over the conflicting descriptions contained in the annuity policy.[206] As such, Ruth was the joint annuitant owner of the policy and Francis was joint owner pursuant to the annuity contract.[207]

The court, reading the annuity contract in the light most favorable to the defendant,[208] held that the "plaintiff's interest in the annuity proceeds vested when the annuitant, Ruth, passed away[,]"[209] and affirmed the trial courts' granting of summary disposition.[210]

197. *Id.* at 387-88.
198. *Id.* (quoting Forge v. Smith, 458 Mich. 198, 207 (1998)) (alteration in original).
199. *Id.* at 388.
200. *Id.* at 383.
201. *Helms*, 286 Mich. App. at 383.
202. *Id.* at 388.
203. 221 Mich. App. 341 (1997).
204. *Helms*, 286 Mich. App. at 388 n.3.
205. *Id.*
206. *Id.* at 388.
207. *Id.*
208. *Id.* at 389.
209. *Id.*
210. *Helms*, 286 Mich. App. at 390.

C. Standard of Review—Clear and Erroneous Error

In *Haines v. Maple Island Estates, Inc.*,[211] the Michigan Court of Appeals upheld a no cause of action order in a case which alleged claims including breach of contract and misrepresentation associated with a contract for the purchase and installation of a modular home.[212]

The plaintiffs entered into a contract with defendants "for the purchase and installation of a modular home."[213] According to the plaintiffs, defendants' sales representatives told the plaintiffs "that the kitchen cabinet doors and interior trim throughout the house would be 'solid' or 'real' wood."[214] However, this was not the case and, instead, portions of the "kitchen cabinet doors and the interior trim were made of manufactured wood."[215] In addition, the plaintiffs provided defendants with a list of problems including leaks in one corner of the basement.[216] "Defendants agreed to fix some," but not all, of the items contained on the list.[217] The plaintiffs, dissatisfied, filed this action.[218]

On appeal, the plaintiffs argued that the trial court erred in finding that (1) defendants' representatives did not deceive, mislead, or misrepresent the plaintiff, by failing to consider proffered evidence,[219] and (2) that there was no evidence of leaks in the basement.[220] The plaintiffs also argued on appeal that the inability to prove the exact costs of repair should not have prohibited their recovery of damages.[221]

The court of appeals, citing *Triple E Produce Corp. v. Mastronardi Produce Ltd.*,[222] stated that when it was asked to review a trial court's findings of fact, it reviewed those findings for "clear error."[223] "'A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made.'"[224]

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211. Haines v. Maple Island Estates, Inc., No 285849, 2009 WL 4438468 (Mich. Ct. App. Dec. 3, 2009).
212. *Id.* at *1.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Haines*, 2009 WL 4438468, at *1.
218. *Id.*
219. *Id.*
220. *Id.* at *2.
221. *Id.* at *3.
222. 209 Mich. App. 165, 171 (1995).
223. *Haines*, 2009 WL 4438468, at *1.
224. *Id.* (quoting *Triple E Produce Corp. v. Mastronardi Produce, Ltd.*, 209 Mich. App. 165, 171 (1995)).

Addressing the plaintiffs' first argument, alleging misrepresentation, the court outlined the six elements required to be proven in order to sustain a fraudulent misrepresentation cause of action:

> 1. The defendant made a material misrepresentation.
>
> 2. The representation was false.
>
> 3. When the defendant made the representation, it knew that it was false, or the defendant made the representation recklessly, without any knowledge of its truth, and as a positive assertion.
>
> 4. The defendant made the representation with the intention that it should be acted upon by the plaintiff.
>
> 5. The plaintiff acted in reliance on the representation.
>
> 6. The plaintiff suffered injury due to his reliance on the representation.[225]

The court further stated that "[f]raud must be proven by clear and convincing evidence."[226]

In applying those criteria, the court reviewed the conflicting testimony presented at trial.[227] One of the plaintiffs "testified that she inquired [as to] whether her home would contain 'real wood' and . . . defendants' sales consultant[] indicated that [her] home would contain 'real wood.'"[228] Another plaintiff testified that solid oak would be used in the home.[229] Contradictory testimony by the defendants stated that the plaintiff was never told that the home would have wooden doors or cabinets but that only portions of the cabinets would be made out of wood.[230] Additionally, important to the court was testimony that demonstrated that the defendants' sales consultant had not misrepresented the nature of the cabinet doors.[231]

The court noted that "[c]redibility determinations are left to the fact-finder."[232] The court reasoned from the conflicting testimony that a

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225. *Id* at *1-2.
226. *Id.*
227. *Id.*
228. *Id.*
229. *Haines*, 2009 WL 4438468, at *1.
230. *Id.* at *2.
231. *Id.*
232. *Id.*

reasonable fact-finder could conclude that either the sales consultant had not made a materially false representation or that she did not know or believe that the statement was false.[233] Regardless, the court found no evidence that the sales consultant made a false statement with the intention of acting upon it.[234] Accordingly, the court held that the plaintiffs failed to prove by clear and convincing evidence that defendants engaged in the use of deceit, misleading statements, or misrepresentations in entering into the contracts.[235] Therefore, the trial court's conclusion was not clearly erroneous.[236]

Concerning the plaintiffs' other arguments, the court affirmed the trial court's finding that the basement no longer leaked as a result of repairs made by defendants as the finding was based on the plaintiffs' testimony and, therefore, was not clearly erroneous.[237] The court also affirmed the trial court's finding that the plaintiffs failed to present evidence sufficient to prove their damages with reasonable certainty because the plaintiffs did not show any evidence to the trial court of the cost to repair or replace the alleged defective items.[238]

D. Awards—Penalty Interest and Attorney Fees

Auto-Owners Insurance Company v. Ferwerda Enterprises, Inc.,[239] was before the Michigan Court of Appeals on remand from the Michigan Supreme Court[240] to determine "whether the trial court properly assessed attorney fees and penalty interest against plaintiff Auto-Owners . . . ."[241]

In *Auto-Owners I*, defendant managed a Holiday Inn Express.[242] The Holiday Inn offered its guests the use of a swimming pool that was inside a building attached to the hotel.[243] The equipment used to operate the pool included pumps that propelled pool water through polyvinyl chloride (PVC) lines through a filter and then into a boiler to heat the water.[244] From the boiler, the water traveled to a device called a "Rola-

233. *Id.*
234. *Id.*
235. *Haines*, 2009 WL 4438468, at *2.
236. *Id.*
237. *Id.*
238. *Id.* at *3.
239. 287 Mich. App. 248 (2010) [hereinafter *Auto Owners II*].
240. Auto-Owners Ins. Co. v. Ferwerda Enters., 485 Mich. 905 (2009).
241. *Id.* at 18.
242. Auto Owners Ins. Co. v. Ferwerda Enters., 283 Mich. App. 243, 244 (2009) [hereinafter *Auto Owners I*].
243. *Id.* at 245.
244. *Id.*

Chem" which put chlorine and muriatic acid into the water.[245] The warmed, chemically treated water was then pushed back into the pool by the pump.[246] The boiler used to heat the pool water was the only source of heat for the entire pool building.[247]

On April 9, 2004, a section of the pool equipment's PVC line "'blew out.'"[248] A Holiday Inn maintenance man repaired the damaged section of the PVC line, but failed to properly turn off the Rola-Chem device during the repair.[249] The chlorine and muriatic acid continued to flow, forming a backup of gasses in the PVC lines.[250] When the maintenance man repaired the damaged PVC line, he turned the system back on and "a cloud of the gas traveled through the PVC lines, entered the pool area, and injured the Bronkema family[,]" who were in the pool building at that time.[251] The Bronkemas filed a personal-injury action against Holiday Inn and Rola-Chem.[252] Holiday Inn was insured by Auto-Owners Insurance Company.[253] Within the policy were two provisions that were at issue in this case—the "pollution exclusion"[254] and the "heating equipment exception."[255] The pollution exclusion "precluded coverage for bodily injury or property damage resulting from the actual or threatened release of pollutants at or from any premises owned, occupied, or controlled by [Holiday Inn]."[256] The heating equipment exception "provided that the pollution exclusion did not apply to a claim for bodily injury if such injury was "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."[257]

"Initially, Auto-Owners paid approximately $10,000 in medical expenses for the Bronkemas, but ultimately declined to defend and indemnify Holiday Inn in the suit brought by the Bronkemas."[258] Auto-

245. *Id.*
246. *Id.*
247. *Id.* at 245-46 ("[']A system that pumps pool water into a boiler to heat the water and pumps the heated water back into the pool heats the building where the pool is located.'").
248. *Auto Owners I,* 283 Mich. App. at 246.
249. *Id.*
250. *Id.*
251. *Id.*
252. *Auto-Owners II,* 287 Mich. App. at 251.
253. *Id.*
254. *Id.* at 251-52.
255. *Id.* at 252.
256. *Id.*
257. *Id.*
258. *Auto-Owners II,* 287 Mich. App. at 252.

Owners determined that the pollution exclusion quoted above precluded coverage for the injuries that the Bronkemas suffered at the hotel because the flow of the gasses created by the backup of chlorine and muriatic acid into the pool building "constituted a release of pollutants."[259]

Auto-Owners filed a declaratory action against Holiday Inn and the Bronkemas, arguing that the pollution exclusion precluded coverage for the injuries suffered by the Bronkemas.[260] "Holiday Inn filed a counterclaim, alleging breach of contract, estoppel, and waiver, and requesting attorney fees and penalty interest."[261] After competing motions for summary disposition, the trial court granted Holiday Inn's motion because it found "that the heating equipment exception applied and that Auto-Owners had a duty to defend and indemnify Holiday Inn in the underlying suit."[262] Holiday Inn asserted it was due attorney fees as a sanction because Auto-Owners misquoted the policy in a letter and that Auto-Owners' position was not supported in fact or in law.[263] The trial court found Auto-Owners' position to be arguable; however, it still "awarded attorney fees to Holiday Inn."[264] The trial court also granted the Bronkemas their attorney fees in this proceeding.[265] After a trial, the jury found in favor of the Bronkemas, awarding them $538,935.91, along with interest.[266]

After this verdict, Holiday Inn "filed another motion for summary disposition on its claims of penalty interest and breach of contract . . ."[267] The trial court agreed with Holiday Inn that Auto-Owners did breach its contract because it was obligated to—but failed to—defend or indemnify Holiday Inn.[268] The trial court also awarded penalty interest on both the judgment and the attorney fees at a rate of twelve percent under section 2006[269] of the Insurance Code.[270]

At the original appeal to the court of appeals, Auto-Owners argued that the trial court erred when it (1) determined that Auto-Owners was in fact required "to defend and indemnify Holiday Inn" because the heating

259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.* at 253.
263. *Id.*
264. *Auto-Owners II*, 287 Mich. App. at 253.
265. *Id.*
266. *Id.*
267. *Id.* at 254.
268. *Id.*
269. The Insurance Code, MICH. COMP. LAWS ANN. § 500.2006 (West 2002).
270. *Auto-Owners II*, 287 Mich. App. at 254; MICH. COMP. LAWS ANN. §§ 500.100-.8302.

equipment exception applied and did not preclude coverage; (2) awarded "attorney fees to Holiday Inn and the Bronkemas;" and (3) awarded penalty interest to both "Holiday Inn and the Bronkemas on the amounts of judgment."[271]

In the first opinion of the court of appeals, a majority of the court held that "because an ambiguity exists with respect to whether the building heating equipment endorsement encompasses the heating, filtration, and treatment system in Holiday Inn's pool room, the parties' insurance contract qualifies as ambiguous, and a fact-finder should ascertain its meaning."[272] The court further found that

> a rational person viewing the circumstances of this case . . . could reasonably conclude either that no coverage exist[ed] because the Bronkemas suffered injury from pollutants [(the chemicals used to treat the pool water)] that Holiday Inn brought onto its premises or that [Auto-Owners] owes coverage because Holiday Inn did not import onto its premises the toxic gas cloud that injured the Bronkemas. In this situation, a fact-finder must make the relevant determination regarding the scope of coverage.[273]

Finally, although the court of appeals originally did not discuss the issue of the trial court awarding Holiday Inn and the Bronkemas attorney fees, it did reverse the trial court's holding.[274]

On remand, the court of appeals was only confronted with the issue of whether "the trial court erred in assessing attorney fees and penalty interest."[275] Attorney fees are generally not recoverable unless a specific statute or court rule expressly authorizes an award of attorney fees.[276] Michigan Court Rule 2.625 provides, in pertinent part, that attorney fees *shall* be awarded "if the court finds . . . that an action or defense was frivolous . . . ."[277] Holiday Inn claimed it was entitled to attorney fees because it believed Auto-Owners filed a frivolous claim.[278] The trial court, however, awarded attorney fees even though it did not find the

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271. *Auto-Owners II*, 287 Mich. App. at 254.

272. *Auto-Owners I*, 283 Mich. App. at 253.

273. *Id.* at 255-56 (citing Klapp v. United Ins. Grp. Agency, Inc., 468 Mich. 459, 469 (2003).

274. *Id.* at 245; *Auto-Owners II*, 287 Mich. App. at 255.

275. *Auto-Owners II*, 287 Mich. App. at 255.

276. Rafferty v. Markovitz, 461 Mich. 265, 270 (1999) (citing McAvley v. Gen. Motors Corp., 457 Mich. 513, 519 (1998)).

277. MICH. CT. R. § 2.625(A)(2).

278. *Auto-Owners II*, 287 Mich. at 256.

claim to be frivolous.[279] The trial court awarded attorney fees on the basis that Auto-Owners took too long to address the heating equipment exception.[280] "Given the trial court's explicit statement that the suit was not frivolous and that there was law supporting [Auto-Owners'] position, attorney fees were not proper . . . ."[281]

The court of appeals also found that the trial court incorrectly awarded penalty interest.[282] Section 2006 of the Insurance Code provides for penalty interest and states, in pertinent part, that "[a] person must pay on a timely basis to . . . an individual or entity directly entitled to benefits under its insured's contract of insurance . . . 12% interest . . . on claims not paid on a timely basis. . . . *unless the claim is reasonably in dispute.*"[283] Holiday Inn believed it was owed penalty interest because its award stemmed from a contract claim.[284] However, this was a completely different situation than that of cases where penalty interest was awarded.[285] This is was an issue of first impression to Michigan courts.[286] The issue was "reasonably in dispute" and, therefore, not an unfair trade practice.[287] As such, the dispute was reasonably in dispute and Holiday Inn was not entitled to penalty interest on its claim.[288]

E. Covenant not to Compete—Standard of Performance

In *Little Caesar Enterprises, Inc. v. Rooyakker*,[289] the Michigan Court of Appeals was presented with several questions regarding the interpretation of a non-compete covenant and a settlement agreement.

Robert Rooyakker, one of the named defendants, and his wife both owned interests in R & K Holdings and A & T Holdings.[290] On behalf of R & K Holdings, they entered into a franchise agreement with the petitioner, Little Caesar, "to operate a Little Caesar restaurant in Grayling, [Michigan]."[291] Robert and his wife also entered into similar

279. *Id* at 257.
280. *Id.*
281. *Id.*
282. *Id.* at 258.
283. MICH. COMP. LAWS ANN. § 500.2006(1) (West 2002) (emphasis added).
284. *Auto-Owners II*, 287 Mich. App. at 258.
285. *Id.* at 259; *see, e.g.*, Griswold Props., L.L.C. v. Lexington Ins. Co., 276 Mich. App. 551 (2007).
286. *Auto-Owners II*, 287 Mich. App. at 260.
287. *Id.*
288. *Id.*
289. Little Caesar Enters. v. Rooyakker, No. 203810, 2009 WL 1940563 (Mich. Ct. App. July 7, 2009).
290. *Id.* at *1.
291. *Id.*

franchise agreements with Little Caesar on behalf of A & T Holdings "to operate Little Caesar restaurants in Gaylord, [Mich.,] and five other locations."[292] Within each of these franchise agreements was a non-compete covenant that came into effect upon the termination of the franchise agreement.[293] This non-compete covenant, in pertinent part, stated that:

> Franchisee shall not, . . . without Little Caesar's prior written consent, either directly or indirectly, for itself or through, on behalf of, or in conjunction with any person, persons, or legal entity, own, maintain, advise, operate, engage in, be employed by, make loans to, or have any interest in or relationship or association with a business which is a quick or fast service restaurant primarily engaged in the sale of pizza, pasta, sandwiches, and/or related products. The prohibitions set forth in this [non-compete clause] shall apply: . . . (ii) for a continuous uninterrupted two year period with respect to the Designated Market Area in which Franchisee's Restaurant was located.[294]

In February of 2005, Little Caesar brought suit in federal court against Mr. Rooyakker, A & T Holdings, and R & K Holdings to terminate the franchise agreements due to the Rooyakkers' use of a spice blend that was not authorized by Little Caesar.[295] This action was settled pursuant to a settlement agreement, which required that the Grayling and Gaylord restaurants "be 'de-identified' as Little Caesar restaurants . . . and that the other five restaurants be sold."[296] This settlement agreement also provided for post-termination limitations as to the operation of the restaurants.[297] In part, the settlement agreement stated:

> The Rooyakker Parties [Robert, A & T Holdings, and R & K Holdings] shall comply with all post-termination obligations of the franchise agreements. A restaurant which sells and advertises (offsite and onsite, including the menu), steaks, salads, pasties and desserts does not violate the [the non-compete covenant] of the franchise agreements if it also offers pizza, pasta and sandwiches, as long as pizza, pasta, and sandwiches are not

292. *Id.*
293. *Id.*
294. *Id.* (omission in original).
295. *Little Caesar*, 2009 WL 1940563, at *1.
296. *Id.*
297. *Id.* at *1-2.

> advertised or marketed as the primary or dominant items, and do not comprise the primary or dominant items, and as long as "pizza" is not the [sic] in the store name, logo, or service mark.[298]

Eventually, A & T Holdings sold its other five restaurants to A & R Hospitality, which was formed and owned by Matthew Rooyakker, son of Mr. and Mrs. Rooyakker.[299] These five restaurants and the restaurants in Gaylord and Grayling were then "operated under the name, 'Spicy Bob's Italian Express.'"[300]

Little Caesar filed the action at issue in this case seeking injunctive relief and monetary damages arising from alleged beaches of the non-compete covenant in the franchise agreements and the settlement agreement.[301] Specifically, this claim concerned Mr. Rooyakker's interest in the Spicy Bob's restaurants "which allegedly advertised and sold pizza, pasta, and sandwiches as predominant or dominant menu items."[302]

"A & R Hospitality moved for summary disposition . . . argu[ing] that it was not a party to the settlement agreement and[, as such,] was not bound by its terms."[303] "Little Caesar opposed summary disposition," claiming that the sale to A & R Hospitality was a sham transaction so that Mr. and Mrs. Rooyakker could avoid the obligation to sell the five restaurants under the settlement agreement.[304] However, the trial court found that this was not a sham transaction, as A & R Hospitality *acquired* the restaurants and they were not *transferred* to A & R Hospitality.[305]

Little Caesar's attorney testified at trial that during settlement negotiations Mr. Rooyakker stated that he wanted to keep the Grayling and Gaylord restaurants "to pursue a 'whole different concept' involving a sit-down restaurant . . . [and] a 'whole different menu[.]'"[306] But, Mr. Rooyakker wanted to continue selling pizza at these restaurants.[307] Because of this, the advertising restriction contained in the non-compete

298. *Id.* at *1-2 (first alteration in original).
299. *Id.*
300. *Id.*
301. *Little Caesar*, 2009 WL 1940563, at *2.
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.* at *3.
307. *Little Caesar*, 2009 WL 1940563, at *3.

covenant was modified.[308] The settlement agreement also modified the non-compete covenant to provide "that pizza, pasta, and sandwiches would not [be the] primary or dominant [menu] items."[309] Thus, the settlement agreement restricted the defendants from selling or advertising pizza, pasta, or sandwiches as primary or dominant menu items.

Mr. Rooyakker, however, continued to sell pizza at his two remaining restaurants, as well as "grinders."[310] Although he was prohibited from selling sandwiches as a predominant menu item, he "did not consider grinders to be sandwiches" under the settlement agreement "because Little Caesar did not sell grinders."[311] However, a menu from the Grayling restaurant "describ[ed] a grinder as an oven-baked sandwich."[312] As for the advertising restriction, Mr. Rooyakker believed Little Caesar would look at the entire marketing program to determine if it was in violation of the settlement agreement.[313] Moreover, the marketing program would be in compliance with the settlement agreement "if he stayed within the spirit of the agreement" by not strictly marketing pizza.[314]

The trial court found that the defendants "made a good faith effort to comply with the settlement agreement by not holding the restaurants out as 'pizza stores' and by not having pizza, pasta, and sandwiches as the 'primary or dominant' items available."[315] It based its finding on its decision that the defendants did not violate the settlement agreement by selling grinders, as grinders were not included in the limitation on the sale of sandwiches, as well as that fact that, even though pizza represented over fifty percent of the total sales at Mr. Rooyakker's two remaining restaurants, this was not done in bad faith because he could not control what customers purchased.[316] Due to these findings, the trial court ordered a judgment for no cause of action, which Little Caesar appealed in the case at issue.[317]

The court of appeals began its analysis with the trial court's inclusion of an obligation to act in good faith in the non-compete covenant.[318] The court agreed with this inclusion in stating that "[']the covenant of good

308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.*
312. *Id.*
313. *Little Caesar*, 2009 WL 1940563, at *3.
314. *Id.*
315. *Id.* at *4.
316. *Id.*
317. *Id* at *4-5.
318. *Id.* at *6.

faith and fair dealing is an implied promise contained in every contract "that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.'"[319] But, a good faith standard will only be applied to a party's performance when a contract calls for a party to exercise discretion when determining its manner of performance.[320] In those cases, the party's discretion must be exercised in good faith.[321] In this case, however, the defendants' performance did not require an exercise of discretion.[322] Specifically, the non-compete covenant explicitly prohibited the defendants from operating a "quick or fast restaurant" that was "primarily engaged in the sale of pizza, pasta, sandwiches, and/or related products."[323] After consulting a dictionary[324] for the definition of "primarily," the court stated that pizza, pasta, sandwiches, and/or other related products "could not be the chief items sold at the restaurants," which provided the defendants "an objective, not discretionary, standard of performance."[325] The settlement agreement also provided objective standards for performance by stating that the defendants did not violate the non-compete covenant if the restaurants were in the business of "'sell[ing] and advteris[ing] steaks, salads, pasties, and desserts.'"[326]

The court found that the two agreements, the non-compete covenant and the settlement agreement, must be read together as one document.[327] By doing this, the court noted that there were two limitations on the defendants' ability to offer pizza, pasta, and sandwiches at their restaurants:[328] "[T]he limitation requires that '[1] pizza, pasta, and sandwiches are not advertised or marketed as the primary or dominant items, *and* [2] do not comprise the primary or dominant items.'"[329] The

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319. *Little Caesar*, 2009 WL 1940563, at *6 (quoting Hammond v. United of Oakland, Inc., 193 Mich. App. 146, 152 (1992)).

320. *Id.* (citing Burkhardt v. City Nat'l Bank of Detroit, 57 Mich. App. 649, 652 (1975)).

321. *Id.*

322. *Id.*

323. *Id.*

324. Mich. Millers Mut. Ins. Co. v. Bronson Plating Co., 445 Mich. 558, 568 (1994) (stating that courts may rely on dictionary definitions to find the meaning of terms used in a contract), *overruled on other grounds* by Wilkie v. Auto-Owners Ins. Co., 469 Mich. 41 (2003).

325. *Little Caesar*, 2009 WL 1940563, at *6.

326. *Id.*

327. *Id.* at *5 n.5; *see* Forge v. Smith, 458 Mich. 198, 207 (1998) ("Where one writing references another instrument for additional contract terms, the two writings should be read together.").

328. *Little Caesar*, 2009 WL 1940563, at *6.

329. *Id.*

court found this to mean that if the restaurant was selling pizza, pasta, or sandwiches, it must objectively fail *both* requirements in order to violate the non-compete covenant.[330]

Moreover, the court also found that the trial court erred when it applied a good-faith standard to the marketing and advertising requirement.[331] Again, this requirement gave no discretion in its standard of performance and any harm that Little Caesar suffered would be the same regardless of whether it was done in good faith.[332] As such, good faith was not a defense to Little Caesar's breach of contract claim and the trial court erred in "evaluating [contract] performance under a good-faith standard."[333]

Based on its findings that the trial court improperly imposed a good-faith standard on the defendants' performance of the non-compete covenant and the settlement agreement, the court of appeals vacated the trial court's judgment of no cause of action and remanded to the trial court the separate breach of contract claims against Mr. and Mrs. Rooyakker, A & T Holdings and R & K Holdings.[334]

Little Caesar also claimed that the defendants breached the restrictive covenants when A & T Holdings sold the five restaurants to Matthew Rooyakker and A & R Hospitality because the defendants made loans to A & R Hospitality which was prohibited under the non-compete covenant.[335] The court of appeals, finding merit in this claim,[336] found that the agreement at issue between A & T Holdings and A & R Hospitality was an installment sales contract and not a loan "because it provide[d] for the sale of assets and require[d] payment in installments."[337] However, this agreement also had characteristics of a loan because it provided for interest to be paid for the temporary use of money and because it was an indirect transfer of money so that A & R Hospitality could take title to the restaurants.[338] Moreover, the fact that A & R Hospitality has to repay this amount makes the agreement a loan.[339]

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330. *Id.* ("[W]e do not agree that the failure to satisfy either requirement constitutes a violation. This interpretation would require that 'and' be treated as 'or' before the 'comprise' requirement. Because the use of the word 'and' does not render the meaning dubious, we apply it as written.").

331. *Id.* at *7.

332. *Id.*

333. *Id.*

334. *Little Caesar*, 2009 WL 1940563, at *8.

335. *Id.*

336. *Id.*

337. *Id.* at *11.

338. *Little Caesar*, 2009 WL 1940563, at *11.

339. *Id.*

Therefore, the trial court clearly erred when it found that A & T Holdings did not breach the non-compete covenant by making this loan and, as such, this claim was also remanded to the trial court.[340]

However, the court of appeals did not find that the trial court erred when it determined that A & R Hospitality was not a party to the settlement agreement because there was no evidence that either the defendants or Matthew Rooyakker did anything illegal in forming A & R Hospitality or purchasing the assets of A & T holdings.[341] As such, the separate corporate entities were respected and the requirements of the settlement agreement could not be imposed on Matthew Rooyakker or A & R Hospitality.[342]

F. Covenant not to Compete—Failure to Comply

In *Lieghio v. Loveland Investments*,[343] the Michigan Court of Appeals was presented with issues involving the alleged violation of a covenant not to compete.

In 2001, the defendant, Gerald Loveland, Jr. (Loveland), entered into a contract with the plaintiffs, the Lieghios, for the purchase of two motel properties owned and operated by Loveland, which were both located in Mackinaw City, Michigan.[344] The purchase agreement contained a

> covenant not to compete [which] provided, in pertinent part, that Loveland would not directly or indirectly own, join in as a partner, control, participate in, become an officer, agent or employee of, or hold stock in or have any financial interest in any business that would be competitive in any respect with the two motels being sold within the geographical area . . . ['a twelve (12) mile radius from the boundaries of the Village of Mackinaw City'] for a period of twenty (20) years . . . . The covenant also provided that '[a]ny breach of the foregoing covenant shall entitle [the Lieghios] to injunctive relief to prevent the same, money damages, and reasonable attorney fees and costs incidental to or required in the enforcement thereof.[345]

340. *Id.*
341. *Id.* at *12.
342. *Id.*
343. Nos. 285393 & 285394, 2009 WL 3491620 (Mich. Ct. App. Oct. 29, 2009).
344. *Id.* at *1.
345. *Id.* (alterations in original).

Finally, the covenant specifically excluded from its terms two additional motel properties owned and operated by Loveland located in the Mackinaw City area.[346]

In the spring of 2004, Loveland learned that a motel property in Mackinaw City was for sale.[347] Loveland, prohibited by the non-compete agreement with the Lieghios from purchasing the property, encouraged defendant, Gail Danielson, to do so.[348] Danielson previously worked for Loveland, managing the hotels in Mackinaw City, and had also maintained a personal relationship with Loveland.[349] Danielson acquired investors for the purchase of the motel with Loveland's assistance, who assured the investors that the purchase of the motel was a good deal.[350] In April 2004, the purchase of the motel by Danielson was completed.[351]

In May of 2004 the Lieghios brought an action against Loveland for breach of the covenant not to compete.[352] The Lieghios alleged that Loveland violated the covenant by, among other things,

> having an indirect interest in a competing business[;] exercising control over the acquisition, establishment, and operation of a competing business[;] providing financial assistance for the acquisition of a competing business[;] soliciting investors for that purchase[;] negotiating with the realtor for that purchase[;] and providing advice and other assistance or otherwise participating in a competing business. Essentially, the Lieghios alleged that Loveland's participation in soliciting the investors was influential and essential to the success of [the competing business].[353]

The trial court found that the terms of the covenant not to compete were violated by Loveland "giving Danielson advice on business matters and providing use of his expertise and reputation,"[354] as well as being the registered owner of the competing business's website.[355] The trial court disagreed with Loveland's argument that without proof of damages, a

346. *Id.*
347. *Id.*
348. *Id.*
349. *Lieghio*, 2009 WL 3491620, at *1.
350. *Id.*
351. *Id.* at *2.
352. *Id.*
353. *Id.*
354. *Id.*
355. *Lieghio*, 2009 WL 3491620, at *2.

breach of the covenant not to complete cannot be established.[356] The court awarded attorney fees and other costs to the Lieghios, ordered Loveland to relinquish his ownership of the offending internet domain, and extended the terms of the covenant not to compete for additional years.[357]

The Lieghios' complaint also alleged "intentional contractual interference against Danielson" and civil conspiracy against both Loveland and Danielson because Danielson assisted Loveland in violating the covenant not to compete.[358] The trial court granted Danielson's motion for summary disposition, "finding insufficient evidence of any wrongdoing or illegal activity on her part to support the claims against her."[359]

Loveland argued that the trial court committed clear error in finding that he breached the covenant without a showing of monetary damages by the Lieghios, which is an essential element for a breach of contract claim.[360] The court of appeals stated that Loveland was correct—damages usually are a necessary element for a breach of contract claim, and that the damages must be proven with reasonable certainty.[361] The court noted that the Michigan Supreme Court has held that "'[t]he remedy for breach of a covenant is damages *or an injunction*[.]'"[362] The court agreed with the Lieghios that an injunction is the proper remedy when damages are difficult to prove.[363] However, in this case "the parties . . . specifically agreed in the covenant not to compete . . . that the breaching party would be responsible for attorney fees . . . ."[364] Therefore, it was proper for the trial court to consider the Lieghios' attorney fees as damages.[365] The court further stated that the trial court did not abuse its discretion in reopening the proofs to receive evidence as to the reasonableness of the attorney fees,[366] and agreed with the trial court that holding an evidentiary hearing as to the reasonableness of the attorney fees did not prejudice Loveland.[367]

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356. *Id.* at *3.
357. *Id.*
358. *Id.* at *2.
359. *Id.*
360. *Id.* at *3.
361. *Lieghio*, 2009 WL 3491620, at *3.
362. *Id.* (alterations in original) (quoting Cramer v. Metro. Sav. & Loan Ass'n, 401 Mich. 252, 261 (1977)).
363. *Id.*
364. *Id.*
365. *Id.*
366. *Id.* at *4.
367. *Lieghio*, 2009 WL 3491620, at *3.

The court also agreed with the trial court's findings that Loveland had violated the covenant not to compete when he assisted Danielson in the acquisition of a motel that was in competition with the two motels purchased by the Lieghios from Loveland.[368] The court also noted that the record reflected that Loveland violated the covenant by, among other activities, making telephone calls to solicit investors,[369] representing to investors that the motel was a good deal,[370] and owning the internet domain name of the acquired motel.[371]

Loveland also argued on appeal that the trial court erred by failing to find that the covenant not to compete was void as against public policy, as an illegal restraint of trade.[372] The court, quoting *Stoia v. Miskinis*,[373] stated that:

> [a]ny bargain or contract which purports to limit in any way the right of either party to work or to do business, whether as to the character of the work or business, its place, the manner in which it shall be done, or the price which shall be demanded for it, may be called a bargain or contract in restraint of trade.[374]

The court noted, however, that within Michigan law there is an exception when it involves the sale of a business.[375]

Here, the court stated that "the parties' agreement is similar to those upheld in a long line of cases . . . that have sanctioned covenants not to compete where they are merely a *reasonable restraint* on a seller's competitive efforts in order to promote the buyer's realization of goodwill in the purchased business."[376] As such, the court held that the covenant not to compete in this case was not unreasonable and that the trial court did not err in concluding the covenant was valid and enforceable.[377]

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368. *Id.* at *7.
369. *Id.*
370. *Id.*
371. *Id.* at *8.
372. *Id.* at *4.
373. 298 Mich. 105 (1941).
374. *Lieghio*, 2009 WL 3491620, at *4 (quoting *Stoia*, 298 Mich. at 117-18).
375. *Id.* (citing Brillhart v. Danneffel, 36 Mich. App. 359, 363-64 (1971)).
376. *Id.* at *5 (emphasis added).
377. *Id.*

IV. CONCLUSION

Although the Michigan courts did not drastically change or alter the state's commercial or contract law during the *Survey* period, they did clarify several issues within both areas of law. In regards to commercial law, the Michigan courts dealt with issues involving the theory of account stated, the Insurance Code, the Michigan Consumer Protection Act, agency law, as well as express and implied warranties. Within contract law, the Michigan courts were presented with issues involving the mutual mistake doctrine, the vesting of beneficiary rights under a joint annuity contract, the clear and erroneous standard, awards for damages, and several issues regarding non-compete covenants.