COMMERCIAL TRANSACTIONS AND CONTRACT LAW

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Table of Contents

I. INTRODUCTION

The following addresses recent developments in contract and commercial law in the state of Michigan for the 2007-2008 *Survey* period, May 23, 2007 to July 30, 2008. The purpose of this article is to do a survey of the law for Michigan practitioners; however, this article does not address every change in commercial and contract law during this time period. Part II discusses significant developments in the area of commercial law and Part III addresses the significant developments in the area of contract law.

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II. COMMERCIAL LAW

A. Michigan Consumer Protection Act (MCPA)

The Michigan Consumer Protection Act (MCPA) prohibits "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce."[1] The MCPA does, however, have an exemption under Section 4(1)(a), which states that any "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."[2] Recently, the Michigan Supreme Court had to determine the scope of this exemption under the MCPA.[3] Specifically, the Court had to decide whether residential home builders fit within the scope of the exemption.[4]

1. Scope of the MCPA Exemption

The scope of the MCPA exemption was first addressed in *Attorney General v. Diamond Mortgage Company*.[5] In this case, the Attorney General claimed, *inter alia*, that the defendant's mortgage writing activities violated the MCPA.[6] The defendant asserted that because he was a licensed real estate broker, he was exempted from the MCPA under Section 4(1)(a).[7] However, the Court disagreed with the defendant.[8] The Court stated that while the defendant was authorized to conduct activities as a real estate broker, his license did not specifically authorize him to engage in all of the conduct and transactions involving mortgage writing and therefore he was not exempt from the consumer protections afforded by the MCPA.[9]

The Court again considered the issue of the scope of the MCPA exemption in *Smith v. Globe Life Insurance Company*.[10] The plaintiff alleged that the defendant, an insurance company, was in violation of the

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1. MICH. COMP. LAWS ANN. § 445.903(1) (West 2005).
2. MICH. COMP. LAWS ANN. § 445.904(1)(a) (West 2005).
3. Liss v. Lewiston-Richards, Inc., 478 Mich. 203, 205, 732 N.W.2d 514, 516 (2007).
4. *Id.*
5. 414 Mich. 603, 327 N.W.2d 805 (1982).
6. *Id.* at 607, 327 N.W.2d at 807.
7. *Id.* at 608, 327 N.W.2d at 807.
8. *Id.* at 606, 327 N.W.2d at 806.
9. *Id.* at 617, 327 N.W.2d at 811.
10. 460 Mich. 446, 597 N.W.2d 28 (1999).

MCPA.[11] The Court held that "*Diamond Mortgage* instructs that the focus is on whether the transaction at issue, not the alleged misconduct, is 'specifically authorized.'"[12] When the Court analyzed the specific transaction at issue, it determined that the sale of credit life insurance is a transaction specifically authorized and therefore the defendant was exempt from the MCPA.[13]

What emerges from both these cases is a test that can be used to determine whether or not a party qualifies for the MCPA exemption. In determining whether or not an activity is exempt under the MCPA, the question "is whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited."[14] The Court of Appeals has applied this test before in other regulated areas, such as in banking and gambling.[15] In both of these regulated areas, the Court of Appeals found that the general transaction complained of was specifically authorized by law—the Michigan Savings Bank Act[16] and Michigan Gaming Control Board.[17]

2. MCPA Exemption Applied to Residential Home Builders

The *Smith* test[18] was recently reexamined by the Court in *Liss v. Lewiston-Richards, Inc.*, in order to determine whether or not residential home building was an activity that qualified under the MCPA exemption.[19] In *Liss*, the plaintiffs and the defendants had made a contract for the completion and sale of the Liss' residential home.[20] After the defendants failed to complete the construction on time or "in a workman-like manner," the plaintiffs filed an action for breach of

11. *Id.* at 451, 597 N.W.2d at 31.
12. *Id.* at 464, 597 N.W.2d at 37.
13. *Id.* at 465, 597 N.W.2d at 38.
14. *Id.* at 465, 597 N.W.2d at 28.
15. *Liss*, 478 Mich. at 210, 732 N.W.2d at 518; *see* Newton v. Bank West, 262 Mich. App. 434, 439, 686 N.W.2d 491, 494 (2004) (holding that defendant federal saving's bank residential mortgage loan transactions fit within an exception to the MCPA because of the applicability of the Michigan Savings Banking Act); Kraft v. Detroit Entertainment, LLC, 261 Mich. App. 534, 541, 683 N.W.2d 200, 204 (2004) (concluding "that the general conduct involved in this case—the operation of slot machines—is regulated and . . . specifically authorized by the MGCB [Michigan Gaming Control Board].").
16. MICH. COMP. LAWS ANN. § 487.3101 (West 2005).
17. *Liss*, 478 Mich. at 210, 732 N.W.2d at 518.
18. *Smith*, 460 Mich. at 465, 597 N.W.2d at 38.
19. *Liss*, 478 Mich. at 205, 732 N.W.2d at 516.
20. *Id.* at 206, 732 N.W.2d at 516.

contract alleging the defendants had violated the MCPA.[21] The defendants counterclaimed, asserting that the MCPA did not apply to residential home building and therefore, they were exempt from the MCPA.[22]

In order for the Court to apply the *Smith* test, the Court had to define the meaning of "specifically authorized" under the MCPA.[23] In defining the meaning of "specifically authorized", the Court concluded that to qualify under the exemption, the general transaction must be "explicitly sanctioned."[24] Because the general transaction at issue is residential home building and residential homebuilders are licensed under the Michigan Occupational Code (MOC)[25] and regulated by the Residential Builders' and Maintenance and Alteration Contractors' Board, the Court held that the defendants qualified for the exemption.[26]

The Court additionally pointed out that there are a limited number of instances in which a non-licensed builder may participate in business activity related to residential building.[27] In making this point, the Court makes an effort to stress "the statutory scheme is that there are only a few *instances* where one can engage in the business of a residential home builder *without having a license.*"[28] The act of contracting to build a home is a vital part of a residential home builder's activity and it is specifically authorized by law.[29]

This case further establishes the test used in applying the MCPA exemption and the fact that residential home building is included within the scope of the exemption. Because home builders are licensed under the MOC, a transaction involving a home builder will be specifically authorized by law and therefore qualifies them for the exemption.

B. The Metropolitan Extension Telecommunication Rights-of-Way Oversight Act (METRO Act)

The purpose of the Metropolitan Extension Telecommunication Rights-of-Way Oversight Act (METRO Act) is to encourage new services or new providers in the telecommunication infrastructure in

21. *Id.* at 206-07, 732 N.W.2d at 516.
22. *Id.* at 207, 732 N.W.2d at 516.
23. *Id.* at 212-13, 732 N.W.2d at 519.
24. *Id.* at 213, 732 N.W.2d at 520.
25. MICH. COMP. LAWS ANN. § 339.101 (West 2005).
26. *Liss*, 478 Mich. at 213-15, 732 N.W.2d at 520-21.
27. *Id.* at 214, 732 N.W.2d at 521.
28. *Id.* at 215, 732 N.W.2d at 521 (emphasis in original).
29. *Id.*

Michigan.[30] There has been an increase in concern over the time frames involved with negotiating the construction of cable systems and the provision of cable systems throughout many states.[31] States have begun discussing changes to the process of "encourag[ing] the spread of video services, foster[ing] competition in the provision of such services, and provid[ing] incentives for the accelerated deployment of high-speed broadband networks."[32] Previously, the franchising of cable services was done at the local level.[33] Now several states, including Michigan, have enacted legislation that calls for statewide franchises instead of local community-by-community negotiations.[34]

The METRO Act was enacted to address the concerns over access to public rights-of-way.[35] The METRO Act states that telecommunications providers are required to pay a fee to the state's "METRO Authority" in order to get permits for the use of public rights-of way and to deploy telecommunications facilities and services.[36] The funds are then disbursed "to the municipalities as compensation for the use of the public rights-of-way."[37] Additionally, the METRO Act requires that all disputes between providers and municipalities be resolved by the state's communications regulator, the Michigan Public Service Commission (MPSC).[38]

In *In re McLeodUSA Telecommunications Services, Inc.*, the interpretation of the METRO Act was tested when a service provider tried to obtain an updated permit under the Act for the use of the township's utility poles for its fiber optic cable.[39] Initially, McLeodUSA properly obtained a permit for access to Charter Township of Commerce's public rights-of-way under the Michigan Telecommunications Act, the METRO's predecessor.[40] McLeodUSA sought to obtain a permit from the MPSC pursuant to the METRO Act which required one of two forms: a "unilateral" form, or a "bilateral"

30. MICH. COMP. LAWS ANN. § 484.3101(2)(b) (West 2005).

31. John M. Dempsey & Michael A. Holmes, *A New Era of Video Competition in Michigan*, 87-AUG MICH. B.J. 30 (2008).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*; *see also* MICH. COMP. LAWS ANN. §§ 484.3101-484.3120 (West 2005).

36. Dempsey & Holmes, *supra* note 31, at 30-31.; *see also* MICH. COMP. LAWS ANN. § 484.3104 (West 2005).

37. Dempsey & Holmes, *supra* note 31, at 30-31.

38. *Id.* at 31.

39. *In re* McLeodUSA Telecommunications Serv., Inc., 277 Mich. App. 602, 605, 751 N.W.2d 508, 511 (2008).

40. MICH. COMP. LAWS ANN § 484.2251 (West 1995); *see also In re McLeodUSA*, 277 Mich. App. at 604-05, 751 N.W.2d at 511.

form.[41] These forms were revised on December 6, 2002, after McLeodUSA had obtained the original permit.[42] The new forms included a provision that required telecommunication providers to "obtain liability insurance for sudden and accidental environmental contamination in the amount of at least $500,000."[43] Once told that it would have to provide proof of insurance, McLeodUSA requested a waiver of the insurance requirement because its "telecommunication facilities were already in place" before the change in the form requiring McLeodUSA to have insurance.[44] The township, however, insisted that McLeodUSA provide proof of insurance, before it could obtain access to the public rights-of-way.[45] McLeodUSA then proceeded to mediation on the issue which resulted in a recommendation to the MPSC to revise the forms to make the purchase of insurance contingent on the placing of "any new or adding to existing facilities underground."[46]Acting under the authority of the METRO Act, the MPSC took action to resolve the dispute between the two parties and adopted the recommendation of the mediator.[47] The township, however, challenged the MPSC's interpretation of its power and requested the court to instead adopt a different interpretation of the METRO Act.[48]

The issue of this case was the interpretation of the METRO Act and the guidelines the court needed to apply in determining the correct interpretation of the Act. The court followed the principle that "statutory language should be construed reasonably, keeping in mind the purpose of the act."[49] The court concluded that MPSC had the authority under the Metropolitan Extension Telecommunications Rights-of-Way Oversight Act to accept the petition from McLeodUSA and to adopt the decision made by the mediator.[50] The court stated that "[w]hen read as a whole, the provisions indicate a comprehensive process allowing the [M]PSC to interact with the parties to impose reasonable permit terms that reflect

41. *In re McLeodUSA*, 277 Mich. App. at 604, 751 N.W.2d at 511.

42. *Id.* at 605, 751 N.W.2d at 511.

43. *Id.*

44. *Id.* at 605, 751 N.W.2d at 511-12.

45. *Id.* at 605, 751 N.W.2d at 512.

46. *Id.* at 606, 751 N.W.2d at 512.

47. *In re McLeodUSA*, 277 Mich. App. at 606, 751 N.W.2d at 512.

48. *Id.* at 607, 751 N.W.2d at 512.

49. *Id.* at 609, 751 N.W.2d at 513 (quoting *In re McEvoy*, 267 Mich. App. 55, 60, 704 N.W.2d 78 (2005)); *see also* People v. Gubachy, 272 Mich. App. 706, 709, 728 N.W.2d 891, 893 (2006); People v. Lawrence, 246 Mich. App. 260, 265, 632 N.W.2d 156, 159-60 (2001); Gladych v. New Family Homes, Inc., 468 Mich. 594, 597, 664 N.W.2d 705 (2003).

50. *In re McLeodUSA*, 277 Mich. App. at 609, 751 N.W.2d at 514; *see also* MICH. COMP. LAWS ANN § 484.3106 (West 2002).

the practicalities of the situation."[51] The court found that the township read the statute selectively, entirely ignoring the purpose of the Act.[52]

In addition, the township argued that if interpreted that the MPSC had authority to impose reasonable permit terms, its actions would usurp the township's authority to control its public rights-of-way.[53] Under the Michigan Constitution, municipalities are granted the right to "the reasonable control of their highways, streets, alleys and public places . . ."[54] The township argued that the MPSC decision to not require McLeodUSA to obtain insurance violated its constitutional right to reasonable control.[55] The Michigan Supreme Court, however, has interpreted the constitutional provision to impose "broad, but not unlimited authority" to local governments.[56] Relying on this interpretation, the court found that its statutory interpretation was not unreasonable and did not violate the township's constitutional rights.[57]

C. Protection of Underground Facilities Act (MISS DIG Act)

The Protection of Underground Facilities (MISS DIG Act) requires excavators to give notice to utility associations before starting a construction activity that might affect underground utilities.[58] The purpose of the MISS DIG Act is "to protect the public safety by providing for notices to public utilities by persons or public agencies engaged in certain construction related activities near underground facilities or demolishing buildings containing utility facilities."[59] Recently, there have been issues involving undefined terms in the MISS DIG Act, specifically what type of activities are considered to be part of the excavation process.[60]

1. Scope of Excavation

In *SBC v. JT Crawford, Inc.*, the Court of Appeals determined that the requirements of the MISS DIG Act applied to pile-driving because

51. *In re McLeodUSA*, 277 Mich. App. at 610, 751 N.W.2d at 514.
52. *Id.*
53. *Id.* at 618-19, 751 N.W.2d at 518.
54. MICH. CONST. 1963, art. 7, § 29.
55. *In re McLeodUSA*, 277 Mich. App. at 619, 751 N.W.2d at 518.
56. Wayne Co. v. Hathcock, 471 Mich. 445, 460, 684 N.W.2d 765, 774-75 (2004).
57. *In re McLeodUSA*, 297 Mich. App. at 621, 751 N.W.2d at 520.
58. MICH. COMP. LAWS ANN. § 460.705(1) (West 2005).
59. MICH. COMP. LAWS ANN. § 460.701 (West 2005).
60. SBC v. JT Crawford Inc., No. 275334, 2007 Mich. App. LEXIS 2656, *1 (Mich. Ct. App. Nov. 27, 2007).

pile-driving was considered an excavation activity.[61] In *SBC*, the plaintiff was a utility with underground utility lines that experienced damage when the defendant began pile-driving operations.[62] The dispute focused on whether pile driving was included under the MISS DIG Act and therefore whether the Henkels (the original party contracted to do the excavation) or its subcontractor was therefore required to give notice to the utility association before the beginning the pile driving activity.[63]

The plaintiff first argued that pile-driving is an activity included under the MISS DIG Act.[64] The plaintiffs argued that because pile-driving is implicitly included under the Act, the defendants were required to request locating of utility lines before beginning excavation.[65] The defendants argued that the MISS DIG Act does not apply to pile-driving.[66] To determine if the Act applied, the court had to decide whether pile-driving was included within the definition of excavation.[67] Because the term excavation is not defined in the MISS DIG Act, the court looked to other states with statutes similar to the MISS DIG Act.[68] The court concluded under the guidance of the definitions from other states' acts, that "pile driving forcibly invades the subsurface and is frequently part and parcel of excavating."[69] Therefore, the court found pile-driving to be a construction activity included under the MISS DIG Act, requiring the defendants to give notice.[70] Additionally, the court found that the original party to the contract, Henkels, was in the best position to give notice and therefore was the party responsible for giving notice.[71]

2. Commencement of Excavation

The next issue the court addressed was when an excavation is considered to have "commenced" for purpose of the MISS DIG Act.[72] Because "commenced" is not defined under the MISS DIG Act, the court was forced to interpret the term in order to determine whether the

61. *Id.* at *4.
62. *Id.* at *1-2.
63. *Id.*
64. *Id.* at *3.
65. *Id.*
66. *SBC*, 2007 Mich. App. LEXIS at *3.
67. *Id.* at *4.
68. *Id.* at *6-7.
69. *Id.* at *7.
70. *Id.* at *9-10.
71. *Id.*
72. *SBC*, 2007 Mich. App. LEXIS at *11.

defendant's original notice had expired before commencement of the excavation.[73] The MISS DIG Act requires that notice be given no more than twenty-one days prior to the commencement of the activity.[74] The court stated that "the first step in performing the action of pile-driving occurs when a pile enters the ground."[75] Because the pile driving did not begin until twenty-two days after the notice was originally given, the court held that the notice had expired.[76]

This case helped establish two important terms not defined under the MISS DIG Act—excavation and commencement. Now, it is clear that pile-driving is an activity that is subject to the requirements of the MISS DIG Act. Additionally, notice must be given no more than twenty-one days before the pile enters the ground, the same as for any other excavation activity as provided by the statute.

D. Privity of Contract—Rescission

Privity is a legal principle that requires there to be a contractual relationship between parties in the same subject matter in order to sue.[77] Michigan has long recognized that in order for a purchaser to bring suit against a manufacturer of a defective product, privity is not required.[78]

In *Davis v. Forest River, Inc.*, the court addressed the issue of whether a purchaser of a previously owned recreation vehicle may sue the manufacturer for its defective condition.[79] The court held that the common law remedy of rescission was appropriate despite the lack of privity between the parties.[80] The court stated, "[w]e find that privity has long been categorically eliminated in Michigan as a prerequisite to purchasers' bringing suit against manufacturers, and the Legislature's adoption of the UCC did not abolish rescission except where the parties actually do have a contract with each other."[81] The court, citing previous cases discussed that the requirement of privity was a holdover from a

73. *Id.*

74. MICH. COMP. LAWS ANN. § 460.714 (West 2005).

75. *SBC*, 2007 Mich. App. LEXIS at *11-12.

76. *Id.* at *12.

77. *See* BLACKS LAW DICTIONARY (8th ed. 2004).

78. *See. e.g.*, Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958).

79. 278 Mich. App. 76, 78, 748 N.W.2d 887, 888 (2008), *rev'd on other grounds*, Davis v. Forest River, Inc., No. 136114, 2008 WL 5272813 (Mich. Dec. 19, 2008).

80. *Id.* at 83, 748 N.W.2d at 890, *rev'd, Davis*, 2008 WL 5272813 at *1 (reversing on issue of rescission).

81. *Id.*

time when goods were manufactured and sold without the use of an intermediary as occurs in modern transactions.[82]

In *Davis*, the recreation vehicle was purchased through a dealer and as a consequence did not have contractual privity with the manufacturer.[83] After requiring a number of lengthy repairs, the purchaser brought suit alleging numerous claims, including breach of contract and breach of warranty, and sought rescission as a remedy.[84] The purchaser was without a remedy under the UCC because there was no contract with the manufacturer.[85] He also was not covered under the state's "lemon law," which expressly exempts recreational vehicles from it protections.[86]

This case reaffirms that at common law contractual privity is not required for an action seeking the equitable remedy of rescission,[87] neither is such an action precluded by the Uniform Commercial Code.[88]

III. CONTRACT LAW

A. Motor Vehicle Protection (Michigan's No-Fault Act)

Michigan's No-Fault Act[89]was implemented in order to replace the old tort system used for compensation for medical and other economic loss as a result of an automobile accident.[90] The Act requires that an individual driver's insurance company be primarily responsible for paying any costs related to an automobile accident.[91] The only time that the driver's insurance company will be responsible for personal injury claims is when the individual's injuries cause "death, serious impairment of body function, or permanent serious disfigurement."[92]

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82. *Id.*

83. *Id.* at 78, 748 N.W.2d at 888.

84. *Id.*

85. *Davis*, 278 Mich. App. at 80, 748 N.W.2d at 889; *see also* MICH. COMP. LAWS ANN. § 257.1401(f) (West 2005).

86. *Davis*, 278 Mich. App. at 82, 748 N.W.2d at 890; *see also* Henderson v. Chrysler Corp., 191 Mich. App. 337, 341-43, 477 N.W.2d 505, 508 (1991) ("[T]he privity requirement precludes seeking the UCC remedy of revocation of acceptance against a distant manufacturer.").

87. *Davis*, 278 Mich. App. at 82, 748 N.W.2d at 890.

88. *Id.* at 89, 748 N.W.2d at 893.

89. MICH. COMP. LAWS ANN § 500.3101 *et seq.* (West 2005).

90. *See, e.g.*, McKendrick v. Petrucci, 71 Mich. App. 200, 211, 247 N.W.2d 349, 354 (1976); Shavers v. Attorney General, 65 Mich. App. 355, 366, 237 N.W.2d 325, 332 (1975).

91. MICH. COMP. LAWS ANN. § 500.3135(1) (West 2005).

92. *Id.*

1. Conditions on Medical Examinations

The Michigan No-Fault Act includes provisions governing conditions on medical examination of a claimant.[93] Additionally, insurers are allowed to place their own conditions on medical examinations within the insurance policy, so long as they are reasonable.[94] However, a question arises regarding whether these conditions are within the court's discretion under the discovery rule, with respect to physical and mental examinations. Essentially allowing the court to modify or impose additional conditions, Michigan Court Rule (MCR) Section 2.311(A) states:

> When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental or blood examination by a physician (or other appropriate professional) or to produce for examination the person in the party's custody or legal control. The order may be entered only on motion for good cause with notice to the person to be examined and to all parties. The order must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made, and may provide that the attorney for the person to be examined may be present at the examination.[95]

Essentially, this discovery rule could allow conditions to be within the courts' discretion as opposed to being governed by the No-Fault Act.

In *Muci v. State Farm Mutual Automobile Insurance Company*, the plaintiff was injured in an automobile accident and filed a claim with her insurance company for personal protection insurance benefits.[96] After the defendant refused to pay her benefits, the plaintiff filed suit against the defendant.[97] Sometime during the suit, the defendant "demanded an unconditional medical examination of the plaintiff."[98] The plaintiff refused to submit to an unconditional medical examination asserting that discovery rule MCR Section 2.311(A) controlled this issue, in addition to

93. MICH. COMP. LAWS ANN. § 500.3151 (West 2005).
94. *Id.*
95. MICH. CT. R. 2.311(A) (2003).
96. 478 Mich. 178, 181, 732 N.W.2d 88, 90 (2007).
97. *Id.* at 182, 732 N.W.2d at 90.
98. *Id.*

the No-Fault Act and the policy.[99] The defendant, however, asserted that MCR Section 2.311(A) is in conflict with the No-Fault Act and policy and therefore does not control.[100]

The Legislature's intent in adopting the No-Fault Act was for the Act to control; only when the Act is silent may the court rules be applied.[101] Under the No-Fault Act,[102] the insured must submit to a medical examination, but under MCR Section 2.311(A) the court has discretion over medical examinations and conditions placed on them.[103] Because the No-Fault Act specifically addresses the issue of medical examination, it will control when there is evidence of a conflict with a court rule.[104]

This case demonstrates that the court's discretion may be limited by statute or contractual agreement. Because the No-Fault Act and the policy agreement between the parties stated that a medical examination is unconditional, the court could not place conditions on the examination pursuant to MCR Section 2.311(A).

2. Compulsory Residual Liability Insurance

Residual liability insurance for the purpose of automobile accidents covers bodily injury and property damage "equivalent to that required as evidence of automobile liability insurance under the financial responsibility laws of the place in which the injury or damage occurs."[105] In cases in which Michigan law applies, the driver's insurance provider's liability is determined under the financial responsibility laws where the automobile accident occurred.[106] The insurance company is contractually liable to pay insurance benefits.[107]

In *Farm Bureau Insurance Company v. Abalos*, the defendants were involved in an automobile accident in Ohio.[108] The Castellanos defendants were Ohio residents, while the Abalos defendants were Michigan residents.[109] The Castellanos, seeking recovery for injuries,

99. *Id.*
100. *Id.*
101. *Id.* at 190-91, 732 N.W.2d at 95.
102. MICH. COMP. LAWS ANN. § 500.3151 (West 2005).
103. *Muci*, 478 Mich. at 191, 732 N.W.2d at 95.
104. *Id.* at 191, 732 N.W.2d at 96.
105. MICH. COMP. LAWS ANN. § 500.3131(1) (West 2002).
106. *See, e.g.*, Kleit v. Saad, 153 Mich. App. 52, 56, 395 N.W.2d 8, 10 (1985) ("The scope of residual liability insurance is determined by the financial responsibility laws of the place where the injury occurs.").
107. *See, e.g.*, Farm Bureau Ins. Co. v. Abalos, 277 Mich. App. 41, 44, 742 N.W.2d 624, 626 (2007).
108. *Id.* at 42, 742 N.W.2d at 625.
109. *Id.*

filed a cause of action against the Abalos' in Ohio, which went unanswered.[110] Subsequently, Farm Bureau, the Abalos' insurance company, sought a declaratory judgment against its insureds, to be relieved of liability because of the Abalos' lack of cooperation.[111]

Before the court could determine whether or not the plaintiff was liable, it had to determine which state law applied.[112] To do this, the court had to "balance the expectations of the contracting parties and the interests of Michigan and Ohio to determine which law to apply."[113] Because the plaintiff failed to establish any interest of Ohio set out in the policy, the court concluded that Michigan law applied.[114] After determining that Michigan law governed, the court looked to a Michigan Supreme Court ruling addressing this matter.[115] The Supreme Court has held that "an insured's failure to cooperate with an insurer is not a valid defense against a third party seeking residual liability insurance benefits to the extent that the residual liability insurance is compulsory."[116] Because Michigan's No-Fault Act requires that the driver's insurance company be liable for costs, it is considered compulsory.[117] The court held that the plaintiff's claim, that it was relieved of liability as a result of the Abalos lack of cooperation, was invalid; further, pursuant to the No-Fault Act, Ohio law governed the financial responsibility of the plaintiff to the Castellanos.[118]

Farm Bureau clarified the issues regarding compulsory residual liability insurance within the context of the Michigan No-Fault Act when the parties are residents of different states. This case requires a court to first determine which state law governs the accident.[119] When Michigan law governs, an insurance company may not escape its contractual obligation from a compulsory residual liability insurance plan when its insured fails to cooperate.[120] Additionally, the No-Fault Act requires that the financial responsibility laws of the state in which the accident

110. *Id.* at 42-43, 742 N.W.2d at 625.
111. *Id.* at 43, 742 N.W.2d at 625.
112. *Id.* at 44, 742 N.W.2d at 626.
113. *Farm Bureau Ins. Co.*, 277 Mich. App. at 45, 742 N.W.2d at 626; *see also* Chrysler Corp. v. Skyline Indus. Serv. Inc., 448 Mich. 113, 125, 528 N.W.2d 698 (1995).
114. *Farm Bureau Ins. Co.*, 277 Mich. App. at 46, 742 N.W.2d at 627.
115. *Id.*
116. *Id.* (citing Coburn v. Fox, 425 Mich. 300, 309, 389 N.W.2d 424, 428 (1986)).
117. *Id.*
118. *Id.*
119. *Id.* at 44, 742 N.W.2d at 626.
120. *Farm Bureau Ins. Co.*, 277 Mich. App. at 45, 742 N.W.2d at 627.

occurred govern the amount of liability the insurance company incurs, rather than the laws of the state in which the policy was issued.[121]

B. Waiver of a Condition Precedent

A condition precedent "is a fact or event that the parties intend must take place before there is a right to performance."[122] Failure of the condition will excuse the contract and there will be no cause of action for failure to uphold the contract.[123] However, if a party to the contract causes the failure of the condition, then they cannot claim that the condition precedent did not occur to avoid liability.[124]

In *Harbor Park Market, Inc. v. Gronda*, the court was faced with the interesting question of whether the defendants' actions lead to the waiver of their condition precedent in the contract.[125] The defendants originally accepted the plaintiff's offer to purchase their liquor license and fixtures.[126] This acceptance, however, was made expressly conditional on the approval of the defendants' attorney.[127] The problem occurred when the defendants submitted a secured conditional agreement to their attorney made by a third party, before the attorney had reviewed the original offer from the plaintiffs.[128] The attorney then reviewed both offers together and approved the second offer.[129] The plaintiff argued that the defendants were in breach of the contract because by submitting a second offer, they created an obstacle for the attorney to approve the plaintiff's agreement, therefore hindering the satisfaction of the condition precedent.[130] The Michigan Supreme Court has recognized that when "a contract is performable on the occurrence of a future event, there is an

121. *Id.* at 46, 742 N.W.2d at 627.

122. Mikonczyk v. Detroit Newspapers, Inc., 238 Mich. App. 347, 350, 605 N.W.2d 360 (1999) (citing Reed v. Citizens Ins. Co. of America, 198 Mich. App. 443, 447, 499 N.W.2d 22, 24 (1993)).

123. Berkel & Co., Contractors v. Christman Co., 210 Mich. App. 416, 420, 533 N.W.2d 838 (1995) (citing Lee v. Auto-Owners Ins. Co., 201 Mich. App. 39, 43, 505 N.W.2d 866, 868 (1993)).

124. Harbor Park Market, Inc. v. Gronda, 277 Mich. App. 126, 131, 743 N.W.2d 585, 588 (2007).

125. *Id.* at 128, 743 N.W.2d at 586.

126. *Id.*

127. *Id.*

128. *Id.* at 128-29, 743 N.W.2d at 587.

129. *Id.* at 129, 743 N.W.2d at 587.

130. *Harbor Park*, 277 Mich. App. at 129, 743 N.W.2d at 587.

implied agreement that the promisor will place no obstacle in the way of the happening of such event . . . ."[131]

In *Harbor Park Market,* the court addressed the issue of what constitutes prevention of the fulfillment of a condition precedent, thereby effectively waiving such condition precedent.[132] Relying on case law, the court determined that a party must take some affirmative action or refuse to take an action required under the contract, for a court to find a waiver of the condition precedent.[133] Because there was no limitation placed on the attorney's approval, set out in the contract, the court concluded that the defendants did not engage in an affirmative action, or refuse to take action, when they submitted a competing agreement.[134]

This case reiterates the interpretation upheld by previous courts that the submission of a second, competing agreement, when not precluded by the contract, will not act as a waiver of the condition precedent.[135] This interpretation is shared by other states as well.[136] New York has held that a submission of a second competing agreement does not constitute bad faith on the part of an acting party.[137] Additionally, the Ohio Court of Appeals held that an attorney has the right to reject a contract for any reason, including a competing agreement.[138] This indicates that Michigan is following the trend with this issue, as compared with other states.

C. Michigan Builders' Trust Fund Act (MBTFA)

The Michigan Builders' Trust Fund Act (MBTFA)[139] was enacted during the Depression-era to provide greater protection to subcontractors and materialmen than the current construction lien laws.[140] The purpose of the MBTFA was "to prevent contractors from juggling funds between unrelated projects, and mandated that funds for a particular project be

131. Hayes v. Beyer, 284 Mich. 60, 64-65, 278 N.W. 764, 766 (1938) (quoting 13 C.J. 648, § 722).

132. *Harbor Park*, 277 Mich. App. at 132, 743 N.W.2d at 589.

133. *Id.*; *see also* Mehling v. Evening News Ass'n, 374 Mich. 349, 352, 132 N.W.2d 25 (1965); Stanton v. Dachille, 186 Mich. App. 247, 257-258, 463 N.W.2d 479 (1990); Lee v. Desenberg, 2 Mich. App. 365, 369, 139 N.W.2d 916 (1966).

134. *Harbor Park*, 277 Mich. App. at 133-34, 743 N.W.2d at 589-90.

135. *Id.* at 134, 743 N.W.2d at 590.

136. *Id.* ("Several of our sister states have provided some insightful cases on this precise point.").

137. Ulrich v. Daly, 650 N.Y.S. 2d 496, 498 (N.Y. App. Div. 1996).

138. Stevens v. Manchester, 714 N.E.2d 956, 961 (Ohio Ct. App. 1998).

139. MICH. COMP. LAWS ANN. § 570.151 (West 2005).

140. Daniel M. Morley, *The Michigan Builders Trust Fund Act: An Overlooked Remedy?*, 73 MICH. B.J. 402, 402 (1994).

used first for the payment of subcontractors, laborers and materialmen on that project."[141] The Michigan Supreme Court has recognized civil remedies under the MBTFA, despite it being primarily a penal statute.[142] In *People v. Brown*, the court held that an officer of a corporation may be held individually liable when he is personally responsible for causing the corporation to act unlawfully.[143] Additionally, "a corporate employee or official is personally liable for all tortious or criminal acts in which he participates, regardless of whether he was acting on his own behalf or on behalf of the corporation."[144] This means that under the MBTFA a person may be held personally liable for misappropriating funds received by the corporation.[145] For a person to have a cause of action under the MBTFA, he or she must show:

> (1) that the defendant is a contractor or subcontractor engaged in the building construction industry, (2) that the defendant was paid for labor or materials provided on a construction project, (3) that the defendant retained or used those funds, or any part of those funds, (4) that the funds were retained for any purpose other than to first pay laborers, subcontractors, and materialmen, and (5) that the laborers, subcontractors and materialmen were engaged by the defendant to perform labor or furnish material for the specific construction project.[146]

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141. *Id.*; *see also* MICH. COMP. LAWS ANN. § 570.1101 (West 2005); MICH. COMP. LAWS ANN § 570.152 (West 1996) stating:

> Any contractor or subcontractor engaged in the building construction business, who, with intent to defraud, shall retain or use the proceeds or any part therefore, of any payment made to him, for any other purpose than to first pay laborers, subcontractors, and materialmen, engaged by him to perform labor or furnish material for the specific improvement, shall be guilty of felony in appropriating such funds to his own use while any amount for which he may be liable or become liable under the terms of his contract for such labor or material remains unpaid, and may be prosecuted upon the complaint of any persons so defrauded, and, upon conviction, shall be punished by a fine of not less than 100 dollars or more than 5,000 dollars and/or not less than 6 months nor more than 3 years imprisonment in a state prison at the discretion of the court.

Id.

142. B.F. Farnell Co. v. Monahan, 377 Mich. 552, 556, 141 N.W.2d 58, 60 (1966).

143. 239 Mich. App. 735, 740, 610 N.W.2d 234, 237 (2000).

144. *Id.* at 739, 610 N.W.2d at 237 (quoting Attorney General v. Ankersen, 148 Mich. App. 524, 557, 385 N.W.2d 658, 673 (1986)).

145. *Brown*, 239 Mich. App. at 740, 610 N.W.2d at 238.

146. Livonia Bldg. Materials, Co. v. Harrison Constr., Co., 276 Mich. App. 514, 519, 742 N.W.2d 140, 144 (2007) (quoting H.A. Smith Lumber & Hardware Co. v. Decina, 258 Mich. App. 419, 426, 670 N.W.2d 729, 734 (2003)).

The MBTFA was enacted to deter fraud in the construction industry and the act should be construed liberally with regard to remedies.[147]

In *Livonia Building Materials Co. v. Harrison Construction Company*, defendants were found personally liable for their corporation's debts in violation of the MBTFA.[148] Plaintiff Livonia Building Materials supplied goods to contractors for construction.[149] The defendants were officers of a corporation which was a longtime customer of the plaintiff.[150] When the defendants' corporation went out of business it had many unpaid bills, including those owed to the plaintiff.[151] The plaintiff filed suit claiming that the defendants had misappropriated funds that were held in trust for them and therefore in violation of the MBTFA.[152]

The defendants specifically argued that the plaintiff did not provide enough evidence to prove the fourth element under the MBTFA—"that the funds were retained for any purpose other than to first pay laborers, subcontractors and materialmen."[153] The issue that faced the court was whether a party could rebut the presumption of misappropriation under the MBTFA, when the breach of a construction contract was "a result of the poor economy at the time or bad business judgment."[154] The court found that this was not enough to rebut the presumption of misappropriation under the MBTFA.[155] More specifically, the lack of bad faith on the part of the defendants, who were simply trying to keep their business afloat and trying to pay their most urgent claims first, did not excuse their non-compliance with the MBTFA.[156] Regardless of the good intentions of a party, the court concluded that the MBTFA must always be followed.[157]

This case helps cement the idea that the requirements of the MBTFA must always be followed and that good faith cannot be used as an excuse for failure to adhere to its requirements. The MBTFA clearly sets out the requirements for parties involved in a construction contract and they must follow these requirements. The strict application of the requirements ensures that parties receive the necessary protection granted under the MBTFA.

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147. People v. Miller, 78 Mich. App. 336, 343, 259 N.W.2d 877 (1977).
148. *Livonia Bldg. Materials Co.*, 276 Mich. App. at 516, 742 N.W.2d at 142.
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 517, 742 N.W.2d at 143.
153. *Id.* at 519-20, 742 N.W.2d at 144.
154. *Livonia Bldg. Materials Co.*, 276 Mich. App. at 521, 742 N.W.2d at 145.
155. *Id.* at 522, 742 N.W.2d at 145.
156. *Id.*
157. *Id.*

D. Covenant Not to Compete—The First-Breach Doctrine

The State of Michigan recognizes the validity of covenants not to compete between employers and employees, provided they are reasonable:

> An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.[158]

Covenants not to compete must be found reasonable by the court in order to be valid when contractual enforceability has been challenged.[159] An otherwise valid contract, however, may not be enforceable where the First-Breach Doctrine applies.[160] The First-Breach Doctrine states that "one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach."[161] The First-Breach Doctrine does not apply where the parties have contracted and the court decides to enforce the plain language of the contract.[162]

In *Coates v. Bastian Brothers, Inc.*, the plaintiff had entered into an employment contract with his employer, the defendant.[163] The employment contract prohibited the defendant from firing the plaintiff

158. MICH. COMP. LAWS ANN. § 445.774(a)(1) (West 2002); *see also* Thermatool Corp. v. Borzym, 227 Mich. App. 366, 575 N.W.2d 334 (1998) (deciding the issue of first impression of whether a state court may extend the terms of the non-compete agreement, as a remedy for breach of such agreement).

159. *See, e.g.*, Woodward v. Cadillac Overall Supply Co., 396 Mich. 379, 389-91, 240 N.W.2d 710 (1976) (explaining that the reasonableness test is a balancing one, which "weighs (1) the interests of the party in favor of whom the restraint runs; (2) the interests of the party being restrained; and (3) the interests of the public") (citing Mitchel v. Reynolds, 1 P. Wms. 181 (Q.B. 1711)).

160. *See, e.g.*, Michaels v. Amway Corp., 206 Mich. App. 644, 650, 522 N.W.2d 703 (1994).

161. *Id.* (citing Flamm v. Scherer, 40 Mich. App. 1, 8-9, 198 N.W.2d 702 (1972)).

162. *Id.* at 650-51, 522 N.W.2d at 706-07.

163. 276 Mich. App. 498, 501, 741 N.W.2d 539, 542 (2007).

without just cause.[164] Additionally, the contract contained a non-competition clause.[165] The trial court held that the plaintiff was in breach of the contract because he violated the non-competition clause when he accepted a position with a competitor after being terminated without just cause.[166]

On appeal, the plaintiff argued that because he was fired without just cause the defendant was the first to breach the employment contract, and therefore under the First-Breach Doctrine, the defendant was barred from enforcing the non-competition clause.[167] This would have been true, however, the court held that the parties had opted out of the First-Breach Doctrine because of the language used in the contract.[168] The language used in the contract explicitly stated: "Employee will not for a period of one (1) year after termination of employment with the Company, *regardless of the reason for termination of employment*, participate . . . in any enterprise in competition with the Company."[169] The use of the language "regardless of the reason for termination of employment" allowed the employer to avoid the First-Breach Doctrine.[170] Although the employment contract stated that the plaintiff could not be terminated without just cause, the contract also stated that the covenant not to compete applied regardless of the reason for termination.[171]

This case, through implication, helped establishe the use of the First-Breach Doctrine within the context of employment contracts. In cases where the First-Breach Doctrine applies, the employment contract may not be enforceable unless the parties had previously avoided the First-Breach Doctrine in the contract. The first breach must be substantial in order for the First-Breach Doctrine to apply.

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 issues involving exemption from the Michigan Consumer Protection Act, the Protection of Underground Facilities Act, No-Fault Act, and the permissible use of the common law remedy of rescission.

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164. *Id.*
165. *Id.*
166. *Id.* at 502, 741 N.W.2d at 542.
167. *Id.* at 509, 741 N.W.2d at 546.
168. *Id.* at 510, 741 N.W.2d at 546-47.
169. *Coates*, 276 Mich. App. at 510, 741 N.W.2d at 546 (emphasis added).
170. *Id.* at 510, 741 N.W.2d at 547.
171. *Id.*