

The Journal of Insurance & Indemnity Law

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Opinions expressed herein are those of the authors or the editor and do not necessarily reflect the opinions of the section council or the membership.

From the Chair



Augustine O. Igwe,
Kaufman, Payton &
Chapa

Happy New Year! I hope everyone had a much needed rest and spent some time with families.

I'm happy to report that our Section continues to grow in importance. Sixty eight (68) new members joined our Section as of December 2018, and our total membership count is 882. I appreciate the active involvement of our Council members and those who serve in the various committees.

Annual Holiday Program

Our Annual Holiday Program is coming together very nicely and promises to be quite exciting. We are planning a joint program with the Marijuana Law Section to be held in Lansing, on January 22, 2019. More details are forthcoming. I am grateful for the hard work of Laurretta Pominville, Renee Vanderhagen, Annie Earls and Robert A. Hendricks, Chair of the Marijuana, in organizing it.

Other Programs

We are planning an Annual Spring Event (May 2019) and Annual Summer Event (date and place to be decided). Since most of our Section Members are also members of other State Bar of Michigan Sections, we will continue to seek out joint

programs of interest across the various sections. As always, we welcome and appreciate any ideas, suggestions, themes, agendas, and topics that continue to advance our Section.

Journal

Our well-regarded quarterly *Journal*, edited by Hal Carroll, now entering its 12th year, has feature articles, case updates, analyses and opinions of interest pertaining to insurance and indemnity law. We encourage all our readers to be a part of the *Journal* by submitting an article or opinion piece to our editor for publication.

Scholarship

Congratulations to Kenneth Cody, Cooley Law School, winner of the \$5,000 Insurance and Indemnity Law Section Scholarship 2018. Mr. Cody's winning essay was: *Bad Conduct and Disparate Remedies: Are Changes Needed to Michigan Laws Limiting Insurer Liability for Bad Faith?* Renee Vanderhagen, Laurretta Pominville and Jason Liss, council members, are working diligently to refine and update our scholarship program going forward.

Finally, a warm welcome to all our new members, and thank you for joining our Section. To all our new members and existing members, please plan to participate actively in our Section. ■

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Insurance Coverage Counsel



Practice Attorney Spotlight

Deborah A. Hebert

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- Over three decades as lead counsel in state and federal appeals
- Author of "Insurance Decisions" published quarterly in *Insurance & Indemnity Law Journal*
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Editor's Notes



By Hal O. Carroll
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The *Journal* – now in its twelfth year – is a forum for the exchange of information, analysis and opinions concerning insurance and indemnity law and practice from all perspectives. The *Journal* – like the Section itself – takes no position on any dispute between insurers and insureds, but we welcome all articles of analysis, opinion, or advocacy for any position.

All opinions expressed in contributions to the *Journal* are those of the author

Copies of the *Journal* are mailed to all state circuit court and appellate court judges, all federal district court judges, and the judges of the Sixth Circuit who are from Michigan. Copies are also sent to those legislators who are attorneys.

The *Journal* is published quarterly in January, April, July and October. Copy for each issue is due on the first of the preceding month (December 1, March 1, June 1 and September 1). Copy should be sent in editable format to the editor at HOC@HalOCarrollEsq.com. ■



A Look at the Little Known MCL 479.21

Thomas Lurie, Stephanie Burnstein, and Eric Conn

MCL 479.21, which is located in Michigan's Motor Carrier Act, is less well known than its older cousin, MCL 691.991. Like MCL 691.991, it applies to indemnity agreements, but in the context of the transportation industry. This article seeks to shed light on the indemnity provisions of 479.21 by comparing and contrasting them to the provisions of MCL 691.991, and how it addresses various issues.

Are We Overlooking The Implications of this Statute?

Contractual indemnification provisions are present in a variety of practice areas, so it is important for practitioners to become very well familiar with their application. In the transportation area in particular, however, we practitioners have yet to fully realize the implications of the anti-indemnity provisions of MCL 479.21, which was adopted in 2013, well after the more familiar MCL 691.991. Since most insurance practitioners are intimately familiar with MCL 691.991, which prevents indemnitees from seeking indemnification for their sole negligence in the *construction* context, it is worth exploring how that statute differs from the less-utilized MCL 479.21 which applies to certain enumerated commercial vehicle contracts. Given MCL 479.21's more recent enactment, understanding the impact it will have on indemnification agreements may prove difficult since there is little (if any) case law applying it, and a comparison to MCL 691.991 is the best path to understanding its younger cousin..

Although it was adopted more than five years ago, MCL 479.21 has no published case law discussing or applying it to a contractual provision. While an explanation for the lack of published case law may be that commercial carriers are extremely well-versed in the law and have yet to create a question for the courts to consider, this explanation is unlikely. A more likely explanation is that we as practitioners have yet to utilize this provision in our practice, leaving our clients exposed to potential and unnecessary risk transfer. In order to properly understand and counsel our clients as to MCL 479.21, it is necessary to make a comparative analysis of it and MCL 691.991. The Michigan Motor Carrier Act's purpose is to regulate and supervise commercial vehicles, and MCL 479.21, the anti-indemnity provision, provides in pertinent part:

(1) A provision, clause, covenant, or agreement contained in, collateral to, or affecting a motor carrier transportation contract that purports to indemnify, defend, or hold harmless, or has the effect of indemnifying, defending, or holding harmless, the promisee from or against any liability for loss or damage resulting from the negligence or intentional acts or omissions of the promisee is against the public policy of this state and is void and unenforceable.

In other words, any indemnity provision within a motor carrier transportation contract that could transfer any and all risk away from the at-fault party is void as against public policy.

In the transportation area in particular, however, we practitioners have yet to fully realize the implications of the anti-indemnity provisions of MCL 479.21, which was adopted in 2013, well after the more familiar MCL 691.991.

By comparison, this is the language found in MCL 691.991:

(1) In a contract for the design, construction, alteration, repair, or maintenance of a building, a structure, an appurtenance, an appliance, a highway, road, bridge, water line, sewer line, or other infrastructure, or any other improvement to real property, including moving, demolition, and excavating connected therewith, a provision purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable.

There are two key differences between MCL 479.21(1) and MCL 691.991(1).

“Sole” negligence

First, MCL 479.21(1) does not contain the word “sole” as a modifier of the word “negligence.” The word “sole” signifies a possessive meaning; the negligence or intentional act must belong to the promisee and not another party. Without the presence of the word “sole” in MCL 479.21(1), there is a real possibility of a different statutory interpretation than that applied when MCL 691.991(1) is at issue. The phrase “...loss or damage resulting from the negligence or intentional acts or omissions of the promisee...” refers only to the promisee. Despite the slightly different phrasing, MCL 479.21(1) could reasonably be interpreted to have the same meaning as 691.991 as the statute only refers to the promisee’s negligence.

In other words, the promisee is able to seek indemnification for other parties’ negligence, but not its own, or “sole,” negligence. It can also be deduced that the Legislature’s policy concerns behind each statute are the same. The State of Michigan does not want to allow parties to contract away their share of liability for their own negligent or intentional acts. However, the failure to qualify the negligence as “sole” may lead courts to disregard the case law interpreting the meaning of the word “sole” in MCL 691.991(1). Thus, MCL 479.21 is not likely to create the confusion that has arisen with the construction indemnity statute, in which a

person could receive indemnity as long as the indemnitee was not the only person at fault.¹

Broader exclusions in MCL 479.21

Second, MCL 479.21(1) is more broadly worded than its construction counterpart. In MCL 691.991(1), there must be an indemnification provision that purports to indemnify the promisee for its ‘sole negligence’ to be void as against public policy. However, in MCL 479.21(1), the indemnification provision does not have to be contained in the agreement, it can be collateral to or affecting a contract that purports to indemnify the promisee for its negligent *or* ‘intentional’ acts. Note also that MCL 479.21(1) specifically includes intentional acts, while MCL 691.991(1) only refers to negligence, bringing in a broader array of the types of claims that cannot be indemnified.

Intermodal contracts are excluded from MCL 479.21

Another important aspect for a practitioner to keep in mind is whether the contract at issue actually qualifies as a “motor carrier transportation contract.” MCL 479.21 contains certain exemptions. Subsection (2) exempts “uniform intermodal interchange and facilities access agreement administered by the intermodal association of North America or other agreements providing for the interchange, use, or possession of intermodal chassis or other intermodal equipment.”

“Intermodal” means that two or more methods of transportation are used, such as trucking and rail. Essentially, this means that if the contract does not solely concern motor carrier transportation, then the sole negligence provision does not apply to the contract. This could limit the effectiveness of the statute as many transportation companies utilize intermodal interchange strategies, especially given a globalized economy.

MCL 479.21(3) provides certain statutory definitions of terms which should not be ignored in assessing whether this statute is applicable. A “motor carrier transportation contract” means a contract, agreement, or understanding for either “the transportation of property for compensation or hire by a motor carrier” or “entrance on property by a motor carrier for the purpose of loading, unloading, or transporting property for compensation or hire.” It also qualifies if a service incidental to the aforementioned activities is part of the contract, such as the storage of property.

Definition of “promisee”

The statute also defines “promisee” as a party who is not a motor carrier, or a party to the contract who is a motor carrier but is not transporting property for compensation or hire. The definition of “promisee” includes agents, employees, servants, and even independent contractors who are directly responsible

to the promisee. The inclusion of independent contractors is an important distinction as it prevents a party from arguing that the negligent actions of an independent contractor are not those of the party. Transportation companies commonly utilize owner-operators, or semi-truck drivers who independently own and operate their tractors, to accomplish their logistical needs. However, the statute makes it clear that an operator's independent contractor status does not exempt the motor carrier from the anti-indemnification provision.

Conclusion

MCL 479.21 is largely unknown and untouched by litigators and the courts, but the more developed guidelines set forth in MCL 691.991, and by the cases interpreting it, allow us to better understand commercial vehicle contracts and protect our clients from void indemnity provisions. The statutes are similarly worded and likely share similar legislative intent; therefore, they are likely to be similarly interpreted. However, there are slight differences and unique carve-outs in MCL 479.21 to be mindful of, especially during the course of litigation. ■

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Endnotes

- 1 Editor's note: see the companion article in this issue for a discussion of this point.

“Sole Negligence” Indemnity Agreements: Deconstructing the Construction Contract Exception

By James T. Mellon and David A. Kowalski, *Mellon Pries, PC*

By statute, Michigan voids certain provisions for indemnity, where the damage arises out of the “sole negligence” of the indemnitee:

In a contract for the design, construction, alteration, repair, or maintenance of a building, a structure, an appurtenance, an appliance, a highway, road, bridge, water line, sewer line, or other infrastructure, or any other improvement to real property, including moving, demolition, and excavating connected therewith, a provision purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negli-

gence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable.¹

A further provision applies to contracts between certain design professionals and public entities, to preclude the public entity from requiring the design professional to “to defend the public entity or any other party from claims, or to assume any liability or indemnify the public entity or any other party for any amount greater than the degree of fault of the Michigan-licensed architect, professional engineer, landscape architect, or professional surveyor, or the contractor and that of his or her respective subconsultants or subcontractors.”²

The present version of this statute was enacted via Public Act 468 of 2012. Questions often arise what is meant by “sole negligence” and when the statute operates to void an indemnity agreement. Note the statute states “sole negligence,” not “own negligence.” The two terms differ. “Own negligence” refers to “situations involving concurrent negligence, where both the indemnitee and the indemnitor are negligent. The indemnitee’s ‘active’ negligence can be anywhere from one percent to 99 percent.”³ “Sole negligence,” in contrast, refers to a situation where a party is 100% liable.⁴

Questions often arise what is meant by “sole negligence” and when the statute operates to void an indemnity agreement. Note the statute states “sole negligence,” not “own negligence.”

The common law required that indemnity contracts, like all contracts, be construed to ascertain and give effect to the parties’ intent.⁵ Contracts for indemnity were also to be strictly construed against the indemnitee/drafter.⁶ Thus, where an indemnity clause provided that “The Sub-contractor agrees to indemnify and hold harmless [Contractor] from all liabilities, claims or demands for injury or damage to any person or property arising out of the performance of this contract,” the Michigan Court of Appeals concluded in 1965 that such a provision has never been successfully used to require indemnity without injury to a third party.⁷ The Court of Appeals complimented the contractor on the “ingenious argument,” but determined it could not be accepted under strict construction against the drafter.⁸ The Court of Appeals further noted the provision at issue in this construction agreement was “a commonly encountered indemnity clause.”⁹

The strict construction rule

A year later, in 1966, the Michigan Court of Appeals acknowledged that an indemnification agreement relating to one’s own negligence could be enforceable, but only if such a provision was clearly worded, and it would still be strictly construed against the indemnitee/drafter.¹⁰ Despite this acknowledgement, the Court of Appeals found the clause in question did not apply to indemnify against one’s own negligence, as it was not a “clear and unequivocal” promise to indemnify for one’s own negligence.¹¹ Thus, it would appear that anything short of an indemnity provision explicitly referencing indemnity for the acts of the indemnitee would be insufficient to shift the burden of the indemnitee’s own negligence. Some might say that the contract had to contain “magic words” to create indemnity for one’s own negligence.

1966 – MCL 696.991 is adopted

In 1966, the Legislature spoke on the issue, and enacted MCL 691.991, which would become effective March 10, 1967 through Public Act 165 of 1966. As originally enacted, the statute read:

A covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenance and appliance, including moving, demolition and excavating connected therewith, purporting to indemnify the promisee against liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable.¹²

The Michigan appellate courts first encountered the statute in a case which asked whether the statute was to be given retroactive effect.¹³ The Court of Appeals concluded that because the occurrence in question was some 33 months prior to the effective date of the statute, the statute did not control.¹⁴ Of equal import in the court’s analysis, however, was its conclusion that “since contracts agreeing to indemnify one against his own acts of negligence are not necessarily invalid, the common law was changed by the 1966 statute which declared invalid indemnity agreements entered into in connection with the construction or repair of buildings.”¹⁵ Thus, there could be no question that prior to MCL 691.991, Michigan law permitted a party to contract for indemnity for the indemnitee’s “sole negligence.”

Limited scope of the statute

The state of the common law prior to enactment of MCL 691.991 bears noting because the statute’s application is limited. As originally enacted, the statute applied only to certain construction contracts, including related services, relative to a building, structure, appurtenance and appliance. Its scope has since been broadened to contracts for construction and related services to any improvement to real property, including “a building, a structure, an appurtenance, an appliance, a highway, road, bridge, water line, sewer line, or other infrastructure.”¹⁶ The statute’s application is limited. In analyzing MCL 691.991, as enacted, the Michigan Court of Appeals noted that “*In the building and construction industry*, public policy, as expressed by MCL 691.991..., prohibits an indemnitee from recovering for his sole negligence.”¹⁷ The public policy is not universal, but only applied in the building and construction industry.

The sole negligence issue

The statute is also limited in that it prevents the shifting of liability in cases of “sole negligence.” This gave rise to a dispute as to what was meant by “sole negligence.” Did the phrase focus on damages, or on the injury, as being the result of the indemnitee’s “sole negligence”? In 1980, one panel of the Court of Appeals noted that due to comparative negligence, liability was distributed based on the fault of each party, and that therefore, because any award of damages would flow solely from the indemnitee’s negligence, an indemnity clause applying to the indemnitee’s negligence was invalid.¹⁸

As originally enacted, the statute applied only to certain construction contracts, including related services, relative to a building, structure, appurtenance and appliance. Its scope has since been broadened to contracts for construction and related services to any improvement to real property,

That is to say, because comparative negligence requires an apportionment of fault, any damages apportioned to the indemnitee as a result of the fault apportioned to it would be solely due to the indemnitee’s negligence. For example, if a party were determined to be 51% at fault, that 51% liability was solely due to the party’s negligence, so no indemnity could be had. Under this theory, MCL 691.991 operated to preclude indemnity, because a party was solely responsible for the negligence apportioned to it. In other words, this decision began to conflate “own negligence” with “sole negligence.”

Two years later, in 1982, a different panel of the Court of Appeals reached a different conclusion, when it held that an indemnity provision could operate so long as the injury was not caused by the “sole negligence” of the indemnitee.¹⁹ Under this rationale, it did not matter that comparative fault attributed certain damages specifically to the indemnitee, so long as the entire injury giving rise to the damages was not caused solely by the indemnitee. That is to say, if a party was determined to be 99% at fault, the statute did not preclude indemnity, because another party was 1% at fault. Thus, “sole negligence” considered whether the party claiming indemnity was solely liable for the entire injury. So long as someone else contributed to the injury, no matter how small, the statutory invalidation for one’s “sole negligence” did not apply.

In 1984, the United States District Court for the Eastern District of Michigan was called upon to answer the same question regarding whether “sole negligence” referred to damages

or injury, and, specifically to consider the conflict between the two previous Michigan Court of Appeals cases referenced *supra*. The court’s conclusion bears note because, much like the present rules of statutory construction, the District Court focused on the text of the statute, itself:

The *Smith* court reads the statute to preclude operation of indemnification provisions when all *recoverable damages* are attributable to the sole negligence of the indemnitee. Such a reading goes beyond the language of the statute, which speaks only of “damages arising out of bodily injury to persons ... caused by or resulting from the sole negligence of the promisee or indemnitee.” This court reads the phrase “damages arising out of bodily injury” to mean *all injuries* incurred by the plaintiff, including those attributable to his own negligence, and not merely those injuries for which the plaintiff can recover under the comparative negligence doctrine announced by *Placek [v Sterling Heights, 405 Mich 638; 275 NW2d 511 (1979)]*.

The court finds such a reading more fully in accord with the plain meaning of the statutory language, and supported by the result reached in *Paquin*[.]²⁰

However, Michigan courts are not bound to follow federal courts interpreting state law, so the matter remained the subject of conflicting decisions of the Michigan Court of Appeals.

1994 – Court of Appeals resolves “sole negligence” issue

The dueling precedents remained in place from 1982 to 1994, when the Michigan Court of Appeals took up the issue again. The Court of Appeals recognized the split of authority in *Sherman v DeMaria Bldg Co, Inc*, and held that “Under MCL 691.991; MSA 26.1146(1), the proper focus is on the whole injury sustained by the injured party rather than on the portion of damages attributable to the indemnitee.”²¹ That is to say, so long as fault is not entirely apportioned to the party seeking indemnity, the statute will not invalidate an indemnity agreement.

Because the conflict arose prior to November 1, 1990, and *DeMaria* was decided after that date, under the “first-out” rule, *DeMaria* controls the issue.²² However, from a practical perspective, the other option would have greatly expanded the operation of the statute. In effect, under the rationale rejected, construction contracts could never have indemnity provision because, after the apportionment of fault, the party would be solely responsible for the fault apportioned to it. If this was what the Legislature had intended, it could have spoken in

much simpler terms than carving out an exception for “sole negligence.” Namely, it could have just declared all indemnity provisions in the listed construction contracts to be void.

The continuing common law rule

Outside the specific situations addressed by MCL 691.991, the courts continued to look to the common law, and apply the requirement that the intent to indemnify for one’s own negligence must be “expressed in clear and unequivocal terms.”²³ The common law, however, is not static, but, rather fluid and evolving. In the past, Michigan courts used to employ different types of analysis and construction, depending on the type of contract at issue.²⁴ Later panels of the Court of Appeals would recognize that prior cases imposed an “additional rule of construction,” in requiring clear and unequivocal language to indemnify for one’s own negligence.²⁵ Owing to the need to give effect to the intention of the parties, the Court of Appeals held that “although an indemnity provision does not expressly state that the indemnitee will be shielded from its own negligence, such language is not mandatory to provide such indemnification.”²⁶ However, in recent years, the trend has been toward normalizing construction and analysis across all types of contracts. That is, regardless of the type of contract, it will be analyzed according to the same principles applied to any other contract. Indemnity contracts are no exception.

Michigan courts have discarded the additional rule of construction that indemnity contracts will not be construed to provide indemnification for the indemnitee’s own negligence unless such an intent is expressed clearly and unequivocally in the contract. ... Instead, broad indemnity language may be interpreted to protect the indemnitee against its own negligence if this intent can be ascertained from “*other language in the contract, surrounding circumstances, or from the purpose sought to be accomplished by the parties.*”²⁷

In other words, the contract no longer need provide, “Indemnitor agreed to indemnify indemnitee for indemnitee’s own acts of negligence,” or similar phrasing. As with all contracts, the intent of the parties will be determinative as to whether indemnification for one’s own negligence is created, and express, unequivocal language is no longer required. However, even with the shift in the common law, the drafter must still be cognizant that the Court of Appeals still “recognize[s] that indemnity contracts are construed strictly against the party who drafts them and against the indemnitee.”²⁸

Conclusion

In short, MCL 691.991 declares public policy, but only for construction contracts (and in certain cases, design professionals). The statute precludes indemnity for the indemnitee’s

“sole negligence” relative only to those contracts within its scope. To determine “sole negligence” for these contracts, one must look to the causes of the injury, not the apportionment of damages. When dealing with an area touching upon construction, one must be mindful of MCL 691.911, and avoid indemnity provisions for sole negligence based on an injury. If looking to maximize indemnity, one could utilize phrases such as “the indemnity required by this agreement shall apply to the greatest extent permissible by law,” or “the indemnity required by this agreement shall be broadly interpreted to apply to all situations, except as expressly precluded by law.”

In all other contracts, indemnity for one’s “sole negligence” is not prohibited. Furthermore, so called “magic words” are no longer required, as the indemnity contract will be reviewed using the same principles of construction applied to other contracts, and will look to the contract as a whole to determine the parties’ intent. However, vestiges of the older common law remain, and courts continued to hold that indemnity contracts will be strictly construed against the drafter. Therefore, a prudent drafter would want to clearly and expressly provide for indemnity for the indemnitee’s “sole negligence,” even though “magic words” may no longer technically be required. ■

About the Authors

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Endnotes

- 1 MCL 691.991(1).
- 2 MCL 691.991(2).
- 3 *Peeples v City of Detroit*, 99 Mich App 285, 296 n1; 297 NW2d 839 (1980).
- 4 *Id.*
- 5 *Title Guaranty & Sur Co v Roehm*, 215 Mich 586, 592; 184 NW 414 (1921).
- 6 *In re Traub’s Estate*, 354 Mich 263, 277; 92 NW2d 480 (1958).
- 7 *Ray D. Baker Contractor, Inc v Chris Nelsen & Son, Inc*, 1 Mich App 450, 452, 453-54; 136 NW2d 771 (1965).
- 8 *Id.* at 454.
- 9 *Id.*
- 10 *Meadows v Depco Equip Co*, 4 Mich App 370, 375-76; 144 NW2d 844(1966) (quoting *Ray D Baker Contractor, Inc*, 1 Mich App at 454).
- 11 *Id.* at 376. The clause in question stated, “It is agreed that Depco

- Equipment Company will not be responsible for equipment in case of loss by fire, or theft; loose tools and equipment left on machines; accidents or other causes beyond our control. Also we will not be responsible for any lost time or breakdown time, for any cause whatsoever.” *Id.*
- 12 *Redfern v RE Dailey & Co*, 146 Mich App 8, 13 n2; 379 NW2d 451 (1985) (quoting MCL 691.991, as then in effect).
 - 13 *Blazic v Ford Motor Co*, 15 Mich App 377, 379; 166 NW2d 636 (1968).
 - 14 *Id.* at 381.
 - 15 *Id.*
 - 16 MCL 691.991.
 - 17 *Peeples*, 99 Mich App at 295.
 - 18 *Smith v O’Harrow Const Co*, 95 Mich App 341, 344-45; 290 NW2d 141 (1980).
 - 19 *Paquin v Harnischfeger Corp*, 113 Mich App 43, 53; 317 NW2d 279 (1982).
 - 20 *Burdo v Ford Motor Co*, 588 F Supp 1319, 1322 (ED Mich 1984).
 - 21 *Sherman v DeMaria Bldg Co, Inc*, 203 Mich App 593, 601; 513 NW2d 187 (1994)
 - 22 MCR 7.215(J)(1).
 - 23 *Peeples*, 99 Mich App at 296.
 - 24 *See, e.g., Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 62; 664 NW2d 776 (2003) (abolishing the rule of “reasonable expectations” in insurance contracts in favor of the standard mode of construction applicable to all contracts); *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005) (holding that insurance policies are subject to the same principles of construction as other contracts); *Bazzi v Sentinal Ins Co*, 502 Mich 390; --- NW2d --- (2018) (holding that insurers may utilize the traditional defenses available in other contract actions, and abolishing the “innocent third party rule.”).
 - 25 *Fischbach-Natkin Co v Power Process Piping, Inc*, 157 Mich App 448, 452; 403 NW2d 569 (1987).
 - 26 *Id.* at 452-53.
 - 27 *Sherman*, 203 Mich App at 596-97 (quoting *Fischbach-Natkin*, 157 Mich App at 452) (internal citation omitted).
 - 28 *Fischbach-Natkin Co*, 157 Mich App at 452.



Legislative Update: The Legislature Rests – A New Legislature Begins

By Patrick D. Crandell, *Collins, Einhorn, Farrell PC*

After a marathon month of session days, culminating in a more than 20-hour-long final day, the Legislature adjourned *sine die*. All pending legislation not sent to the Governor expired on December 31, and a new House and Senate convene in January.

But, before they left, the Legislature did approve a number of insurance-related bills:

Adopted

- **PA 429 of 2018** – HB 6431 amends the Insurance Code provisions regarding Medicare supplemental (“Medigap”) benefit plans by making a number of changes to Plans B, C, D, F and G, for people qualifying after December 31, 2019. *Introduced on 10/4/18; Passed the House (107-1) on 12/4/18; Passed the Senate (38-0) on 12/12/18; Signed by the Governor on 12/20/18 (PA 429 2018).*
- **PA 449 of 2018** – HB 6444 amends the Insurance Code to allow an insured’s agent to obtain insurance coverage through an insurer’s agent, but only when the insured’s agent is licensed as an insurance producer and where there is a specified written agreement between the agents. *Introduced on 10/4/18; Passed the House (107-1) on 12/4/18; Passed the Senate (38-0) on 12/12/18; Signed by the Governor on 12/28/18 (PA 449 2018).*
- **PA 397 of 2018** – SB 898 modifies the date when captive insurance companies must provide their annual reports and permits Michigan domestic captive insurers to use international financial reporting standards, if approved by the director of DIFS. *Reported out of the Senate Insurance Committee on 5/24/18; Passed by the Senate (32-0) on 5/30/18; Passed by the House (107-2) on 12/12/18; Signed by the Governor on 12/20/18 (PA 397 2018).*
- **PA 421 of 2018** – SB 1029 permits a domestic stock insurer to divide into multiple insurers and describes the process for the division. *Reported out of the Senate Insurance Committee on 6/7/18; Passed the Senate (35-1) on*

6/12/18; Passed the House (108-1) on 12/12/18; Signed by the Governor on 12/21/18 (PA 421 2018).

Sent to Governor for signature

- **HB 5609** – raises the value of gifts that insurers can give to customers from \$10 to \$50 per calendar year. *Reported out of the House Insurance Committee on 3/1/18; Passed the House (107-2) on 3/13/18; Passed the Senate (38-0) on 12/18/18; Sent to the Governor on 12/20/18.*
- **HB 6432** – modifies the Health Benefit Agency Act to permit only “health benefit agents” (defined as a licensed insurance agent) to sell health benefits on behalf of a health benefit corporation (previously, employees of the health benefit corporation could sell benefits under certain circumstances). *Introduced on 10/4/18; Passed the House (107-1) on 12/4/18; Passed the Senate (38-0) on 12/12/18; Sent to the Governor on 12/18/18.*
- **HB 6484** – amends the Insurance Code to create tort liability for property damage arising from a motor vehicle accident, but only when the damage exceeds the limit specified in Section 3121 (currently \$1 million) for which liability insurance required by federal statute or regulation is in effect; the exception is limited to the amount of applicable limits or \$4 million, whichever is less. *Introduced on 11/8/18; Passed the House (109-0) on 12/6/18; Passed the Senate (38-0) on 12/20/18; Sent to the Governor on 12/21/18.*
- **HB 6491** – amends the Insurance Code by adding Chapter 5(A) (Data Security), which enacts new data security requirements for licensees that handle sensitive information. *Introduced on 11/8/18; Passed the House (103-6) on 12/6/18; Passed the Senate (38-0) on 12/19/18; Sent to the Governor on 12/21/18.*
- **HB 6520** – creates a new chapter in the Insurance Code requiring all Michigan-domiciled insurers to annually write and submit a Corporate Governance Annual Disclosure – the Legislature incorporated the Corporate Governance Annual Disclosure Model Act from the National Association of Insurance Commissioners. *Introduced on 11/28/18; Passed the House (107-2) on 12/6/18; Passed the Senate (38-0) on 12/19/18; Sent to the Governor on 12/20/18.*
- **SB 985** – exempts an “automobile club contract” from the Michigan Insurance Code. *Reported out of the Senate Insurance Committee on 6/7/18; Passed the Senate (38-0) on 11/29/18; Passed the House (65-42) on 12/21/18; Sent to the Governor on 12/21/18.*
- **SB 1234** – amends the Public Health Code to permit an ambulance to transport a police dog, injured in the line of duty, to a veterinary or similar clinic, as long as no individuals required transport at that time. *Introduced on 11/28/18; Passed the Senate (36-0) on 12/6/18; Passed the House (104-0) on 12/21/18; Sent to the Governor on 12/21/18.* ■



Accord and Satisfaction and Insurance Coverage Disputes

By George Storms, Willison + Hellman, PC

Accord and satisfaction is a defense that most of us vaguely recall from our countless hours poring over outlines and practice exams in a caffeine-induced trance while studying for the bar exam. If you are anything like the author of this particular article, it had long since been forgotten – relegated to simply being one of the many vestiges of a law school contracts curriculum. It remains however, that this defense is often misunderstood, if not overlooked, when coverage disputes arise under a policy of insurance – occurring most commonly when coverage is subject to restrictions limitations, or exclusions – the applicability of which is disputed by the insured. For

example, the insured suffers a \$20,000 property loss under a homeowner’s policy which has a \$2,500 limitation for loss to property used at any time for a business purpose. The insurer issues payment for \$2,500 and the insured disputes whether this limitation applies.

For starters, an accord and satisfaction is an agreement to discharge an obligation (the accord) for some form of legal consideration (the satisfaction). At common law, accord and satisfaction requires: (1) a good faith dispute over the amount of an unliquidated claim; (2) substituted performance that is tendered and accepted; and (3) valuable consideration.¹

When accomplished by tender of a negotiable instrument, MCL 440.3311 (“Accord and satisfaction by use of instrument”) controls, not the common law.² Such is the customary method of claims settlement in the insurance context, thus the remainder of this article will focus on this statute and cases interpreting the same.

The Legislature drafted MCL 440.3311 of the Uniform Commercial Code with the intent that it would address circumstances involving insurance coverage disputes. The code section’s comments state in part:

This section deals with an informal method of dispute resolution carried out by use of a negotiable instrument. In the typical case there is a dispute concerning the amount that is wd on a claim.

* * *

Case # 2: A claim is made on an insurance policy. The insurance company alleges that it is not liable under the policy for the amount of the claim.

To invoke this statutory defense, there must be a good-faith tender of an instrument as full satisfaction of an unliquidated claim. A claim is unliquidated if the liability of the party or the amount of the claim is in dispute.³ “Good faith” is defined as “honesty in fact and the observance of reasonable commercial standards of fair dealing.”⁴

The claimant must then negotiate the instrument.⁵ The claim is discharged if the instrument, or an accompanying written communication, contains a conspicuous statement that the tender is in full satisfaction of the claim⁶ or if the claimant or claimant’s agent knew that the defendant tendered the instrument in full satisfaction of the claim.⁷ Whether a statement is sufficiently conspicuous and/or whether the claimant knows payment was for full satisfaction of the claim are questions that form the majority of the pitfalls accompanying this defense.

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The Language Must Be Conspicuous

As stated previously, MCL 440.3311(2) provides that a claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written

communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim. This subsection focuses only on the written language provided on or with an instrument; thus a court’s analysis will be similarly constrained. MCL 440.120 (j) defines “conspicuous” as “a term . . . so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it.” The definition goes on to state that conspicuous terms include any of the following:

(i) A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to surrounding text of the same or lesser size.

(ii) Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.⁸

The purpose of the requirement that the language be conspicuous is to ensure a sufficient meeting of the minds between the parties, to discharge the obligation. In *Nationwide Mut Ins Co v Quality Builders, Inc*, the Michigan Court of Appeals expounded on this definition:

The tender of a sum less than the contract price, in settlement of a disputed claim, must be accompanied with a statement, not which may be understood by the creditor as intended to be in full settlement and satisfaction of the claim, but which must be so understood by him. That is, the statement must be so clear, full and explicit that it is not susceptible of any other interpretation.⁹

Stated differently, the statement must be “so clear, unequivocal, and unambiguous that [it] fully inform[s] [the claimant] that [her] claim w[ill] be satisfied upon negotiating the check.”¹⁰ The preeminent case on this issue is that of *Hoerstman Gen Contracting, Inc v Hahn*.¹¹

The plaintiff, Hoerstman General Contracting, Inc., and defendants Juanita and Ronald Hahn entered into a contract whereby the defendants’ home was to be remodeled. Construction was delayed and the pre-determined completion deadline was going to be missed.¹² The defendants were advised of this, and they subsequently agreed to pay extra for the work to be completed on time.¹³ Once completed, the defendants did not pay the entirety of what the plaintiff claimed was due – some \$32,750.¹⁴ After exchanging settlement offers, the defendants sent a check for \$5,144.79 along with a letter stating:

If we send you a check for \$5,144.79 we will consider this account closed and will not expect discussion of

the other items. We will then expect the lein [sic] waiver to be sent. If this is not acceptable, we will have to resort to arbitration per attorney [sic].¹⁵

The plaintiff cashed the check and brought suit for the remaining balance.

The Supreme Court analyzed the content, font, and location of the language the defendants used in its evaluation of whether the language satisfied the conspicuous requirement of subsection (2). It found that the check satisfied this condition, as the defendants wrote the words *final payment* on the comment line in capital letters that were not obfuscated in any way. The court applied the same analysis to the accompanying letter, finding it too contained language sufficiently apprising the plaintiff that payment was for full satisfaction of the balance owed. The letter sent with the check also contained a conspicuous statement that the check discharges the claim. This statement was the concluding paragraph, directly above the signature line. It was not placed in a footnote or other location that plaintiff might skip over while reading. Therefore, it too was a “conspicuous” statement that the check was tendered as full satisfaction of the claim, and that the claim was discharged.¹⁶

The purpose of the requirement that the language be conspicuous is to ensure a sufficient meeting of the minds between the parties, to discharge the obligation

The Claimant Must Know Payment Was Tendered in Full Satisfaction of the Claim

Subsection (4) discharges a claim if the person against whom it is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant, or an agent of the claimant having direct responsibility with respect to the disputed obligation, knew the instrument was tendered in full satisfaction of the claim. The central focus of this section, is identical to that of common law accord and satisfaction – to have a meeting of the minds between the parties for the substituted performance.¹⁷

The inquiry here is as to the claimant’s knowledge, which presents additional obstacles that do not exist under subsection (2). This subsection conditions discharge of the obligation on whether the claimant knew the payment was for full satisfaction of the claim within a reasonable time before he or she initiates payment. Unless the facts are undisputed, what constitutes a reasonable time may almost certainly be a question of fact that could defeat an MCR 2.116(C)(10) motion.¹⁸ Practitioners should consider the distinctions between both subsections in their overall analysis of this defense.

In this particular case, State Farm buried the language in the last paragraph of the document along with other boilerplate language, which did not include any distinguishable characteristics in its font or location.

MCL 440.1202 defines “knowledge” as “actual knowledge,” which for purposes of this article, is as helpful as tautologies generally are. Nevertheless, the case of *Mossing v Demlow Products Inc* provides a perfect example of factors courts consider when analyzing this subsection.¹⁹ In *Mossing*, the defendant sent the plaintiff a check with the words “JUNE 2006 FINAL PMT” written on the comment line along with correspondence indicating that the payment was full and final.²⁰ The plaintiff’s attorney responded with written correspondence disputing fulfillment of the obligation, and that the check was cashed subject to this understanding.²¹

The court examined both the language accompanying the check, as well as the plaintiff’s contemporaneous statements in its analysis of subsection (4). It found the plaintiff fully understood the check was tendered for final payment when he responded:

My client ... received a check of \$7364.94, representing a payment for June. The memo on the check also indicated that it was a final payment. As you know, the issue of future payment is in dispute in this matter and therefore, the check is being cashed with the understanding that it is not, in fact, a final payment. . . .²²

Additionally, and arguably more important, the attempt by plaintiff’s counsel to reserve his client’s right to collect future payment was ineffective. Under the statute, the plaintiff’s rights to additional compensation were extinguished once he negotiated the instrument. The Court of Appeals ultimately affirmed summary disposition in favor of the defendant.

In both *Hoerstman* and *Mossing*, the party seeking to discharge the obligation expressed a clear intent to do so.²³ It follows that successfully asserting this defense becomes more difficult when such intent is vague.

Although these cases are beneficial to a general comprehension of this defense, the factual scenarios in the context of insurance coverage disputes are markedly different – often involving correspondence between the policyholder, adjusters, claim reps, agents, etc. Below are two cases involving coverage disputes where this defense was invoked.

Disputes Over PIP Benefits

The United States District Court of the Eastern District of Michigan applied MCL 440.3311 to a dispute over PIP benefits in *Hopkins v Isaac*.²⁴ In *Hopkins*, the plaintiff suffered injuries in a motor vehicle accident with a Freightliner insured by State Farm and sought payment of her medical expenses. State Farm issued payments to the plaintiff's medical provider, all of which were accompanied by an Explanation of Review that stated in part:

The amount of the charges submitted has been reviewed. As a result of the review, the reimbursable amount is as reflected in our check. If you or the provider do not accept this check in discharge of the submitted claim, please notify us immediately.

²⁵

Naturally, the plaintiff challenged this position, arguing that the statement was not conspicuous – as it appeared at the very bottom of the page and did not contain unequivocal language indicating that the partial payment was made in full satisfaction of the bill.

Relying on definitions from both case law and the statute,²⁶ the court examined the substantive language used and found that State Farm did not clearly and unequivocally express its intent so as to satisfy MCL 440.331 (2). Unlike both *Hoerstman* and *Mossing*, State Farm did not include any variation of *final payment* on the check itself, or in the accompanying correspondence.

It also analyzed where the language was placed within the document itself. In this particular case, State Farm buried the language in the last paragraph of the document along with other boilerplate language, which did not include any distinguishable characteristics in its font or location. This ultimately led the court to hold that it was not written in an objectively noticeable manner, contrary to the requirements of subsection (2). Accordingly, none of State Farm's partial payments toward the plaintiff's medical expenses resulted in an accord and satisfaction.

Disputes Involving Business Income and Extra Expense Coverage

The insured business in *King v Hartford Cas Ins Co*²⁷ sustained fire damage and sought coverage under its commercial policy. Hartford issued three payments for the dwelling and contents over the course of six months – totaling \$58,826.38 – the last of which was issued on July 11, 2009.²⁸ The policy provided business interruption coverage, and the parties agreed to a monthly income loss of \$9,332.52.²⁹ The point of contention: Hartford asserted the policy covered only 60

days of business income while King claimed 12 months – a \$93,325.20 difference in potential liability.³⁰

After paying \$24,207.93 towards the business interruption claim, Hartford issued a check for \$3,789.63 in November 2009 with the words *final payment* written on the stub.³¹ King did not negotiate the check, and in December 2009, Hartford issued another \$27,997.56 check to King, that did not state *final payment*, relying instead on a verbal agreement it allegedly reached with King prior to issuing payment.³² King returned the December check to Hartford, insisting on further payment. No such payment was tendered, and King filed suit.³³

Hartford attempted to argue that it was not relying on its affirmative defense of accord and satisfaction, but another common law defense.³⁴ The court refused to entertain this argument, citing *Hoerstman* in support. It proceeded to analyze the facts of the case under MCL 440.3311, noting that there was no “final payment” notation either on the check or in an accompanying letter that would satisfy the conditions of MCL 440.3311 (2).³⁵ Perhaps the most significant hurdle blocking Hartford's defense was the fact that, unlike the plaintiff in *Mossing*, King did not negotiate the check, which effectively ended the court's analysis. It bears mentioning that this opinion did not substantively address whether King's verbal settlement discussions satisfied the condition of subsection (4) of proof that the claimant, or its agent, *knew that the instrument was tendered in full satisfaction of the claim*. It is clear however, that relying solely on verbal discussions absent further conspicuous language accompanying the instrument will undoubtedly present more difficulties to successfully asserting this defense.

Conclusion

By its nature, the claims settlement process may very well result in a valid accord and satisfaction. For those representing insurers, it would be prudent to ensure his or her client's final payment for, or settlement of a claim is issued with language satisfying the requirements of MCL 440.3311(2). Attorneys representing policyholders may also find it helpful to assess whether the prospective client's claim is vulnerable to this defense in his or her initial claim intake, to prevent unnecessary litigation costs and expenses. As it turns out, a practical understanding of accord and satisfaction can be a valuable asset to both law students and seasoned practitioners alike. ■

About the Author

George Storms is an associate with Willison + Hellman, PC. His practice is primarily focused on counseling insurers

on a variety of complex coverage issues and representing their interests in both subrogation and defense litigation. He specializes in fraud and arson investigation, detection, and defense in the context of property insurance claims. His email is gstorms@willisonhellman.com

Endnotes

- 1 *Stadler v Ciprian*, 265 Mich 252, 251 NW404 (1933)
- 2 *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 75–76, 711 NW2d 340 (2006)
- 3 *Hoerstman, supra*, 474 Mich at 347.
- 4 MCL 440.3103(1)(d).
- 5 MCL 440.3311
- 6 MCL 440.3311 (2)
- 7 MCL 440.3311 (4)
- 8 MCL 440.120
- 9 *Nationwide Mut Ins Co v Quality Builders, Inc*, 192 Mich App at 649, 482 NW2d at 478 (1992)
- 10 *Id*
- 11 *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 75–76, 711 NW2d 340 (2006)
- 12 *Id* at 69
- 13 *Id*
- 14 *Id*
- 15 *Id*
- 16 *Hoerstman*, 474 Mich at 80.
- 17 *Newport West Condominium Ass'n v Veniar* 134 Mich App 1, 350 NW2d 818 (1984)
- 18 See *SC Gray, Inc v Ford Motor Co*, 92 Mich App 789, 817, 286 NW2d 34 (1979)
- 19 *Mossing v Demlow Products Inc* 287 Mich App 87; 782NW2d 780 (2010)
- 20 *Id* at 89
- 21 *Id*
- 22 *Mossing*, 285 Mich App at 91
- 23 See also *Loomis v Stayton*, unpublished per curiam opinion of the Michigan Court of Appeals, issued March 21, 2013 (Docket No. 305819)
- 24 *Hopkins v Isaac*, opinion of the United States District Court for the Eastern District of Michigan, issued March 14, 2018 (Case No. 16-cv-12064)
- 25 *Id* at 4

- 26 The court relied upon the definitions of “conspicuous” as stated in MCL 440.1201. See also *Nationwide Mut Ins Co v Quality Builders, Inc*, 192 Mich App 643, 482 NW2d 474 (1992)
- 27 *King v Hartford Cas Ins Co*, opinion of the United States District Court for the Eastern District of Michigan, issued December 22, 2010 (Case No. 10-CV-12209)
- 28 *Id* at 1
- 29 *Id*
- 30 *Id*
- 31 *Id*
- 32 *Id*
- 33 *Id*
- 34 Hartford attempted to argue that the verbal agreement to settle the business income loss claim bound the parties pursuant to *REMax Int'l, Inc v Realty One, Inc*, 271 F3d 633, (CA 6, 2001).
- 35 *King*, unpub op at 3



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Insurance and Indemnity 101

Resolving Ambiguities

By Hal O. Carroll, *Law Office of Hal O. Carroll*

Every attorney who practices in the area of insurance policies and indemnity contracts sooner or later encounters the question whether a provision is ambiguous, and if so, how the ambiguity is to be resolved. The principles that govern the analysis can be stated pretty simply, but the application of them can be trickier.

According to the cases, an ambiguity arises in either of two situations: two provisions conflict, or a term can be interpreted in more than one way.

“An ambiguity will be found if two contractual provisions irreconcilably conflict or a term is equally susceptible to more than one meaning.”¹

“An insurance contract is ambiguous when its provisions are capable of conflicting interpretations.”²

The basic principles

These principles operate against the backdrop of what is perhaps the most basic of all rules, which is that the policy must be read as a whole. It is more common than you might think for a person seeking to establish coverage – or to avoid it – to select the provision that he or she or it likes, and make that the basis of an argument, while ignoring inconvenient language.

But context is crucial in interpreting any provision.

“[C]ourts cannot simply ignore portions of a contract in order to avoid a finding of ambiguity or in order to declare an ambiguity. Instead, contracts must be “ ‘construed so as to give effect to every word or phrase as far as practicable.’ ”³

In the interpretation of policies, a “textualist” approach is necessarily a “contextualist” approach. We even have some elegant Latin phrases to stress the importance of context. *Noscitur a sociis* (“known by its neighbors”) is one of the best.

“[T]his Court applies the doctrine of *noscitur a sociis*, which ‘stands for the principle that a word or phrase is given meaning by its context of setting.’ ”⁴

Of course, a conflict between the main policy form and an endorsement can never create an ambiguity, because the

purpose of an endorsement is to change the policy.

“The general rule, in Michigan as elsewhere, is that, if there is an ambiguity such that all parts of the contract cannot be harmonized, the language of the policy rider or endorsement controls.”⁵

It would be more accurate to say that a conflict between the policy and the endorsement does not create an ambiguity in the first place, rather than saying that there is ambiguity and it is resolved, but the result is sound.

Addressing the ambiguity

But let’s assume that after all of these rules have been brought to bear, there is still an ambiguity. What tools are in the toolbox to resolve it?

Presumably we start with the twin rules that the interpretation of any contract is a matter of law, which means the court interprets it, and that ambiguities are construed against the drafter.

“Where ambiguity is found, the court must construe the term in the manner most favorable to the insured.”⁶

This principle is an application of the broader rule that an ambiguity in a contract is interpreted against the drafter. This has its own Latin phrase, *contra proferentem*.

But notice the phrase “the court must construe” in the quotation above. That was the rule for as long as anyone can remember, and likely is the rule in most other states even today, but no longer the rule in Michigan. Now the interpretation of a policy or other contract is a matter of law only if it is unambiguous. Once an ambiguity is found, interpretation becomes a matter of fact, to be resolved by the trier of fact. The change came in 2003 in *Klapp v United Ins Group Agency, Inc.*,

If the court finds that a provision is ambiguous, its interpretation becomes a matter of fact to be resolved by the trier of fact based upon the evidence. If the trier of fact is not able to make a decision based on the evidence, then it must apply the rule “*contra proferentem*” and interpret the provision against the drafter.⁷

The effect of this rule is to insert an additional step in the process of interpretation, by forbidding the application of *contra proferentem* by the court, as had often been done. The theoretical, or perhaps philosophical, basis for this is that freedom of contract requires that the courts defer to the parties' actual intent where the words themselves do not make that intent plain.

This view was expressed in a decision a month after the *Klapp* decision, when the Supreme Court abandoned the concept of "reasonable expectations" in the interpretation of an insurance policy.

This approach, where judges divine the parties' reasonable expectations and then rewrite the contract accordingly, is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy. This Court has recently discussed, and reinforced, its fidelity to this understanding of contract law. The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable. It draws strength from common-law roots and can be seen in our fundamental charter, the United States Constitution . . .⁸

The preeminence and dignity of freedom of contract are so fundamental, in fact, that the concept of a "contract of adhesion," which accepts the fact that some contracts are not really negotiated at all, but are mere take-it-or-leave-it contracts, was rejected a few years after *Klapp*.

[W]e hold that it is of no legal relevance that a contract is or is not described as "adhesive." In either case, the contract is to be enforced according to its plain language. Regardless of whether a contract is adhesive, a court may not revise or void the unambiguous language of the agreement to achieve a result that it views as fairer or more reasonable.⁹

Ambiguous insurance policy – who testifies?

There you have the ambiguity rule and the basis for it. It has the company of close cousins (rejection of adhesion contracts and reasonable expectations) all of which proceed from the dignity of freedom of contract. All of this is fine and proper, especially where the parties actually negotiate a contract. In *Klapp*, for example, the dispute was over the interpretation of an agency contract.

It's hard to object to this as a theory. Freedom of contract – what one author called "capitalist acts between consenting adults" – is certainly important. The question is how this theory of "*contra proferentem* by the jury after testimony" is supposed to work when the ambiguity arises in an insurance policy. Sometimes theory and practice do not work well together.

To apply the *Klapp* rule, we must accept that factual testimony is crucial. So, whose testimony? The Supreme Court can decree that the trial courts cannot apply a rule tailored to the fact that insurance contracts are contracts of adhesion, but the fact that they are contracts of adhesion cannot be decreed away. The point is that it will not be easy to identify the person whose understanding of the ambiguous term should guide the trier of fact.

For example, what exactly will Patricia Policyholder offer by way of testimony as to her understanding of the disputed provision in the policy that is now suddenly the focus of everyone's interest? Will she, under oath, testify that she did read the policy as soon as she received it and that she read this very provision and understood it – at the time of contracting – to mean this or that? If she merely testifies as to what she now understands the provision to mean, she is not offering facts at all; she is merely expressing an opinion. Remember, the *Klapp* case says that it is a question of fact that must be resolved.

Maybe the agent? An independent agent is the agent of the insured,¹⁰ so maybe he negotiated the contract and discussed the clause with the insurer. Again, the stubborn fact is that the real world seldom works that way.

Look at it from the insurer's side. The claim representative will often have to make a decision as to whether a particular provision applies and what effect it has, but the claim representative, by definition, gets involved only after there is a loss and therefore after the contract was "agreed upon." More likely the claim representative will consult with an attorney on the disputed clause, but the attorney can only offer an opinion, not facts.

Maybe the underwriter? But the underwriter usually just evaluates the risk and sets the premium.

Or maybe the policy was actually written by the Insurance Services Office and licensed to various insurers, including the one whose policy is at issue. Should there be discovery to identify the particular ISO employee who chose the language at issue and then seek his or her understanding? But he or she is not a party to the contract, so his or her understanding cannot be attributed to either party.

Conclusion

Articles in this publication usually present issues and then proceed to offer answers, or at least suggest possible resolutions. But in the case of the ambiguous insurance policy

provision, under the *Klapp* rule, there are no facts that can be offered to the jury to elucidate the insured's and the insurer's respective intents. The jury will, of course, have at its command all of the grammatical rules, and the structure of the policy provision, and dictionary definitions that were available when a judge applied *contra proferentem*. In other words, the jury will be able to hear the same sort of analyses that the attorneys have traditionally presented to judges, but in terms of additional facts to inform the decision, there is nothing to be presented.

That leaves the rule *contra proferentem* still in place, only this time to be applied by the trier of fact rather than the court. ■

About the Author

Hal Carroll is a co-founder and first chairperson of the Insurance and Indemnity Law Section. Mr. Carroll practices extensively in the area of insurance coverage and indemnity law and was designated a "Super Lawyer"™ again in 2018. He also consults with businesses and insurers on the drafting of contracts, represents insureds and insurers in declaratory actions, and is a frequent author of articles in the areas of insurance coverage and indemnity contracts. His email address is HOC@HalOCarrollEsq.com.

Endnotes

- 1 *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007).
- 2 *Farm Bureau v Nikkel*, 460 Mich 558, 566, 596 NW2d 915 (1999).
- 3 *Hunter v Pearl Assurance Co., Ltd*, 292 Mich 543, 545; 291 NW 58 (1940), quoting *Mondou v Lincoln Mut Cas Co*, 283 Mich 353, 358-359; 278 NW 94 (1938).
- 4 *In re complaint of Rovas against SBC Mich*, 482 Mich 90, 114; 754 NW2d 259 (2008)
- 5 *Morbark Industries v Western Employers Insurance Co*, 170 Mich App 603, 613; 429 NW2d 213 (1988).
- 6 *Michigan Millers Mutual Insurance Company v Bronson Plating*, 445 Mich 558, 567; 519 NW2d 864 (2003).
- 7 *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).
- 8 *Wilkie v Auto-Owners*, 469 Mich 41, 51-52; 664 NW2d 776 (2003) (internal citation deleted).
- 9 *Rory v Continental Insurance*, 473 Mich 457, 489; 703 NW2d 23 (2005).
- 10 "An independent insurance agent, or broker, is ordinarily the agent of the insured, not the insurer." *Mayer v Auto-Owners Ins Co*, 127 Mich App 23, quoting *16 Appleman, Insurance law and Practice*, §8722, pp 322-324.



ERISA Decisions of Interest

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Sixth Circuit Update

No Fiduciary Duty Violation Where Employer Failed to Inform Insured of Right to Convert Group Life Insurance to Individual Insurance

Vest v Resolute FP US Inc, 905 F.3d 985 (6th Cir. 2018)

In a 2-1 decision, the Sixth Circuit affirmed dismissal of the plaintiff's claim that an employer breached a fiduciary duty to inform a plan participant of his right to convert his group life insurance coverage to individual coverage. The insured stopped working in September, 2015 because of diabetes and began receiving disability benefits. Under the plan, employees on disability maintained basic life insurance coverage, but lost optional coverage. Employees could, however, "port or convert" the optional group coverage to individual coverage within 31 days of leaving employment. The defendant ended the

insured's optional coverage on May 18, 2016 without giving him "any information concerning his right to port or convert the coverage that ended." The insured died in October 2016 and the insurer paid the plaintiff (the insured's beneficiary) the base life insurance, but not the additional optional coverage that had been terminated.

The plaintiff sued, alleging the employer breached a fiduciary duty to inform the insured of the right of conversion. The district court dismissed for failure to state claim, and the Sixth Circuit affirmed.

The general rule is that a fiduciary cannot be liable "for a failure to disclose information that it is not required to . . . disclose . . ." *Sprague v GMC*, 133 F.3d 388, 305 (6th Cir. 1998)(*en banc*). There are three circumstances in which a fiduciary may breach a duty to disclose: (1) where an insured asks a question and is given an inaccurate or misleading answer;

(2) where the fiduciary on its own initiative provides misleading or inaccurate information; or (3) where ERISA requires an employer to forecast future events and the employer fails to do so.

The plaintiff's claim did not fit (3). It also did not fit (1) because the plaintiff did not allege that the insured requested information of the employer to which the employer gave a wrong or misleading answer. The court held it did not fit (2) because the plaintiff did not allege the employer made any inaccurate or misleading statement. In deciding the claim did not fit (2), the court first noted that a failure-to-disclose claim cannot proceed if the fiduciary is not required to disclose the information at issue, and ERISA does not require an employer to give notice of conversion rights to insureds. Second, the summary plan description provided to insureds said that insurance "will cease" when employment ends, and that employees can convert terminating coverage to individual insurance. Third, the plaintiff alleged no facts to show that the employer knew that being able to convert the optional group coverage to individual coverage would have been important to the insured. Under Sixth Circuit precedent, an employer must allegedly know that its "silence might be harmful," and the plaintiff's complaint alleged no such facts.

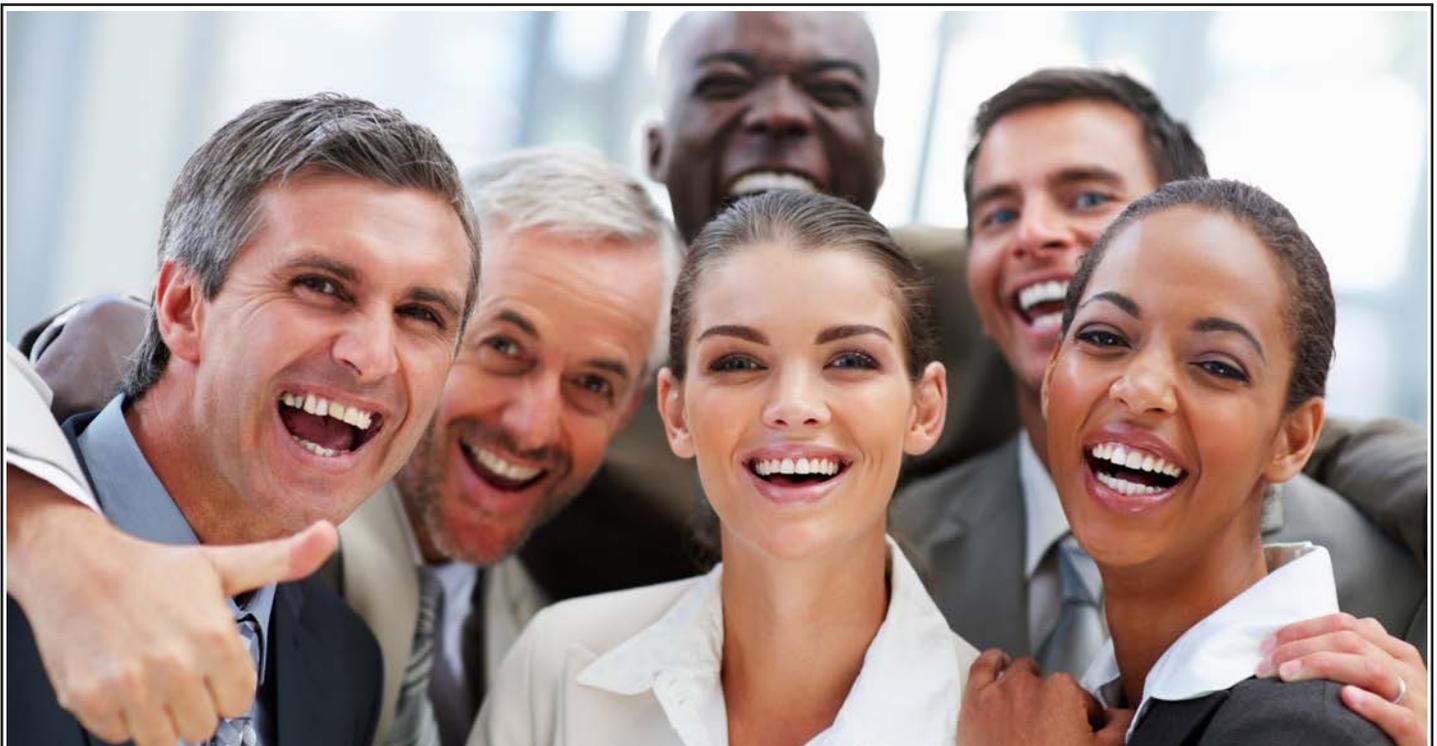
Eastern District of Michigan

Contingent Beneficiary of Life Insurance Benefits Lacked Standing to Sue

Metropolitan Life Ins Co v Robinson, (ED Mich, Dec 19, 2018) (unpub), Case No. 2:18-cv-11493, 2018 WL 6649968

The insurer filed an interpleader action concerning competing claims to the decedent insured's life insurance benefits. Certain of the defendants counterclaimed for benefits.

Under ERISA, only participants, beneficiaries, fiduciaries and other designated parties may bring an enforcement action. 29 U.S.C. §1132(a). A "beneficiary" is any person designated by a participant or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. §1002(8). The court reasoned that "[f]rom the time of Decedent's death until the filing of the counterclaim, [one defendant] was not a beneficiary," but was "[a]t most . . . a contingent beneficiary to Decedent's Plan Benefits." When the decedent died, "the primary beneficiaries were alive and [the counterclaiming defendant] was accordingly not 'entitled to a benefit' under the plan. The court thus concluded that "she is not a 'beneficiary' and lacks standing to bring her . . . counterclaim against MetLife." ■



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Selected Insurance Decisions

By Deborah A. Hebert, *Collins, Einhorn, Farrell PC*
Amy Felder, *Atain Insurance Companies*

Supreme Court Decisions

Equitable estoppel cannot be applied against the insurer in favor of an insured with unclean hands

Yu v Farm Bureau Gen'l Ins Co of Michigan
___ Mich ___; 919 NW2d 399 (2018)

By order of November 21, 2018, the Supreme Court rejected the Court of Appeals' reliance on equitable estoppel to find homeowners coverage for this property damage claim. Plaintiffs had insured their home with Farm Bureau for several years before moving to another city in 2010. No one occupied the home after they moved and plaintiffs never informed Farm Bureau of that fact. In February of 2013, plaintiffs discovered minor damage from a water leak and submitted a claim. When Farm Bureau investigated, plaintiffs told the adjuster they "were moving." Farm Bureau covered the claim but denied a subsequent claim in December of 2013, when another leak caused major property damage. The Court of Appeals determined that Farm Bureau was equitably estopped from denying the second claim because it knew plaintiffs were moving in February of 2013 and yet renewed the policy in November. The Supreme Court disagreed. To obtain coverage through equity, plaintiffs had to come to the table "with clean hands." The case was remanded to the Court of Appeals for a purely contractual determination of coverage.

Michigan Court Of Appeals – Unpublished Decisions

"Bobtail" policy covers trucker's liability

Great West Cas Co v Progressive Cas Ins Co
Docket Nos. 338617; 339612
Released December 13, 2018

Barkley Trucking entered into a trucking contract with two transportation companies insured by Great West. Barkley

also had its own auto policy with Progressive. Barkley's owners delivered a load to Michigan under contract with one of the Great West insureds. Afterward, they dropped off the empty trailer at a Walmart parking lot and drove the truck to a laundromat. The truck was involved in an accident while it was detached from the trailer for this purpose. Great West argued that its policy afforded liability coverage only when the truck was being used in the course of one Great West's insured's business. Progressive disagreed, citing an exclusion in its policy for vehicles "operated . . . or used . . . [i]n any business or for any business purpose." According to Progressive, the truck had not returned from the run and so was still being used in the course of business. The Court of Appeals sided with Great West. The trailer had been detached and the cab was "bobtailing on clearly personal errands." Progressive owed the indemnity. The case was remanded to resolve defense obligations for each of the insureds.

Criminal act exclusion for arson is limited to actions by the person "with complete dominion and control"

DKE, Inc. v Secura Ins Co
Docket Nos. 333497; 337834
Released November 6, 2018;

Reconsideration denied December 12, 2018

DKE was the owner of commercial property insured under a policy with Secura. That property sustained major damage due to a fire started by the company owner's son, who was involved in the business. Secura denied coverage under the criminal acts exclusion in its policy. In a prior appeal involving this same claim, another panel of the Court of Appeals determined that the exclusion applied only if the person who committed the arson "had complete dominion and control over the affairs of the corporation." At the trial conducted on

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remand from the first appeal, the trial court instructed the jury that the son had to have “sufficient control over the affairs of DKE” to trigger the criminal acts exclusion. In this second appeal, the panel reaffirmed the requirement of “complete control” based on the doctrine of the law of the case and also based on Michigan precedent. The case was remanded for a second trial because “complete” control is “distinctly different” from “sufficient” control. The dissenting judge disagreed with the need for a remand because the evidence allowed for only one conclusion: the son had complete control over the building and that was the only asset of the corporation.

Business pursuits exclusion in homeowner's
policy bars coverage

Membersselect Ins Co v Guzman
Docket No. 338162
Released December 4, 2018

Defendant was insured under a homeowner's policy with Membersselect. He operated a window cleaning company as a sole proprietorship and also contracted with customers to perform lawn maintenance and other services. The insured would sometimes pay others to help him with his work. On one occasion, the insured was attempting to load a lawn mower onto a pick-up truck on his way to mow lawns for one of his customers. The friend he hired that day was injured when the lawnmower fell and struck him in the head. Because the insured's auto policy had lapsed, he looked for liability coverage from his homeowner's insurer. But that policy expressly excluded coverage for injuries arising out of the insured's business pursuits, and thus barred coverage for the claim. Although the policy did not define “business pursuits,” the term “business” was defined in the policy as “any full or part-time trade, business, or occupation.” Case law in Michigan views a business pursuit as an activity “performed with continuity and for profit.” At the time of this accident, plaintiff was performing lawn maintenance for a regular customer for the purpose of making a profit. The exclusion applied.

Policy expired on its own terms within 30 days;
coverage could also be rescinded based on innocent
misrepresentation

Holman v Mossa-Basha
Docket Nos. 338210; 338232

Released November 29, 2018; Reconsideration pending

Plaintiff applied for six-month auto policy with Farm Bureau and received a certificate of insurance effective for 30 days pending premium payment and compliance with the other terms of the policy. When plaintiff failed to produce the required proof of prior insurance for the vehicle, Farm Bureau sent a letter advising him of the expired coverage. Plaintiff was involved in an accident a few days later. He claimed lack of

proper cancellation notice and sued for coverage. The court held that even if the certificate of insurance was a “binder” and therefore a short-term policy subject to policy cancellation rules, this short-term policy wasn't cancelled; it expired according to its own terms. In addition, plaintiff made two material misrepresentations in applying for the policy: (1) that he did not operate an uninsured motor vehicle owned by him in the preceding six months, and (2) that his current vehicle was insured at the time of application. Because Farm Bureau would not have issued a policy to plaintiff had it been properly informed of his use of uninsured vehicles, rescission would have been warranted if coverage hadn't expired. Rescission can be supported by innocent misrepresentations where they work to the advantage of the person making the misrepresentations.

Policy rescission reversed where insurer had relevant
information in hand

Gonzalez v Titan Indemnity Co
Docket No. 341227
Released November 27, 2018

The named insured listed two vehicles on her auto policy with Titan, one of which she owned and one of which was owned by her fiancé, who lived with her. The fiancé, however, was not listed as an insured or driver on the policy that was issued. There was some evidence that Titan received paperwork from the agent indicating that the fiancé owned one of the vehicles and resided at the same address. The panel also noted that “one of Titan's adjusters even specifically opined that Titan ‘should have known about Pedro [the fiancé].’” The trial court allowed Titan to rescind on the theory that Titan had no duty to investigate the information provided by the insured, but the Court of Appeals found a question of fact about the nature of the information provided and then concluded that insurers “may not ignore information actually in its position” in underwriting and issuing policies of insurance.

6th Circuit Court Of Appeals Decisions

Theft loss at unscheduled property is not covered

Berrylane Trading, Inc
___ Fed Appx d ___ (2018)
Case No. 18-3144, Released November 2, 2018

Applying Ohio principles of contract interpretation mirroring those of Michigan, the 6th Circuit denied commercial property coverage to the named insured for the theft of over a million and a half dollars in iPhones from a warehouse that was not scheduled on the policy. The endorsement providing coverage for “Newly Acquired or Constructed Property” was limited to property acquired after the inception of the policy period under which coverage was sought.

Unpublished Federal District Court Decisions

Proofs of loss are not always evidence of
an accord and satisfaction

*Midland Academy of Advanced and Creative Studies
v Hamilton Mut Ins Co*

Case No. 17-cv- 12790, Released December 11, 2018

Plaintiff's school building was damaged as the result of a motor vehicle accident. Plaintiff engaged in numerous communications with defendant property insurer regarding the nature of its losses, including loss of inventory, loss of equipment, and loss of income attributable to student withdrawals

during repair and renovation work. Defendant did not agree that all of the losses were attributable to the accident and after paying approximately \$186,000 in damages, determined that the claim was finally resolved. Plaintiff disagreed and filed suit. In response to Hamilton's motion for summary judgment, the court addressed a number of different issues, including the lack of any evidence that plaintiff had submitted a final statement of loss or accepted any payment as final for purposes of proving an accord and satisfaction. Nor was there evidence that plaintiff waived coverage by failing to file suit against Hamilton. The court then identified the coverage issues to be resolved in further proceedings. ■



No-Fault Corner

The Curious Case of Snowbirds

Home-Owners Ins Co v Jankowski

By Ronald M. Sangster Jr.

Well, winter has just begun, and even though the weather has been relatively mild (I even saw motorcycles on the road on Saturday, January 5, 2019), we know that it is just a matter of time before the snow starts to fly, and we open our doors to 6 plus inches of snow on the ground. Many residents of this state have no doubt fled the cold weather to Florida and Arizona, seeking warmer weather. Many even have second homes in those states. Many may even have cars parked at those second homes. So what happens if a Michigan resident, staying at their winter home in Florida or Arizona, is injured while driving one of their vehicles garaged at their winter home?

The Michigan Supreme Court is considering this precise issue in *Home-Owners Ins Co v Jankowski*, Supreme Court docket no.: 156240. Oral argument took place on the Jankowski Defendants' Application for Leave to Appeal on October 12, 2018, but as of the date this article is being prepared, the Supreme Court has yet to issue its opinion in this matter.

The underlying facts are not in dispute, and are probably familiar to anyone who is either a "snowbird" or has friends or relatives who are snowbirds. The Jankowski Defendants have two homes – one in Michigan and one in Florida. They consider themselves to be residents of the State of Michigan. The Jankowskis own multiple motor vehicles, which are insured through Home-Owners Insurance Company.

In late 2013, the Jankowskis traveled from Michigan to Florida in their Michigan-registered and Michigan-insured

vehicle. In January 2014, they trade their Michigan-registered and Michigan-insured vehicle for a lease on a new vehicle. Instead of registering and insuring the new vehicle under their Michigan residence, they decide to purchase Florida nofault insurance through Allstate Insurance Company and to register this newly acquired vehicle in the State of Florida. There was no doubt but that the Florida nofault policy, issued by Allstate Insurance Company, was less expensive than the Michigan no-fault policy that the Jankowskis previously had on their old vehicle through Home-Owners Insurance Company.

Four months later, while still in the State of Florida, the Jankowskis were involved in a motor vehicle accident while utilizing their newly acquired vehicle. Not surprisingly, their Florida PIP benefits, which were capped at \$10,000.00 were quickly exhausted. After returning to Michigan, they consult with counsel and file a claim for Michigan nofault insurance benefits on their Home-Owners Insurance Company policy covering one of the vehicles that stayed behind in the State of Michigan, while the Jankowskis traveled to Florida. Home-Owners Insurance Company denied their claim for Michigan nofault insurance benefits based upon MCL 500.3113(b), claiming that the Jankowskis were disqualified from recovering benefits because they were the owners of an uninsured motor vehicle. Home-Owners then instituted a declaratory judgment action in the Ingham County Circuit Court.

The Circuit Court determined that Mr. Jankowski was disqualified as he was an “owner” of the Florida-registered and insured motor vehicle, which did not carry the insurance required under Michigan law. However, Mrs. Jankowski was determined to be a non-owner of the vehicle and, as a result, the Circuit Court ruled that she was entitled to benefits under the Michigan policy. On appeal, the Court of Appeals affirmed in part and reversed in part the decision of the Circuit Court and ruled that both Mr. and Mrs. Jankowski were “owners” of the motor vehicle that simply did not carry the necessary insurance coverages required under Michigan law. Therefore, both Mr. and Mrs. Jankowski were disqualified from recovering Michigan nofault insurance benefits. The Jankowski Defendants then filed an application for leave to appeal with the Michigan Supreme Court, and on May 25, 2018, the Supreme Court scheduled oral argument on whether to grant the Jankowski’s application.

The Jankowski’s argument is rather straightforward. MCL 500.3111 provides:

“Personal protection insurance benefits are payable for accidental bodily injury suffered in an accident occurring out of this state, if the accident occurs within the United States, its territories and possessions or in Canada, and the person whose injury is the basis of the claim was at the time of the accident a named insured under a personal protection insurance policy, his spouse, a relative of either domiciled in the same household or an occupant of a vehicle involved in the accident whose owner or registrant was insured under a personal protection insurance policy or has provided security approved by the secretary of state under subsection (4) of section 3101.”

MCL 500.3111 is an entitlement provision, not a priority provision. *Auto-Owners Ins Co v State Farm*, 187 Mich App 617, 468 NW2d 317 (1991). Because the Jankowski’s are the named insureds under the Michigan nofault policy covering their non-involved vehicles, the Jankowski’s argue that they are clearly entitled to benefits under this provision.

HomeOwners Insurance Company, on the other hand, denied the claim based upon MCL 500.3113(b), which provides:

“A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:

(b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect.”

MCL 500.3111 is an entitlement provision, not a priority provision.

In reply, the Jankowski’s argued that, because their vehicle was never registered in the State of Michigan, it was not required to carry Michigan nofault insurance coverage. In this regard, the Jankowski Defendants relied upon the first sentence of the NoFault Insurance Act, MCL 500.3101(1):

“The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance.”

To sum up the Jankowski’s argument, because the vehicle was not “required to be registered in this state,” it was not required to carry Michigan nofault insurance. Therefore, neither Mr. nor Mrs. Jankowski were disqualified from recovering benefits.

The Motor Vehicle Code, MCL 257.216, sets forth what type of vehicles are required to be registered in this state, and are therefore required to carry nofault insurance. As noted therein:

“Every motor vehicle, recreational vehicle, trailer, semitrailer, and pole trailer, when driven or moved on a street or highway, is subject to the registration and certificate of title provisions of this act except the following . . .”

While HomeOwners Insurance Company argues that, by its own terms, this provision applies to a Michigan resident who operates a motor vehicle anywhere in the United States, the Jankowski’s argued that, by reading this provision in conjunction with the preamble to the Michigan Vehicle Code, it only applies to vehicles “driven or moved on a street or highway” in this state. Under this interpretation, because the Jankowski’s Florida-registered and Florida-insured vehicle was not required to be registered in the State of Michigan, it was not required to be insured for Michigan nofault insurance benefits.

The Court of Appeals rejected this argument, relying upon its earlier decision in *Wilson v League Gen’l Ins Co*, 195 Mich App 705, 491 NW2d 642 (1992). In that case, Plaintiff Wilson was a Michigan resident who was attending college in Texas. While in Texas, she purchased a used vehicle but did not bother to obtain insurance on the vehicle. While traveling from Texas to Michigan, Wilson was involved in a motor vehicle accident in the State of Tennessee. As she was domiciled with her mother in Michigan at the time of the accident, she filed a claim for nofault benefits with her mother’s insurer, League General.

For purposes of triggering the disqualification provision of MCL 500.3113(b), it is the vehicle itself that must not have the three mandatory components of a valid Michigan no fault policy – not the person or persons who may “own” the vehicle.

League General denied the claim on the basis that Wilson was the owner of a motor vehicle that did not carry the three mandatory insurance requirements set forth in MCL 500.3101(1) – personal injury protection (PIP) benefits, property protection insurance benefits (PPI) benefits and residual liability insurance. Therefore, according to League General, Wilson was disqualified from recovering benefits pursuant to MCL 500.3113(b). Like the Jankowski Defendants, Wilson argued that because her vehicle was not required to be registered in the State of Michigan, it was not required to be insured for Michigan nofault benefits. In upholding League General’s denial of Wilson’s claim, the Court of Appeals rebuffed Plaintiff’s argument:

“We reject plaintiff’s interpretation of §3113(b) and MCL §257.216. . . .

The language of §3113(b) clearly and unambiguously states that the owner of a vehicle involved in an accident, where the vehicle had no security required by §3101 at the time of the accident, is not entitled to personal protection insurance benefits. See *Coffey v State Farm Mut’l Automobile Ins Co*, 183 Mich App 723, 730, 445 NW2d 740 (1990); *Childs [v American Comm’l Liability Ins Co*, 177 Mich App, 589, 592, 443 NW2d 173 (1989)]. MCL§257.216 does not specifically limit the requirements of §3113(b) of the NoFault Act only to cars driven on Michigan highways. Because the language of §3113(b) is unambiguous, we will not read additional provisions into the language.”

Wilson, 491 NW2d at 644

This very holding is being reviewed by the Michigan Supreme Court, as noted in the order granting oral argument on the Jankowskis’ application for leave to appeal:

“The appellants shall file a Supplemental Brief within 42 days of the date of this Order addressing whether, to be eligible to receive personal protection insurance (PIP) benefits, they were required to register, in Michigan, the vehicle involved in

the accident, and were thus obligated to maintain security for the payment of PIP benefits pursuant to MCL 500.3101 or be precluded from receiving such benefits by MCL 500.3113(b).”

The author respectfully suggests that instead of focusing on whether or not the vehicle was required to be registered in this state, the Supreme Court should focus on the language of MCL 500.3113(b) and simply determine whether or not the motor vehicle or motorcycle involved in the accident carried “the security required by section 3101 or 3103.”

As previously noted, there are three mandatory components for any Michigan nofault insurance policy – personal protection insurance (PIP) coverage, property protection insurance (PPI) coverage, and residual liability coverage. The absence of any one of these three components is fatal to a claim for nofault benefits. *Bronson Methodist Hosp v Michigan Assigned Claims Facility*, 298 Mich App 192, 826 NW2d 197 (2012). Arguably, MCL 500.3113(b) simply mandates *what type* of insurance is required to be on the vehicle involved in the accident, and not *when* it is required to be insured.

After all, for purposes of triggering the disqualification provision of MCL 500.3113(b), it is the vehicle itself that must not have the three mandatory components of a valid Michigan nofault policy – not the person or persons who may “own” the vehicle. *Iqbal v Bristol West Ins Group*, 278 Mich App 31, 748 NW2d 574 (2008). In this case, the *involved vehicle* clearly did not have the three mandatory coverages necessary under Michigan law. Therefore, because “the security required by §3101 . . . was not in effect” on the involved vehicle, the Jankowskis should be disqualified from recovering nofault benefits. In retrospect, the Jankowskis got what they paid for – Florida nofault benefits at a far lesser premium than what they would have paid for a Michigan nofault insurance policy.

Should the Michigan Supreme Court rule in favor of the Jankowskis, one can easily imagine a scenario wherein individuals who have a residence in Michigan, and another state, will garage one vehicle in Michigan and obtain the least expensive nofault policy available on that single vehicle. They will then purchase, register and insure vehicles through their second home, at a far less expensive premium, with the understanding that, if they are injured while driving any of those other vehicles, they can still make a claim for Michigan nofault insurance benefits under the policy covering the “clunker” principally garaged at their Michigan residence. Surely, this cannot be what the Legislature intended when it drafted MCL 500.3113(b) and, at least as an interpreted by the *Iqbal* Court, tied the insurance requirement to the vehicle involved in the accident. Again, it will be interesting to see how the Michigan Supreme Court ultimately resolves this issue. ■



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