# The Journal of Insurance & Indemnity Law

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# From the Chair

Jason J. Liss
Fabian, Sklar, King & Liss

## Brave New E-World

As of this writing, we are closing in on six months since the onset of the COVID-19 pandemic, and one thing is clear: we are living in a brave new world. For those of us who litigate, the adjustments we and the courts have made demonstrate, in my opinion, that we can effectively conduct our pretrial practices from the comfort of our desks. Since the issuance of the shelter-in-place order this past March, I have participated in numerous depositions and court hearings (both procedural and substantive) via Zoom video conferencing. As the restrictions have eased, the parties in some cases have requested in-person depositions.

My first post-COVID, in-person depositions are scheduled for later this month and my expectation is that the attorneys, witnesses and court reporters will all be wearing masks throughout. In addition to keeping us safe while in close quarters, I anticipate the masks will have the effect of eroding or eliminating the perceived advantages of conducting an examination across the table as opposed to the perceived disadvantages of doing so across cyberspace. Depending on one's point-of-view, this can be seen as either a positive or a negative. Regardless, handling routine matters via video conferencing appears to be a much more efficient and cost effective way of practicing law. It is my sincere hope that even after the necessity of doing so has passed, the courts will adopt video conferencing as an alternative, upon the stipulation of the parties, for appearing in court for routine pretrial hearings and other matters.

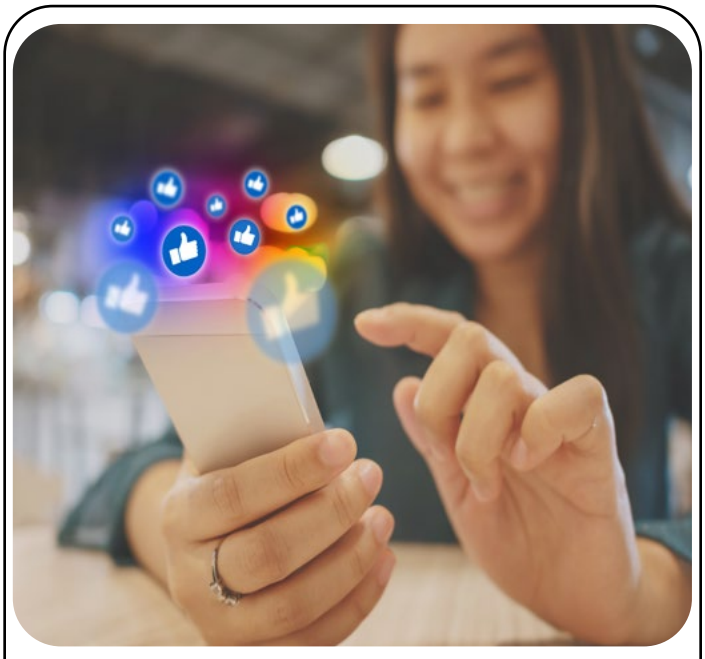
## Scholarship Contest

Since our last publication, the Council held its quarterly meeting on April 30, 2020 via Zoom and the minutes for the meeting are available to members in the Section's SBM-connect web page (*https://connect.michbar.org/insurance/home*). As of that meeting, all competing submissions for the Section's annual $5,000 scholarship had been received and circulated amongst the Council's members to review and rank. After the votes were tallied, a clear winner, having garnered 87.5% of the first place votes, emerged. The winning submission did an excellent job of analyzing the conflict between state and federal law that workers' compensation insurers face when considering reimbursement of claims for treatment involving medical marijuana.

While the candidates have been notified of the results, the winner will not be formally announced until our annual business meeting, which, per our Section's by-laws, will be on a date to be scheduled in the month of October. If we are able to gather in-person by then, which seems dubious at the present time, we will make a formal presentation, as we did last year, and take photos to accompany the winning submission, which will be published in the January 2021 Edition of the *Journal*.

The Council's next meeting is scheduled for July 22, 2020 and I anticipate we will once again be meeting via Zoom. As always, members are welcome to join and anyone wishing to do so should contact me via email at *jliss@fabiansklar.com*, so I can send an invitation with a link to the meeting.

I am happy to report that with 968 active members, our section continues to be vibrant. As always, I wish each of you safety and good health as we continue adapting to this brave new world. ■



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Editor's Notes

# A Special Note

By Hal O. Carroll
*www.HalOCarrollEsq.com*

The *Journal* is now well into its thirteenth year, and, with the efforts of many, has survived the Covid-19 virus (with a slight delay in the print version of our April issue).

The *Journal* 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. All opinions expressed in contributions to the *Journal* are those of the author. We welcome all articles of analysis, opinion, or advocacy for any position.

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. ■

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# The Interruption of Business Interruption Claims in the Covid Pandemic

By Karen Libertiny Ludden

In the first two months of this year, the Covid virus rolled in like silently gathering storm clouds, subtle and menacing, but with no obvious effect on businesses. In March, however, its effect was sudden and severe; an unleashed hurricane that has relentlessly battered the service industry in particular. Shuttered overnight, with near total layoffs, restaurants, salons and entertainment venues turned to their insurance companies to fortify themselves. As a result, every business insurer in this country saw a swell of business interruption claims and hastened to address them.

Some states even began drafting statutes aimed at ordering insurers to pay business interruption claims, whether qualifying as covered losses or not. Lawsuits were filed, gathering steam and moving into class action status. Claims are far down now, and the number of states drafting reparatory statutes has lessened. What happened to stem the flow of business interruption claims? The short answer is: the law.

By way of background, business interruption (BI) insurance coverage is generally found in property damage policies. These polices are often composed of standard clauses generated by Insurance Services Office (ISO), a company which prepares and disseminates the vast majority of insurance forms used in the United States. An insured can elect to purchase BI coverage, for a premium.

As with all insurance contracts, the extent of that coverage, and when it applies, is governed by the terms of the insurance contract. A typical BI clause or endorsement will provide coverage for certain business losses for a temporary closure. The coverage is subject to policy dollar limits and certain explicit exclusions. There is also coverage a business can buy to cover a shutdown by operation of "civil authority," when exercise of that authority prohibits access to one's business premises.

Most of the time, an insured who purchases business interruption coverage is under the impression that all business losses will be covered, for as long as required, hence the flood of BI claims since March. This lamentable presumption is seldom the case, however, even under the broadest of coverages. The devil is in the details, and those details include not only limitations on what scenarios trigger this coverage in the first place, but also limitations on the duration, amount and type

of coverage. There are often also specific exclusions including, most relevantly, an exclusion for damages caused by viruses.

> There is also coverage a business can buy to cover a shutdown by operation of "civil authority," when exercise of that authority prohibits access to one's business premises.

## The triggering event – direct physical loss

Let's unwrap coverage then. The typical ISO policy that does provide some business interruption coverage requires a covered triggering event, more specifically, "direct physical loss or damage." This is because business interruption coverage was initially created to cover a certain type of loss triggered by some accident that caused "damage to property," for example a temporary closure because a tree fell on the building, or a fire damaged it. In the decades since this type of coverage was first offered, however, claimants and their attorneys have attempted to twist and turn the language of the coverage to fit all manner of fact scenarios that have departed significantly from the original scope of coverage contemplated by insurers. Some notable examples are beef shipping interruption due to Mad Cow Disease, 9/11 airport closures and E-coli contamination. Coverage for these claims generally were not upheld by courts around the country because there was no "direct physical loss."[1]

> The devil is in the details, and those details include not only limitations on what scenarios trigger this coverage in the first place, but also limitations on the duration, amount and type of coverage.

## The "Civil Authority" Clause

Also affecting coverage is the plain language of the "civil authority" clause. There is limited coverage where operation of civil authority shuts down access to a business's premises, but again, it was created for a specific set of circumstances, for example, a street being closed, which prevents an insured from opening its business. Trying to apply to it to a scenario where a governor's order requires businesses to close does not generally trigger the coverage because the specific conditions are not met.

Perhaps most importantly, in the wake of the last corona virus to hit this country -- SARS-Cov-1, which hit the United States in 2002-04 -- most insurers include the ISO form excluding coverage for "any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." This is a comprehensive exclusion that exactly fits the wave of covid-19 we are now facing and its effect on business. There are also exclusions for "pollutants," again arguably precluding damage resulting from the covid-19 virus.

So what happened to the initial waive of BI claims? Part of the answer is that insurance companies and agents that sell those policies began explaining the terms of the coverage to insureds. Unless overruled by state or federal mandate – which, as will be addressed below would largely be unconstitutional – the standard for interpretation of a private contract is to review and enforce its plain language. From there, different states have different views on how ambiguities should be interpreted and whether extrinsic evidence should be admitted. Here, if a policy contains a virus exclusion, it is hard to imagine a scenario where that would not apply to covid-19 closures. Likewise, while some intrepid plaintiff lawyers are arguing that a virus causes "microscopic physical damage" to a surface, this is quite a stretch of logic. Thus, the straightforward application of contract interpretation law has in large part stemmed the tide of BI claims.

## States' Remedial Legislation – Constitutional Issues

Another reason for the reduction in claims is constitutional law analysis of new proposed statutes that have been circulating in various states, including New Jersey, New York, Massachusetts, Pennsylvania, Louisiana, South Carolina and Ohio. Although their format does vary, they all appear to try to compel private insurance companies to provide coverage to private businesses by rewriting or manipulating the terms of private contracts; the insurance policies. That would require the retroactive amendment of a private contract, and that is not permitted under the contracts clause of Article I of the United States Constitution. Contractual rights and obligations are generally binding under the law, and the United States Supreme Court has ruled that a sudden and substantial retroactive obligation on private parties is not permitted.[2] Likewise, the takings clause prohibits any law as a per se taking when it confiscates an established pool of funds or renders private property worthless.[3] Regulatory taking is also prohibited, and the proposed legislation might fall under that category.[4] Substantive due process might also be violated by retroactive rewriting of a private contract. Retroactive laws change the legal consequences of transactions long closed, and this change can destroy the reasonable certainty and security which are the very objects of property ownership.[5] Once again, then, the law in this country does not favor BI coverage where none was purchased.

There is one last reason why claims have died down: the practical legal mechanism as to how insurance actually works. Insurance exists because there is way for insurers to evaluate risk and pool insurance premiums to provide coverage. They use underwriting principles to determine how likely a risk is to manifest, and how extensive it will be, and they then formulate a premium to spread across a pool of insureds. Asking, or requiring, insurers to cover losses for which they never charged premiums would destroy the insurance industry. There is just no way to do it. Insurance provides valuable assistance to businesses and private citizens alike. Even those legislators who have the best of intentions in trying to "create coverage" where there is none to help this country, recognize that, in the long run, doing so will not help this country at all.

## Conclusion

So where did all the BI claims go? They were analyzed and addressed, and insureds and agents went back to read the policies, and the vast majority have understood the legal reasons why BI coverage is not generally available for covid-19 losses. ■


## About the Author

***Karen Libertiny Ludden*** *is the Chair of the Insurance Coverage and Defense Practice Group at Dean & Fulkerson, in Troy, Michigan. She has been practicing coverage law for over 25 years. She has evaluated Covid coverage claims for the entire State of Michigan for a national insurer and has been coverage counsel for a national insurer of an opiate distributor involved in the National Prescription Opiate Multi-District Litigation.*


## Endnotes

1 See e.g. *Source Food Technology v U.S. Fidelity & Guaranty Corp, 465 F3d 834 (8th Cir, 2006; United Airlines Inc v Ins Co of State of Penn*, 385 FSupp 3d 343 (SDNY 2005), aff'd 439 F3d 128 (2nd Cir 2006); *Penton Media v Affiliated*, 2006 WL 2504907; *Meyer Natural Foods LLC v Liberty Mutual*, 218 FSupp 3rd 1034 (DC NE, 2016).

2 *Allied Structural Steel Co v Spannaus*, 438 US 234 (1978).

3 *Koontz v St. Johns River Waste Management Dist*, 570 US 595 (2013); *Lucas v South Carolina Coastal Council*, 505 US 1003 (1992).

4 *Penn Central Transp Co v City of New York*, 438 US 104, 124 (1978).

5 *Eastern Enterprises v Apfel*, 524 US 498 (1988), Kennedy, J, concurring).

# Zoom Training for Lawyers - and Using it Securely

By Sharon D. Nelson, Esq. and John W. Simek



The coronavirus pandemic has forced a lot of lawyers to utilize video conferencing to "meet" with co-workers and clients. One of the most popular video conferencing platforms is Zoom. There are others, but we see Zoom as the choice of many lawyers, especially those in solo and small firms. While we can't cover all the options and settings for Zoom (there are a ton of them), we'll try to give our advice on the best way to use and secure Zoom for your firm.

The growth in Zoom usage has exploded. As of the end of December 2019, there were approximately 10 million free and paid daily meeting participants. In contrast, that number has increased to over 300 million free and paid daily meeting participants in April of 2020. The boom in usage has squarely put the crosshairs on Zoom. Multiple security and privacy issues have been discovered and exposed by security researchers and journalists. Some of the publicity was just and some of the media statements were wrong or overblown.

On April 1, 2020, Zoom CEO Eric Yuan announced that there would be a feature freeze for the next 90 days while resources are concentrated on fixing the "biggest trust, safety, and privacy issues." As a result, we continue to update our previous Zoom article(s) as Zoom is currently in damage control mode fixing those issues. Make no mistake about it though – clients and lawyers both love Zoom and, as Zoom has fixed more and more security defects, we believe it is a darn good videoconferencing solution for lawyers as long as they learn how to use it properly.

## Basics

The first question for rookies is…what the heck is this thing called Zoom? According to the website, "Zoom is the leader in modern enterprise video communications, with an easy, reliable cloud platform for video and audio conferencing, collaboration, chat, and webinars across mobile devices, desktops, telephones, and room systems. Zoom Rooms is the original software-based conference room solution used around the world in board, conference, huddle, and training rooms, as well as executive offices and classrooms."

Zoom is extremely easy to use (for lawyers and clients!) and is available across multiple platforms and operating

systems. You can use your mobile device with apps available for Android and iOS. There are desktop clients available for macOS, Windows and a bunch of Linux/Unix versions (e.g. Ubuntu, Linux, CentOS, OpenSUSE, etc.).

Many of us are working from home and may be remotely connecting to our computers at the office. If so, you'll need to not remotely connect and must use your home computer, smartphone, iPad or some other device that you physically possess.

## Equipment

To state the obvious, you will need some sort of camera to participate in a video conference call. Most modern-day laptops are equipped with a webcam for video calls. You could even use your iPad or smartphone with Zoom. Another consideration is sound. The built-in microphones for laptops or phones may not sound particularly good if you are on the receiving end. Consider using a headset (with microphone) or earbuds. You'll be able to hear better, and so will all the other participants. Besides sounding better, headsets and earbuds help cut down on the ambient noise.

If you are using your home desktop computer to participate in a video conference session, you will probably need some sort of camera and microphone device to facilitate the video transmission. As a result of the pandemic, besides a shortage of toilet paper, there is also a shortage of available webcams. To add a webcam to your desktop computer, we would suggest investigating several of the models from Logitech. The model C920, C920S, C922 or C930E are all good models to add to your computer setup. The referenced models connect via USB and provide 1080p video resolution and stereo sound. You can also add a webcam to your laptop if it is not equipped with video.

Don't forget where you physically sit during the video conference. If your back is to an open window, the brightness may make you difficult to see. Light sources (lamps, skylights, etc.) behind you will have the same effect. Objects behind you may be distracting too. Think about what the person on the other end is seeing. Be cognizant of those around you. Family members may be able to hear you discussing confidential information even if you are wearing a headset.

## Participating in a Meeting

We've participated in a slew of Zoom meetings over the years, but it sure feels like we're now involved in one or two a day instead of one every several months. It seems obvious to us that you need to be in physical possession of the device you use to participate in a Zoom meeting. Apparently, a lot of attorneys don't get the obvious or haven't completely thought things through.

Many of us are working from home and may be remotely connecting to our computers at the office. If so, you'll need to *not* remotely connect and must use your home computer, smartphone, iPad or some other device that you physically possess. If you try to participate in a Zoom meeting while remotely connecting to your office machine, it will be just as if you were sitting at your office desk. We can't tell you the number of times we were looking at an empty desk chair. You are not sitting in your office so participants can't hear you either. In other words, when you remotely connect to your office computer, Zoom uses the microphone and camera of that office machine. It seems pretty silly, but invariably there's at least one participant in a Zoom meeting that remotely connects to their office computer and wonders why we can't see or hear them. Good thing there is a chat function in Zoom.

All you need to do is have some way to access the meeting invite details from a physical device you have control over and which is in your possession. If the invite went to your firm's email address, just access it from your smartphone (assuming you can get to your firm email from your phone); otherwise, just forward the message to a personal email account you can access from your home machine or other personal device. Remember…when participating in a Zoom meeting, the video camera must be able to "see" you and the microphone must be able to "hear" you. When you're at home, your office machine can't do that.

We've also had experience where we couldn't hear a participant, yet they were unmuted in Zoom. The likely cause is that the microphone is muted on the actual device they are using or the wrong microphone is selected. The key to checking if your computer microphone is muted varies by computer manufacturer and model. Bottom line…check to make sure the microphone/sound is not muted on your physical device. That even applies if you use a headset. Most wired headsets will have some type of switch assembly in the cable to adjust volume and mute the microphone. Apparently, inadvertently bumping up against the microphone mute button is fairly common.

## Meeting Management

While you are in a meeting, clicking the Participants icon in the bottom menu bar pops a panel to the right that shows all the participants for the meeting. You can see the status of the user's microphone (muted or unmuted) and status of their video camera. Obviously, there will be no camera icon if the participant dialed in with a phone number. The participants panel is where the host can manage and control the participants. The host can 'mute all' or mute participants individually. The host has other options as well such as changing the name of the participant, stopping their video, preventing

screen sharing and requesting a participant to start their video. If enabled, the host can put the participant on hold, send them to the waiting room, etc.

You can also configure Zoom to allow file transfers and screen sharing. Screen sharing is very common when observing a product demo. It is even used when giving a webinar. The presenter can mute all the attendees and share their PowerPoint slides from their computer desktop.

When you click on a meeting link, you will be prompted to open the Zoom application. The default view shows the participants across the top bar with the speaker showing in the center panel. If someone else starts talking, the video will shift to that speaker. If have more than a handful of participants, it is difficult to see who is in the meeting. Taking your mouse to the upper right corner of the screen will give you the option to change the view to gallery. The gallery view shows all participants in their own "square" with the speaker's box having a yellow outline. The outline will bounce around to the various speakers and is less annoying than the speaker's video constantly being switched out. Think of the view as being similar to the introduction of the Brady Bunch TV show or the TV game show Hollywood Squares, where each person was in their own "box." Many new Zoom users have no clue about how they can change the view to "gallery." That is something we have to explain in most meetings.

Zoom's popularity hasn't gone unnoticed by the competition either. Zoom's gallery view is very popular. So much so that Microsoft and Google are scrambling to catch up. Zoom can display up to 49 participants in gallery view on a single screen. You're going to need a pretty big monitor or hook up to your big screen TV in order to see that many people clearly. Google just released an update to Meet that can only display up to 16 people simultaneously. Microsoft Teams is supposed to support nine people in a gallery view shortly, which is a far cry from 49. It seems like Zoom has won the gallery view battle.

Zoom has released an update that is most visible to those hosting meetings. There is now a new Security icon in the lower menu that replaces the Invite button. The icon allows the host to quickly and easily find and enable/disable security features. When you click the icon, hosts and co-hosts will be able to lock the meeting, remove participants, restrict a participant's ability to perform some actions (rename themselves, share screens, etc.) and enable the Waiting Room even if it's not already enabled.

## Features

The primary function of Zoom is to facilitate video conferencing. It supports video and audio transmission for each connected user over the internet. There's also a dial-in number for audio only connections. Some people use Zoom as an audio conference bridge so that users won't have to incur potential long-distance phone charges.

You can also configure Zoom to allow file transfers and screen sharing. Screen sharing is very common when observing a product demo. It is even used when giving a webinar. The presenter can mute all the attendees and share their PowerPoint slides from their computer desktop. There is also a whiteboard feature which participants can annotate for all to see.

There are a lot of meeting controls available to the host. As an example, you can control the audio of the participants. All participants can be muted when they first join the meeting. Audible tones can "announce" the joining of a participant. Sessions can be recorded. There used to be a feature to let the host know if a participant is not paying attention, but Zoom has permanently removed that feature in a nod to privacy concerns.

Another helpful feature for mediators is the Breakout Room feature, which is disabled by default. You create the rooms and then assign participants to a specific room. You even have the option to preassign participants to specific breakout rooms when you first schedule the meeting. When the host opens the breakout rooms, each participant gets a notice to move to the room. Each room is isolated from the others, just like you would be in a real mediation. The participants can take advantage of the Zoom features (e.g. screen share, chat, etc.) among everyone in the room. The host and co-host can freely move among the breakout rooms. However, that feature only works for the host at this time. The co-host must be assigned a room, but the host can move them among the various rooms as needed. When the host closes the breakout rooms, the participants get a notice that the room will close in a certain amount of time and need to return to the main meeting space. Of course the mediator should be the one that hosts the meeting. We would not recommend allowing one of the parties to be the host in a mediation unless separate Zoom meetings were created for the appropriate participants, which would ensure separation of the parties. The disadvantage with separate meetings is that you can't easily move among the various rooms as you would in a real physical mediation.

Apparently the breakout room feature has gotten the attention of Cisco. Sometime this summer, the Cisco Webex product will get a feature it calls Side Rooms to compete with Zoom's Breakout Room feature.

You can record Zoom meetings too. The paid subscriptions offer local and cloud recording. The Pro plan includes 1GB of cloud recording storage. You can add more storage space for an additional fee. We would highly recommend not recording to the cloud. Cloud recording means Zoom stores the recording

and manages it. Local recording means you have control over the distribution of and access to the recording. One downside is that local recording is not available in the iOS or Android app. You must use a computer to be able to record locally. Another concern is the issue of encryption. Encryption is not possible for the recorded information. The good news is that local recording is only available for the host unless the host allows participants to record locally.

We are asked how the recordings are handled when you are using breakout rooms, especially if used for mediations. If you elect to do cloud recording, only the main room is recorded. The breakout rooms are not recorded. Local recordings are done for whatever room the host is in. That would typically mean the main meeting room, but a breakout room would be recorded if the host (mediator in our example) went into one of the breakout rooms. The host always has the option to stop the recording and then go into the breakout room to prevent recording the breakout room session. The host could then resume the recording once they exit the breakout room and return to the main room.

When configuring Zoom, do not enable the cloud settings or automatically record. It is possible to record without the host, but we would recommend against it. Prior to initiating a local recording, make sure the option is enabled. Login to your account from a browser and go to Settings and then the Recording tab. Make sure the "Allow hosts and participants to record the meeting to a local file" is enabled. You can also configure the host to allow the participants to record locally. To start a recording, click on the Record button in the bottom menu. Select the "Record on this computer" choice. The host and participants will see a visual indicator in the upper left to indicate that recording is in progress. There will be an audio notification too if you have configured it. You can stop or pause the recording at any time during the meeting. Once the meeting is over, the recording will get converted and downloaded to your computer. The host needs to stay connected to the internet during the entire download process. The default location to save the recording is in the Zoom folder in the host user's Documents folder.

Once all the intended participants have joined, close the meeting. You do this by selecting "Manage Participants" icon in the bottom menu and then click "More" at the bottom of the panel or by clicking the new Security icon. Select the "Lock Meeting" to prevent anybody else from joining. As you can see, the intent is to create as many barriers as possible to prevent unintended attendance to your meeting. So-called "trolls" having a way of joining for mischievous reasons, including Zoom-bombing with inappropriate content, without those barriers.

Consider checking some of the default settings prior to scheduling the meeting. The first one is screen sharing. The default is now set to allow only screen sharing by the host. Make sure the setting is not configured to allow all participants to screen share.

## Cost

There is a free version of Zoom, but there is a 40-minute limit per meeting that has three or more participants. The Pro version is the most popular for solo and small firm attorneys. The cost is $14.99/month per host account. (The host is the one who schedules the meeting.) Each session is limited to 24 hours (don't invite us) and you can have up to 100 participants. There are additional admin controls as well. If you pay annually, the cost is $149.90 ($12.49/month). The next level up is the Business subscription, which is $19.99/month per host and requires a minimum of 10 hosts. There are a lot of enterprise features available with the Business plan such as a vanity URL and the ability for on-premise deployment.

We're confident the Pro plan is more than adequate for most law firms. If you need more than one host, just purchase an additional Pro plan subscription.

## Configuration Settings

We're not going to go through all the various ways you can use or control Zoom. Assuming you have purchased a Zoom subscription, we will make some suggestions for configuring and using Zoom in a more secure fashion. First, make sure you are using the most up-to-date version of Zoom. If you have previously used Zoom, you probably already have Zoom installed. To manually download the latest version, launch the Zoom application, log in to Zoom and click on your user icon in the upper right (it probably has your initials). Select "Check for Updates" and follow the instructions. Periodically check your configuration settings after updating. We have experienced some of our configuration settings getting changed back to defaults after an update.

Consider checking some of the default settings prior to scheduling the meeting. The first one is screen sharing. The default is now set to allow only screen sharing by the host. Make sure the setting is <u>not</u> configured to allow all participants to screen share. That means anyone can share their screen with inappropriate content. Yes, even bizarre sexual content. You can always change the setting during a meeting to allow those other than the host to share their screen if needed, but make sure the default is set so that only the host has screen sharing enabled.

Another setting is to require a meeting password. You can configure Zoom to include the password in the meeting invite or you can distribute the password separately. A related default password setting is to require a password for those joining by phone as well. Zoom has changed the default settings in a recent release. As a security measure, passwords are now required

for all meetings including those using your Personal Meeting ID. Even though it is now the default, check your settings to make sure passwords are required for all participants, including those just using a telephone.

It would be nice if everyone in the meeting used their video cameras so you could verify who they are. However, some participants may not want their cameras turned on or they call in using a telephone. There is another Zoom setting to prevent someone from changing their display name to indicate they are someone else. When you are in the meeting, go back to the managing participants panel and click on "More" again. Make sure that the "Allow Participants to Rename Themselves" is unchecked.

An additional step to prevent the display of inappropriate content is disabling virtual backgrounds. Go to the "Setting" section in Zoom and select the "In Meeting (Advanced)" choice. Disable the "Virtual background" option. This will prevent someone from displaying an inappropriate image as their background. Having said that, you may consider allowing participants to utilize virtual backgrounds. Virtual backgrounds are useful to "hide" the clutter of your surroundings or to show a pleasant scene. We would suggest leaving virtual backgrounds enabled unless you experience abuse. If you are particularly paranoid, disable them.

Control when the meeting starts. Don't let the participants join the meeting before you do. Who knows what could be going on before you connect? After all, it is your meeting. In the "Schedule Meeting" section of "Settings," turn off the "Join before host" option. An alternate control mechanism is the Waiting Room feature. Participants connecting prior to the host are held in the waiting room. The host then admits the participants individually or all at once. Enabling the Waiting Room feature automatically disables the "Join before host" option. You may have heard that there was a serious vulnerability with the waiting room feature. Independent research lab Citizen Lab did identify a problem and worked with Zoom to correct the issue. Zoom has since corrected the security issue so it is safe to use the waiting room feature if you want.

The Waiting Room feature is now enabled by default. As a host, you may find it is overkill to review each attendee in the waiting room prior to starting the meeting. Changing your configuration to "Join before host" may be good enough to control entry to the meeting. You can always set the Waiting Room option on an individual meeting basis. The Waiting Room is a good feature to enable if you anticipate a large number of participants and the meeting link is made public.

If you are particularly paranoid about what someone might pop up or write on a screen, you should turn off annotations and whiteboard in the "In Meeting (Basic)" section.

Consider turning on "Allow host to put attendee on hold" in the "In Meeting (Basic)" section. This will allow you kick people out of the meeting if necessary. Hopefully, you won't have to do that, but it's a good idea to have the option if needed.

Two other settings to disable deal with the user experience at the end of the meeting. We find it particularly annoying to have survey questions or ratings appear after visiting a site or at the end of a webinar, etc. Be nice to your participants and turn off the Feedback to Zoom and Display end-of-meeting experience feedback survey settings. They are both enabled by default.

## Scheduling

It is highly recommended *not* to use your Personal Meeting ID (PMI) when scheduling meetings. Your PMI is a constant value and never changes unless you manually edit it. Once it is known to someone else, they could connect to the meeting whether they have been invited or not. Of course, requiring a password for PMI meetings will help, but our recommendation is to not use PMI - period. Allowing Zoom to automatically generate the meeting ID is a more secure option. This means that each scheduled meeting will have a unique random meeting ID. This greatly enhances the security of using Zoom.

Another available security setting when scheduling a meeting is to require registration. You must have a paid Zoom subscription to require meeting registrations. Meeting registration means the participants register with their email address, name and questions. There are some predefined questions such as Phone, Industry, Job Title, Address, etc. You can also create your own custom questions. The registration option is not available in the Zoom app when scheduling meetings. You must schedule your meeting using a web browser in order to select the Registration Required option. The default is to automatically approve all participants after they complete the registration. You may want to change the setting to manually approve participants for the meeting. After registration is approved (manually or automatic), the participant will receive information on how to join the meeting. Meeting registration is another good way to further restrict meeting participants and help prevent Zoom-bombing.

## Account Security

Just like any other service you use, your password should be strong and not easily guessed. In addition, two-factor authentication (2FA) should be enabled for the account. It still amazes us that the default is not set to require 2FA. You enable 2FA for your Zoom account by selecting "Security" in the "Admin" section, under "Advanced." Turn on the "Sign in with Two-Factor Authentication" option. You will only be prompted for the 2FA code when you sign into your Zoom account using a browser. Launching the Zoom app *does not* prompt for the 2FA code. Zoom protects your account settings by enforcing 2FA from the browser. Logging in with your Zoom credentials when launching the app does not give you access to account settings so 2FA is less of a concern. The

Zoom app is primarily used to impact the user interface while you participate in a meeting.

## Video Conference Etiquette

When you are participating in a Zoom meeting, mute yourself so that other participants don't hear all your background noise and potential disruptions. Barking dogs, ringing doorbells, children screaming, etc. do not leave a very professional impression. Unmute yourself when you have something to say. A very fast way to temporarily unmute yourself is to press and hold the space bar. Just like the old-style push-to-talk microphones, holding down the space bar unmutes and allows you to be heard. Releasing the space bar mutes you again. While we're at it, become familiar with hotkeys and keyboard shortcuts for Zoom. There are a lot of them. Zoom has a help article that discusses hotkeys and keyboard shortcuts for the various operating systems. *https://support.zoom.us/hc/en-us/articles/205683899-Hot-Keys-and-Keyboard-Shortcuts-for-Zoom*

Another etiquette consideration is positioning of your video camera. If you have a separate USB webcam, position it at face level pointed directly at you. If you use the webcam in your laptop, make sure the laptop is elevated to have a straight view of your face. Set your laptop on a few books to get it higher if needed. The last thing you want is the camera looking upward exposing your nostrils. Not pretty.

## Privacy

You need to understand that Zoom is constantly being criticized for its collection of data. It's rare that we come across an attorney that has actually read the Terms of Service, Acceptable Use or Privacy Policy. The Terms of Service for Zoom is thirteen pages, which may take you a little time to plow through. The interesting thing is that Zoom updated its privacy policy on March 18, 2020. Coincidence or was it in response to the sudden spike in users flocking to Zoom?

Bottom line…Zoom collects a lot of data from users about their devices, activities and data shared/transferred. Consumer Reports pointed out that advertising campaigns could be developed from the videos and chat messages. Like Facebook, Zoom could use facial recognition technology against all the recorded videos. To be fair, Zoom has clarified and changed some of its past practices. As an example, Zoom removed the Facebook SDK (Software Development Kit) in the iOS client and reconfigured it to prevent unnecessary collection of device information. Previously, Zoom would send data about participants and used LinkedIn to match people. If a participant had a LinkedIn Sale Navigator account, they could access the other participants LinkedIn details without the participant knowing. Zoom has since disabled the feature.

A major difference between Zoom and its competition is the amount of control hosts have over participants and their activities. We've already discussed some of the recommended configuration settings to restrict what participants can do. Director of privacy and technology policy at Consumer Reports, Justin Brookman, said, "Zoom puts a lot of power in the hands of the meeting hosts. The host has more power to record and monitor the call than you might realize if you're just a participant, especially if he or she has a corporate account."

Citizen Lab discovered that some participant traffic was being rerouted through servers in China. As it turns out, Zoom uses geofencing to control traffic flow. Participants outside of China do not route through China and those in China stay within servers in China. When network traffic started to increase significantly, additional servers were added to Zoom's network. Unfortunately, a mistake was made and servers in China were improperly added. Therefore, some traffic was routed through China when it shouldn't have. After the report by Citizen Lab, Zoom removed the errant servers from the traffic flow.

Besides removing the improperly configured servers, Zoom has released an update that allows for even greater control of network traffic. If you have a paid subscription, you can now control which servers have the ability to handle your network traffic. Go to the In Meeting (Advanced) section of the Settings. Find the section where you can define the data center regions for your meetings/webinars. By default, all of the regions are selected. The available regions are data centers located in Australia, China, Hong Kong (China), Japan, United States, Canada, Europe, India and Latin America. Uncheck any region where you don't want traffic to flow through. Unchecking a region may cause trouble for those participants that are calling in with a phone number from that region. We have our account configured to allow only data centers located in the United States and Canada to handle our Zoom traffic. You always have the option to override your default traffic setting and select additional regions on a per meeting basis.

## Encryption

Security of Zoom meetings is a major concern of millions of users. Some companies and agencies have banned the usage of Zoom. Some companies are asking their employees not to use Zoom but haven't banned it outright. Some think that competing products are more secure and should be used instead. We believe the truth is somewhere in between. Recently, Zoom clarified their architecture and encryption schemes. The major criticism is the lack of end-to-end encryption despite Zoom's earlier claims. Zoom was using the term end-to-end encryption in a way that is not the commonly accepted definition. Busted.

Zoom explained its encryption in a blog post on April 1, 2020. "To be clear, in a meeting where all of the participants are using Zoom clients, and the meeting is not being recorded, we encrypt all video, audio, screen sharing, and chat content

at the sending client, and do not decrypt it at any point before it reaches the receiving clients."

Zoom clients include your computer running the Zoom app, a smartphone running the Zoom app and a Zoom Room, which are really only seen in large firms and enterprises. Essentially, your traffic is encrypted if all participants are using the app on a computer or smartphone. In that case, the user content is inaccessible to Zoom's servers or its employees.

The exposure for most people is when someone participates via a telephone call and not with the app or if the meeting is being recorded. Zoom cannot guarantee full encryption in those cases. There are other situations where full encryption may not be possible, but they are not commonly experienced by most lawyers. If you are really concerned about making sure that your Zoom meeting is as secure as it can be, require that all participants use the computer audio and do not allow telephone participation.

For those worried if Zoom can "tap" your session like a traditional communication channel, Zoom response is: "Zoom has never built a mechanism to decrypt live meetings for lawful intercept purposes, nor do we have means to insert our employees or others into meetings without being reflected in the participant list."

Zoom did not clarify the technical details for its encryption implementation. Without getting totally in the weeds, Zoom's encryption methods were not nearly as good as they could have been. Previously, Zoom used a single AES 128-bit key that was shared among all participants. Zoom also used AES in ECB mode, rather than a stronger industry standard.

To further improve security and respond to criticism about Zoom's encryption implementation, Zoom has released an update that implements AES-256 encryption instead of the weaker 128bit version. Version 5.0 of the Zoom client was released on April 28, 2020 and is required for all Zoom participants as of May 30, 2020. All Zoom participants are now using AES 256-bit GCM encryption. Currently, the encryption keys are still stored and managed by Zoom while in GCM mode. The future implementation of end-to-end encryption for Zoom will put control of the encryption keys in the hands of the user.

In further news about end-to-end encryption for Zoom, it appears that users of the free version will not be able to participate in end-to-end encrypted meetings. Zoom is under fire for this decision by many in the cybersecurity space. Perhaps a better direction is to allow hosting of end-to-end encrypted meetings by paid subscribers only. Since Zoom has not delivered its new end-to-end architecture, we really don't know how it will work or who will be able to participate.

## Ethical to Use Zoom?

Despite the media histrionics over Zoom's shortcomings, those shortcomings are shrinking day by day as security measures and privacy safeguards are implemented. We certainly believe that a lawyer's duty of competence (Model Rule 1.1) and the duty of confidentiality (Model Rule 1.6) are met if the lawyer has taken the time to understand the basic features of Zoom, including all security features.

## Final Words

Zoom has become extremely popular. It is very easy to use even for those not technically inclined. Performance is good and there are lots of features to use. There are also features that can go awry. The jury is still out as to whether Zoom can be trusted or not. Are its intentions pure or did they just get caught? Certainly, we've seen some major improvements in the platform. We would certainly like to see a more secure method of end-to-end encryption and we need more time to assess Zoom's transparency promises.

Despite the concerns with Zoom's privacy and security, there is a practical side to using technology in your law practice. While it is desirable to control the encryption keys, the reality is that you can't always do that today. A lot of technology providers hold a master decryption key and could technically decrypt your data. Dropbox and Apple's iCloud are two that come immediately to mind. Another reality is that you can't really control what you cannot see at the other end of your communication. It doesn't matter if you are using Zoom, Webex, GoToMeeting or calling on your iPhone. You have no control over what the person on the other end is doing. They could have software installed that is recording your entire conversation and capturing video. A more old school method is to record with a separate device such as a voice recorder or even taking a video with your smartphone. Bottom line… nothing is 100% secure.

For now, we don't see any problem using Zoom for your video conferencing needs as long as the subject matter is not extremely sensitive. Be smart in how and when you use it. Spend a little time to become familiar with the capabilities of Zoom, especially if you are the one hosting the meetings. ■

## About the Authors

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# No-Fault Insurers' Rights To Notice and Administrative Appeal under the 2013 SMART Act Amendments to the Medicare Secondary Payer Act

By Jack L. Hoffman, *Kuiper Kraemer PC*

In 2013 the Medicare Secondary Payer Act was amended by the SMART Act in which Congress directed the Secretary of HHS to develop regulations providing an administrative process by which applicable insurance plans might administratively appeal a determination by the Center for Medicare Services (CMS) that identified the plan as primarily responsible for medical charges for which Medicare had made a conditional payment. The secretary promulgated final regulations effective April 28, 2015. The regulations applied to applicable insurers the same administrative process for notice and administrative appeal which CMS had previously developed for beneficiaries and providers in cases in which CMS had identified the beneficiary or provider as being indebted to reimburse Medicare for medical benefits paid by Medicare for which the beneficiary or provider had later received payment from another source.

However, the regulations did not provide an administrative process with notice and right of administrative repeal for applicable insurers such as liability insurers, workers compensation insurers and no-fault insurers.

Prior to the Smart Act there was an anomaly in CMS procedure. With regard to beneficiaries and providers, Medicare's federal cause of action for recovery of payments paid for by another source, and the double damages penalty which went with it, did not accrue until the CMS through its administrative process determined that the money was owed and a recovery demand letter issued. After receipt of a recovery demand letter the beneficiary or the provider who disagreed had a choice. It could pay the amount demanded and continue to appeal its liability through the administrative process. Or it could refuse payment and be subject to the federal cause of action, with the double damage penalty in the event Medicare prevailed.

However, the regulations did not provide an administrative process with notice and right of administrative repeal for applicable insurers such as liability insurers, workers compensation insurers and no-fault insurers. In a number of state and federal trial and appellate opinions issued around 2010, Michigan no-fault insurers were held subject to a federal cause of action and double damages without any prior notice that Medicare had identified the insurer as an applicable plan primarily liable for charges which Medicare had paid conditionally and without any opportunity to administratively appeal the determination. The SMART Act was passed by congress expressly to correct this anomaly.

> The Secretary shall promulgate regulations establishing a right of appeal and appeals process, with respect to any determination under this subsection for a payment made under this subchapter for an item or service for which the Secretary is seeking to recover conditional payments from an applicable plan . . . .[1]

In the background section of the final rules publication, the Secretary stated the reason for the change:

> The debts at issue involve recovery of the same conditional payments that would be at issue if recovery were directed at the beneficiary. Given this, we believe it is appropriate to utilize the same multilevel appeals process for applicable plans.[2]

## The Change That No One Noticed

However, as we all know, change is hard. The writer of this article has been struck by how little impression the amendment of the statute has made on the Michigan no-fault bar and bench. Relying on old case law interpreting the statute as it stood prior the SMART Act amendments, provider counsel continue to plead Medicare Secondary Payer act federal actions against no-fault insurers as a matter of course and Michigan trial judges continue to apply the obsolete case law, as if Congress had never passed and President Obama had never signed the SMART Act. A recent experience of this writer in the Michigan circuit court is a good example.

The patient was a seventy-seven year old male who had a shoulder replacement in 2018 due to a severe arthritic condition of the left shoulder of several years standing. The hospital as a participating Medicare provider submitted a claim for Medicare benefits on the theory that no other applicable insurance covered the expenses of the treatment. Medicare

made an initial determination that the hospital was entitled to payment as a Medicare benefit in the agreed upon amount of about $15,000, a little more than the cost to the hospital of providing the treatment, as shown by CMS health services financial data in the public domain.

After receiving the Medicare payment but without moving to administratively reopen the initial determination the hospital commenced in state court a federal cause of action for payment of gross charges of $55,000, a Medicare secondary payment act penalty in the same amount, and no-fault penalties totaling about another $55,000. The hospital's theory was that about a year prior to the shoulder replacement, the patient had been in a motor vehicle accident. The patient did not recall any part of his body touching the vehicle on impact. The physician's emergency department report states: "He was apparently ambulatory on scene – was not going to be seen as a patient – road (sic) in the ambulance with his wife and then was talked into being seen here. He does not think he lost consciousness in the accident. . . . CT Scans of his head and neck were unremarkable. His pain is greatly improved – his C-spine is cleared here in the emergency department – he has no pain with motion - . . . A shoulder x-ray of he left shoulder shows severe osteo-arthritis but no acute process. Discussed with him that likely he will be more sore tomorrow than he is today. There is no significant injury." The discharge diagnosis was whiplash, no serious injury.

The theory of the hospital was that the whiplash injury aggravated the pre-existing condition, therefore no-fault allowable expense benefits were due for treatment of the pre-existing condition.

The no-fault insurer moved to dismiss on two grounds. First, the hospital as participating provider had invoked the Medicare administrative process and by the terms of its participation agreement was required to continue to follow that process. Therefore, under the SMART Act and the regulations promulgated pursuant thereto, the hospital was bound by the initial administrative determination until the determination was administratively reopened according to the processes defined in the regulations.

Second, the standard of proof for whether allowable expense benefits are due is whether the charges are for treatment for the injury arising out of the accident.[3] The hospital was bound by the testimony of its member physician, who was also the treating doctor and the hospital's expert, that it was not possible to say that more likely than not the treatment was for the injury arising out of the accident.

The hospital responded that under the decision in Sc*ott v State Farm Mut Automobile Ins Co*,[4] an allowable expense benefit was due for treatment of a pre-existing condition if the injury arising out of the motor vehicle accident aggravated the pre-existing condition to "almost any" degree. With regard to the insurer's position with regard to the primacy of the Medicare administrative process, the hospital cited *Mich Spine & Brain Surgeons, PLLC v State Farm Mut Automobile Ins Co.*[5]

A strong argument can be made that the inherent institutional biases of the court system make it impossible to cost effectively manage a health care delivery system through the courts. That is why congress has opted for an administrative system with a right of judicial review

The no-fault insurer pointed out that the *Scott* "almost any" test had been called out by name and expressly overruled by the Michigan Supreme Court in *Oostdyk v Auto Owners Ins Co.*[6] With regard to the *Michigan Spine* decision, the no-fault insurer pointed out that the decision had been made in reference to the text of the Medicare act prior to the SMART Act and prior to the regulations promulgated pursuant to the amendments. The insurer argued that a federal statute and the regulations promulgated thereunder were superior in authority to a judicial opinion interpreting a prior version of the statute.

The trial court endorsed the hospital's position in all respects. The insurer has filed an application for leave to make an interlocutory appeal.[7]

The foregoing situation induces reflection on whether it is possible to manage an effective health care delivery system through the courts.

The Medicare system is premised on avoiding litigation and channeling disputes through the Medicare administrative process. The claim of the hospital described above was well within the bounds of the Medicare administrative process. Under federal statutes and regulations it should have remained there. The trial court however thought it would be a better idea to take the case out of the federal administrative process and plunk it down in the middle of the Michigan civil litigation process. On the basis of judicial economy alone, let alone issues of federal and state comity, it would seem to make more sense to leave the issues where the federal government and the secretary of health and human services put them, in the Medicare administrative system. The hospital signed a participation agreement to that effect. Michigan trial courts should enforce that agreement, but by and large, do not.

A strong argument can be made that the inherent institutional biases of the court system make it impossible to cost effectively manage a health care delivery system through the courts. That is why congress has opted for an administrative system with a right of judicial review for Medicare and why the Michigan legislature has opted for a similar system with regard to Worker's Compensation. Why the Michigan legislature has not opted for an administrative system for no-fault is a complex question involving many intersecting lines of force.

Nevertheless, apart from what the Michigan legislature might do, Medicare participating providers have signed an

agreement to participate in the Medicare administrative system. No-fault insurers have rights to notice and administrative appeal in that system, just as do beneficiaries and providers. A federal cause of action does not vest until Medicare has notified the no-fault insurer that it has been identified as an applicable plan liable to reimburse Medicare for a conditional payment and a recovery demand has been issued. ■

## About the Author

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## Endnotes

1 42 USC 1395y (b) (2) (B) (viii).

2 80 FR 10611, 10611-10612.

3 *Nasser v Auto-Club Ins Assoc,* 435 Mich 33 at 49; 457 NW2d 637 (1990), citing *Nelson v DAIIE,* 137 Mich App 226, 231; 359 NW2d 536 (1984).

4 278 Mich App 578, 586; 751 NW2d 51 (2008)

5 758 F3d 787 (CA 6, 2014).

6 498 Mich 913; 870 NW2d 926 (2015).

7 The application may be found on the Court of Appeals website under *Spectrum Health Hospitals, et al, v Farm Bureau Gen Ins Co of MI, et al,* COA #353552, 17th Cir # 19-3130-NF

# Unpacking the Products Completed Operations Hazard:

## Clarifying the Complex Exclusion to Commercial General Liability Policies Under Michigan Law

By Eric Conn and Thomas Lurie, *Segal, McCambridge, Singer & Mahoney, Ltd.*

The Products Completed Operations Hazard, which is found in Commercial General Liability insurance policies, is a mystery to many and difficult to understand even under the most basic of fact patterns. This article seeks to demystify the exception to coverage and provide a general understanding of how it can be used appropriately to limit coverage in the appropriate circumstances.

## Introduction

A common exception to Commercial General Liability ("CGL") insurance policies is the "products completed operations hazard." It may be an outright exclusion or a separately stated limit of coverage. Either way, it refers to accidents involving products or operations after the products or operations have been completed or abandoned and that are away from the premises owned, rented, or controlled by the named insured[1] (no wonder there is confusion about the exception). In simpler terms, if bodily injury or property damage occurs because of an insured's defective product or the insured's negligent work, then coverage is not available under the CGL policy.

There are good reasons for the limit and the exclusion. Primarily, an insured has only purchased coverage under a CGL policy for operational hazards, that is, hazards that arise out of the day-to-day operation of an insured's business on the insured's own premises. The insured has not purchased coverage through a standard CGL policy for "completed operation hazards." To say it differently, an insured is typically not seeking coverage for hazards that arise after its work (its "operations") is finished or its product (its "work-product") is completed and delivered. Thus, insurers have no intent to insure for shoddy workmanship.

The exception arose with the wave of tort reform in the 1970s and 1980s creating statutory causes of action for product liability. After insurance companies saw the growing number of product liability claims against manufacturers and construction companies that were previously covered by CGL policies, insurers determined they should exclude coverage for these significant business risks.[2]. Therefore, an insured who wanted coverage for products completed operation hazards, must add this coverage to the basic CGL language, which typically resulted in two or three times the base premium.[3]

## Unpacking the Products Completed Operations Hazard

In Michigan, the Products Completed Operations Hazard, as an exception to the normal liability coverage in a CGL pol-

icy, is strictly construed against the insurer and liberally in favor of coverage.[4] Furthermore, if the exception falls within an endorsement to the policy that conflicts with the CGL policy terms, then the endorsement language will control.[5]

The definition language usually takes the following form:

> Products-completed operations hazard:
>
> A. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:
>
> 1. Products that are still in your physical possession; or
>
> 2. Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:
>
> a) When all of the work called for in your contract has been completed.
>
> b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
>
> c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.[6]

This provision contains many large terms packed tightly into the proverbial lunch pail. These can be unpacked into smaller, more bite-sized pieces.

## The "Accident or Occurrence" Requirement

The Products Completed Operations Hazard applies within the basic coverage requirement that "bodily injury" or "property damage" must "occur." The exception starts by stating that the injury or damage must have occurred, an oft litigated term with a loose definition that could justify its own article; however, the situations where the Products Completed Operations Hazard is implicated are not always "occurrences" under the terms of the CGL policy.

An important aspect that arises in situations where the Products Completed Operation Hazard exception may be utilized is that the "occurrence" must be an "accident." The word "accident" is defined as "an event which under the circumstances is unusual and unexpected by the person to whom it happens; an unusual, fortuitous, unexpected, unforeseen or unlooked event."[7] If the bodily injury or property damage arose out of a completed product or work, then the events that brought about the injury or damage must have been unusual and unexpected by the injured party. Thus, if the injury or damage is anticipated by the injured party, then there is no coverage.

> ... an insured is typically not seeking coverage for hazards that arise after its work (its "operations") is finished or its product (its "work-product") is completed and delivered. Thus, insurers have no intent to insure for shoddy workmanship.

## "Completed or Abandoned" – Ongoing Contractual Duty

Another area where litigation arises with the Products Completed Operations Hazard is determining when an operation or product is completed or abandoned. The Sixth Circuit examined one scenario in *McNally v American States Ins. Co.*, 308 F. 2d 438 (6th Cir. 1962) (interpreting Michigan law), which involved an insured's contractual obligation to continually inspect and maintain an elevator. The insureds, as an elevator service company, were required by contract to inspect and maintain an elevator in a safe working condition. A person was injured after the elevator fell, subjecting the insured to a lawsuit and bringing into question whether the insurer was responsible for defending and indemnifying the insured. *Id.*

In *McNally*, the insured's contractual language required continuous inspection and maintenance of the elevators; therefore, because its contractual obligation to perform operations had not completed, the insured's operations had not concluded, and it was determined that the insurer had an obligation to cover the insured. When making its ruling the court relied upon the completed operations paragraph of the exclusionary provision and stated it did not apply to an injury caused by the alleged negligent failure of the insured to inspect or maintain the elevator. *Id.* It did so because of the continuing nature of the contractual operation. *Id.*

The Sixth Circuit encountered this issue more recently in *Secura Ins v Stainless Sales, Inc*, 431 F.3d 987 (6th Cir. 2005) (applying Michigan law), where it found that the Products-Completed Operations Hazard exclusion in the CGL policy did not apply to preclude coverage for any liability resulting from a train derailment caused by an insured's defective packing of its product into shipping containers at its warehouse. *Id.* Under the sales contract between the insured and purchaser, the contractual obligation was not complete until the goods were delivered to another company for transport across the ocean. Therefore, "all the work called for in…[the] contract" had not yet been completed at time of derailment. *Id.*

It can be more complicated when the service is one that may not require the constant duty to provide services. In *St Paul Ins Co v Bischoff*, 150 Mich App 609, 389 NW2d 443 (1986), there was not coverage for a fire loss which was allegedly caused by the insured's negligent installation of a security alarm system

In *McNally*, the insured's contractual language required continuous inspection and maintenance of the elevators; therefore, because its contractual obligation to perform operations had not completed, the insured's operations had not concluded, and it was determined that the insurer had an obligation to cover the insured.

at an electric company. The system had been fully installed and the electric company was using the system as intended, despite the fact that the insured continued to tweak the system and make adjustments as necessary after installation. *Id.* Therefore, Michigan courts do not impose a blanket obligation on insurers to cover losses that result from insureds that provide services that may continue as ancillary to the original contract. This appears to be because the insured's duty to service the system was not continuing, but was rather required if, and only if, the installed product was not working properly.

This distinction can be seen more clearly in *First Mercury Syndicate v Telephone Alarm Sys.*, 849 F Supp 559 (W.D. Mich. 1994) (applying Michigan law). There the court found that Michigan law does not exclude coverage for losses that are the result of defective monitoring pursuant to the Products Completed Operations Hazard exclusion. In *First Mercury*, the insured was an alarm company that installed a fire alarm system on a client's premises and entered into an agreement with said client to monitor the system. After the client's premises was destroyed by a fire and the client alleged the insured failed to monitor the system, the insurer attempted to exclude coverage. However, the court found that because the insured's duty to monitor was a continuing one pursuant to contract, its duties were not completed and the Products Completed Operations Hazard exclusion was inapplicable. *Id.*

It is clear from an examination of Michigan case law that if there is an incomplete contractual obligation at the time of the accident, then the Products Completed Operations Hazard exception does not apply because the insured's work is inherently incomplete. Whether an operation is complete can be complicated when there is no continuing contractual obligation to provide services. The Products Completed Operations Hazard can become even more convoluted when dealing with the definition of "product" or "operation." That said, the primary takeaway is that if there are no continuing contractual obligations, it is much more likely that the exclusion will apply, and coverage will be excepted.

## Arising Out of the Insured's "Product" or "Work"

The last item of the Products Completed Operations Hazard exclusion concerns the definition of "product" or "work" as the CGL policy may loosely define these terms. This leaves the insured and the insured's business partners or customers to define the scope of "work" or what can be considered part of the "product." For example, some CGL policies define "your work" as "work or operations performed by you or on your behalf" and "your product" as "any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by you."[8] This inherent inconsistency creates various judicial interpretations and opinions of the Products Completed Operations Hazard exception.

In *Auto-Owners Ins Co v Keizer Morris*,[9] the court held that express and implied warranties are included in the definition of "your product" under the Products Completed Operations Hazard exception. The definition of "your product" under this particular CGL policy included "[w]arranties or representations made at any time with respect to the fitness, quality, durability, performance or use of 'your product.'" The court looked at the dictionary definition of "made" and found that the insured need not take affirmative action to "make" the warranty. Furthermore, the court reasoned that implied warranties are included within the exclusion as the insured inherently "made" the warranty with respect to the fitness, quality, durability, or performance of its product by placing it in the marketplace. Therefore, not only are the physical products included in the exception, but so are express and implied contractual warranties and damages that may arise out of the alleged breach of warranty.

Michigan courts also make a distinction that the insured's purported commission of a tort while offering a service or constructing a product may be separate from liability arising out of the "product" or "operation." In *Ornamental Iron & Stair Co v General Accident & Life Assurance Corp*, 68 Mich App 259, 264, 242 NW2d 544, 547 (1976), the Michigan Court of Appeals relied on case law developed in other states to explain that the insured was covered by the CGL policy where the insured, "…handled no products but was engaged solely as a contractor and the exclusion provisions of the policy have no application to the construction work performed by [the insured]." *Id.* The insured was allegedly negligent in its construction of a sewer system; however, the sewer system did not fail or cause the loss to take place. Therefore, insurance coverage was afforded for the alleged acts of negligence committed by the insureds during the time period the work had not yet been completed.

The case law surrounding the Products Completed Operations Hazard often hinges on the court's interpretation of what the insured's "work" or "product" may be. The definition of "work" or "product" has evolved in reaction to judicial interpretation that would find in favor of coverage and narrow the exclusion. Therefore, if the action or event is found to fit within the definition of "work" or "product" by the court, then the

court is more likely to rule that coverage would be excluded under the Products Completed Operations Hazard exclusion.

## Conclusion

The Products Completed Operation Hazard exclusion is one that is heavily reliant on the unique facts and circumstances that give rise to a case. However, certain elements are more outcome-determinative, such as the contractual obligations of the insured at the time of the alleged occurrence or how the insured's "product" or "work" is defined. As an attorney examining such a situation, special attention should be paid to the underlying contractual agreements to provide clarity to the loosely defined terms found in most Products Completed Operations Hazard exclusions. ■

## About the Authors

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## Endnotes

1 Construction and application of clause excluding from coverage of liability policy "completed operations hazards", 58 A.L.R.3d 12, 16.

2 Robert M. Landis and Mark C. Rahdert, *The Completed Operations Hazard*, 19 Forum 570, 1984.

3 *Id.*

4 *Auto Club Ins Ass'n v DeLaGarza*, 433 Mich 208, 214, 444 NW2d 803 (1989).

5 *Royce v Citizens Ins Co*, 219 Mich App 537, 544; 557 NW2d 144 (1996); *Hawkeye-Security Ins Co v Vector Construction Co*, 185 Mich App 369, 380; 460 NW2d 329 (1990).

6 *See*, *Secura Ins. v. Stainless Sales, Inc.*, 431 F.3d 987, 990-991 (6th Cir. 2005).

7 *Allstate Ins Co v Freeman*, 432 Mich 656, 443 NW2d 734 (1989).

8 *Hastings Mut Ins Co v Mosher*, opinion and order issued by the Sixth Judicial Circuit Court of Michigan, filed August 22, 2005, Case Number 2004-056508-CK (decided by Judge Nanci Grant, available at 2005 Mich. Cir. LEXIS 28); *Z & R Elec Serv v Cincinnati Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2001, Docket No. 226605 (available at 2001 Mich. App. LEXIS 1503).

9 Unpublished opinion per curiam of the Court of Appeals, issued June 28, 2011, Docket No. 297657(available at 2011 Mich. App. LEXIS 1194, 2011 WL 2557617).

No-Fault Corner

# *MemberSelect Ins Co v Flesher* - Another Nail in the Coffin of the "Insurable Interest" Argument in No-fault Claims

Ronald M. Sangster, *Law Offices of Ronald M. Sangster PLLC*

Six months ago, this *Journal* published an article on the Michigan Supreme Court's decision in *Dye v Esurance Prop & Cas Ins Co,* 504 Mich 167, 934 NW2d 674 (2019), which addressed the issue of whether or not a vehicle owned by one person is properly insured when the owner maintains insurance through a non-owner of that vehicle. In *Dye*, the Michigan Supreme Court concluded that MCL 500.3101(1) only requires that an owner "maintain" insurance on the vehicle, and that the owner fulfills this requirement when he insures the vehicles through a third person. In the article, this writer urged practitioners to "exercise caution about using an 'insurable interest' argument to void a policy in cases involving parental named insureds or their children," and reserve those arguments for cases involving complete "strangers to the insurance contract." It appears as if a recent Court of Appeals panel may have read this article and heeded this advice!

In *MemberSelect Ins Co v Flesher*, __ Mich App __, __ NW2d __ (Court of Appeals docket no. 348571, rel'd 4/23/2020), the Michigan Court of Appeals, in a published opinion, addressed the continuing validity of the "insurable interest" argument in a lawsuit involving a claim for nofault insurance benefits. To recap what the "insurable interest" argument encompasses, it is based upon a long-standing public policy against "wager policies" and as summed up by the

Court of Appeals in *MemberSelect Ins Co*:

> "Specifically, it arises out of a venerable public policy against 'wager policies'; which, as eloquently explained by Justice Cooley, are insurance policies in which the insured has no interest, and they are held to be void because such policies present insureds with unacceptable temptation to commit wrongful acts to obtain payment. *O'Hara v Carpenter,* 23 Mich 410, 416-417 (1871). Thus, 'fundamental principles of insurance' require the insured to 'have an insurable interest before he can insure: a policy issued when there is no such interest is void, and it is immaterial that it is taken in good faith and with full knowledge.' *Agricultural Ins Co v Montague,* 38 Mich 548, 551 (1878)." *Id*, slip opinion at p 4.

As also noted by the Court of Appeals:

> "The 'insurable interest' doctrine seems to find its origin in public policy concerns. Among those concerns is a desire to prohibit to use of insurance as a form of wagering, and a desire to prevent the creation of socially undesirable interests, such as where a creditor buys insurance on the life of a debtor for an amount greatly exceeding the amount of the debt, such that the creditor 'might be [tempted] to bring the debtor's life to an unnatural end.' *Lakin v Postal Life & Cas Ins Co,* 316 SW 2d 542, 548 (MO, 1958)." *Id*, quoting *Allstate Ins Co v State Farm*, 230 Mich App 434, 438-439, 584 NW2d 355 (1998)."

Prior to the Supreme Court's decision in *Dye, supra,* many insurers were taking the position that whenever a motor vehicle was not owned by its policyholder, the policyholder *automatically* lacks an "insurable interest" in the vehicle, thereby rendering the policy void. The fact that *Dye, supra,* seems to approve of the practice of insuring vehicles in the name of a non-owner (absent an indication of fraud) casts doubt on the continuing validity of the "insurable interest" argument in the context of automobile insurance policies.

Turning to the specific facts at issue in *MemberSelect Ins Co*, Defendant Flesher was operating his motorcycle when he was involved in an accident with a hit-and-run motor vehicle. Under MCL 500.3114(5), the insurer of the owner or registrant of the motor vehicle involved in the accident with the motorcyclist occupies the highest order of priority for payment of the benefits at issue. At some point after the accident, Mr. Flesher identified the vehicle as a GMC Yukon, which was insured by Plaintiff MemberSelect Insurance Company. The GMC Yukon was owned by Nicholas Fetzer but insured by his mother, Kelly Fetzer. MemberSelect Insurance Company then filed a declaratory judgment action against the motorcyclist, Mr. Flesher, and the owner and operator of the GMC Yukon, arguing that its policy was void because the owner's mother, Kelly Fetzer, had no "insurable interest" in the Yukon that was titled in the name of her son.

Nicholas Fetzer was 33 years old at the time of the accident. He testified that he had the vehicle insured in his mother's name because it was too expensive for him to insure the vehicle in his own name. Ms. Fetzer testified that she never rode in her son's vehicle and had no plans to ride in it in the future. Both Kelly and Nicholas testified that Nicholas would reimburse his mother for the monthly premium payments that she made on his behalf.

At the trial court level, the court noted that the MemberSelect policy was not void for lack of an "insurable interest" in the vehicle. In fact, the lower court ruled that Ms. Fetzer "has an interest in her son's well-being both physically and financially," presumably relying on similar rationale enunciated by the Court of Appeals' in *Madar v League Gen'l Ins Co*, 152 Mich App 734, 394 NW2d 90 (1986). Therefore, the policy remained in full force and effect.

On appeal, the Court of Appeals affirmed the decision of the lower court, but in doing so, the Court of Appeals, for the first time, explicitly cast doubt on the continuing validity of the "insurable interest" requirement in the context of automobile insurance policies. The Court of Appeals acknowledged that in *Clevenger v Allstate Ins Co*, 443 Mich 646, 505 NW2d 553 (1993), the Supreme Court did, in fact, indicate that an insurable interest in *something* is necessary to support a valid automobile liability insurance policy, and that the insurable interest must belong to a "named insured." However, in *Clevenger,* the Supreme Court failed to elaborate on its statement in any great length or cite any authority for this proposition. Rather, in *Clevenger,* the Supreme Court simply observed that Allstate's insured, Williams, still had an "insurable interest" in the vehicle because after selling it, he left his license plate on the vehicle, thereby rendering himself a "registrant" of that vehicle. By contrast, in *Allstate Ins Co, supra,* the Court of Appeals observed that because the seller had removed his license plate, registration and certificate of insurance from the vehicle at the time he sold it, he no longer had an "insurable interest" in that vehicle.

However, neither one of these cases seemed to have any direct impact on the issue before the Court in *MemberSelect Ins Co;* i.e., whether a family member insuring another family member's vehicle in their name still has an "insurance interest" in something that would thwart the attempted voiding of the policy by the insurer. Instead, the Court was confronted with a situation we see in many cases; i.e., a parent insuring a vehicle in their name, which is actually owned by their son or daughter – usually because the premiums are too expensive for the son or daughter to pay on their own.

In this regard, the Court of Appeals noted that in the context of automobile insurance, "there is a legitimate question

whether [automobile] liability insurance requires an 'insurable interest'" because "these public policy concerns are not implicated in the case of liability insurance, because the holder of the insurance cannot collect cash on the policy," citing *Allstate Ins Co,* 230 Mich App at 438-439. Nonetheless, the Court of Appeals stated that even assuming that the 'insurable interest' requirement was still valid, an "insurable interest" can go beyond the property itself that is being insured. Rather, the 'insurable interest" can be "any kind of benefit from the thing so insured or any kind of loss that would be suffered by its damage or destruction." *Morrison v Secura Ins Co*, 286 Mich App 569, 572-573, 781 NW2d 151 (2009). Noting that "a person obviously has an insurable interest in his own health and well-being," the Court of Appeals extended this rationale to include family members of the named insured – even those "children" who are no longer living with their parents, but may even have families of their own:

> "Although none of these cases decided the issue that confronts us in this case, they persuade us that we should let intact the trial court's determination that Kelly had an insurable interest in this case. To begin with, the *Morrison* Court recognized that 'family members share a large portions of their lives and properties in ways they do not share with strangers' and that 'public policy clearly recognizes that the family unit is, and always has been, entitled to a special status in the law." *Id* at 574-575. *Morrison* also noted, as did *Allstate*, that in the context of a nofault automobile policy, "the basis for the insurable interest requirement is weak," and further stated:
>
> > Parents who provide vehicles for their children are obviously interested in something other than personal pecuniary gain, and they are understandably concerned – not to mention of the view that it is a significant life event – when those children are finally 'on their own.' Furthermore, nofault insurance is fundamentally not something from which one could profit anyway, its goal being indemnification rather than compensation. Considering, additionally, parents' natural interest in the well-being – physical, emotional, and financial – of their children, we would, at a minimum, conclude that the trial court's conclusion is worthy of serious consideration in an appropriate case. [*Id* at 573, n 4.]
>
> We conclude, reaching the issue that this Court declined to reach in Morrison, that Kelly had a sufficient interest in the well-being of her adult child and that we should not void her insurance policy on public policy grounds. An insurable interest may be found, at least in some instances, in 'the property, or the life insured' by an insurance policy. [Citation omitted]. Although, unlike the adult child in Morrison, Nicholas does not live with Kelly (and in fact has several children of his own), we do not believe that this is so dispositive a factor as to divest Kelly of an insurable interest; our Courts have long noted that even a de minimis insurable interest may be insured. [Citations omitted]. We conclude that the interest of a parent in an adult child's welfare, including such aspects as being covered for potential injury, being protected from financial ruin from injuring another, even the avoidance of civil infraction or other legal penalties for driving while uninsured, is sufficient to avoid temptations and social ills of 'wager policies.'"
>
> *MemberSelect Ins Co,* slip opinion at pages 7-8.

What is noteworthy about this case is that it seemingly disapproves of the Court of Appeals' analysis of this same issue in *Bracy v Farmers Ins Exch*, Court of Appeals docket no. 341837, unpublished decision rel'd 9/19/2019, which was discussed at some length in the author's earlier article. In *Bracy*, the Court of Appeals had held that the policyholder/mother lacked an insurable interest in a motor vehicle owned by her adult son, which was involved in an accident with a pedestrian. The pedestrian, being a "stranger to the contract" was determined to be ineligible to obtain benefits under that contract because the policy was void, due to a lack of an insurable interest in the vehicle. Here, the motorcyclist, again being a "stranger to the contract" could conceivably claim benefits under that policy because MemberSelect Insurance Company's policyholder/mother had an "insurable interest" in her adult son's health and well-being.

Finally, the Court of Appeals noted that its opinion was supported by the Supreme Court's decision in *Dye, supra*, and particularly the Supreme Court's statement that "determining whether nofault benefits are available to an injured person does not depend on 'who' purchased, obtained or otherwise procured nofault insurance." *Dye*, 504 NW2d 167, 181, 934 NW2d 674 (2019). As noted by the Court of Appeals:

> "While *Dye* concerned itself with the interpretation of specific provisions of the NoFault Act, see MCL 500.3107(1), MCL 500.3113(b), we conclude that *Dye* demonstrates that tensions may exist between the goals of the NoFault Act and the application of the 'insurable interest' rule so as to avoid an insurance policy from its inception. It may be that the 'insurable interest' requirement in fact

> conflicts with the goals of the NoFault Act; as discussed, other panels of this Court have questioned the applicability of such a requirement for policies (specifically, automobile liability insurance policies) that do not readily lend themselves to gambling and rarely, if ever, result in non-compensatory cash payouts to an insured. In light of *Clevenger* and *Allstate*, we cannot go so far as to say that the insurable interest requirement does not apply in the automobile liability insurance context; rather, we merely hold under the circumstances of this case that Kelly had a sufficient insurable interest in Nicholas' well-being that we should not declare the policy void on public policy grounds."
>
> *MemberSelect Ins Co*, slip opinion at pages 8-9.

Nonetheless, the Court of Appeals closed it opinion by noting that it would "be delighted if our Supreme Court would take the opportunity in this or some other case to clarify the insurable interest requirement, its applicability in the context of automobile liability insurance, and the continued viability of *Clevenger* in that regard." *Id* at page 9. The Court of Appeals also noted, in footnote 15, that:

> "Nothing in this opinion should be read as limiting an insurer from asserting appropriate contract-based or other traditional defenses to coverage, such as fraud in the procurement of a policy, see e.g., *Titan Ins Co v Hyten*, 491 Mich 547, 817 NW2d 562 (2012), or from seeking rescission, and we offer no opinion about the applicability of any such claims or defenses in this case."
>
> *Id* at page 9, n15.

Given the fact that both Kelly Fetzer and Nicholas Fetzer testified that the reason they were having the mother insure the vehicle, owned by her son, was to reduce premiums, one wonders why MemberSelect Insurance Company did not opt to simply rescind coverage, based upon fraud, as opposed to pursuing the "insurable interest" argument.

## Concluding Remarks

As of the date this article is being prepared, MemberSelect Insurance Company has filed a motion for reconsideration with the Court of Appeals. The Court of Appeals has yet to rule on this motion. Nonetheless, it seems to this writer that pursuing the "insurable interest" argument in cases involving nofault insurance may be an exercise in futility. For example, in the context of the MemberSelect Insurance Company case, the insurer should have considered rescinding the policy altogether, based upon what appears to have been a clearly fraudulent act on the part of its insured and her son.

Another alternative would have been to simply deny the claim based upon a straightforward priority analysis. After all, MCL 500.3114(5) requires the motorcyclist to obtain nofault benefits from the insurer of the owner or registrant of the motor vehicle involved in the accident. Here, the "owner" and "registrant" was Nicholas Fetzer himself – not his mother. Although MemberSelect Insurance Company undoubtedly insured the motor vehicle that was involved in the accident with the motorcyclist, it arguably did not insure the adult son (the owner of the vehicle involved) who did not even reside in the same household. See e.g., *Stone v Auto-Owners Ins Co*, 307 Mich App 169, 858 NW2d 765 (2014), which was likewise discussed at some length in the author's earlier article. It will be interesting to see how this area of the law evolves as Courts continue to grapple with the implications of the Michigan Supreme Court's decision in *Dye*. ■

# Selected Insurance Decisions

By Deborah A. Hebert, *Collins, Einhorn, Farrell PC*

## Michigan Supreme Court

### A precedential ruling on CGL coverage: subcontractor's defective work can be an occurrence

*Skanska USA Building, Inc v*
*MAP Mechanical Contractors, Inc*
Docket Nos. 159510 and 159511, rel'd June 29, 2020
____ Mich ___ (2020)

In a unanimous opinion, the Supreme Court held that "faulty subcontractor work that was unintended by the [additional] insured may constitute an 'accident' (and thus an 'occurrence') under a CGL policy." That's because faulty workmanship may fit within the ordinary definition of an accident, which is "an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated and not naturally to be expected." Faulty workmanship may happen by chance. It may occur outside the usual course of things, and be unanticipated or unexpected. And "an 'accident' may include damage to an insured's own work product." The court expressly did not decide the coverage available under a CGL policy "to a contractor for the damages resulting from its own defective work, not the work of a subcontractor."

### Proper Notice for Policy Cancellations

*Yang v Everest National Ins Co*
Docket No. 344987
Order granting oral argument on application
May 20, 2020

In a case involving the notice required before cancelling an insurance policy, the Supreme Court has directed the parties to submit briefs addressing the following questions: (1) whether an insurer may cancel an insurance policy in compliance with MCL 500.3020(1)(b) by mailing a written notice of cancellation to the insured before the grounds for cancellation have occurred; and (2) whether the appellant's written notice of cancellation complies with the provision in the insurance policy that requires "at least 10 days notice by first class mail, if cancellation is for non-payment of premium."

## Court of Appeals – Published

### Insurable Interests and Family Relationships

*Memberselect Insurance Company v Flesher*
___ Mich App ___ (2020)
Docket No. 348571

This opinion wrestles with the "contours of what may comprise an 'insurable interest'" in a motor vehicle (other than economic interests) sufficient to support a valid and

enforceable auto policy. The panel concludes that "the interest of a parent in an adult child's welfare, including such aspects as being covered for potential injury, being protected from financial ruin from injuring another, even the avoidance of civil infraction or other legal penalties for driving while uninsured, is sufficient to avoid temptations and social ill of 'wager policies.'" Policies issued to parents covering vehicles owned or registered to non-resident adult children are not contrary to public policy. Related issues of fraud or misrepresentation or other contract defenses are separate considerations.

## Michigan Court of Appeals – Unpublished Decisions

### No UM/UIM Coverage for Owned but Unlisted Vehicle

*Holland v Citizens Ins Co of the Midwest*
Docket No 347562
Released June 25, 2020

Plaintiff's decedent was killed in an accident while riding a motorcycle. Plaintiff sued her primary auto insurer and her umbrella insurer for UM or UIM benefits. The primary auto policy excluded UM/UIM coverage for injuries sustained while occupying an owned "motor vehicle" if that vehicle was not listed on the policy. Citizens' policy did not define the term "motor vehicle" so the court applied its ordinary meaning, which includes motorcycles. The umbrella policy expressly excluded UM and UIM benefits without the endorsement providing that coverage.

### Impaired Property Exclusion Not Applicable

*Cardinal Fabricating, Inc v Cincinnati Ins Co*
Docket No 348339
Released June 18, 2020

In this construction defect claim, the court relied on *Hawkeye-Security Ins Co v Vector* to hold that because the insured's defective workmanship caused damage to property other than its own work, the insurer had a duty to defend and indemnify the insured against any liability for that damaged property. The "impaired property" exclusion did not apply because the other property was "physically injured" and the exclusion only applies to "impaired property or property that has not been physically injured." In this case, the insured fabricated the steel used in support beams to hold up a visual screen installed at the end of an airport runway. The steel cracked and caused panels to fall off the screen, which damaged other property.

### Liability of Title Insurers and their Agencies is Limited by Contract

*Shower Curtain Solutions Limited, LLC v First American Title Ins Co*
Docket No 346549
Released June 18, 2020

Plaintiff-insured sued its title insurer and the insurer's agency for negligence in failing to determine the lack of access to an alley behind the insured property. The City of Detroit had abandoned the alley some years earlier, and it became part of the adjacent property. The court held that insureds had no legally viable tort claim against its title insurer or the agent because the relationship is governed by contract only. "[A]n injured party must rely on its title insurance contract to bring suit against its title insurer or the insurer's agent."

### No Workers' Compensation Coverage for Intentional Tort Claim

*Perfect Fence Company v Accident Fund Nat'l Ins Co*
Docket No. 349114
Released June 11, 2020

Plaintiff-employer sued its workers' compensation insurer for defense and indemnity against an employee's bodily injury claim based on intentional tort. According to the employee, plaintiff subjected him to a continuing dangerous condition knowing it would cause injury and willfully disregarded that known risk. The court held that the workers' compensation policy expressly excluded coverage for claims of intentional tort. And because liability based on negligence is barred by the WDCA, there was no potentially covered claim and thus no duty to defend.

### Cap on Coverage for CDs in Homeowners Policy

*Winans v Farmers Ins Exchange*
Docket No. 347872
Released May 28, 2020

Plaintiff recording artist submitted a claim under her homeowners policy for the loss of $400,000 in CDs stored at her home. The CDs were recordings of her work which she would sell while on tour. Farmers Exchange initially denied coverage under the business-property terms of coverage, but subsequently asserted, in the alternative, that coverage was limited to the $5,000 policy limit on losses of "recording or storage media that cannot be replaced with other of like kind and quality on the current retail market." The majority opinion rejected plaintiff's claim that Farmers was barred from asserting the $5,000 limit because it had not referenced that defense in its original declination. The court disagreed, holding

that principles of waiver and estoppel may not alter or extend the terms of coverage provided by the contract. Those equity principles only come into play in connection with an insured's failure to comply with the conditions of coverage.

### Homeowners Misrepresentation in the Application

*Meemic Ins Co v Jones*
Docket No. 346361
Released May 21, 2020
Motion for reconsideration pending

In her application for homeowners insurance, defendant Jones falsely stated that she resided at the property insured. Jones did later move into the home and lived there when it was damaged by a fire. Upon learning of the initial misrepresentation, Meemic rescinded the policy and commenced this action to recoup the more than $53,000 paid to Jones' mortgagee, and the advance payment made to Jones for her property damage. The court held that the standard mortgage clause in the policy created what was, in effect, a separate contract between the lienholder and the insurer. That contract was unaffected by any misrepresentation by the insured. The court also found that because Meemic rescinded the policy with Jones, it could not satisfy the precondition required by the contract for subrogation.

### Homeowners Failure to Submit Proof of Loss Results in Loss of Coverage

*Hurt v Depositers Ins Co*
Docket No. 346995
Released April 23, 2020

This homeowners policy required the insured plaintiff to return a sworn statement of proof of loss within 60 days of the insurer's request. Defendant-insurer sent the request for the proof of loss to plaintiff at the insured address, where a fire had occurred. Plaintiff never produced the statement but defendant did pay over $40,000 in personal property loss. Defendant closed the claim five months after the fire, with no outstanding claims for damage. When plaintiff submitted new damage claims a year after the fire, defendant denied coverage. The court agreed with the decision. Plaintiff failed to timely submit the required proof of loss, so defendant had no obligation to cover those later claims.

### Issues of Indemnity and Insurance for Construction Site Accidents

*Citizens Ins Co of America v Midwest Interiors, LLC*
Docket No. 346772
Released April 2, 2020

In a lengthy opinion that is worth reading if you have a similar case, the court grappled with the insurance and indemnity issues that typically arise in the face of a construction site injury. At issue were the insurance and indemnity rights and obligations of the general contractor, subcontractors, and a sub-subcontractor. The key holdings include:

1. when a subcontractor and its insurer respond to the general contractor's tender by acknowledging coverage and a duty to defend, but assert a reasonable belief that another subcontractor is assuming that responsibility, and the general contractor fails to respond, principles of equitable estoppel and laches bar that general contractor from recouping defense costs back to the original date of tender;
2. once the general contractor does respond with contrary information, the subcontractor's obligation to reimburse for defense costs begins to run;
3. this sub-subcontractor's promise to indemnify the subcontractor for claims arising out of, or in any way connected to, the sub-subcontractor' work or services or delivery of goods, did not include a promise of indemnity for the subcontractor's own contractual indemnity obligation to the general contractor;
4. in determining whether a contractor is an additional insured under another policy, the phrase "caused, in whole or in part by" is not the equivalent of fault, but means cause-in-fact or but-for cause.

## Sixth Circuit Court of Appeals

### Insurer's Liability for Consent Judgment After Failing to Defend

Hamilton Specialty Ins Co v Transition Investment, LLC
Case No 19-1935
___ Fed Appx ___
Decided June 19, 2020

Hamilton Specialty issued an insurance policy to Transition for three properties located in Detroit. A fire broke out in one of the buildings, fatally injuring three occupants and injuring a fourth. When Transition faced a lawsuit for negligent maintenance of the property (a defective stove caused the fire), it tendered its defense to Hamilton, which declined coverage. Transition subsequently entered into a consent judgment with the plaintiffs for $3,000,000. In this declaratory action by

Hamilton, the court rejected Hamilton's reliance on the two exclusions cited. The first was the contractual liability exclusion, barring coverage for damages the insured is obligated to pay by assumption of liability in a contract. The claim against Transition was based on Transitions' own acts and omissions, so the exclusion did not apply.

Hamilton also relied on an exclusion for liability "arising out of" or "resulting from" certain statutory violations, such as housing codes. Hamilton claimed that Transition allowed too many people to reside in the home, and failed to comply with code requirements for fire safety. The Court surveyed Michigan law on the meaning of "arising out of" and "resulting from" and concluded that although the statutory violations may have increased the damage caused by the fire, there was no reason to conclude that the statutory violations caused the fire itself. Hamilton had a duty to defend and because it did not, it was the first to breach the contract and could not assert other provisions barring coverage for voluntary settlements by the insured without the insurer's consent.

### "Business Purposes" Exclusion in Homeowner's Policy Applies to Rental Property

*Kelly v Metropolitan Group Property and Casualty Ins Co*
Case No. 19-1326
Decided April 13, 2020

This homeowners policy excludes coverage for damage to any part of the insured home used for "business purposes." The term "business purpose" is defined in the policy to include "property rented or held for rental by you," subject to certain exceptions. One exception is property that is "rented only occasionally for use as a residence." In this case, the insured moved to another state for her job and leased her home to a friend for two-and-a-half years. The court conducted a thorough review of the case law and concluded that such a long-term rental was not "occasional" and denied coverage for the fire damage claim.

## Federal District Court – Eastern District of Michigan

### Property Damage Claim

*Cox v State Farm Fire and Cas Co*
Case No. 19-12235
Decided April 16, 2020

This is a fire loss claim in which the plaintiff property owner claimed total loss but the insurer only agreed to cover cost of repairs. There was also a dispute over the damage caused by the fire vs the damage caused by the insured's failure to protect the property after the fire. The court confirmed that plaintiff could only recover for damage caused by the fire as opposed to post-fire damage caused by plaintiff's neglect. It concluded that an appraisal would be appropriate to determine the covered loss. But because State Farm was also asserting a fraud defense, one that was supported by evidence sufficient to create a question of fact for the jury, the case was not subject to resolution by appraisal.

### Commercial Policy Only Covered Tenant's Personal Property

*DLSH Properties, Inc v Samsung Fire & Marine Ins Co, Ltd*
Case No. 19-11227
Decided March 31, 2020

Plaintiff property owner sought coverage for damage to the building that it had leased to a tenant insured by the defendants in the case. The commercial lease required the tenant to maintain insurance on the property. But the policies purchased by the tenant for the years in question did not include coverage for damage to the building, so the court granted defendants' motion for summary judgment.

### Insurer Breached its Duty to Defend by Ignoring the Litigation

*Cherry v American Country Ins Co*
Case No. 18-13883
Decided March 27, 2020

American Country issued a commercial auto policy for a vehicle that struck plaintiff's vehicle and caused him injury. Plaintiff filed suit against American Country's insureds, but they never tendered the complaint for a defense or otherwise notified American Country of the lawsuit. Plaintiff's attorney did contact American Country on several occasions, and provided a copy of the complaint and other filings, including the defaults and the motion for entry of a default judgment, which was granted for $1.2 million. Plaintiff filed this action to recover on the judgment. He first argued that Michigan's financial responsibility law, MCL 257.520(f)(1) mandated coverage. The trial court rejected that argument because the policy was not subject to that act. But the court also rejected American Country's reliance on the notice requirements of its policy. While the policy did require the insureds to provide notice of suit as a condition of coverage, the insured's failure to do so does not automatically result in the loss of coverage under Michigan law. Coverage is lost only if the insurer can show actual prejudice. It could not do so here. The court declared that American Country had a duty to defend and indemnify and left it to plaintiff to pursue garnishment in the state court action. ■

# Legislative Update: Not Much to Discuss

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

As expected, the COVID-19 pandemic changed the legislative landscape, shifting priorities. The House and Senate Insurance Committees haven't met since March, and there's only been four new insurance bills referred to those Committees in that same span. With the looming budget shortfall, don't expect much insurance-related activity over the summer. Although, with the July launch of the revised No-Fault provisions, we may see a push to make some peripheral changes or to address any problems that arise. And don't forget, we're coming up on an election and the end of the two-year legislative cycle – meaning, lame duck is almost here.

Here are the bills that moved since the last update:

- **Chiropractic services and PIP benefits -** HB 4449 removes certain chiropractic services from the list of non-reimbursable personal injury protection benefits.
- ***Passed by the House*** *(102-5) on 12/10/19; Passed by the Senate (38-0) on 6/11/20; House Concurred in Substitute (106-2) on 6/17/20.*
- **Insurers' explanations of privacy policies –** SB 172 modifies the requirements for insurers to provide privacy policies to customers.
- ***Passed the Senate*** *(35-2) on 11/5/18; Passed by the House (91-18) on 6/3/20; Senate Concurred in Substitute (36-2) on 6/9/20; Signed by the Governor on 6/16/20 (PA 90'20 with immediate effect).*

Referrals to the House and Senate Insurance Committees:

- **Rehabilitation clinics:** revising reimbursement provisions under the No-Fault Act for rehabilitation clinics (**HB 5858).**
- **Emergency refills of medication:** requiring health insurers to provide emergency refills of medication during a declared emergency (**HB 5873).**
- **Public disclosure of information:** Creating exemption from public disclosure of certain information under the financial exploitation prevention act (**SB 862).**
- **Coverage for telemedicine visits:** Requiring health insurers to provide the same coverage for telemedicine visits as face-to-face visits (**SB 898).** ■

# ERISA Decisions of Interest

K. Scott Hamilton, *Dickinson Wright PLLC, khamilton@dickinsonwright.com*

Michigan's "Anti-Discretionary Clause" Regulation Did Not Apply to ERISA Policy Issued and Delivered Outside Michigan.

*Fores v Unum Life Ins Co of America*,
Case No. 19-11358 (E.D. Mich., May 29, 2020)

Michigan Administrative Code Regulation 500.2202(c) provides that "[o]n or after [July 1, 2007] a discretionary clause issued and delivered to any person in this state in a policy contract, rider, endorsement, certificate or similar contact document is void and of no effect," and applies to any such document revised in "any respect on or after July 1, 2007. The insurer issued a disability income insurance policy to the plaintiff's employer in Toledo, Ohio. The policy vested in the insurer discretion to determine benefits. It stated that the "policy is delivered in and is governed by the laws of" Ohio. The plaintiff was at all times a Michigan resident working in Michigan.

The plaintiff argued that Michigan's anti-discretionary clause regulation made the standard of review *de novo*, rather than arbitrary and capricious. Rejecting that argument, the court held that "[p]lainly, Rule 500.2202, according to its express terms, does not apply" because the policy was issued and delivered outside Michigan. The court further reasoned that "the choice of law provision in the policy precludes application of Rule 500.2202."

Lastly, the court rejected the plaintiff's argument that a May 17, 2007 letter the insurer sent to Michigan's Commissioner of Insurance stating that it would no longer enforce discretionary clauses in certain policy forms (including the plaintiff's form of policy) waived the insurer's ability to argue for an arbitrary and capricious standard of review. The insurer argued that the letter merely complied with Rule 500.2202's requirement to provide the Commissioner a list of all policy forms in Michigan that have discretionary clauses. The court held that "[n]othing in the letter suggests that [the insurer] was voluntarily agreeing that policies issued and delivered outside the State of Michigan would be subject to Rule 500.2202," and because "the policies listed in the letter to which the rule would apply were only those issued as defined in the referenced rules" it did not apply to the policy issued in Ohio.

On the merits, the court held the insurer's benefit decision was not arbitrary and capricious. ■

## About the Author

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# SCAO and SBM Seek Input from Lawyers Practicing During the Pandemic

The Michigan Supreme Court's State Court Administrative Office and the State Bar of Michigan have collaborated on a survey to gather feedback from attorneys navigating the practice of law during the COVID-19 pandemic.

All survey responses are confidential. The information collected will be used to help improve the practice of law in Michigan and enhance the resources available to lawyers working to stay safe and maintain their practice throughout the pandemic.

If you're in private practice, please take the survey here (https://www.surveymonkey.com/r/SBMpracticingcovid).

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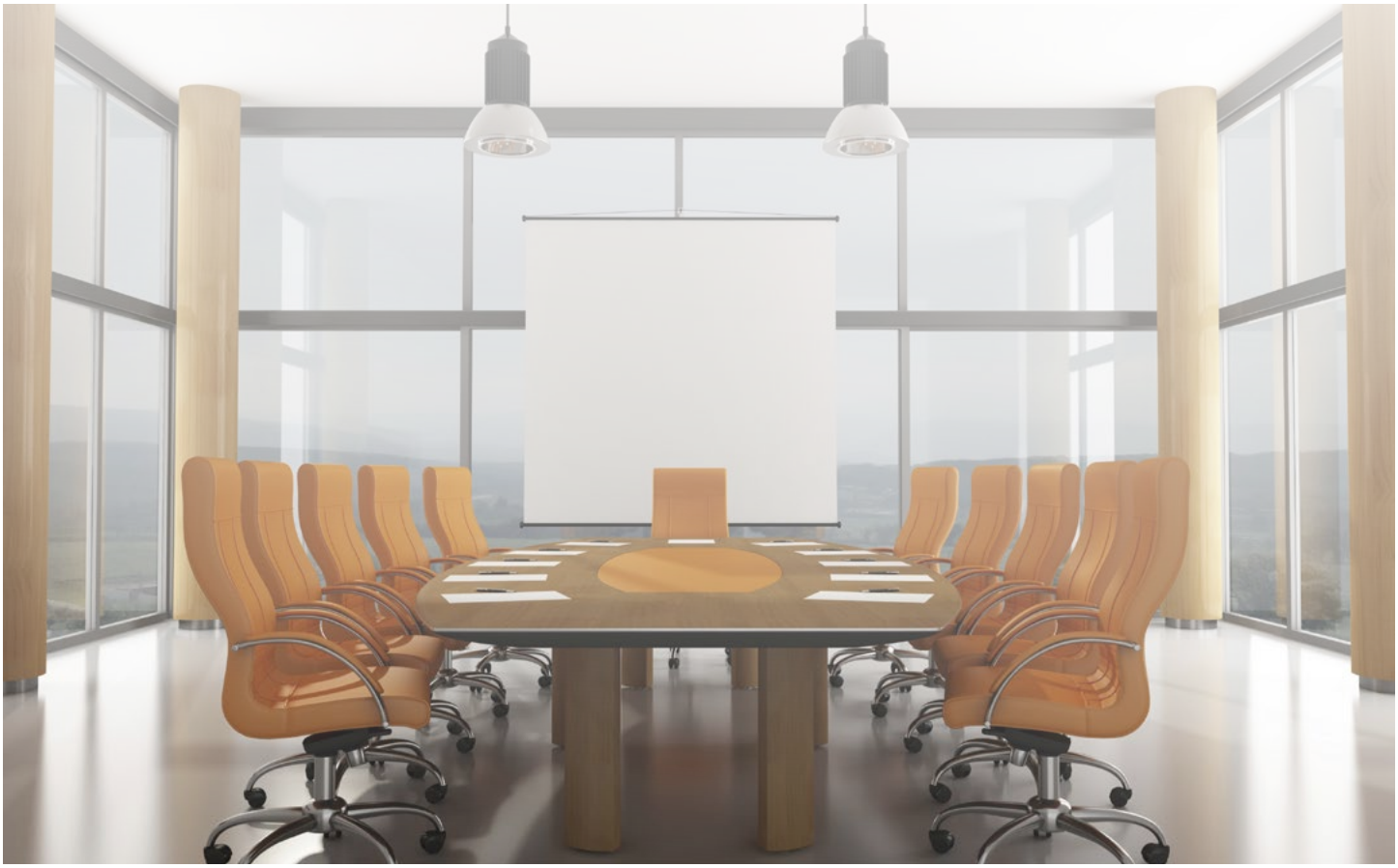

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