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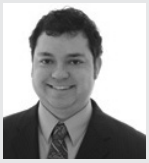

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President's Corner

By: Terence P. Durkin, *Kitch Drutchas Wagner Valitutti & Sherbrook, P.C.*
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Terence Durkin's practice blends labor and employment law with medical malpractice and general litigation. His years of experience as a litigator gives him a unique ability to help clients sort through the challenging and ever-changing world of labor and employment rules and regulations. Clients come to Terence and the firm's labor and employment practice group for guidance because they understand the priorities and risks involved with managing a diverse workforce, creating contracts, and implementing the best policies and procedures.

Terence and the Kitch labor and employment practice group offer a full array of employment and labor law services, including dispute resolution in all types of forums: the courts, mediation panels, arbitration, and administrative agencies. Clients rely on Terence to help them navigate collective bargaining, contract administration, and grievance and arbitration proceedings, and he often participates with them in those proceedings.

Terence plays an active role in the community by serving on the Executive Board of the Michigan Defense Trial Counsel, chairing the Ascension Providence Foundation, and being a member of the Plymouth Rotary. Most recently, he was elected to the Board of Directors and the Core Leadership Team of Oak Mac SHRM (Society of Human Resource and Management).

Terence received his Bachelor of Arts in political science from Millikin University in Decatur, Illinois, and his Juris Doctorate from Western Michigan University Cooley Law School, where he was Article Editor of the Journal of Practical and Clinical Law. He is licensed to practice law in Michigan as well as the United States District Courts of Eastern and Western Michigan.

He is married to Jessica and lives in Northville.

Who thought that court proceedings would be held virtually? Who thought that school classes would be held at the kitchen table? The COVID-19 pandemic has impacted our professional and personal lives in ways that we never thought imaginable. These alterations to how we live and work have extended into 2021 as the COVID cases rise, and we wait for vaccines to be administered to the mass public.

Hopefully, the vaccines will drastically reduce the number of COVID cases and tragic deaths. If the vaccines work as we want and expect them to, will we go back to our prepandemic life? In my opinion, the answer is no because a post-pandemic life cannot be the same as a pre-pandemic life. We will learn from what caused the pandemic in the first place and institute changes to prevent such a pandemic from occurring again. Think about the changes made after the horrific events that unfolded on September 11, 2001. Like 9/11, we must deal with and adapt to the changes brought about by the COVID-19 pandemic.

The MDTC is no different from any other association or business during these difficult times. The MDTC has had to be fiscally responsible while keeping our members and the community safe and healthy. These were not easy decisions because we enjoy the comradery of others while attending in-person events, seminars, and conferences. Despite our decisions to cancel certain events, the MDTC moved to a virtual platform to hold its League of Excellence Awards ceremony and winter conference. Instead of spending time away from the office, our winter conference was held virtually over three Fridays during the lunch hour. This unique scheduling allowed the MDTC to continue its educational programs in a safe and convenient format for the participants. In the future, we will continue to offer seminars on a virtual platform.

The COVID-19 pandemic has impacted our professional and personal lives in ways that we never thought imaginable.

In addition to the seminars and conferences, the MDTC offers a discussion list to its members that is free. This service is email-based and allows members an easy way to network with peers while staying safe. The email forums allow members to share ideas and suggestions on legal issues. It also allows members to ask questions on a particular issue or request information on expert witnesses. These are just a few of the examples that show the benefit of this discussion list. All members are automatically added to the general liability discussion list. However, the discussion list is further broken down by practice group, which may be utilized if the member has a question for a specific group. Most importantly, the discussion lists allow members to request assistance virtually while safely working remotely.

The MDTC is adapting to changes brought about by the COVID-19 pandemic. We continue to offer educational programs and a format to engage with members all in a safe environment. In the future, I truly hope that we will be able to hold in-person events. These in-person events will most likely be different than what we attended prepandemic. Despite these likely changes, the MDTC will continue to adapt to remain relevant and benefit its members.

I look forward to seeing you, either virtually or even perhaps in person, in the coming months. If you have any comments or suggestions on how the MDTC may better serve you, please do not hesitate to contact me.

Interpreting The New IME Requirements Under The Amended No-Fault Act Through An Analysis Of Medical-Malpractice Law

By: Lynn B. Sholander and Gina M. Derderian, *Collins Einhorn Farrell PC*

Executive Summary

As one of the first states to adopt a no-fault automobile insurance system, the Michigan no-fault act is often looked to as a model for this type of auto-reparation scheme. The Legislature's comprehensive changes to the no-fault act have left many wondering how these changes will impact litigation.[1] This is especially so when it comes to MCL 500.3151, the section governing independent physical and mental examinations. This statute provides that a physician performing an independent medical evaluation must meet specific criteria. Although Michigan's appellate courts have yet to address the application of this statute, a look at the Courts' interpretation of Michigan's expert qualification statute in medical malpractice actions, MCL 600.2169, may provide valuable insight as to how appellate courts will interpret MCL 500.3151.

Introduction

As one of the first states to adopt a no-fault automobile insurance system, the Michigan no-fault act is often looked to as a model for this type of auto-reparation scheme. The Legislature's comprehensive changes to the no-fault act have left many wondering how these changes will impact litigation.[2] This is especially so when it comes to MCL 500.3151, the section governing independent physical and mental examinations.

The first clause of § 3151 remains essentially the same, but a new subsection includes several requirements that a physician must satisfy to conduct an insurer-requested independent medical evaluation (IME).

When it comes to interpreting any statute, the text is the natural starting point for inquiry into its meaning. Courts are required to consider the plain meaning of the critical words as well as the statute's placement and purpose in the statutory scheme.[3] But a statute's perceived purpose cannot overcome its plain meaning—the language of the statute is paramount.[4]

Michigan's appellate courts have not yet had an opportunity to consider the amended language under § 3151. Consequently, trial courts must apply the new provisions as written without guidance from the higher courts. But a reasoned interpretation of these provisions does not require starting from scratch.

Lynn B. Sholander's practice primarily focuses on appellate and post-verdict litigation. She also has significant experience with general civil litigation, especially drafting and arguing complex motions in state and federal court. Lynn began her legal career as a research attorney and judicial law clerk at the Michigan Court of Appeals, serving under the Honorable Michael J. Riordan and the Honorable Kurtis T. Wilder. Before joining Collins Einhorn, Lynn was a member of the appellate practice group at a law firm in Metro Detroit, where she specialized in legal research and writing and all aspects of appellate litigation. During law school, she served as the editor-in-chief of the Wayne Law Review. lynn.sholander@ceflawyers.com or 248-351-5409

Gina M. Derderian is an associate attorney that focuses her practice in the areas of asbestos and toxic tort and general and automotive liability. Gina excelled in law school and maintained a record of academic excellence. She also has extensive research and investigative experience. Before joining Collins Einhorn Farrell, Gina handled bankruptcy, immigration, and labor/union cases. Gina.Derderian@ceflawyers.com or 248-663-7732

Conveniently, the requirements recently adopted into Michigan's amended no-fault act mirror similar provisions found in MCL 600.2169. That statute lays out several requirements for expert witnesses in medical-malpractice actions.[5] An analysis of case law in that context offers a practical guide for how Michigan's appellate courts will likely define, interpret, and apply § 3151 in its present form. Equally instructive are the textual differences between § 3151 and § 2169, which reflect dissimilar legislative intent and, consequently, direct different results.

In the end, this article aims to provide an examination of comparable statutes and instructive case law, tempered by an appreciation for the different contexts, to better equip no-fault practitioners to recognize, obtain, and defend valid IME opinions.

The Qualification-Matching Requirement

A physician performing an IME of an injured claimant must now satisfy the qualification-matching requirements under § 3151(2)(a) if the claimant's treating physician is a specialist. As a general matter, an IME physician's practice must match the practice of the insured's treating physician.

In its present form, subsection (2)(a) provides:

> If care is being provided to the person to be examined by a specialist, the examining physician must specialize in the same specialty as the physician providing the care, and if the physician providing the care is board certified in the specialty, the examining physician must be board certified in that specialty.[6]

The statute does not define "specialty" or "board certified," but its use of those terms mirrors the requirements under § 2169 for an expert witness in medical-malpractice cases.

In relevant part, § 2169(1)(a) states that "a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in [Michigan] or another state and meets" two basic criteria. First, "if the [treating physician being sued for malpractice] is a specialist," the expert must "specialize[] at the time of the occurrence that is the basis for the action in the same specialty as the [defendant treating physician]."[7] Additionally, if the defendant is a specialist who is board-certified, the expert witness must be board certified in the same specialty.[8]

The Michigan Supreme Court examined "specialty" within the framework of § 2169 in *Woodard v Custer*.[9] The court defined the term as "a particular branch of medicine or surgery in which one can potentially become board certified."[10] Relying on the plain language of § 2169, *Woodard* also concluded that "[a] subspecialty, although a more particularized specialty, is nevertheless a specialty" because it is also a branch of medicine or surgery in which a practitioner may become board certified.[11] *Woodard* further explained that a physician is "board certified" in the context of § 2169(1)(a) if they "have received certification from an official group of persons who direct or supervise the practice of medicine that provides evidence of one's medical qualifications."[12] So, "if a defendant physician has received certification from a medical organization to this effect, the plaintiff's expert witness must have obtained the same certification in order to be qualified to testify concerning the appropriate standard of medical practice or care."[13] Correspondingly, in the no-fault context, if a treating physician has received certification in a specialty or subspecialty, an IME physician must have the same certification.

The qualification-matching requirement in both statutes refers to "the same specialty" and "that specialty," as opposed to "the same specialties" and "those specialties." The singular language shows a legislative intent to require matching of a single specialty (and, if applicable, a single board certification), not multiple specialties.[14] *Woodard* similarly held that § 2169 requires a plaintiff's expert witness to "match the **one most relevant standard of practice or care," i.e., "the specialty [or subspecialty] engaged in by the defendant physician during the course of the alleged malpractice[.]"**[15] Correspondingly, if the defendant physician was board certified in the "one most relevant" specialty at the time of the alleged malpractice, "the expert witness must also be board certified in that specialty."[16]

By way of example, the defendant physician in *Woodard* specialized in pediatrics, with subspecialties in neonatal and pediatric critical care medicine.[17] The plaintiff's proposed expert specialized in pediatrics but not in the same subspecialties as the defendant.[18] The Supreme Court concluded that the "defendant physician was practicing pediatric critical care medicine"—one of his subspecialties—"at the time of the alleged malpractice, and, thus, pediatric critical care medicine is the one most relevant specialty." Thus, the Court held that although both experts shared a specialty, the mismatch in subspecialty made the expert unqualified to testify.[19]

It is reasonable to infer that courts considering the amended version of § 3151(2)(a) will apply the *Woodard* Court's reasoning in the no-fault context. Accordingly, an insurer-requested IME physician is now required to match the most relevant specialty that the insured's physician was practicing when they treated the insured. Consequently, it appears that a physical medicine and rehabilitation physician will no longer qualify to examine a claimant whose treating physician specialized in orthopedics during the relevant treatment.

Along related lines, because the qualification-matching requirement is specific to the treating physician's specialty and/or board certification at the time of treatment, an IME physician must limit their examination and testimony to the treating physician's medical practice. For example, if a claimant's treating physician specializes in general orthopedics and the IME physician specializes in general orthopedics and orthopedic spine surgery, the IME physician must limit their examination and testimony to general orthopedics.

If the claimant's treating physician is not a specialist, the qualification-matching requirement does not apply.[20] In that case, the IME doctor only needs to be licensed as a physician in Michigan or another state and satisfy the criteria under § 3151(2)(b), discussed next. However, as a practical matter, it is highly improbable that a physician would not be considered a specialist under Woodward. Per the Court's opinion, a "specialist" is "a physician whose practice is limited to a particular branch of medicine or surgery, especially one who, by virtue of advanced training, is certified by a specialty board as being qualified to so limit his practice.""[21] The American Board of Medical Specialties currently recognizes 169 practice areas for certification.[22] And the American Osteopathic Association offers certifications in 106 areas of practice.[23] Included among those are family medicine and internal medicine, both of which are subject to board certification.

The Professional Time Requirement

The next set of new criteria for an insurer-requested IME physician is found in § 3151(2)(b)(i) and (ii). These subsections establish professional time requirements that all IME physicians must satisfy—whether the claimant's treating physician is a specialist or not. Specifically, the statute states, "During the year immediately preceding the examination, the examining physician must have devoted a majority of his or her professional time to *either or both*" (i) "the active clinical practice of medicine" or (ii) "[t]he instruction of students in an accredited residency or clinical research program for physicians[.]"[24] The qualification-matching requirement persists in this subsection as well. If the insured's treating physician is a specialist, the IME physician's "active clinical practice" and/or "instruction of students" must be related to that specialty.[25]

The Legislature did not define "majority," "active clinical practice of medicine," or "instruction of students" in the statute. But these words and phrases are familiar, as they too are akin to the expert-witness requirements for medical-malpractice actions contained in § 2169. Case law interpreting § 2169 defines "majority" as "more than 50%."[26] Accordingly, to perform an insurer-requested IME under § 3151, the examining physician must have spent more than 50% of their professional time in the active clinical practice of medicine and/or the instruction of students. Case law defining "active clinical practice" and "instruction of students" is discussed next.

a) "Active Clinical Practice"

To date, there is only one published case in Michigan that has addressed the meaning of "active clinical practice of medicine." In *Gay v Select Specialty Hosp*,[27] the Court of Appeals was tasked with determining whether the plaintiff's proposed nursing expert met the qualifications under § 2169. Part of its analysis hinged on whether the expert was engaged in the "active clinical practice" of nursing. At her deposition, the proposed expert testified that she served as the director of education and as an administrator at a hospital.[28] Her work included instructing CPR classes, instructing continuing education classes, and orienting new nurses.[29] Based on her testimony, the trial court found that she was not engaged in the active clinical practice of nursing because she did not spend the majority of her time directly interacting with patients.[30]

On appeal, the Court reversed. It broadly defined the phrase "active clinical practice," clarifying the contours of this requirement. It rejected the trial court's reliance on the fact that the proposed expert was not directly involved in patient care, reasoning that the statute imposes no such requirement.[31] The Court explained that the word "active" cannot be construed in this context as requiring the professional to physically interact with patients. Rather, "the word 'active' must be understood to mean that, as part of his or her normal professional practice at the relevant time, the professional was involved—directly or indirectly—in the care of patients in a clinical setting."[32] The majority explained that while this usually occurs in "a setting where patients are treated," it is not "the equivalent of stating that a professional must directly interact with patients[.]"[33] Applying those standards, the Court found that the time the proposed expert spent "explaining, coordinating, and instructing nurses about the proper care of patients in a clinical setting" constituted time spent in "active clinical practice" for purposes of § 2169.[34]

Practically, then, "active clinical practice" is the "actual, day-to-day performance" "of one's profession in a clinical setting."[35] This usually means that the practice occurs in a setting where patients are treated, but § 2169 and § 3151 do not require that the professional physically interact with patients.[36] Instead, activities where the professional is involved directly or indirectly in the care of patients in a clinical setting will also count toward the professional time requirement.[37]

The definition applied in *Gay* serves as an instructive tool for applying the same phrase in the context of § 3151(2)(b)(i). It is reasonable to assume that the same types of activities identified in *Gay* will count toward the "active clinical practice" of an IME physician. As such, a physician who spends more than 50% of their time in a supervisory role, e.g., overseeing residents, will likely satisfy the professional time requirement. And, of course, a physician may satisfy the "majority of . . . professional time" requirement by combining time spent in the "active clinical practice of medicine" with time spent in "the instruction of students," so long as they spend more than 50% of their time between the two.[38]

b) "Instruction Of Students"

Like "active clinical practice," case law in the medical-malpractice context has broadly defined the phrase "instruction of students." When considering the breadth of the statutory phrase, *Gay* determined that it embraced more than just time spent physically demonstrating or lecturing in front of students.[39] The Court recognized that a person who teaches must spend a significant amount of time preparing for class, keeping abreast of current professional techniques, and contributing

in other ways that further the educational process.[40] The Court reasoned that "[s]uch activities are no less 'devoted' to the 'instruction of students' than the time actually spent in front of" them.[41]

Since *Gay* is the only case to date interpreting "instruction of students" under § 2169, the opinion provides a great deal of guidance in understanding what activities may qualify under the parallel provision in the no-fault context. For example, if a proposed IME physician authors a textbook considering the basic level of knowledge that a graduate medical student should have mastered, it appears that the time spent on this endeavor in the year proceeding the examination may count towards the new professional time requirement.

The Operation Of MCR 2.311

The amended version of § 3151 may appear to prohibit a no-fault insurer from obtaining an IME by a physician who doesn't match the qualifications of the insured's treating physician. But the Legislature inserted three important words into § 3151 that are not found in § 2169. This dissimilar language, considered with the rest of the statute, shows that § 3151 does not wholly prevent an insurer from requesting and obtaining an IME by a physician who does not meet the new requirements.

The first clause of § 3151(1) provides, "If the mental or physical condition of a person is material to a claim that has been or may be made for past or future personal protection insurance benefits, at the request of an insurer the person **shall submit** to mental or physical examination by physicians."[42] Subsection (2) then states that a physician who conducts an IME **"under this section"** must meet the applicable criteria.[43] Thus, an insurer may request an IME under § 3151 without court involvement—and the claimant must submit to that IME—as long as the examining physician possesses the qualifications required under the statute.[44] Unlike § 3151, § 2169 has a broader reach. It mandates that the proffered expert **"shall not give . . . testimony"** unless they meet the requirements under the statute. This language evidences an intent to provide strict requirements for the admission of any and all expert testimony in medical-malpractice actions.[45]

The glaringly divergent text reveals that the Legislature did not intend to impose the same restrictions under § 3151 and § 2169. Rather, the Legislature's insertion of "under this section" limits the scope of § 3151 and shows that the statute is not intended to be the only way an insurer can obtain an IME. Likewise, nothing in amended § 3151 limits an insurer's ability to obtain an IME for litigation purposes pursuant to MCR 2.311.

In relevant part, MCR 2.311 provides that if the mental or physical condition of a party is in controversy, the court may order the party to submit to a physical or mental examination by an appropriate professional.[46] So, as long as litigation is pending, a no-fault insurer may move the court for permission to obtain an IME outside of the limitations under § 3151. If the insurer establishes "good cause" for its request, the court may exercise its discretion to allow the IME.

In *Muci v State Farm Mutual Aut Ins Co*,[47] the Michigan Supreme Court addressed how the prior version of § 3151 and MCR 2.311 function together. The Court rejected the claimant's argument that MCR 2.311 alone governs insurer-requested IMEs after litigation is pending. Instead, it concluded that insurer-requested examinations (without prior court approval) fall within the purview of § 3151 and MCL 500.3159.[48] In its reasoning, the Court stated, "The no-fault act comprehensively addresses the matter of claimant examinations. Accordingly, MCR 2.311 is not applicable to such examinations."[49] But nowhere in its opinion did the Court hold that insurers cannot file a motion requesting an IME under MCR 2.311 after litigation is pending. Stated differently, Muci was focused on a claimant's mandatory obligation to submit to an IME requested under § 3151. The Court did not hold that § 3151 denies a no-fault insurer the ability to seek permission to obtain another IME outside of § 3151. Again, nothing in the current version of § 3151 precludes an insurer from utilizing MCR 2.311 to obtain an IME for trial purposes.[50]

In light of these considerations, a no-fault insurer should not forgo an IME by a physician who is more qualified to provide an opinion on the specific issues in a lawsuit compared to a physician who matches the practice of the insured's treating physician. Instead, once the insured commences litigation, insurers should not hesitate to utilize MCR 2.311 to obtain an additional IME for trial-related purposes.

Conclusion

There is no doubt that the amended version of § 3151 is now facing challenges in the courtroom. Because § 3151 and § 2169 include parallel language, medical-malpractice case law serves as an instructive guide for applying § 3151. It's equally important that no-fault attorneys recognize where the similarities between those statutes end and the important implications this has in each context. An understanding of both statutes will likely prove critical to successful litigation under the amended no-fault act.

Endnotes

1 See 2019 PA 21, 22.
2 See 2019 PA 21, 22.
3 *Sun Valley v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999), quoting *Baley v United States*, 516 US 137 145; 116 S Ct 501; 133 L Ed 2d 472 (1995).
4 *Id.* at 237.
5 MCL 600.2169.
6 MCL 500.3151(2)(a).
7 MCL 600.2169(1)(a).
8 *Id.*
9 476 Mich 545, 561-562; 719 NW2d 842 (2006).
10 *Id.* at 561.
11 *Id.* at 561-562.
12 *Id.* at 564.
13 *Id.*
14 *Id.*
15 *Id.* at 660 (emphasis added); see also *id.* at 662.
16 *Id.* at 660.
17 *Id.* at 554, 575.
18 *Id.*
19 *Id.* at 576
20 MCL 500.3151(2).
21 *Woodard*, 476 Mich 545, quoting Dorland's Illustrated Medical Dictionary (28th ed).

22 American Board of Medical Specialties, Specialty and Subspecialty Certificates, https://www.abms.org/member-boards/specialty-subspecialty-certificates/ (last visited Nov. 19, 2020).

23 American Osteopathic Association, AOA Board Certification, https://certification.osteopathic.org/specialties-and-subspecialties/ (last visited Nov. 19, 2020).

24 MCL 500.3151(2) (emphasis added).

25 MCL 500.3151(2)(b) states:
During the year immediately preceding the examination, the examining physician must have devoted a majority of his or her professional time to either or both of the following:

(i) The active clinical practice of medicine and, **if subdivision (a) applies, the active clinical practice relevant to the specialty.**

(ii) The instruction of students in an accredited medical school or in an accredited residency or clinical research program for physicians and, **if subdivision (a) applies, the instruction of students is in the specialty.** [Emphasis added.]

26 *Cox v Hartman*, 322 Mich App 292, 301; 911 NW2d 219 (2017).

27 295 Mich App 284; 813 NW2d 354 (2012).

28 *Id*. at 293-295.

29 *Id*.

30 *Id*. at 293-295.

31 *Id*. at 295-296.

32 *Id*. at 297.

33 *Id*. at 296.

34 *Id*. at 297-298, 300-301.

35 *Id*. at 295-297.

36 *Id*. at 296-297.

37 *Id*.

38 See *id*. at 292, 300-301.

39 *Id*. at 300.

40 *Id*.

41 *Id*. at 362.

42 MCL 500.3151(1) (emphasis added).

43 MCL 500.3151(2)(a) (emphasis added). In full, the statute states: "A physician who conducts a mental or physical examination under this section must be licensed as a physician in this state or another state and meet the following criteria, as applicable[.]"

44 See also MCL 500.3153 (providing for court orders concerning a claimant's noncompliance with MCL 500.3151).

45 *McDougall v Schanz,* 461 Mich 15; 597 NW2d 148 (1999).

46 In full, MCR 2.311 states:
(A) Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental or blood examination by a physician (or other appropriate professional) or to produce for examination the person in the party's custody or legal control. The order may be entered only on motion for good cause with notice to the person to be examined and to all parties. The order must specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made, and may provide that the attorney for the person to be examined may be present at the examination.

47 478 Mich 178; 732 NW2d 88 (2007).

48 *Id*. at 190-191.

49 *Id*. at 191.

50 See 2019 PA 21, 22.

The Op-Ed(ish) Column

By: John Hohmeier, *Scarfone & Geen, P.C.*

This is a new(ish) and regular column for the Michigan Defense Quarterly. It's an open forum, available for opinion pieces, storytelling, and even entertaining law-related fiction. Any views and opinions expressed here are those of the author and do not necessarily reflect the official policy, view, opinion, or position of the MDTC.

John Hohmeier joined Scarfone & Geen, P.C. in 2012 to litigate first- and third-party no-fault cases. He was both trial and appellate counsel in Dawoud v State Farm Mut Auto Ins, where the Court of Appeals issued a published opinion further limiting and clarifying the derivative nature of medical provider's rights in the no-fault arena.

Mr. Hohmeier is also a Chair for the Insurance Law Section of the Michigan Defense Trial Counsel. While still in school at Thomas M. Cooley Law School, his commentary on the interaction of emotion and brain chemistry with a person's ability to recall veridical memories was published in the Thomas M. Cooley Law Review.

The Good Doctor's Prescription: *We Are All in This Together*

Introduction and Caveat

It is worth mentioning that everything in this article was written in May and June of 2020. The article was then temporarily lost in the ether of the chaos that has become known as 2020. True story, though: me, my wife, and our three-year-old daughter all tested positive for COVID in November 2020, several months after I wrote this. The only reason this is worth mentioning is that the body of this "article" remains completely unchanged, and the sentiment remains unchanged as well. Enjoy, be nice to each other, and be safe out there.

So Zoom hearings, eh? I am a BIG FAN of Zoom hearings. I am also a big fan of Hunter S. Thompson, and in these strange and weird times, it seems that it would only make sense to try and channel the Good Doctor to offer a perhaps dark, but maybe almost uplifting commentary on the weird and polarizing environment we all find ourselves in. Rest assured, there are times – and this is one of them – when even being right feels wrong.[1]

These are crazy times indeed: even going to the grocery store on a Wednesday can turn into some strange, Mad Max odyssey when someone at the end of the aisle starts eyeing up the last pack of toilet paper. Whether you belong to the MAJ, ADTC, or the MDTC, a Democrat or a Republican, a boy or a girl or black or white or anything in between...the first part of 2020 has been, for the most part… "different."

Of course, there are an infinite number of words to use other than "different" to describe the first part of *your* 2020, but 2020 doesn't feel like years past, does it? Something is different, or maybe everything is different now. The way we shop, the way we work, the way we eat, the way we interact with each other, even the way we feel. Sometimes, you can strike sparks anywhere just by whispering the right thing to the wrong person or the wrong thing to anyone…

> Maybe it meant something. Maybe not, in the long run…but no explanation, no mix of words or music or memories can touch that sense of knowing that you were there and alive in that corner of time in the world...whatever it meant…
>
> There was madness in any direction, at any hour…You could strike sparks anywhere. There was a fantastic universal sense that whatever we were doing was right, that we were winning. . .
>
> And that, I think, was the handle—that sense of inevitable victory over the forces of Old and Evil. Not in any mean or military sense; we didn't need that. Our energy would simply prevail. There was no point in fighting—on our side or theirs. We had all the momentum; we were riding the crest of a high and beautiful wave. . . .

> So now, less than five years later, you can go up on a steep hill in Las Vegas and look West, and with the right kind of eyes you can almost see the high watermark — that place where the wave finally broke and rolled back…[2]

The opinions on the meaning of this passage from *Fear and Loathing in Las Vegas* are well documented, and anyone can guess what HST was talking about when he penned it, but nobody can dispute that he had his handle on things...a rare confidence that you were right in what you believed ... even if others did not. Well ... the wave is rolling back here again. Maybe, the wave has rolled back ... and we can see the high watermark of civility: the place we used to be ...

COVID, social distancing, lockdowns, eating in cars, masks, unacceptable brutality, protests, and riots, you are probably pretty confident that you don't even have confidence any more... our world is changing. Our world has changed. But that doesn't mean that we have to change who we were before this, does it? That doesn't mean that we have to isolate each other and forget that we are all here and now ... and we will probably be here tomorrow too.

Honestly, is there no common ground anymore? Just because you disagree with someone doesn't mean that either of you is right or wrong. And just because you passionately believe in your ideas doesn't mean you are right either. There is room in every civilized society for disagreement, but necessarily there is also room for understanding, which necessarily means there is also room for compassion.

Sometimes, people get so convinced of their ideas and goals that they forget other people have ideas and goals too, and chances are their ideas and goals will conflict with yours. Sometimes people get so convinced of their ideas that they think everyone else is wrong, and they will do anything to achieve their own goals ... like a bull elk in the rut.[3] Then there is no conversation any more anyways ... only two people talking at each other without ears.

Even though we may say the words or tell each other that *we are all in this together*, do we actually believe that?

> We are all alone, born alone, die alone, and — in spite of True Romance magazines — we shall all someday look back on our lives and see that, in spite of our company, we were alone the whole way. I do not say lonely — at least, not all the time — but essentially, and finally, alone. This is what makes your self-respect so important, and I don't see how you can respect yourself if you must look in the hearts and minds of others for your happiness."[4]

Now, can this also be true? Either way, if you are still reading this, you probably already know that this is going nowhere in a hurry, so I'll try to wrap it up. "Myths and legends die hard in America."[5] Or, so they say. But our day-to-day lives and struggles – for the most part – don't hinge on what celebrities think may be right and wrong or who happens to be the mayor, the governor, or even the president.

Our lives are impacted most by the people we interact with every day … "people getting ready and people giving up, the sound of hope and the sound of hanging on, and behind them all, the quiet, deadly ticking of a thousand hungry clocks ..."[6] Now, while it is universally reasonable to recommend and encourage everyone to give each the benefit of the doubt these days, going to trial with a lawyer who thinks your entire lifestyle is a crime-in-progress is not a happy prospect either.[7] Being reasonable is a standard anybody can agree with, so be reasonable.

Anyways, we are all in this together: help yourself … lol, but also help your family, help your business, help your friends, help a stranger, help anyone you have the power to help ... and remember that there are people out there who you probably don't want to help because you disagree with their entire existence … but just because you disagree with them, doesn't mean you can't give them some space and try to understand them. We are all in this together. This won't hurt.[8]

Endnotes

1 Generation of Swine: Tales of Shame and Degradation in the '80's (1988).
> There are times, however, and this is one of them, when even being right feels wrong. What do you say, for instance, about a generation that has been taught that rain is poison and sex is death? If making love might be fatal and if a cool spring breeze on any summer afternoon can turn a crystal blue lake into a puddle of black poison right in front of your eyes…It's a strange world. [modified].

2 Fear and Loathing in Las Vegas (1972).

3 Fear and Loathing on the Campaign Trail (1972).
> A career politician finally smelling the White House is not much different from a bull elk in the rut. He will stop at nothing, trashing anything that gets in his way; and anything that he can't handle personally he will hire out -- or, failing that, make a deal.

4 The Proud Highway: Saga of a Desperate Southern Gentleman, 1955-1967 (1998).

5 The Great Shark Hunt (1979). "Myths and legends die hard in America. We love them for the extra dimension they provide the illusion of near-infinite possibility to erase the narrow confines of most men's reality."

6 The Rum Diary (1999).

7 Songs of the Doomed (1991).

8 HST's suicide note was titled "Football Season is Over."
> No More Games. No More Bombs. No More Walking. No More Fun. No More Swimming. 67. That is 17 years past 50. 17 more than I needed or wanted. Boring. I am always bitchy. No Fun – for anybody. 67. You are getting Greedy. Act your old age. Relax – This won't hurt.

Appellate Practice Report

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When is a Bankruptcy Order "Final" for Appellate Purposes?

A party's appellate rights often depend on whether the order at issue is a final order. In most contexts, there's an appeal of right from a final order but not from a non-final (or interlocutory) order. These appeals often have different deadlines, too. So confusing a final order with an interlocutory order (or vice versa) may have adverse consequences for a client. It's important to get this one right.

In typical litigation, determining whether an order is final means deciding whether a court has resolved all claims against all parties. But a bankruptcy case involves many parties and many discrete issues—reorganization or liquidation, automatic-stay issues, refinancing, litigation of pre-existing claims, and "an aggregation of individual controversies," as one leading authority puts it.[1] In this context, deciding whether an order is final isn't as easy as making a list of outstanding claims and checking them off. (And because everything is more complicated in bankruptcy law, Congress created a category of non-final orders that are appealable as if they *were* final orders—namely, orders that increase or deduce the debtor's exclusive period for filing a Chapter 11 plan. See 28 USC § 158(a)(2)).

The current test for finality in the bankruptcy context comes from the United States Supreme Court's opinion in *Bullard v Blue Hills Back* (2015),[2] which the Court applied again in *Ritzen Group, Inc v Jackson Masonry, LLC* (2020).[3] Both cases begin with 28 USC §158, a statute in which Congress authorized district courts to hear appeals from "final judgments, orders, and decrees" "in cases *and proceedings* referred to bankruptcy judges under section 157" of title 28.[4] This statute's reference to cases *and proceedings* indicated to the Supreme Court that Congress intended to allow direct appeals from discrete "proceedings" within a bankruptcy case. So how can one tell whether an order resolves a discrete "proceeding" within a bankruptcy case?

In *Bullard*, the question was whether an order denying confirmation of a proposed Chapter 13 plan was final for appellate purposes. To answer that question, the Court considered whether plan confirmation was a distinct "proceeding" within the bankruptcy.[5] It had little difficulty concluding that it was: "The relevant proceeding is the process of attempting to arrive at an approved plan that would allow the bankruptcy to move forward."[6] The Court concluded that an order *approving* a plan would end that "proceeding." But an order denying confirmation—with leave to file a new proposed plan—does not end the proceeding.[7] "The parties' rights and obligations remain unsettled," the Court wrote. "The possibility of discharge lives on. 'Final' does not describe this state of affairs."[8]

The Court found further textual support in 28 USC §157, which lists proceedings within a bankruptcy court's "core" jurisdiction. Among these core proceedings, Congress listed the "confirmation of plans."[9] For the Supreme Court, that listing indicates that plan confirmation is a discrete proceeding and that the bankruptcy court in *Bullard* had not yet resolved it finally. Although the debtor and the Solicitor General offered a parade of horribles that could arise from failing to treat denial of confirmation as a final order, the Supreme Court wasn't convinced. If an order denying confirmation deserved an immediate appeal, the Court said, the aggrieved party can file an application for leave.

The Supreme Court returned to this test in *Ritzen*. The test, *Ritzen* explained, is whether an order "definitively dispose[s] of discrete disputes within the overarching bankruptcy case."[10] The particular question in *Ritzen* was whether an order denying

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relief from the automatic stay was final. The creditor at issue tried to seek relief through the claim-allowance process after losing a lift-stay motion. Then, well after the time for filing a separate appeal on the lift-stay motion, the creditor filed a claim of appeal challenging the lift-stay ruling and the bankruptcy court's resolution of his claim.[11] If the order denying the creditor's lift-stay motion was final, then the creditor's appeal of that order was too late.

The Court held that the "proceeding" under 28 USC § 158 was "the stay-relief adjudication."[12] The Court found support in 28 USC § 158's list of core proceedings, which includes "motions to terminate, annul, or modify the automatic stay[.]"[13] Moreover, a motion seeking relief from the automatic stay "initiates a discrete procedural sequence, including notice and a hearing, and the creditor's qualification for relief turns on the statutory standard, *i.e.*, 'cause' or the presence of specified conditions."[14] Although the Supreme Court reaffirmed *Bullard*'s statement that a "proceeding" should not include "disputes over minor details about how a bankruptcy case will unfold," it didn't view stay relief as a minor matter.

The test applied in *Bullard* and *Ritzen* works well enough when a matter is defined as "core" under 28 USC § 158. But it can be tricky for matters that Congress didn't include in its list of core proceedings. The safest approach, as always, is to assume that the earliest deadline applies.

Submitting Supplemental Authority

As there can often be a delay of several months between the time that briefs are filed and oral argument is held, there are times when a party may want to supplement the authorities in its brief with a decision that came out after briefing was completed. The Michigan Supreme Court, Court of Appeals, and Sixth Circuit all have specific procedures for doing just that.

Michigan Supreme Court and Court of Appeals

Submitting supplemental authority in the Michigan Supreme Court and Court of Appeals is governed by MCR 7.212(F).[15] The rule explains that without leave of court, a party may submit a "one-page communication" titled "supplemental authority," subject to certain conditions. First, it must be for the purpose of "call[ing] the court's attention to new authority released after the party filed its brief."[16] Second, a supplemental authority "may not raise new issues."[17] Third, it "may only discuss how the new authority applies to the case, and may not repeat arguments or authorities contained in the party's brief."[18] Finally, a supplemental authority "may not cite unpublished opinions."[19]

> As further explained in the Court of Appeals' Internal Operating Procedures (IOPs):
>
> Such a filing may only cite and discuss new published authority released subsequent to the date the party filed its last brief or supplemental authority. New issues may not be raised in a supplemental authority. The body of the supplemental authority cannot exceed one page. The caption may be on a preceding page and the signature block alone may be on a subsequent page. But the *text* of the supplemental authority cannot exceed one page.[20]

Should a party seek to exceed the one-page limit or cite newly-discovered authority that was released *before* the party filed its brief, then a motion is required:

> Unless accompanied by a motion, a supplemental authority will be returned if it (1) fails to comply with the requirement that it not exceed one page, (2) cites other than new published authority.[21]

Finally, the IOPs provide one last word of caution. A supplemental authority must include *all* new authorities that the party wishes to raise. In other words, multiple supplemental authorities are not permitted unless "a party files a supplemental authority after the filing of the brief, and then another *new* case is released after filing of the first supplemental authority."[22] In that case, "the subsequent supplemental authority will be accepted."[23]

Note that neither MCR 7.212(F) nor the IOP specifically provide for a *response* to a supplemental authority filing. Doing so, however, is simply a matter of the opposing party filing its own "supplemental authority" addressing the new case.

Sixth Circuit

Supplemental authority filings in the Sixth Circuit are governed by FR Civ P 28(j). The rule provides that a party may "promptly advise the circuit court clerk by letter" of any "pertinent and significant authorities [that] come to a party's attention after the party's brief has been filed—or after oral argument but before decision." Although the rule does not expressly restrict a party to citing decisions issued after the party's brief has been filed, it would be wise to use caution in citing decisions that were simply overlooked. The letter must "state the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally." Thus, it should go without saying that a Rule 28(j) letter may not be used to raise new issues. Finally, the "body of the letter must not exceed 350 words." A party wishing to respond to a Rule 28(j) letter must do so "promptly" in a letter that it is "similarly limited."

Endnotes

1 1 Collier on Bankruptcy ¶5.08[1][b], p. 5-42 (16th ed. 2014), quoted in *Bullard v Blue Hills Bank,* 575 US 496 (2015).
2 *Bullard v Blue Hills Bank,* 575 US 496 (2015).
3 *Ritzen Group, Inc v Jackson Masonry, LLC* 140 S Ct 582 (2020).
4 28 USC 58(a) (emphasis added).
5 *Bullard,* 575 US at 1692.
6 *Id.* at 1692.
7 *Id.* at 1693.
8 *Id.*
9 *Id.* at 1693, quoting 28 USC 157(b)(2)(L).
10 *Ritzen,* 140 S Ct at 586.
11 *Id.* at 588.
12 *Id.* at 589.
13 *Id.* at 590, quoting 28 USC 157(B)(2)(G).
14 *Ritzen,* 140 S Ct at 589.
15 MCR 7.312(I), which governs supplemental authority in the Supreme Court, provides that a party may file "a supplemental authority in conformity with MCR 7.212(F)."
16 MCR 7.212(F).
17 MCR 7.212(F)(1).
18 MCR 7.212(F)(2).
19 MCR 7.212(F)(3).
20 IOP 7.212(F)-1 (emphasis in original).
21 *Id.*
22 *Id.* (emphasis in original).
23 *Id.*

Legal Malpractice Update

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Engagement Agreement Weakens Defenses to Legal-Malpractice Action

***Jones v Lawyer-Defendant*, unpublished per curiam opinion of the Court of Appeals, issued December 22, 2020 (Docket No. 348378), 2020 WL 7636610.**[1]

Facts and Procedural History:

The plaintiff/client retained the defendants/attorneys to represent her in a divorce action. She alleged that she specifically requested that the defendants file a motion to change venue to another county. The engagement agreement stated that the plaintiff retained the defendants for a "divorce/motion to dismiss matter." The attorneys never followed through with the motion but continued to represent the client through trial. Just before judgment was entered, the defendants withdrew. The plaintiff filed this lawsuit more than two years later. Her complaint alleged legal malpractice, breach of contract, and a series of negligent and intentional-conduct claims.

The defendants moved for summary disposition, arguing that the plaintiff's claims were barred under the two-year statute of limitations for legal-malpractice claims. The trial court granted the motion, and the plaintiff appealed.

Holding:

The Court of Appeals agreed that the plaintiff's legal-malpractice claims were untimely under the two-year statute of limitations. However, the court held that her breach-of-contract claim was independent of her legal-malpractice claim. A malpractice claim is based on an attorney's failure to exercise the requisite standard of care or skill, whereas a contract claim is based on an attorney's failure to perform a "special agreement." As such, a plaintiff may maintain a breach-of-contract action stemming from an attorney-client relationship where the plaintiff alleges a breach of a "special agreement" to perform a specific act.

Applying this rule to the facts, the Court of Appeals reasoned that the plaintiff's breach-of-contract claim rested, in part, on her allegation that she retained the defendants, in part, to bring a motion to dismiss the action from one county and transfer it to another. This allegation was supported by the engagement agreement, which specifically recognized that the plaintiff requested that the defendants represent her "with respect to a divorce/Motion to Dismiss matter." The court also explained that after the defendants promised to seek a change of venue, they failed to do so, yet misrepresented that they sought or were in the process of seeking a change of venue. These facts established a "special agreement" separate from the defendants' duty to represent the plaintiff competently. And the breach of these claims was separate from the plaintiff's malpractice claim.

So, while the two-year limitations period barred the plaintiff's legal-malpractice claim, the six-year statute of limitations governed her breach-of-contract claims. The court, therefore, reversed the dismissal of the breach-of-contract claim. It remanded for further proceedings concerning the remaining negligent and intentional-conduct claims to determine the extent to which the plaintiff could establish a cause of action distinct from her malpractice claim.

Dissent:

Judge Jansen dissented on the breach-of-contract issue. She believed that the plaintiff's objective to have the case transferred to another county did "not constitute a warranty

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that the objective would be achieved" or that the defendants guaranteed that result. In other words, there was no special agreement. She further stated that the other contractual duties allegedly breached were only to render legal services under an ordinary standard of care. As such, she concluded that the plaintiff could not maintain a separate breach-of-contract claim. And the other negligent and intentional conduct alleged were insufficient to establish causes of action distinct from her legal-malpractice claim.

Practice Note:

Making a specific promise in your engagement agreement could open up the scope of potential liability in the event that you face a lawsuit arising out of your legal representation. Carefully consider the language you use to define the scope of representation.

Endnotes

1 The authors would like to thank Fawzeih Daher for her significant contribution to this article.

MICHIGAN DEFENSE QUARTERLY

Publication Schedule

Publication Date	Copy Deadline
January	December 1
April	March 1
July	June 1
October	September 1

For information on
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MDTC Legislative Report

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As I finish this final report of 2020 on December 18th, the Electoral College's vote has made Joe Biden's status as President-Elect official, and the lame-duck session of Michigan's 100th Legislature is drawing to a close. With no circumstances creating any sense of urgency, this year's lame-duck session has been uneventful, even to the extent of being dubbed a "lame" lame duck – nothing at all like the highly-charged and controversial lame-duck session of 2018, when the Republicans were scrambling to complete their legislative agenda before Governor Snyder's departure. Regrettably, there has been little cooperation across the aisle in this election year, but there does seem to be bipartisan agreement that we will all be glad to see 2020 in the rearview mirror.

Except for Mr. Biden's victory at the top of the ticket, not much has been changed by this year's election. Governor Whitmer and the currently-serving state Senators will remain in office for the next two years at least, and the Republicans will maintain their control of the Michigan House of Representatives by the same comfortable margin that they have enjoyed in the current session, with Representative Jason Wentworth taking the helm as its new Speaker. But as the new year begins, the politicians of both parties will have some new questions to consider. The Republicans may want to ask themselves why Mr. Trump was not re-elected and how their party can redefine itself and move forward in the days ahead. The Democrats will need to think about why Mr. Biden didn't have longer coattails to sweep more of their members into office. And they should all ponder how they might do a better job of appealing to the moderates like myself, who have felt so badly neglected for so long. Our votes will again be up for grabs in two years. Who will win them? We shall see.

Public Acts of 2020

As of this writing, there are 249 Public Acts of 2020 – 99 more than when I last reported in September. The most significant of these have addressed a variety of issues related to the Covid-19 pandemic, most notably, new protections for employees and provisions limiting the liability of employers and health care providers. They include:

2020 PA 236 – House Bill 6030 (Albert – R), which has created a new "Covid-19 Response and Reopening Liability Assurance Act" establishing broad-reaching limitations of tort liability applicable to suits for damages based upon exposure or potential exposure to the COVID-19 virus. The new act applies retroactively to claims and causes of action accruing after March 1, 2020. It specifies that an individual or entity that has acted in compliance with all federal, state, and local statutes, rules, regulations, executive orders, and agency orders related to COVID-19 that had not been denied legal effect at the time of the conduct or risk alleged to have caused the harm is immune from liability for a COVID-19 claim.

The act broadly defines "COVID-19 claim" as "a tort claim or tort cause of action for damages, losses, indemnification, contribution, or other relief arising out of, based on, or in any way related to the exposure or potential exposure to COVID-19, or to conduct intended to reduce transmission of COVID-19." To ensure the inclusion of any and all claims related to actual or potential exposure to the virus, the definition of "COVID-19 claim" includes "a tort claim made by or on behalf of an individual who has been exposed or potentially exposed to COVID-19, or any representative, spouse, parent, child, member of the same household, or other relatives of the individual, for injury, including mental or emotional injury, death or loss to person, risk of disease, or other injury, costs of medical monitoring or surveillance, or other loss allegedly caused by the individual's exposure or potential exposure to COVID-19." But lest anyone forget that the newly-established immunity is for tort liability only, the definition of "COVID-19

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claim" also specifies that these claims do not include administrative proceedings or civil actions brought by a state or local government prosecutor or agency to enforce state statutes and regulations, executive orders, or state agency orders applicable to COVID-19."

Although the new act's immunity from liability is conditioned upon compliance with applicable statutes, rules, regulations, and administrative orders, it provides that the immunity will not be lost by "an isolated, de minimis deviation from strict compliance unrelated to the plaintiff's injuries." This legislation took effect on October 22, 2020, and as previously discussed, its provisions apply retroactively to claims or causes of action accruing after March 1, 2020.

2020 PA 237 – House Bill 6031 (Brann – R) and **2020 PA 239 – House Bill 6101 (Byrd – D)** have added two new sections to the Michigan Occupational Safety and Health Act, which together provide additional protection for employers against liability for an employee's exposure to COVID-19. The new section MCL 408.1085 created by PA 237 provides that, notwithstanding any other provision of the act, an employer is not liable under the act for an employee's exposure to COVID-19 if the employer was operating in compliance with all federal, state, and local statutes, rules, regulations, executive orders, and agency orders related to COVID-19 that had not been denied legal effect at the time of the exposure. The new immunity from liability will not affect any right, remedy, or protection under the worker's disability protection act. The new section MCL 408.1085a created by PA 239 defines COVID-19 consistent with the definition provided in PA 236.

Consistent with the new provisions of PA 236, PA 237 provides that its newly created immunity from liability will not be defeated by "an isolated, de minimis deviation from strict compliance" unrelated to the employee's exposure to COVID-19. This legislation took effect on October 22, 2020, and consistent with PA 236, the immunity created by PA 237 will apply retroactively to exposures to COVID-19 occurring after March 1, 2020.

2020 PA 238 – House Bill 6032 (Filler – R) has created a new act that prohibits employees from reporting to work under certain circumstances when exposed to or infected with COVID-19 and protects employees against being penalized for compliance with the new restrictions. The act provides that an employee who tests positive for COVID-19 or displays its principal symptoms shall not report to work until enumerated conditions that ensure a safe return have been satisfied. Similar prohibitions and conditions will be applied to employees who have had close contact with a person who has tested positive for COVID-19 or displayed its principal symptoms. However, the restrictions prescribed for those employees will not apply to health care workers, first responders, and other enumerated essential workers. The act's definitions of "close contact" and "principal symptoms" and the conditions imposed for return to work are consistent with the definitions provided, and restrictions called for by the CDC Guidelines and orders of the Department of Health and Human Services.

To facilitate compliance with its new restrictions, PA 238 provides that an employer cannot discharge, discipline, or otherwise retaliate against an employee who complies with its requirements to stay at home, opposes a violation of the act, or reports health violations related to COVID-19. An employee aggrieved by a violation of the act may bring a civil action for injunctive relief and/or money damages in the circuit court for the county where the employer is located or has its principal place of business. If the plaintiff prevails, the court will be required to award damages of not less than $5,000.

2020 PA 240 – House Bill 6159 (Hauck – R), which has created a new "Pandemic Health Care Immunity Act" providing additional protection for health care providers and facilities against claims related to their participation in the state's response to the pandemic. This new act took effect on October 22, 2020, and applies retroactively, but its terms limit its application to response activity between March 29, 2020, and July 14, 2020. The operative language provides that, "A health care provider or health care facility that provides health care services in support of the state's response to the COVID-19 pandemic is not liable for an injury, including death, sustained by an individual by reason of those services, regardless of how, under what circumstances, or by what cause those injuries are sustained, unless it is established that the provision of the services constituted willful misconduct, gross negligence, intentional and willful criminal misconduct, or intentional infliction of harm by the health care provider or health care facility."

To avoid potential confusion, our members should note that a House Substitute for **Senate Bill 1185 (VanderWall – R)**, a more recently introduced Senate counterpart for House Bill 6159, proposes to repeal PA 240 and replace it with a new "Pandemic Response Health Care Immunity Act." If signed into law, this new act will be virtually identical to PA 240, with only a few differences. The name of the new act would be only slightly different; the definition of "health care facility" would be expanded to include a facility operating as a "care and recovery center" as defined in the new act, and a psychiatric hospital, as defined in the Mental Health Code. Most importantly, the provisions of the new act would apply to response activity occurring between October 29, 2020 and February 14, 2021, in addition to the activity occurring between March 29, 2020 and July 14, 2020 previously covered under the terms of PA 240. The Bill Substitute was passed by the House and transmitted to the Senate for its concurrence on December 17th. It was passed by the Senate and enrolled for presentation to the Governor on December 18th.

A Fond Farewell

I began writing the Legislative Report for the *Quarterly* in September of the year 2000, at the end of the last millennium. Now, as the second decade of the new century is coming to its end, I have reluctantly decided that the time has come for me to step aside and let someone new take over where I've left off when the 101st Legislature convenes in January. It's a bittersweet moment, to be sure. Observing and reporting on legislative matters from my vantage point across the street from the state Capitol has been fascinating and a great deal of fun. Having that opportunity has been a great honor and privilege, and for that, I will be forever grateful.

Insurance Coverage Report

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Last year, in Vol. 37 No. 1, this report focused on the effects of COVID-19 and various governments' responses to it on the world of insurance coverage. In particular, we looked at several business interruption claims relating to the pandemic that were then in litigation. In the intervening months, several of those suits – including at least two in Michigan – have ripened into definitive trial court holdings.

***Turek Enterprises, Inc v State Farm Mut Auto Ins Co,* __ F Supp 3d __ (ED Mich, 2020) (Docket No. 20-11655)**

In this case, a chiropractic office located in Alcona County, Michigan, had its operations suspended for approximately two months due to COVD-19-related Executive Orders and sought business interruption coverage from State Farm. The policyholder did not allege that the virus was present on the covered premises but asserted that it lost income when it suspended operations in compliance with the Executive Orders. The policy provided first-party property and business interruption coverage for accidental direct physical loss to covered property and contained an exclusion for "any loss which would not have occurred in the absence of …[v]irus, bacteria or other microorganisms that induces or is capable of inducing physical distress, illness, or disease." *Turek,* __ F Supp 3d at __; slip op at 15.

State Farm denied coverage based on the lack of "direct physical loss." State Farm also invoked the virus exclusion. The district court, Hon. Thomas Ludington, ruled that the undefined term "direct physical loss" was unambiguous, required tangible damage, and did not encompass loss of use of property. *Id.* at __; slip op at 14. In support of this conclusion, Judge Ludington cited *Universal Image Prods, Inc v Fed Ins Co,* 475 F Appx 569, 572 (CA 6, 2012). In *Universal,* the plaintiff brought action against its insurer, alleging that it suffered a "direct physical loss or damage to" property after it was forced to vacate its building for mold remediation. *Id.* The district court found that "direct physical loss or damage" required "tangible damage" and entered summary judgment for the defendants. *Id.* at 571. The Sixth Circuit affirmed, noting that "[the plaintiff] did not experience any form of 'tangible damage' to its insured property" and that its losses were not "physical losses, but economic losses." *Id.* at 573.

Additionally, the district court in *Turek* rejected the policyholder's assertion that it sustained tangible loss because of alleged deterioration during the months that its business was suspended, including the expiration of medication and depreciation of assets. "Rather than the loss of use being the 'direct physical loss,' the 'direct physical loss' is now the passive depreciation **caused by** the loss of use." *Turek,* __ F Supp 3d at __; slip op at 14. "Plaintiff offers no authority to support the theory that passive depreciation counts as a 'direct physical loss to Covered Property,' and such a conclusory allegation fails to state a claim…." *Id.*

The district court further held that even if the policyholder had alleged direct physical loss, coverage would still be precluded by a virus exclusion. In so ruling, Judge Ludington rejected the policyholder's contention that the government orders, rather than the virus, were the proximate cause of the alleged losses: "Plaintiff's position essentially disregards the Anti-Concurrent Causation Clause, which extends the Virus Exclusion to all losses where a virus is part of the causal chain." *Turek,* __ F Supp 3d at __; slip op at 16. Moreover, actual viral contamination was not required for the exclusion to apply, as the exclusionary language applies to any "[v]irus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness, or disease." *Id.* at __; slip op at 16-17.

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Judge Ludington's application of the "Virus or Bacteria" exclusion could be instructive in many cases because this is a widely used Insurance Services Office ("ISO") form. This form was specifically crafted to address both the direct and indirect economic consequences flowing from the outbreak of contagious diseases like COVID-19. White & Breen, *The Impact of the Global COVID-19 Pandemic on the Insurance Industry,* 62 No. 4 DRI For Def. 22, 31 (April 2020). "Significantly, when ISO submitted the exclusion to state regulators … its circular LI-CF-2006-175 expressly identified SARS – *the virus from which COVID-19 mutated* – as a type of virus that the exclusion is designed to address." *Id.* (emphasis in original). "The ISO circular stated: [e]xamples of viral and bacterial contaminants are rotavirus, SARS, influenza (such as avian flu), legionella, and anthrax. The universe of disease-causing organisms is always in evolution." *Id.* See also Biser, et al., *COVID-19: Construction Contracts and Potential Claims Under Business Interruption, Civil Authority, and Other Insurance Policies and Endorsements,* Practical Law Practice Note w-025-0046 (Westlaw 2020), noting that such exclusions were "written in response to the 2003 worldwide spread of SARS (see ISO Form CP0140 (0706)…." "These exclusions began appearing in BI policies to avoid coverage for something like COVID-19." *Id.*

***Gavrilides Mgmt Co v Michigan Ins Co*, opinion of the Ingham County Circuit Court, issued July 1, 2020 (Docket No. 20-258-CB-C30)**

One of the trial court decisions cited by the district court in Turek was *Gavrilides,* where the Hon. Joyce Draganchuk also ruled that there was no business interruption coverage, based on the lack of any direct physical loss, as well as the "Virus or Bacteria" exclusion.

In this case, Gavrilides Management Co, LLC ("Gavrilides") operated two Michigan restaurants, "The Bistro" in Williamston and "The Soup Spoon Cafe" in Lansing. These restaurants were limited to carry-out services only, due to various COVID-19-related Executive Orders issued by the Michigan Governor, starting on or around March 23, 2020. Gavrilides "closed The Bistro in Williamston on March 23, 2020, because … Plaintiffs could not sustainably operate the business" under the terms of the Executive Orders. Gavrilides continued to operate "The Soup Spoon Cafe" as "take-out only," but its revenue allegedly "dropped precipitously." Like *Turek,* Gavrilides' complaint did not suggest that the virus was ever present, or suspected of being present, on the insured's premises. Indeed, the Complaint seemed to expressly say that the alleged business interruption losses were due to the government's mitigation efforts and not the virus itself. Michigan Insurance Company ("MIC") denied the claims, noting that the policy does not afford business interruption coverage in the absence of "direct physical loss of or damage to property." MIC also denied the claims based on the aforementioned "Virus or Bacteria" exclusion.

The insureds claimed that they had suffered "direct physical loss" to the restaurants because the Executive Orders prevented customers from dining-in. Judge Draganchuk dismissed that argument as "simply nonsense" and agreed with MIC that the phrase "accidental direct loss of or damage to property" required "some physical alteration to or physical damage or tangible damage to the integrity of the building." An appeal is pending, Docket No. 354418. This author's firm defended MIC in the trial court and represents it on appeal.

***Diesel Barbershop, LLC, et al. v State Farm Lloyds*, __ F Supp 3d __ (WD Tex, 2020) (Docket No. 20–461)**

Here, the insureds operated a barbershop businesses that was deemed non-exempt and non-essential under Texas' COVID-19-related emergency orders, such that insureds lost use of their properties. The district court granted the insurer's motion to dismiss, finding that the policy language explicitly required "an accidental, direct physical loss to the property in question." *Diesel Barbershop,* __ F Supp 3d at __; slip op at 12. While "some courts have found physical loss even without tangible destruction to the covered property," this district court found "the line of cases requiring tangible injury to property" to be "more persuasive" to COVID-19 business interruption claims, while "the other cases are distinguishable." *Id.* at __; slip op at 12-13. "For instance, … COVID-19 does not produce a noxious odor that makes a business uninhabitable." *Id.* at __; slip op at 14. The "loss needs to have been a distinct, demonstrable physical alteration of the property." *Id.* (citation omitted). "The requirement that the loss be 'physical,' given the ordinary definition of that term is widely held to exclude alleged losses that are intangible or incorporeal, and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property." *Id.* (citation omitted). The *Diesel Barbershop* opinion also cited 10A Couch, Insurance, 3d, § 148.46 for the proposition that "direct physical loss" requires "a distinct, demonstrable, physical alteration of the property."

The district court in *Diesel Barbershop* went on to consider the above-referenced "Virus or Bacteria" exclusion and found that the exclusion would unambiguously foreclose coverage even if there had been a direct physical loss. *Diesel Barbershop,* __ F Supp 3d at __; slip op at 16. The district court was able to read the exclusion "objectively and without creating difficult causation determination where none otherwise exist." *Id.* (citation omitted). "…COVID-19 is in fact the reason for the Orders being issued and the underlying cause of Plaintiffs' alleged losses." *Id.* at __; slip op at 17. "While the Orders technically forced the Properties to close to protect public health, the Orders only came about sequentially as a result of the COVID-19 virus spreading rapidly throughout the community." *Id.* "Thus, it was the presence of COVID-19 in Bexar County and in Texas that was the primary root cause of Plaintiffs' businesses temporarily closing." *Id.*

Finally, the district court in *Diesel Barbershop* found that civil authority coverage did not apply. "Plaintiffs' recovery remains barred due to the unambiguous nature of the events that occurred, causing the Virus Exclusion to apply such that Plaintiffs fail to allege a legally cognizable 'Covered Cause of Loss.'" *Id.* at __; slip op at 18. "[C]ivil authority coverage is intended to apply to situations where access to an insured's property is prevented or prohibited by an order of civil authority issued as a direct result of physical damage to other premises in the proximity of the insured's property." *Id.* (citation omitted).

See also *Kelaher, Connell & Conner, PC v Auto-Owners Ins Co,* 440 F Supp 3d 520, 529-530 (D SC, 2020) ("without a nexus between the issuance of the civil authority order and the damage to an adjacent property, there is no coverage").

***Infinity Exhibits, Inc v Certain Underwriters at Lloyd's,* __ F Supp 3d __ (MD Fla, 2020) (Docket No. 20-1605)**

The insured in this case designed and fabricated trade show displays. The insured began to lose income on or about March 2, 2020, due to canceled trade shows. About a month later, an order enacted by Florida's Governor mandated the closure of non-essential businesses, including the trade shows that the insured serviced. After its insurer denied its claim for business interruption coverage, it filed this suit. The complaint did not include any allegations that the insured was precluded from accessing its property as a result of COVID-19 or any of the related government orders or social distancing requirements. *Infinity Exhibits,* __ F Supp 3d at __; slip op at 5. The complaint, even after an amendment, did not describe how the insured's property, or any other property, experienced "direct physical loss or damage." *Id.* This proved to be fatal to the suit.

The district court cited both the Michigan decisions (*Gavrilides and Turek) as well as trial court decisions from several other jurisdictions to illustrate what appears to be* a national trend in denying coverage for such claims, *Infinity Exhibits,* __ F Supp 3d at __; slip op at 8-10:

> Plaintiff is not the first insured to seek coverage due to COVID-19 government shutdown orders under a policy that limits coverage to losses caused by direct physical loss or damage to the property. Courts across the country have held that such coverage does not exist where, as here, policyholders fail to plead facts showing physical property damage. For example, in *Turek* … the plaintiff chiropractor sought coverage for loss of income due to government orders that restricted plaintiff's ordinary use of its property. The court dismissed the action with prejudice, holding that the plaintiff had failed to demonstrate tangible damage to covered property, as "plainly" required by the policy term "direct physical loss."
>
> In *10E, LLC v. Travelers Indemnity Co. of Connecticut*, No. 2:20-cv-04418-SVW-AS, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020), the plaintiff sought coverage for income lost as a result of government shutdown orders that prevented the ordinary and intended use of a property. The court dismissed the action, holding that the plaintiffs "cannot recover by attempting to artfully plead impairment to economically valuable use of property as physical loss or damage," and noting that impaired use or value cannot substitute for physical loss or damage. *Id.* at *5.
>
> In *Malube, LLC v. Greenwich Insurance Co.*, No. 1:20-cv-22615-KMW, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020), the plaintiff sought coverage for lost income due to government orders that restricted the plaintiff's ability to use its property as intended. The Magistrate Judge's Report and Recommendation concluded that the action should be dismissed because the policy required direct physical loss or property damage, and plaintiff had alleged: "merely … economic losses – not anything tangible, actual, or physical." *Id.* at *8; *see also Mudpie, Inc. v. Travelers Cas. Ins. Co. of America*, C.A. No. 4:20-cv-03213-JST, __ F Supp 3d __; 2020 WL 5525171 (N.D. Cal. Sept. 14, 2020) (granting insurer's motion to dismiss); *Pappy's Barber Shops, Inc., et al. v. Farmers Group, Inc., et al.*, C.A. No. 3:20-cv-907-CAB-BLM, 2020 WL 5500221 (S.D. Cal. Sept. 11, 2020) (granting insurer's motion to dismiss); *Diesel Barbershop* … (granting insurers' motion to dismiss); *Soc. Life Magazine, Inc. v. Sentinel Ins. Co.*, C.A. No. 20-cv-3311-VEC (S.D.N.Y. May 14, 2020) (denying insured's motion for preliminary injunction seeking coverage); *The Inns by the Sea v. Cal. Mut. Ins. Co.*, C.A. No. 20-cv-001274 (Cal. Super. Ct. Aug. 6, 2020) (granting insurer's demurrer); *Rose's 1, LLC v. Erie Ins. Exch.*, C.A. No. 2020-CA-002424-B, 2020 WL 4589206 (D.C. Super. Ct. Aug. 6, 2020) (granting insurer's summary judgment motion); *Gavrilides* ... (granting insurer's motion for "summary disposition" which under Michigan law was on a motion to dismiss standard).

The district court in *Infinity Exhibits* noted that it was "sympathetic to Plaintiff and all insureds that experienced economic losses associated with COVID-19…." *Infinity Exhibits,* __ F Supp 3d at __; slip op at 10. However, "there is simply no coverage under the policies if they require 'direct physical loss of or damage' to property." *Id.* "Here, there is no business income coverage and no civil authority coverage because the Amended Complaint fails to allege facts describing how the Property suffered any actual physical loss or damage." *Id.* The *Infinity Exhibits* opinion does not mention a virus exclusion.

***Uncork and Create, LLC v Cincinnati Ins Co,* __ F Supp 3d __ (SD W Va, 2020) (Docket No. 20-401); 2020 WL 6436948**

Like *Infinity Exhibits*, here, the district court also expressed sympathy for "the situation facing the Plaintiff and other businesses," but held that "the unambiguous terms of the Policy do not provide coverage for solely economic losses unaccompanied by physical property damage." *Uncork and Create,* __ F Supp 3d at __; slip op at 10. While some of the cases discussed above turned on the absence of any allegation that COVID-19 was on the premises, this opinion noted that "even when present, COVID-19 does not threaten the inanimate structures covered by property insurance policies, and its presence on surfaces can be eliminated with disinfectant." *Id.* at __; slip op at 9. "Thus, even actual presence of the virus would not be sufficient to trigger coverage for physical damage or physical loss to the property." *Id.*

Here, the insured held art and cooking classes in Barboursville and Charleston, West Virginia. The company had to shut down due to government closure orders in March and allegedly suffered significant business loss. The insured closed its Barboursville studio permanently in late April 2020, although its Charleston

studio reopened in June 2020. What makes this case different is that – apart from the now-familiar "no direct physical loss" argument – the insurer in *Uncork and Create* also invoked a pollution exclusion. While the district court did not address the exclusion (having found no covered loss), it presents an interesting argument for insurers when their policy does not contain a virus exclusion. Case law from outside of Michigan suggests that a virus can be a "pollutant" within the meaning of a similar exclusion. See *Nova Cas Co v Waserstein,* 424 F Supp 2d 1325, 1336 (SD Fla, 2006) (finding that "living organisms," "microbial populations," and "microbial contaminants" fit the ordinary meaning of "pollutants"). And under Michigan law, the definition of a "pollutant" has not been limited to human-made substances; a naturally occurring "irritant or contaminant" can be a "pollutant." See *Housing Enterprise Ins Co v Hope Park Homes Ltd,* 446 F Supp 3d 229 (ED Mich, 2020) (finding that carbon monoxide was a pollutant). See also *McGuirk Sand & Gravel, Inc v Meridian Mut Ins Co,* 220 Mich App 347, 356-357; 559 NW2d 93 (1996). So the argument may succeed under Michigan law. However, a recent Minnesota decision discussed below suggests that a pollution exclusion will not extend to COVID-19 business interruption claims, at least when the policy also contains a virus exclusion.

***Seifert v IMT Ins Co,* __ F Supp 3d __ (D Minn, 2020) (Docket No. 20-1102)**

Here, the insured operated a hair salon in Albert Lea, Minnesota, and a barbershop in St. Paul, Minnesota. On March 13, 2020, Minnesota's Governor declared an emergency in response to the spread of COVID-19 and issued several Emergency Executive Orders, one of which mandated the closure of salons and barbershops. As a result of the Orders, the insureds had to suspend all business operations. The insured then made a claim with their insurer for lost business income. The insurer denied the claim based on the lack of a direct physical loss, and multiple exclusions. The insured sued, and the district court granted the insurer's motion to dismiss, finding that the insured did not "plausibly allege any direct physical loss or damage to the properties…." *Seifert,* __ F Supp 3d at __; slip op at 2. "[T]he Orders are alleged to be the sole cause of his losses, but governmental action prohibiting the use of property, by itself, is not enough." *Id.* at __; slip op at 9. "Civil Authority" coverage was also unavailable for this reason; this coverage is only triggered "when a Covered Cause of Loss causes damage to another's property, and a civil authority then prohibits access to the insured property." *Id.* "Thus, a direct physical loss of or damage to property is again required to trigger coverage." *Id.*

The district court further held that the insured did not "plausibly demonstrate that the virus or bacteria exclusion would not preclude coverage…." *Id.* at __; slip op at 2. "However, recognizing "that the law concerning business interruption coverage linked to the COVID-19 pandemic is very much in development," the district court allowed the insureds to amend the complaint. *Id.* at __; slip op at 11 n 7.

In addition to what appears to have been a standard "Virus or Bacteria" exclusion, the insurer in *Seifert* also asserted a pollution exclusion and "Ordinance or Law" exclusion. Noting that "exclusions are to be construed narrowly and strictly against the insurer," the district court rejected the insurer's "attempt to place the coronavirus in the same category of pollutants as 'smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste'…." *Id.* at __; slip op at 10 n 6. "Additionally, while the Ordinance or Law Exclusion might be applicable, IMT offers nothing to demonstrate whether the Emergency Executive Order specifically closing barbershops and hair salons had the force of law." *Id.*

Other pro-insurer decisions that were recent as of this editorial deadline, but contained reasoning that is mainly repetitive of what is discussed above, include:

***Border Chicken, LLC v Nationwide Mutual Ins Co,* __ F Supp 3d __ (D Az, 2020) (Docket No. 20-00785)**

Here, the insured owned 14 fried chicken and pizza franchises in Arizona, and sought "Civil Authority" coverage from Nationwide after Arizona's Governor issued Covid-19 mitigation orders that shut down indoor dining. The district court held that the claim failed because Nationwide's policy contained a standard "Virus or Bacteria" exclusion. *Border Chicken,* __ F Supp 3d at __; slip op at 10. The district court rejected the insured's arguments regarding ambiguity and "regulatory estoppel."[1] *Id.* at __; slip op at 9-10.

***Goodwill Industries v Philadelphia Indemnity Ins Co,* __ F Supp 3d __ (WD Okla, 2020) (Docket No. 20-511)**

Citing *Turek* and other decisions, this district court found that the insured had failed to plead a direct physical loss and, "[e]ven if the Court applied an expansive definition of direct physical loss, as Goodwill requests, its claim is still subject to dismissal because the Virus Endorsement expressly excludes coverage." *Goodwill Industries,* __ F Supp 3d at __; slip op at 8.

***Handel v Allstate Ins Co,* __ F Supp 3d __ (ED Pa, 2020) (Docket No. 20-3198)**

"[P]laintiff's property remained inhabitable and usable, albeit in limited ways. Plaintiff has failed to plead plausible facts that COVID-19 caused damage or loss in any physical way to the property so as to trigger coverage…." *Handel,* __ F Supp 3d at __; slip op at 8-9. "Plaintiff's claim for coverage pursuant to the civil authority provision of the policy also fails" for similar reasons. *Id.* at __; slip op at 9. And "[e]ven if plaintiff had pleaded sufficient facts for physical damage or loss as a result of COVID-19, plaintiff's claims are still excluded by the virus exclusion provision." *Id.* at __; slip op at 10.

***Real Hospitality, LLC v Travelers Casualty Ins Co,* __ F Supp 3d __ (SD Miss, 2020) (Docket No. 20-00087)**

"…Plaintiff fails to plausibly allege that it suffered a 'direct physical loss of or damage to' its property … [and] even if Plaintiff was able to show it suffered such loss or damage, coverage would be precluded under the virus exemption to the Policy." *Real Hospitality,* __ F Supp 3d at __; slip op at 8.

***Vizza Wash v Nationwide Mut Ins Co,* __ F Supp 3d __ (WD Tex, 2020) (Docket No. 20-00680)**

"…Plaintiff's allegations make clear that its claimed losses stemmed – at least indirectly – from the ongoing Covid-19 virus pandemic, and the Policy's Virus Exclusion unambiguously excludes coverage for damages that 'indirectly'

arise from '[a]ny virus . . . that induces or is capable of inducing physical distress, illness or disease' irrespective of whether 'any other cause or event that contributes concurrently or in any sequence to the loss.'" *Vizza Wash*, __ F Supp 3d at __; slip op at 15.

***Henry's Louisiana Grill v Allied Ins Co*, __ F Supp 3d __ (ND Ga, 2020) (Docket No. 20- 2939)**

"[T]he contract language issue here is not ambiguous, and because the Governor's Executive Order did not create a 'direct physical loss of' the Plaintiffs' dining rooms, the Business Income provision does not apply.…" *Henry's Louisiana Grill*, __ F Supp 3d at __; slip op at 6. For similar reasons, "Plaintiffs cannot claim coverage under the Civil Authority provision." *Id.*

***Wilson v Hartford Casualty Co*, __ F Supp 3d __ (ED Pa, 2020) (Case No. 20-3384)**

"[A]n unambiguous virus exclusion bars coverage here" and "[e]ven assuming that the governmental closure orders are a separate cause of loss, the virus exclusion would still bar coverage because of the anti-concurrent causation clause in the virus exclusion." *Wilson*, __ F Supp 3d at __; slip op at 21-22.

Endnote

1 A "regulatory estoppel" argument, in this context, is based on the idea that insurers secured state insurance commissioners' approval for the "Virus or Bacteria" exclusion under false pretenses. Regulatory estoppel has not been recognized in any reported Michigan decision. The argument is unlikely to gain traction in Michigan because the Michigan Supreme court has held that estoppel "will not be applied to broaden the coverage of a policy to protect the insured against risks that were not included in the policy or that were expressly excluded from the policy." Kirschner v Process Design Assocs, Inc, 459 Mich 587, 594; 592 NW2d 707 (1999). The argument has not been particularly successful outside of Michigan either. See Sher v Allstate Ins Co, 947 F Supp 2d 370, 389 (SD NY, 2013) ("The theory of regulatory estoppel ... has received almost universal disapproval. It has been consistently rejected by federal and state authorities across the country.").

Amicus Report

By: Anita Comorski

The Supreme Court, in its upcoming term will be addressing the interpretation of the statutory notice of intent requirements in a medical-malpractice case. Specifically, the Supreme Court granted oral argument on the plaintiff's application for leave to appeal in *Marquardt v Umashankar* to address whether the plaintiff provided proper notice to the defendant physician.[1] Michigan Defense Trial Counsel has been invited to file an *amicus curiae* brief in this case.

In an action alleging medical malpractice, the prospective plaintiff is required by statute, MCL 600.2912b, to provide pre-suit notice of intent (NOI) to each defendant to be named in the complaint. The plaintiff must then wait for the applicable notice period before filing a complaint. As the Supreme Court previously held, "a medical malpractice plaintiff must provide **every** defendant a timely NOI in order to toll the limitations period applicable to the recipient of the NOI." *Driver v Naini*, 490 Mich 239, 251; 802 NW2d 311 (2011) (emphasis in original). If a plaintiff fails to provide a notice of intent to a defendant, the statute of limitations cannot be tolled during the notice period, nor is the limitations period tolled when the complaint is filed.

In the *Marquardt* case, as set forth in the Court of Appeals' opinion, the plaintiff provided a notice of intent addressed only to the risk manager at the facility where the at-issue care was provided – University of Michigan Health System. The notice was not addressed to or sent to the prospective defendant physician whose care was at-issue, Dr. Umashankar, although the plaintiff stated in the body of the notice that the plaintiff intended to file suit against Dr. Umashankar.

While the plaintiff's notice of intent was found to have been timely sent, the Court of Appeals held that the plaintiff failed to provide the notice of intent to Dr. Umashankar specifically since it was not directed to him. Lacking tolling by the notice of intent, the complaint against Dr. Umashankar was not timely filed. Thus, the Court of Appeals affirmed summary disposition in favor of the defendant Dr. Umashankar.

In granting oral argument on the plaintiff's application for leave to appeal, the Supreme Court will consider whether the Court of Appeals properly interpreted the statutory notice of intent requirements, directing the parties to brief the issue of whether the plaintiff "failed to give Dr. Umashankar notice as required by MCL 600.2912b, by way of notice mailed on July 20, 2009, on the ground that the notice was not addressed or directed to him."

Briefing is currently in progress in *Marquardt*. It is anticipated that MDTC's amicus brief will be filed within the next few months.

This update is only intended to summarize the complex issues addressed in the amicus briefs filed on behalf of the MDTC. The MDTC does maintain an amicus brief bank on its website accessible to its members. For a more thorough understanding of the issues addressed in these cases, members are encouraged to visit the brief bank to review the complete briefs filed on behalf of this organization.

Endnotes

1 Supreme Court Docket Nos. 160772.

Anita Comorski a principal in the Appellate Practice Group at Tanoury, Nauts, McKinney & Garbarino, P.L.L.C., prepared this report before her passing in December 2020. With over fifteen years of appellate experience, Ms. Comorski handled numerous appellate matters, obtaining favorable results for her clients in both the state and federal appellate courts. Ms. Comorski was a talented attorney, a recipient of the MDTC's Volunteer of the Year Award, and chair of the MDTC's Amicus Committee. The MDTC, its members, and many others will miss Ms. Comorski's tireless dedication.

Supreme Court Update

By: Stephanie Romeo, *Clark Hill PLC*
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In October 2020, the Supreme Court issued one of the most highly anticipated opinions of the year with its first opinion relating to the COVID-19 pandemic. The opinion addressed the scope of the Governor's emergency powers under the Emergency Management Act ("EMA") and Emergency Powers of the Government Act ("EPGA"). The narrow majority held that the Governor lacked authority to declare a state of emergency or state of disaster under the EMA after April 30, 2020, and that the EPGA violated the Michigan Constitution. However, Chief Justice McCormack noted in her minority opinion that the majority "needlessly insert[ed] the Court into what has become an emotionally charged political dispute." Such a contentious case reminds attorneys to consider both the text and spirit of the law when representing their clients and to also think critically about their advocacy's societal implications. *In re Certified Questions From United States Dist Court, W Dist of Michigan, S Div*, ___ NW2d ___; 2020 WL 5877599 (Mich. Oct. 2, 2020) (Docket No. 161492)

Facts: Beginning in March 2020, Michigan Governor Gretchen Whitmer issued a series of Executive Orders in response to the COVID-19 pandemic. On March 10, 2020, the Governor issued EO 2020-04, which declared a "state of emergency" in Michigan under the Emergency Powers of the Governor Act ("EPGA") and the Emergency Management Act ("EMA"). On April 1, 2020, the Governor issued EO 2020-33, which declared a "state of emergency" under the EPGA and "state of emergency" and "state of disaster" under the EMA. She then requested that the Legislature extend the state-of-emergency and state-of-disaster declarations by 70 days. In response, the Legislature extended the state of emergency and state of disaster only through April 30, 2020. Thus, on April 30, 2020, the Governor terminated the state of emergency and disaster under the EMA. However, immediately after that, she issued two new executive orders, which indicated that a state of emergency remained declared under the EPGA and that she redeclared the state of emergency and state of disaster under the EMA.

In the underlying case, the plaintiffs include healthcare providers and a patient who was scheduled to undergo a knee-replacement surgery in March. Plaintiffs specifically objected to the Governor's EO 2020-17 issued in March, which prohibited healthcare providers from performing nonessential procedures. Plaintiffs brought their case in federal district court against the Governor, Michigan Attorney General, and the Michigan Department of Health and Human Services Director. Although EO 2020-17 had been rescinded since the filing of Plaintiffs' lawsuit, the district court held that the case was not moot because subsequent executive orders had continued to impose restrictions on healthcare providers. The federal court certified the following questions to the Michigan Supreme Court: 1) Whether, under the EPGA or EMA, Governor Whitmer had the authority after April 30, 2020, to issue or renew any executive orders related to the COVID-19 Pandemic; and, 2) Whether the EPGA and/or EMA violates the Separation of Powers and/or the Non-Delegation Clauses of the Michigan Constitution.

Ruling: In an opinion joined by four justices, the majority held that the Governor did not have authority after April 30, 2020, to issue or renew any executive orders related to the COVID-19 Pandemic under the EMA and that the EPGA violated the Michigan Constitution because it delegated to the executive branch the legislative powers of state government indefinitely. Concerning the EMA, the majority held that the Governor possessed the authority to declare a state of emergency or disaster once but did not have the authority to redeclare the same state of emergency or disaster after the Legislature declined to authorize an extension. With respect to the EPGA, the majority held the EPGA's language delegating broad powers to the Governor to enter orders "to

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protect life and property or to bring the emergency situation within the affected area under control" until a "declaration by the governor that the emergency no longer exists" granted the Governor the ability to exercise her emergency powers for an indefinite duration. The majority noted that that the only standards governing the Governor's emergency powers under the EPGA were the words "reasonable" and "necessary," which did not provide genuine, meaningful guidance to the Governor.

While the minority concurred in the majority's opinion to the extent that it concluded that the certified questions posed by the district court should be answered and that the Governor's orders issued after April 30, 2020, were not valid under the EMA, it dissented from the majority's ruling striking down the EPGA as unconstitutional. The minority stated that the majority was wrong in claiming that the EPGA had no genuine standards to guide the Governor's discretion or to subject the Governor to "checks and balances." These genuine standards included that the Governor's actions must be "reasonable and necessary," they must "protect life and property" or "bring the emergency situation . . . under control" and that these actions may be taken only at a time of "public emergency" or "reasonable apprehension of immediate danger" when "public safety is imperiled." Moreover, the minority noted that the Legislature could repeal the EPGA if it saw fit or amend the law to alter its standards or limit its scope. Michigan citizens could also initiate petitions to repeal or amend the EPGA and can hold the Governor accountable by voting in the next gubernatorial election. Accordingly, the minority found that the delegation of powers to the executive, as outlined in the EPGA, did not violate the nondelegation doctrine and was therefore constitutional.

Practice Pointer: This case offers valuable guidance beyond the mere analysis and discussion of various legal principles. As this case continues to spark great debate among Michiganders, it encourages attorneys to consider the text of the law and the spirit and intention behind the law when representing their clients. While the 4-member majority found that the EPGA provided no meaningful guidance regarding the scope of the Governor's powers, the minority found that there were a variety of checks on the Governor's power. Such differing opinions emphasize the various types of analyses that may be guiding a court's decision. The opinion also encourages attorneys to consider the broader implications of their advocacy. Here, the Court's ruling invalidated all of the Governor's Executive Orders issued after April 30, 2020, and pegged the EPGA as unconstitutional. While the plaintiffs, in this case, may have intended this outcome, such a broad-sweeping holding reminds attorneys to carefully consider the lasting impact of their representation.

"The views expressed are those of the author and not necessarily of Clark Hill PLC."

Municipal Law Report

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First Amendment Retaliation and Conspiracy: *Pro Se* Plaintiff's Allegations Sufficiently Created an Inference of Conspiracy to Violate Free Speech Rights.

Rudd v City of Norton Shores, 977 F3d 503 (CA 6, 2020).

Facts:

The Sixth Circuit has recently published two cases that define the parameters for pleading a First Amendment retaliation claim. The first, *Rudd v City of Norton Shores*, 977 F3d 503 (CA 6, 2020) was issued on October 6, 2020. Appellant Daniel Rudd challenged the Western District of Michigan's grant of defendants' motions to dismiss his *pro se* complaint alleging First Amendment retaliation and conspiracy against the City of Norton Shores, its mayor, city manager, former and sitting police chief, several police officers, the city attorney and his law firm, a Michigan State Police Lieutenant, and the city manager's wife, her law firm, and two other members of her firm.

The facts of this case were intertwined with a custody dispute between Rudd and his ex-wife. Rudd alleged that his ex-wife abducted their sons with her attorney's assistance in 2013. He went to the police and specifically informed them that his sons might be hidden at his ex-wife's attorney's home. He alleged that the city manager conspired with the then-police chief and officers to not investigate his claims because his ex-wife's attorney was married to the city manager and had represented the then-police chief.

Rudd also alleged that one day he was parked outside of his ex-wife's attorney's house when he encountered the then-police chief, who allegedly told Rudd that the department would not investigate his claims, and threatened to arrest him for trespassing.

After the children were recovered, Rudd obtained an order restricting his ex-wife's parenting time. He claimed that several city officials then assisted his ex-wife's attorney in obtaining evidence to support his ex-wife's successful effort to obtain a personal protection order against Rudd, including falsifying police reports and disclosing information about Rudd obtained from the Law Enforcement Information Network (LEIN). He also implicated city officials in his ex-wife's attempt to have Rudd held in contempt of the protection order.

After a new police chief was installed in 2015, Rudd filed a complaint with the police department requesting an inquiry into his allegations. He claimed that the police chief forwarded the complaint to the city manager, his wife, and the former police chief. He also arranged for the LEIN-related issue to be investigated by a friendly Michigan State Lieutenant with instructions to "go through the motions" of an investigation. After that, though Rudd alleged that the protection order had expired and been removed from the LEIN system, he claimed that his ex-wife's attorney and her firm attempted to enforce the protection order against him and that she sent an e-mail in which she referred to his past complaints. He claimed that when he brought this e-mail to the police chief's attention, the police chief sent it to his ex-wife's attorney. He further claimed that the department re-entered the protection order into LEIN without a court order after he sought records about his complaints through the Freedom of Information Act.

Rudd's ex-wife's firm then filed a contempt motion against him. He alleged that he sought to have the LEIN record corrected but claimed that the police ignored his request. He claimed that the city attorney then issued a letter at the mayor's request asking him to cease-and-desist making comments about the city manager. Rudd also alleged that the defendant members of his ex-wife's firm threatened him with jail time if he continued making complaints and records requests and offered to drop the

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contempt motion if he would withdraw his complaints against the city.

Rudd sued in February 2018, alleging First Amendment retaliation, conspiracy, and state tort claims against all defendants. Defendants successfully moved to dismiss on grounds including that the complaint did not sufficiently plead an adverse retaliatory action against any defendant. The Sixth Circuit reversed as to all defendants except the mayor.

Ruling:

The Sixth Circuit emphasized throughout that, even though Rudd's claims may all prove to be meritless, it must accept the pled facts as true. Further, while one defendant could not be held liable for another defendant's actions on First Amendment retaliation grounds alone, a plaintiff can pursue his claims against all defendants (including private actors) for which he plausibly alleged a conspiracy.[1]

Regarding the retaliation claim, the court rejected defendants' argument that an adverse action was not pled. It noted that the action need only be "capable" of deterring a person from exercising free speech rights such as filing complaints with the city.[2] The court found that, if true, Rudd's allegations regarding the police department's refusal to investigate his abduction claim, the former police chief's "detention" of Rudd, the entry of the protection order into the LEIN database after it expired, and his ex-wife's attorney's firm's protection order-related actions and threat to put him in jail all could have a "chilling effect" on his speech.[3] It further held that sufficient temporal connections and references to his activity existed in the defendants' alleged actions to plausibly plead the causation element of a retaliation claim.[4] The court rejected the defendants' argument that the complaint only alleged non-actionable "inaction" by the police and concluded that its defense that the protection order was still effective in 2015 was a fact question.[5]

While the court seemed to acknowledge that Rudd's defendant-specific First Amendment-related allegations had their limits, it found that the conspiracy allegations sufficed at the pleading stage to offset any alleged defects.[6] Defendants argued that the complaint merely alleged parallel actions by independent actors rather than a conspiratorial agreement. Still, the court held that express agreement or collaboration of the actors need not be alleged and that a conspiratorial purpose and agreement can be inferred from facts that "suggest" an agreement.[7] The court concluded that Rudd had pled sufficient facts to infer a purpose and agreement against all defendants except the mayor, who Rudd only claimed had asked the city attorney to write him a letter. The court also noted that none of the individual defendants argued qualified immunity, and the corporate defendants did not argue against the sufficiency of the complaint's allegations for imposing liability upon them.[8] The court, therefore, reversed the district court on all matters except the claims against the mayor and the state claims against the State Police Lieutenant (which Rudd's appeal did not address).

Practice Note:

Though the court did not expressly address whether its review was more lenient based on Rudd's *pro se* status, its opinion shows the lengths to which the court appears willing to go to find a plausible claim from the complaint's allegations as a whole even if the claims appear conclusory or seem to be lacking against specific defendants. Special attention should be given to multi-defendant complaints that join constitutional claims with a conspiracy claim. Where available, alternative defenses such as qualified immunity should be considered if a court shows such deference to the complaint.

First Amendment Retaliation and Sexual Harassment: Threat Insufficient to Sustain Federal Claim; Court Lacked Supplemental Jurisdiction over State Claim.

Kubala v Smith, 984 F3d 1132 (CA 6, 2021).

Facts:

The Court reached a decidedly different outcome in a First Amendment retaliation case in its decision in *Kubala v Smith,* 984 F3d 1132 (CA 6, 2021), issued on October 9, 2020. Appellant Kenneth Kubala appealed the Northern District of Ohio's dismissal of his complaint that alleged a federal First Amendment retaliation claim and state sexual harassment claim.

Kubala was an employee of the Trumbull County Engineer's office from October 2011 until his resignation in May 2018. He had been a "fiduciary employee" outside of the civil service system. Kubala alleged that the county engineer engaged in a multi-year pattern of comments and actions inquiring whether Kubala was gay and bullying him based on the county engineer's belief that Kubala was gay. When Kubala complained to the human resources director, he alleged that he was told that nothing could be done.

During his employment, Kubala also ran for a political office against the county engineer's wife. Kubala claimed that, in response to this and his attendance at other political functions, he was threatened to have his job reclassified to be within the civil service system, which would prohibit Kubala from running for political office and engaging in local political activities. He based this claim on three allegations: 1) the county engineer told him not to attend political functions of two officials; 2) the county engineer smacked him on the back and told him that he would be thinking about Kubala in the voting booth when he was voting for a candidate that Kubala did not favor, and 3) the county engineer's attorney asked him if he wanted to change his job status to "classified" to be "protected."

Kubala resigned in March 2018, stating he was doing so because of "an unhealthy work environment." He then sued in state court, but the defendant county and county engineer removed to federal court. The district court granted summary judgment to both defendants and dismissed both claims with prejudice. The Sixth Circuit affirmed in part and reversed in part.

Ruling:

On the First Amendment retaliation claim, the court recited the standard requiring a plaintiff to show 1) engagement in constitutionally protected speech or conduct; 2) an adverse action that would deter a person of ordinary firmness from engaging in that conduct; and 3) causation. While the court agreed that Kubala's political activities were protected conduct, it concluded that

Kubala failed to make a prima facie case of retaliation on the adverse action and causation elements. It found that the complaint only alleged threatened action. While threats can be actionable if capable of deterring protected activity, Kubala's allegations did not meet this threshold. It held that neither the county engineer's request for Kubala not to attend political functions, nor his comments about his thoughts at the voting booth involved retaliation or threats.[9] Moreover, it found that a reasonable juror could not conclude that the single instance of the county engineer's attorney asking Kubala if he wanted his job reclassified would deter a reasonable person from engaging in political activity since the attorney did not have the power to carry out the threat.[10] The court concluded that Kubala's inference that the alleged acts were retaliation for his running against the county engineer's wife for office was "ambiguous" and required the court to "draw too many inferences."[11] It also showed deference to the attorney's representation that reclassifying Kubala would protect him. The court likewise found that Kubala's resignation was based on his sexual harassment allegations, not fear of retaliation.

However, the court found that the district court lacked jurisdiction over the state sexual harassment claim. It observed that the two claims arose under a distinct law and did not relate to a common nucleus of operative facts, as no harassment was alleged to have occurred during the alleged First Amendment violations.[12] Even though this claim had been dismissed on summary judgment and efficiency favored hearing both claims, the court deferred to its charge not to hear cases over which it has no power.[13] It observed that the question of supplemental jurisdiction "remains open throughout the litigation" and can even be reached after a jury trial.[14] The court, therefore, vacated the district court's dismissal of the state claim with prejudice and remanded it to the district court with an order that it be dismissed without prejudice for lack of subject matter jurisdiction.[15]

Practice Note:

While at first glance, the court's rejection of the inferences invited by Kubala's retaliation theory seems to be in tension with its treatment of the claims in *Rudd*, the key distinction appears to be that this case was decided on summary judgment. More importantly, this case reveals the careful calculations that need to be made when removing a case or deciding to challenge supplemental jurisdiction. Even where a defendant may welcome the federal court hearing a state claim, a court's erroneous exercise of jurisdiction could lead to the entire claim being litigated only to be dismissed without prejudice, creating the risk that it will be re-litigated in state court. Attention should be paid to the commonality in law and facts when evaluating a decision to litigate state claims in federal court.

Endnotes

1 *Rudd v City of Norton Shores,* 977 F3d 503, 513 (CA 6, 2020).
2 *Id.,* at 514.
3 *Id.,* at 515.
4 *Id.,* at 515-516.
5 *Id.,* at 516-517.
6 *Id.,* at 517.
7 *Id.,* at 520.
8 *Id.,* at 530.
9 *Kubala v Smith,* 984 F3d 1132, 1140 (CA 6, 2021).
10 *Id.,* at 1141.
11 *Id.*
12 *Id.,* at 1138.
13 *Id.*
14 *Id.,* at 1137.
15 *Id.,* at 1142.

Court Rules Report

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PROPOSED AMENDMENTS

2020-19 – Requirement that audio and video trial exhibits be transcribed

Rule affected:	MCR 2.302
Issued:	November 18, 2020
Comment Period:	March 1, 2021
Public hearing:	Not set

The proposed amendment would require transcripts of audio and video recordings intended to be introduced as an exhibit at trial to be transcribed.

2020-20 – Process of service on limited liability companies

Rule affected:	MCR 2.105
Issued:	November 18, 2020
Comment Period:	March 1, 2021
Public hearing:	Not set

The proposed amendment establishes a procedure for service of process on limited liability companies.

ADOPTED AMENDMENTS

2002-37 – Amendment of e-filing rules

Rule affected:	Numerous
Issued:	October 28, 2020
Effective:	January 1, 2021

This amendment makes numerous procedural changes to the rules relating to e-filing requirements. In addition, however, MCR 2.603(A)(1) allows the court clerk to enter a default against a party that has failed to plead or otherwise defend the case even in the absence of a request for default. MCR 3.101(C) requires the use of SCAO approved forms in seeking garnishment after judgment.

2017-28 – Protection of personal identifying information submitted to courts

Rule affected:	MCR 1.109 and MCR 8.119
Issued:	May 22, 2019
Effective:	January 1, 2021

These amendments define what constitutes personal identifying information, when such information is prohibited from being filed with the court, and the process regarding redaction of personal identifying information.

2019-26 – Amendment to Supreme Court oral argument time limitation

Rule affected:	MCR 7.314
Issued:	September 23, 2020
Effective:	January 1, 2021

This amendment eliminates the oral argument time period (30 minutes per side) and instead provides for an amount of time established by the Court in the order granting leave to appeal.

Sandra Lake is a 1998 graduate of Thomas M. Cooley Law School. She is Of Counsel at Hall Matson, PLC in East Lansing, specializing in appellate practice, medical malpractice defense, insurance coverage, and general liability defense. She is also the Vice President of the Ingham County Bar Association and previously served as Chair of its Litigation Section. She may be reached atslake@hallmatson.law.

2019-29 – Amendments to appellate rules regarding appendix

Rule affected: MCR 7.212 and MCR 7.312
Issued: September 23, 2020
Effective: January 1, 2021

This amendment allows practitioners to produce an appendix for all appellate purposes by making the appendix rule consistent between the Court of Appeals and Supreme Court.

2019-31 – Amendment to allow vexatious litigator sanctions

Rule affected: MCR 7.216
Issued: September 23, 2020
Effective: January 1, 2021

This amendment enables the Court of Appeals to impose filing restrictions on a vexatious litigator, similar to the Supreme Court's rule (MCR 7.316), either by court initiative or motion of a party.

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MEMBER NEWS

Work, Life, and All that Matters

Collins Einhorn Farrell PC Announces Attorneys Pasquali, Hunter, Hicks, Cernak, and Peck as New Partners.

Southfield, Mich., January 5, 2020 – Collins Einhorn Farrell PC is pleased to announce that attorneys Chelsea E. Pasquali, James J. Hunter, Jeffrey R. Hicks, Margaret A. Cernak, and Lindsey A. Peck have been elected partners in the firm.

All five new partners have earned their promotions through their dedication to the best interests of our clients, and the firm." said firm CEO Theresa Asoklis. "We are proud of their accomplishments and are looking forward to their continuing accomplishments.

Chelsea E. Pasquali is a partner in the firm's General Liability, Professional Liability, and Commercial Litigation practice areas. She also has extensive experience defending first-party No-Fault, third party negligence, and premises liability cases. Chelsea has represented large corporations, small businesses, and individuals in breach of contract and fraud claims.

James J. Hunter is a partner in the firm's Professional Liability and Trucking & Transportation Liability practice groups. He has substantial experience defending complex claims in both practice areas. As a member of the Professional Liability practice group, Jim is dedicated to protecting the rights and livelihoods of professionals serving the community. He has successfully defended claims against attorneys, architects, real estate professionals, and others. Jim also represents transportation industry clients in state and federal litigation arising out of serious trucking and personal injury accidents.

Jeffrey R. Hicks is a partner in the firm's Commercial Litigation, Professional Liability, and Trucking and Transportation Liability practice groups. Jeff's practice focuses on professional liability defense. He has vast litigation experience, including all phases of the litigation process. He also has experience preparing and successfully arguing motions for summary disposition and appeals on behalf of clients. In addition to his current professional liability work, Jeffrey has also handled auto/negligence liability, complex real property litigation, commercial litigation, and pharmaceutical liability defense.

Margaret A. Cernak is a partner in the firm's Insurance Coverage practice group. She devotes a significant portion of her practice to preparing coverage opinions and proposed coverage position letters, counseling insurance carriers on complex insurance coverage disputes, and commencing and defending insurance coverage actions in both state and federal court. She has practiced in the areas of commercial, tort, and insurance coverage litigation with firms in southeastern Michigan.

Lindsey A. Peck is a partner in the firm's Appellate and Employment Practices Liability practice groups. Her eye for detail and penchant for writing has been the key to her success in both state and federal appellate courts. Lindsey has experience in general liability, personal injury defense, and most notably in municipal law. She has defended municipal agencies, departments, appointed and elected officials, officers, and employees against a broad spectrum of claims, including statutory claims, civil rights claims, tort claims, zoning and land use claims, employment claims, and contract claims arising out of public works infrastructure projects and improvements.

About Collins Einhorn Farrell PC

Founded in 1971, Collins Einhorn Farrell PC is a multi-specialty law firm headquartered in Southfield, Michigan. As one of the leading law firms in defense litigation, the firm provides expert legal representation in a wide variety of industries throughout the Midwest. The firm's practice areas include professional liability, asbestos/toxic tort, insurance coverage, appellate, fire and explosion litigation, general and automotive liability, trucking and transportation liability, medical malpractice, grievance defense, employment practices liability, and workers compensation. For more information, visit www.ceflawyers.com or call 248-355-4141.

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Vendor Profile

Shaun Fitzpatrick, Owner and CEO
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1. Where are you originally from?
I grew up south of Detroit in a city called Riverview. I started my career in the legal field in 2006 working for a national court reporting firm. In 2011, my family and I moved to Las Vegas, NV to pursue a VP position at a regional litigation support firm. In 2015, we moved back to Michigan and started Fortz Legal Support, LLC.

2. What was your motivation for your profession?
I love connecting with people and providing timely and unique solutions! We position ourselves as being the only one-stop solution for all litigation support needs in Michigan, including nationwide court reporting, computer forensics, trial support and process service. This profession is very fast-paced, and deadlines pop up virtually out of nowhere. I am proud that clients think of us when they are faced with tough issues and needs.

3. What is your educational background?
In 2000, I graduated with a dual major in Business and Communications from Aquinas College in Grand Rapids, MI.

4. How long have you been with your current company and what is the nature of your business?
We are celebrating our 5-year anniversary as of December 1st. We have grown to be one of the top litigation support firms not only in Michigan but across the country.

5. What are some of the greatest challenges/rewards in your business?
The greatest challenge and reward recently occurred with the COVID outbreak. During the pandemic, we had to significantly change the way we do business. Depositions were unable to take place in person. We adjusted quickly to provide the best remote deposition services in the industry. Our thoughtful approach to handling exhibits during remote depositions has received national attention. While many businesses have struggled, we are lucky and fortunate to be growing.

6. Describe some of the most significant accomplishments of your career:
Each year, Inc. Magazine announces its list of the 5000 fastest-growing, privately held companies in the United States. This year, Fortz Legal Support made the list with an amazing 87% growth from 2016 to 2019.

7. How did you become involved with the MDTC?
The MDTC is a fantastic organization with some of the top trial lawyers in the state. These are the professionals that we service in our business, so it was a natural fit for us. We have partnered with the MDTC to provide education seminars for its members and we have also sponsored events.

8. What do you feel the MDTC provides to Michigan lawyers?
MDTC provides a network of resources and information to help improve their practice; ultimately preparing Michigan lawyers to better serve the legal needs of our communities.

9. What do you feel the greatest benefit has been to you in becoming involved with the MDTC ?
The referral network has been incredibly beneficial to our business. Trial attorneys are the ones who can benefit greatly from our services.

10. Why would you encourage others to become involved with MDTC?
Involvement with MDTC will allow you to have a professional network to make sure you are staying up to date on new rules and policies. Their seminars and trade shows are informative and provide a great networking opportunity.

11. What are some of your hobbies and interests outside of work?
As a father of three young children, I am heavily involved in their lives. I have coached our kid's sports teams for years including baseball, softball, and basketball. I am an avid runner. My wife and I also have a passion for real estate, and we have renovated several homes.

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2021

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Thursday, June 17	Annual Meeting – Zoom
Wednesday, June 23	Young Lawyers Series – Zoom
Friday, August 6	Virtual Trials #2 – Zoom
Wednesday, August 25	Young Lawyers Series – Zoom
Friday, September 10	Golf Outing – Mystic Creek, Milford, MI
Wednesday, October 27	Young Lawyers Series – Zoom
Thursday, November 4	Board meeting – Sheraton Detroit Novi Hotel, Novi, MI
Friday, November 5	Winter Meeting & Conference – Sheraton Detroit Novi Hotel, Novi, MI

2022

Thursday, March 17	6th Annual Legal Excellence Awards – The Gem Theatre
Thursday, June 16 – Friday, June 17	Annual Meeting & Conference – Tree Tops - Gaylord

2023

Thursday, June 15 – Friday, June 16	Annual Meeting & Conference – Tree Tops - Gaylord

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Thursday, June 13 – Friday, 14	Annual Meeting & Conference – H Hotel - Midland

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