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Michigan

REGULATORY LIMITS ON CLAIMS HANDLING

Timing for Responses and Determinations

The time limits for responding to claims are found in the Uniform Trade Practices Act, MCLA § 500.2001, et seq. Examples: 30 days to specify in writing the materials that constitute a satisfactory proof of loss after receipt of claim unless claim is settled within the 30 days, MCLA § 500.2006; 60 days to pay after receipt of proof of loss.[i] *Id*.; 30 days to pay personal protection benefits under the Michigan Auto No-Fault Act after an insurer receives reasonable proof of the fact and of the amount of the loss sustained, MCLA § 500.3142.

Standards for Determination and Settlements

Claims handling standards are set forth in the Uniform Trade Practices Act, MCLA § 500.2001, et seq. However, no private right of action exists in tort for violation of the statute. *Crossley v Allstate Ins Co*, 155 Mich App 694, 697; 400 NW2d 625 (1987).

PRINCIPLES OF CONTRACT INTERPRETATION

"[I]nsurance policies are subject to the same contract construction principles that apply to any other species of contract." *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). "The primary goal in the construction or interpretation of any contract is to honor the intent of the parities." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 473; 663 NW2d 447 (2003) quoting *Rasheed v Chrysler Corp*, 445 Mich 109, 127 n. 28; 517 NW2d 19 (1994).

"[T]he language of the parties' contract is the best way to determine what the parties intended." *Klapp*, 468 Mich at 476. "'An insurance policy is enforced in accordance with its terms. Where a term is not defined in the policy, it is accorded its commonly understood meaning.'" *Gavrilides Mgt Co, LLC v Michigan Ins Co*, 340 Mich App 306, 317; 985 NW2d 919 (Mich 2022), *app denied*, 981 NW2d 725 (2022) (quoting *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 534; 676 NW2d 616 (2004). See also *Henderson v State Farm and Casualty Co*, 460 Mich 348, 355-356; 596 NW2d 190 (1999) (A policy is not ambiguous just because it does not define a relevant term).

An insurance company may not be held responsible for a risk that it did not assume. *Arco Industries Corp v American Motorists Ins Co*, 448 Mich 395, 402; 531 NW2d 168 (1995), *abrogated by Frankenmuth Mut Ins Co v Masters*, 460 Mich 105; 595 NW2d 832 (1999); *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567; 489 NW2d 431 (1992). Moreover, an insurer is free to limit its liability, as long as it does so clearly and unambiguously. *Allstate Ins Co v Fick*, 226 Mich App 197, 201-202; 572 NW2d 265 (1997). "Any clause in an insurance policy is valid as long as it is clear, unambiguous and not in contravention or public policy." *Raska v Farm Bureau Ins Co*, 412 Mich 355, 361-362; 314 NW2d 440 (1982). Unambiguous contracts are not open to judicial construction and must be enforced as written. *Rory*, 473 Mich. at 468.

CONTRACT INTERPRETATION
Common Issues

1. Faulty Workmanship as an "Occurrence" [What is the state of the common law in your state on this subject?]

Recent case law has somewhat changed the landscape on this issue in Michigan. Generally speaking, the faulty workmanship of an insured has been held not to constitute an occurrence under commercial general liability (CGL) policies. However, a recent case has held that the faulty work of a subcontractor may be considered an occurrence.

The Michigan Court of Appeals first addressed whether alleged defective workmanship constitutes an accident/occurrence within an insurance contract in *Hawkeye-Sec. Ins. Co. v. Vector Const. Co.,* 185 Mich. App. 369, 371, 460 N.W.2d 329, 330 (1990). In that case, the insured was sued for breach of contract arising out of concrete work at a waste-water treatment plant. The insurer, Hawkeye, denied coverage on the basis that its CGL policy did not provide coverage for property damage to work product due to faulty workmanship, as it did not constitute an occurrence. The Court of Appeals held that "the defective workmanship of Vector, standing alone, was not the result of an occurrence within the meaning of the insurance contract." *Id.* at 378.

Subsequently, the Court of Appeals addressed whether damage caused by the insured's faulty workmanship to the insured's own work product constituted an accident under a CGL policy. *Radenbaugh v. Farm Bureau Gen. Ins. Co. of Michigan*, 240 Mich. App. 134, 610 N.W.2d 272 (2000). In that case, the court addressed whether claims for breach of contract, breach of warranty, and shoddy workmanship arising out of the failure to give proper dimensions for the construction of certain aspect a mobile home constituted of an occurrence. The court held that if the complaint's allegations were limited to damage to the insured's product (the mobile home), the lawsuit would not have alleged an occurrence. However, "when an insured's defective workmanship results in damage to the property of others, an 'accident' exists within the meaning of the standard comprehensive liability policy. Accordingly, where a complaint alleges defective workmanship causing property damage only to that work, there exists no occurrence under the standard language contained in CGL policies. Where the defective workmanship results in damage to persons or to property other than the work product itself, such faulty workmanship could constitute an occurrence.

The Michigan Supreme Court has recently held that unintentionally faulty *subcontractor* work which damages an insured's work product may constitute an "accident" under a CGL policy. *Skanska USA Bldg. Inc. v. M.A.P. Mech. Contractors, Inc.,* 505 Mich. 368, 372, 952 N.W.2d 402, 404 (2020). In that case, the insurer had denied coverage to its insured on the basis that the claims alleged against the insured arose out of the insured's subcontractor's faulty work on a construction project, and was thus not an occurrence. The Supreme Court disagreed, finding that "generally, faulty work by a subcontractor may fall within the plain meaning of most of [the term 'accident']. It happens by chance, is outside the usual course of things, and is neither anticipated nor naturally to be expected." *Id.* at 378. The court further opined that its holding was supported by the CGL

policy's "Damage to Your Work" exclusion, which precluded coverage for an insured's own work product but carved an exception for work performed by a subcontractor; finding that this carve-out would be inoperative if faulty workmanship by a subcontractor could never constitute an accident.

2. Does Your State Have an Anti-Indemnity Statute? [And if so, does it have any notable peculiarities?]

Outside of the construction context, addressed below, there is no express public policy prohibition against allowing for an indemnitor to indemnify an indemnitee for the indemnitee's sole negligence. Instead, the court looks to the intent of the parties. *See McBride v. Pinkerton's, Inc*., 1999 WL 33439548 (Mich. Ct. App. Jul. 2, 1999) (holding that the legislature intended for the statutory prohibition on indemnity for indemnitee's sole negligence to apply only in the construction context). Much of the case law outside of the construction context deals with indemnity clauses that explicitly provide for the possibility of the indemnitee's sole negligence. *See McBride, supra* (clause explicitly allowed for indemnification for the indemnitee's sole negligence).

Michigan has an anti-indemnity statute applicable to construction contracts:

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

MCL § 691.991(1); see also *Miller-Davis Co. v. Ahrens Const., Inc*. 848 N.W.2d 95, 495 Mich. 161 (2014), *reh'g denied*, 845 N.W.2d 742, 495 Mich. 998. It does not extend to ancillary maintenance or similar contracts. *Poole v. Cintas Corp*., No. 291716, 2010 WL 2925394, at *1 (Mich. Ct. App. July 27, 2010) ("Although the agreement arguably concerns the 'maintenance' of floor mats and hand soap, the presence of these items and Cintas's servicing in the building does not mean that Cintas was maintaining the building."); *McBride*, *supra* (contract for security services in a building did not constitute maintenance of the building). Courts have found that where the complaint's allegations expressly or impliedly reference the contractor's own work, the contractor is by definition not being required to indemnify another party's sole negligence. *See Provenzino v. Macomb Cty*., No. 328653, 2017 WL 104544, at *5 (Mich. Ct. App. Jan. 10, 2017) ("contrary to [subcontractor]'s assertions in the trial court and on appeal, the case was not just about signage, barriers, and warnings, which fell within [contractor]'s scope of work. Rather, plaintiff's broad allegation that the combined defendants created an unreasonably dangerous condition included the height differential, which was the result of [subcontractor]'s work.").

CHOICE OF LAW

Michigan courts have endorsed the balancing approach for contract choice of law questions set forth in §§ 187 and 188 of the Restatement (Second) Conflicts of Law. *Chrysler Corp v Skyline Industrial Services, Inc*, 448 Mich 113, 125-126; 528 NW2d 698 (1995). See also *Auto-Owners Ins Co v Redland Ins Co*, 522 F Supp 2d 891, 895 (WD Mich 2007) (applying the Restatement (Second) approach to a coverage dispute involving a commercial auto policy).

DUTIES IMPOSED BY STATE LAW

Duty to Defend

1. Standard for Determining Duty to Defend

The duty to defend is broader than the duty to indemnify. *Auto-Owners Ins Co v City of Clare*, 446 Mich 1, 15; 521 NW2d 480 (1994). The duty to defend is determined by the allegations in the underlying complaint against the insured and the duty to defend arises with "allegations . . . [that] even arguably come within policy coverage." *Am Bumper and Mfg Co v Hartford Fire Ins Co*, 452 Mich 440, 451; 550 NW2d 475 (1996). However, the "duty to defend cannot be limited by the precise language of the pleadings. The insurer has the duty to look behind the third party's allegations to analyze whether coverage is possible." *Citizens Ins Co v Pro-Seal Serv Group*, 477 Mich 75, 89; 730 NW2d 682 (2007) (Cavanagh, J., dissenting), quoting *Shepard Marine Const Co v Maryland Cas Co*, 73 Mich App 62; 250 NW2d 541 (1976). Thus, an insurer's duty to defend must include the duty to investigate and analyze whether the third party's claim is covered. *Koski v Allstate Ins Co*, 456 Mich 439, 445 n. 5; 572 NW2d 636 (1998). The duty to defend continues until the carrier confines the claim to one that is not covered by the policy. *Id*. The duty to defend also exists even if there are theories of recovery against the insured in the complaint, which do not fall within coverage of the policy, so long as some allegations arguably fall within coverage. *Am Bumper*, 452 Mich at 452, quoting *Dochod v Cent Mut Ins Co*, 81 Mich App 63; 264 NW2d 122 (1978).

2. Issues with Reserving Rights

An insurer may unilaterally reserve its rights to decline coverage at a later date. The insurer satisfies its defense obligation in situations where a potential conflict exists by appointing independent counsel to represent the insured. *Cent Mich Bd of Tr v Employer's Reinsurance Corp*, 117 F Supp 2d 627, 634-635 (ED Mich 2000). The insurer must exercise good faith in selecting truly independent counsel. *Id* at 635. Because the tripartite relationship is rife with potential for conflict, the defense attorney's loyalty must lie with the insured. *Id*. Moreover, an insurer's reservation of rights still allows the insurer "some prerogative with respect to the defense beyond just paying expenses." *Fed Ins Co v X-Rite, Inc*, 748 F Supp 1223, 1229 (WD Mich 1990).

Where an insurer has undertaken the defense of an insured while having knowledge of facts which would allow avoidance of liability the insurer will be deemed to be estopped from avoiding coverage if it fails to provide reasonable notice to its insured of the possible disclaimer. See *Fire Ins Exchange v Fox*, 167 Mich App 710, 714, 423 NW2d 325

(1988) (finding as a matter of law that four months is not unreasonable); *Amerisure Mut Ins Co v Carey Transp, Inc*, 578 F Supp 2d 888, 903 (WD Mich, 2008).

State Privacy Laws; Insurance Regulatory Issues; Arbitration/Mediation

1. Criminal Sanctions

Michigan has enacted a number of parallel provisions from the Gramm-Leach-Bliley Act, 15 USC § 6801, 6805, and 6807. MCL 500.547. Michigan has a separate act which criminalizes the misuse of certain personal information, MCL 445.86. However, where a person has taken reasonable measures to enforce a valid policy in place to protect personal information, and to correct and prevent the reoccurrence of any known violations, this statute is inapplicable. The implementation of any policy in conformity with the Gramm-Leach-Bliley Act must meet the requirements of Mich. Adm. Code R. 500.551.

2. The Standards for Compensatory and Punitive Damages

With respect to property damage, Michigan law provides that if the injury caused to property by negligence is permanent or irreparable, the measure of damages is the cost of replacement or the difference in its market value before and after the injury. *Price v High Pointe Oil Co*, 493 Mich 238, 828 NW2d 660 (2013). Conversely, if the injury caused to property by negligence is reparable, and the expense of making repairs is less than the value of the property, the measure of damages is the cost of making repairs. *Id*.

With respect to medical expenses, one who is injured as a result of another's negligence is entitled to recover reasonable and necessary medical expenses incurred in an attempt to be cured of the injuries. *Grinnell v Carbide & Carbon Chemicals Corp*, 282 Mich 509, 532, 276 NW 535, 544 (1937).

With respect to punitive damages, Michigan law provides that negligence is not sufficient to justify an award of exemplary damages. *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 45, 436 NW2d 70, 86 (1989). In order to justify an award of exemplary damages, an act or conduct complained of must be voluntary and the act must inspire feelings of humiliation, outrage, and indignity; the act or conduct must also be malicious or so wilful and wanton as to demonstrate a reckless disregard of plaintiff's rights. *McPeak v McPeak*, 233 Mich App 483, 487–88, 593 NW2d 180, 183 (1999).

3. Insurance Regulations to Watch

Michigan is a publish and use state, authorizing insurers to utilize forms after proper publishing with the Department of Insurance and Financial Services (DIFS). Regulations are found on the Office of Regulatory Reinvention, State Budget Office, which can be accessed through the DIFS website. Most regulations deal with the operation of carriers and reporting requirements. The regulations establish rating requirements and tables to be used in rate calculations. These regulations are supplemented by published Bulletins addressing numerous issues relating to day-to-day management by insurers. DIFS Bulletins can be found at: https://www.michigan.gov/difs/legal/bulletins.

4. State Arbitration and Mediation Procedures

Michigan has legislatively adopted most of the provisions of the Federal Arbitration Act. MCL § 691.1681 *et seq*. Issues regarding interpretation of any arbitration provision not answered by the Michigan statute can be resolved by reliance on federal court interpretation. Arbitration can be required by statute in certain circumstances or agreed to by contract. The burden of proof on the issue of arbitrability falls on the person opposing arbitration as Michigan policy supports enforcement of contracts and the enforcement of alternate dispute resolution procedures. *McKistry v Valley Obstetrics & Gynecology Clinic, PC*, 428 Mich 167 (1987), and cases cited therein.

As an alternative form of dispute resolution, Michigan has adopted a near-mandatory Case Evaluation process, applicable to all cases in which monetary relief is sought. MCR 2.403. Case Evaluation involves a written submission to three court-appointed evaluators who review the submission, meet jointly with the attorneys (no parties), and then meet separately to fashion a recommended award. The parties have 28 days to accept the award. A mutually accepted award results in either a settlement with a release or a judgment pursuant to Case Evaluation. If one party rejects, that rejecting party must achieve a more favorable result than the Case Evaluation award, as favorability is defined by MCR 2.403.

Michigan procedure also allows a court to appoint a facilitator to attempt to negotiate a mutually agreeable resolution between parties. The cost is borne by the parties.

5. State Administrative Entity Rule-Making Authority

The Michigan Legislature has granted the Commissioner of Insurance the authority to adopt rules and regulations as the commissioner may deem necessary to effectuate the purposes of the insurance laws of this state. MCL 500.210. Such rules and regulations must be promulgated in the manner prescribed by the Administrative Procedures Act. MCL 24.201 *et seq*.

EXTRACONTRACTUAL CLAIMS AGAINST INSURERS: ELEMENTS AND REMEDIES

Bad Faith Claim Handling/Bad Faith Failure to Settle Within Limits

1. First Party

Michigan courts have repeatedly refused to recognize an independent cause of action in tort for breach of the implied covenant of good faith and fair dealing arising out of commercial contracts, including insurance policies. See, e.g., *Dahlman v Oakland Univ*, 172 Mich App 502, 507; 432 NW2d 304 (1988) ("We decline to recognize such a cause of action, because such a radical departure from the common law and Michigan precedent should come only from the Supreme Court."); *Ulrich v Fed Land Bank*, 192 Mich App 194, 197; 480 NW2d 910 (1992) ("Michigan does not recognize an independent tort action for an alleged breach of a contract's implied covenant of good faith and fair dealing."); *Aetna Cas & Sur Co v Dow Chem Co*, 883 F Supp 1101, 1111 (ED Mich 1995) (Michigan law does not recognize an implied contractual duty of good faith. Michigan law does not recognize an independent tort based upon a bad faith breach of contract). See also, *Kewin v Mass Mut Life Ins Co*, 409 Mich 401;

295 NW2d 50 (1980); *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 604; 374 NW2d 905 (1985); *Casey v Auto Owners Ins Co,* 273 Mich App 388, 402; 729 NW2d 277 (2006).

2. Third-Party

Michigan courts previously held that any duty of good faith and fair dealing arises from the contract, thus, third-parties were barred from suing an insurer for bad faith because Michigan law treated bad faith as a claim for fraud. *In Re Baker*, 709 F2d 1063 (6th Cir Mich 1983); *Kewin v Mass Mut Life Ins Co*, 409 Mich 401; 295 NW2d 50 (1980); *Jones v Hicks*, 358 Mich 474; 100 NW2d 243 (1960). However, since that time the Michigan Supreme Court decided that bad faith should not be used interchangeably with the word "fraud," "because bad faith is a state of mind and there can be bad faith without actual dishonesty or fraud." *Benkert v Med Protective Ins Co*, 842 F2d 144 (6th Cir 1988) (citing *Commercial Union Ins Co v Liberty Mut Ins Co*, 426 Mich 127; 393 NW2d 161 (1986). Recovery for alleged bad faith on the part of an insurer is severely limited in Michigan, with certain limited exceptions. See *infra*, "Duty to Settle."

Fraud

To sustain a cause of action for fraud, plaintiff must establish that (1) the defendant made a material representation, (2) the representation was false, (3) when the defendant made the representation, it knew it was false, or the defendant made the representation recklessly, without any knowledge of its truth, and as a positive assertion, (4) the defendant made the representation with the intent that it be acted upon by the plaintiff, (5) the plaintiff acted in reliance on the representation, and (6) the plaintiff suffered injury due to his reliance on the representation. *Hord v Envtl Research Inst*, 463 Mich 399; 617 NW2d 543 (2000).

Intentional or Negligent Infliction of Emotional Distress

It is generally held that damages for mental distress cannot be recovered in an action for breach of a contract. *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401; 295 NW2d 50, 53 (1980); *Van Marter v Am Fid Fire Ins Co*, 28 ALR4th 690; 114 Mich App 171, 183; 318 NW2d 679 (1982). In *Kewin*, the Michigan Supreme Court stated that while it recognizes that breach of an insurance contract results in annoyance and vexation, recovery for the annoyance and vexation is generally not allowed "absent evidence that [those consequences] were within the contemplation of the parties at the time the contract was made." *Id* at 54. Michigan courts have held that failure to pay a contractual obligation does not constitute outrageous conduct, even if it is done in bad faith or willfully. *Hayley v Allstate Ins Co*, 262 Mich App 571, 577; 686 NW2d 273 (2004).

There is no Michigan case law that has allowed a plaintiff to recover damages for negligent infliction of emotional distress arising out of a claim against an insurance company. Claims for negligent infliction of emotional distress are typically limited to cases where a plaintiff witnesses injury to an immediate family member that was caused by negligence. *Hesse v Ashland Oil*, 466 Mich 21; 642 NW2d 330 (2002).

State Consumer Protection Laws, Rules and Regulations

Michigan Consumer Protection Act ("MCPA"), MCL § 445.903, provides remedies for unfair, unconscionable, or deceptive methods, acts, or practices in conduct of trade or commerce. The intent of the MCPA is to protect consumers in their purchases of goods which are primarily used for personal, family, or household purposes. The MCPA does not provide protection if an item is purchased primarily

for business or commercial purposes. *Zine v Chrysler Corp*, 236 Mich App 261; 600 NW2d 384 (1999). Amendments to the MCPA in 2000 eliminated the ability to bring a MCPA claim against an insurance company. *McLiechey v Bristol West Ins Co*, 474 F3d 897 (2006) (holding that the MCPA does not apply to insurance companies).

DISCOVERY ISSUES IN ACTIONS AGAINST INSURERS

Discoverability of Claims Files Generally

Insurer claim files are routinely found to be discoverable in first party coverage litigation because these files are not generally made in anticipation of litigation. Files generated in relation to third party claims may contain documents that were made in anticipation of litigation, which are generally not discoverable. *In re Professionals Direct Ins Co*, 578 F3d 432, 439 (CA 6, 2009) (federal work product doctrine); *Taylor v Temple & Cutler*, 192 FRD 552, 558 (ED Mich 1999). Courts recognize that such claim files may contain documents subject to the attorney/client privilege and/or the work product doctrine, and such documents are protected from discovery. *Koster v June's Trucking, Inc*, 244 Mich App 162; 625 NW2d 82 (2001).

While there are no published decisions in Michigan regarding the production of claim files of other insureds, some trial courts have flatly rejected the right to such discovery. See, e.g., *Commercial Union v Cannelton*, No 2:92 CV 111 (WD Mich SD 1996) (Magistrate Rowland rejected the policyholder's request for such information as "not necessarily probative of the mutual intent of the parties in this case" and unduly burdensome to produce).

Discoverability of Reserves

There are no published decisions in Michigan regarding the discoverability of reserves. However, in *Aetna Cas & Sur Co v Dow Chem Co*, unpublished opinion of the United States District Court, Eastern District of Michigan, decided July 14, 1995 (Case No. 93-CV-73601-DT), the Court stated that information regarding reserves need not be produced by the insurer because it is "insufficiently probative of the proper interpretation or application of the individual policies in issue..." See also *US Fire Ins Co v City of Warren*, No. 2:10-CV-13128, 2012 WL 1454008, at *10 (ED Mich, April 26, 2012)("neither the existence nor amount of a reserve fund has any bearing on the legal question of coverage"); *Commercial Union v Cannelton*, Case No. 2:92 CV 111 (WD Mich 1996) (Magistrate Rowland held that "because insurance carriers set reserves at least in part because they are required by law, it does not appear that the reserve amount or the date the reserve was set would have any significance in this case"); *Dow Corning Corp v Hartford Accident & Indem Co*, Case No 93-325-789-CK (Wayne Cty Cir Court) ("Dow also seeks information with respect to ...reserves. The overwhelming majority of case law cited recognizes that these items are not discoverable") and *Hendricks v Frankenmuth Mut Ins Co*, Case No. 08095843 (Oakland Cty Cir Court) (reserve information held not relevant and therefore not discoverable in first party no-fault case).

Discoverability of Existence of Reinsurance and Communications with Reinsurers

Again, there are no published decisions in Michigan regarding the discoverability of reinsurance information and communications with reinsurers. Magistrate Rowland addressed this issue in *Cannelton*, *supra*, in the context of a "late notice" analysis. Judge Rowland held that "[i]n the absence of an ambiguity, if it is [the policyholder's] responsibility to provide notice of an occurrence or claim, extrinsic evidence [reinsurance] may not be admissible." (See Op. at 11). See also *US Fire Ins Co v City of Warren*, No. 2:10-CV-13128, 2012 WL 1454008, at *10 (ED Mich, April 26, 2012); *Stryker Corp v Nat'l Union Fire*

Ins Co, No. 4:01-CV-157 (WD Mich), oral argument transcript at pg. 38, (Judge Quist stating that he does not believe that reinsurance information is helpful to the insured and that reinsurance is a "business decision" not an "insurance decision"); *Aetna Cas & Sur Co v Dow Chem Co*, No. 93-CV-73601-DT (ED Mich), Order at 2, and *Dow Corning Corp v Hartford Accident & Indem Co*, No 93-325-789-CK (Wayne Cty Cir Court).

Attorney/Client Communications

No attorney/client relationship exists between the insurance company and the attorney it appoints to represent the insured. The attorney's sole loyalty and duty is owed to the client and not the insurer. *Koster v June's Trucking, Inc*, 244 Mich App 162; 625 NW2d 82 (2000); *Kirschner v Process Design Assoc*, 459 Mich 587; 592 NW2d 707 (1999).

Michigan courts have not addressed whether advice of counsel can act as a defense to a bad faith action.

DEFENSES IN ACTIONS AGAINST INSURERS

Misrepresentations/Omissions: During Underwriting or During Claim

An insurance company may rescind coverage and declare a policy void if an insured misrepresents a material fact in the application for insurance. *Oade v Jackson Nat Life Ins Co*, 465 Mich 244; 632 NW2d 126 (2001). The insurer may rescind coverage even for an innocent misrepresentation, as long as the insurer relied on the misrepresentation. *Lake States Ins Co v Wilson*, 231 Mich App 327, 331; 586 NW2d 113 (1998); *Titan Ins Co v Hyten*, 491 Mich 547, 571-572; 817 NW 2d 562, 576 (2012). No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to either a refusal by the insurer to make the contract or to the charging of a higher premium. *Montgomery v Fidelity & Guar Life Ins Co*, 269 Mich App 126, 129; 713 NW2d 801 (2005) ("A misrepresentation on an insurance application is material if, given the correct information, the insurer would have rejected the risk or charged an increased premium.")

Failure to Comply with Conditions

The Michigan Supreme Court has supported the use of notice provisions in insurance contracts requiring policyholders to provide reasonable notice as a means of protecting a carriers' right to investigate, evaluate and defend claims. *Wendell v Swanberg*, 384 Mich 468; 185 NW2d 348 (1971); *Wehner v Foster*, 331 Mich 113, 117; 49 NW2d 87 (1951); *Weller v Cummins*, 330 Mich 286, 292-93; 47 NW2d 612 (1951); *Kenney v Dashner*, 319 Mich 491; 30 NW2d 46(1947); *Wood v Duckworth*, 156 Mich App 160; 401 NW2d 258 (1987). The purpose of notice provisions in insurance policies is to allow carriers to make timely investigations of accidents in order evaluate claims and to defend against fraudulent, invalid or excessive claims. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429; 761 NW2d 846, 858 (2008); *Wendell*, 384 Mich at 477; *CPC Int'l, Inc v Aerojet-Gen'l Corp*, 825 F Supp 795, 813 (WD Mich 1993). Conditions requiring notice to the insurer "as soon as practicable" are interpreted to mean within a reasonable time, dependent on the facts and circumstances of the case. *Motor State Ins Co v Benton*, 35 Mich App 287, 297; 192 NW2d 385, 387 (1971); *CPC Int'l, Inc.*, 825 F Supp at 815; *Upjohn v Aetna Cas & Sur Co*, 768 F Supp 1186, 1202 (WD Mich 1990). It is well established that an insurer which seeks to cut off responsibility on the grounds that the insured did not comply with a contract provision requiring notice immediately or within a reasonable time must establish actual prejudice to its position. *Koski v Allstate Ins Co*, 456 Mich 439, 442; 572 NW2d 636, 638 (1998) (citing *Weller v Cummins*, 330 Mich 286; 47 NW2d 612

(1951)); *Bank of Am, NA v Fid Nat Title Ins Co*, 316 Mich App 480, 503; 892 NW2d 467 (2016); *Triple Inv Group, LLC v Hartford Steam Boiler Inspection & Ins Co*, 71 F Supp 3d 733, 740 (ED Mich, 2014).

Breaches of the cooperation clause also preclude coverage where the insurer can establish resultant prejudice. *Fed Ins Co v X-Rite, Inc*, 748 F Supp 1223 (WD Mich 1990). The insurer has the burden to show that it actively sought cooperation, and that due to the insured's lack of cooperation, evidence needed to defend insured was not available. *Anderson v Kemper Ins Co*, 128 Mich App 249, 253-254; 340 N2d 87 (1983).

Failure to comply with the "voluntary payment" condition also may result in loss of coverage for a claim. *Coil Anodizers, Inc v Wolverine Ins Co*, 120 Mich App 118; 327 NW2d 416 (1982); *Tenneco Inc*, 281 Mich App at 472. An insurer does not need to establish prejudice to preclude coverage for breach of a policy's "voluntary payment" condition. Tenneco Inc, 281 Mich App at 470.

Challenging Stipulated Judgments: Consent and/or No-Action Clause

While most liability policies seek to bar collusive settlements by barring action against the insurer until there has been a judgment or a settlement approved by the carrier, Michigan law recognizes the right of a subrogee of the insured's rights to take a consent judgment and to bring a direct action against the insurer for breach of the insurance contract. *Ounan v Hastings Mut Ins Co*, No. 182100, 1996 WL 33347940, at *1 (1996); *Davis v Great Am Ins Co*, 136 Mich App 764; 357 NW2d 761 (1984); *Cloud v Vance*, 97 Mich App 446; 296 NW2d 68 (1980); *Michigan Educ Emps Mut Ins Co v Exec Risk Indem, Inc*, No. 242967, 2004 WL 134005, (2004).

Preexisting Illness or Disease Clauses

Under MCL 550.1402(b), a health care corporation may not exclude or limit coverage for a preexisting condition for an individual covered under a group certificate. However, in the case of an individual covered under a non-group certificate, a health care corporation may exclude or limit coverage for a preexisting condition if (1) the exclusion or limitation does not last for more than six months after the effective date of the certificate, and (2) it relates to a condition for which medical advice, diagnosis, care, or treatment was recommended or received within six months before enrollment. MCL 550.1402(b).

Statutes of Limitations and Repose

Where the insurance policy does not specify a deadline by which a suit must be brought under the policy, the action is controlled by the statute of limitations, MCL 600.5807(8). Parties to an insurance contract may stipulate to shorten (*Rory v Cont'l Ins Co*, 473 Mich 457, 47; 703 NW2d 23 (2005)), or lengthen the time when a cause of action accrues.[ii] *Traverse City State Bank v Ranger Ins Co*, 72 Mich App 150; 243 NW2d 333 (1977). The statute of limitations in an insurance coverage action depends upon whether the plaintiff asserts a cause of action based upon contract or tort theories. Actions based upon breach of contract are subject to a six-year limitations period. MCL 600.5807(8); *Smith v Allstate Ins Co*, 102 Mich App 473; 302 NW2d 208 (1981). With respect to an insurer's promise to defend its insured from suits, a breach of contract occurs when the insurer refuses to defend an action brought against its insured. *Schimmer v Wolverine Ins Co*, 54 Mich App 291, 297; 220 NW2d 772 (1974). With respect to a promise to indemnify, the period of limitations runs from "when the indemnitee sustained the loss," *Ins Co of North Am v Southeastern Electric Co, Inc*, 405 Mich 554, 557; 275 NW2d 255 (1979), or "when the promisor fails to perform under the contract." *Cordova Chem Co v Dep't of Natural Resources*, 212 Mich App 144, 153; 536 NW2d 860 (1995).

Actions based upon tort (i.e., bad faith breach of implied covenant of good faith, to the extent recognized) are subject to a three-year limitations period. MCL 600.5805(8).

The statute of limitations under the Michigan Auto No-Fault Act is generally one year for first-party no-fault benefits. MCL 500.3145.

TRIGGER AND ALLOCATION ISSUES FOR LONG-TAIL CLAIMS

Trigger of Coverage

In *Gelman Sciences, Inc v Am Motorists Ins Co*, 456 Mich 305, 329; 572 NW2d 617, 628 (1998), overruled in part by *Wilkie v Auto-Owners Ins Co*, 469 Mich 41; 664 NW2d 776 (2003), the Michigan Supreme Court held that the standard CGL policy language, providing coverage for property damage occurring during the policy period, unambiguously dictated application of the injury-in-fact trigger of coverage. See *Stryker Corp v Nat'l Union Fire Ins Co of Pittsburgh, Pa*, No. 4:01-CV-157, 2005 WL 1610663 (WD Mich 2005) (recognizing that the Michigan Supreme Court in Gelman Sciences adopted an "injury in fact" trigger of coverage).

Allocation Among Insurers

The Michigan Courts have discussed five different methods for allocating liability among successive insurance policies where property damage or injury occurred over several years. All five methods were discussed in *Arco Indus Corp v Am Motorists Ins Co*, 232 Mich App 146, 165; 594 NW2d 61 (1999) aff'd by equal division, (Order dated June 22, 2000). In *Arco*, the Michigan Court of Appeals determined that the "time-on-the-risk" method of allocation should be utilized in cases involving continuous property damage and successive insurance policies.

More recent decisions have applied pro rata time on the risk allocation. See *Indiana Ins Co v Maul Inv*, No 02-043886-CZ-1 (Borchard, J.); *Decker Mfg Corp v Travelers Indem Co*, 106 F Supp 3d 892, 899 (WD Mich 2015). In *Century Indem Co v Aero-Motive Co*, 318 F Supp 2d 530 (WD Mich 2003) the Court in an environmental contamination coverage case, determined that defense costs are subject to a pro rata allocation among insurers based on the time-on-the-risk method. Likewise, the Sixth Circuit in *Cont'l Cas Co v Indian Head Indus, Inc*, 666 F App'x 456 (6th Cir 2016), applied Michigan law and ruled that damages arising from injuries due to asbestos exposure from the insured's products should be allocated on a pro rata basis.

CONTRIBUTION ACTIONS

Claim in Equity vs. Statutory

Under Michigan law, the right to contribution is controlled by statute. See MCL 600.2925a.

Elements

MCL 600.2925a(1) states that "[e]xcept as otherwise provided in this act, when 2 or more persons become jointly or severally liable in tort for the same injury to a person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them." MCL 600.2925a(2) provides that "[t]he right of contribution exists only in favor of a tort-feasor who has paid more than his pro rata share of the common liability and his total recovery is limited to the amount paid by him in excess of his pro rata share. A tort-feasor against whom contribution is sought shall not be compelled to make contribution beyond his own pro rata share of the entire liability."

DUTY TO SETTLE

Michigan law recognizes the cause of action for bad faith refusal to settle within policy limits in the context of a judgment rendered that is in excess of the policy limits when an insurer "having exclusive control of settlement, fraudulently or in bad faith refuses to compromise a claim for an amount within the policy limits." *Frankenmuth Mut Ins Co v Keeley*, 433 Mich 525, 534; 447 NW2d 691 (1989) (quoting *City of Wakefield v Globe Indem Co*, 246 Mich 645, 648; 225 NW 643 (1929)); see also *J & J Farmer Leasing, Inc v. Citizens Ins Co of America*, 472 Mich 353, 356 fn 3; 696 NW2d 681 (2005).

The standard for bad faith is determined by utilizing a series of factors. See *Commercial Union Ins Co v Liberty Mut Ins Co*, 426 Mich 127, 138-139; 393 NW2d 161 (1986). The factors are not exclusive, and the jury must consider the factors together with "all other evidence in deciding whether or not the Defendant acted in bad faith." *Id* at 137. Some of these factors include "failure to keep the insured fully informed of all developments in the claim or suit that could reasonably affect the interests of the insured" and "undue delay in accepting a reasonable offer to settle a potentially dangerous case within the policy limits where the verdict potential is high," among others. *Id* at 165-66.

The Supreme Court of Michigan has held that "the insurer does not act in bad faith if it refuses settlement in the honest belief that it has a fair chance of victory, or of keeping the verdict within the policy limit, or, upon reasonable grounds, that the compromise amount is excessive, or if it has legal defenses, as yet undetermined by a court of last resort, which fairly seem applicable..." *City of Wakefield*, 246 Mich at 652-653. "Good-faith denials, offers of compromise, or other honest errors of judgment are not sufficient to establish bad faith. Further, claims of bad faith cannot be based upon negligence or bad judgment, so long as the actions were made honestly and without concealment." *Commercial Union*, 426 Mich at 164.

LH&D BENEFICIARY ISSUES

Change of Beneficiary

Under Michigan law, the insured has the right to change the beneficiary, unless they have made an irrevocable designation. There is no requirement of consent from the beneficiary for a change of beneficiary. MCL 500.3424(1).

Effect of Divorce on Beneficiary Designation

Subsection (1) of MCL 552.101 states in relevant part:

> If the judgment of divorce or judgment of separate maintenance does not determine the rights of the wife in and to a policy of life insurance, endowment, or annuity, the policy shall be payable to the estate of the husband or to the named beneficiary if the husband so designates.

Subsection (2) of MCL 552.101 is identical to subsection (1), but instead discusses the rights of a husband to a wife's life insurance policy. MCL 552.101 terminates a divorced beneficiary spouse's rights in an insured spouse's life insurance policy.

INTERPLEADER ACTIONS

Availability of Fee Recovery

MCR 3.603 governs interpleader in Michigan. MCR 3.603(E) states that "[t]he court may award actual costs to an interpleader plaintiff. For the purposes of this rule, actual costs are those costs taxable in any

civil action, and a reasonable attorney fee as determined by the trial court." Subrule (1) of MCR 3.603(E) provides that "[t]he court may order that the plaintiff's actual costs of filing the interpleader request, tendering the disputed property to the court, and participating in the case as a disinterested stakeholder be paid from the disputed property or by another party." Subrule (2) states that "[i]f the plaintiff incurs actual costs other than those described in subrule (1) due to another party's unreasonable litigation posture, the court may order that the other party pay those additional actual costs."

Differences in State vs. Federal

MCR 3.603 largely mirrors Rule 22 of the Federal Rules of Civil Procedure, but also provides that "[i]f one or more actions concerning the subject matter of the interpleader action have already been filed, the interpleader action must be filed in the court where the first action was filed." See MCR 3.603(A)(3).

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[i] Failure to timely pay benefits may subject an insurer to paying 12% penalty interest, irrespective of whether coverage is reasonably in dispute. MCL 500.2006(4); *Griswold Properties, LLC v Lexington Ins Co*, 276 Mich App 551, 562-563; 741 NW2d 549 (2007).

ii By statute, a policy condition shortening the time by which the insurer may commence a lawsuit must contain the following provision: "The time for commencing an action is tolled from the time the insured notifies the insurer of the loss until the insurer formally denies liability." MCL 500.2833; see *Smitham v State Farm Fire & Cas Co*, 297 Mich App 537, 544; 824 NW2d 601 (2012); *Jimenez v Allstate Indem Co*, 765 F Supp 2d 986 (ED Mich 2011).