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Hal O. Carroll

Happy new year. Well, we made it through the first year. Our first year actually began last November at our organization meeting, but it ended at the September Annual Meeting of the State Bar, where we reported to the members, had two excellent speakers recruited by **Tim Casey**, the chair-elect, and elected our officers and council members. **Michael T. Lynch** discussed the area of indemnity provision in the context of construction and professional services contracts, and the insurance commissioner, **Kenneth M. Ross**, explained the operations and activities of his office.

(Re)elections. The four officers were re-elected for a second term, so we will be at the helm until next September. Four of the eight council members were up for re-election because they drew one-year terms under the bylaw requirement that the terms, which are for two years, be staggered. Officers' terms are normally for one year, but especially in light of the fact that we are all new to running a new section, we thought that allowing a second year would be a good idea.

Journal. This *Journal* continues to be a success. Many of our members have supplied articles, all of uniformly high quality. This issue is no exception, with articles on diverse topics: renewal policies, captive insurer legislation, and the Office of Financial and Insurance Regulation. It's worth pointing out again that the *Journal*, in addition to being sent to all of our members, is also sent to judges and to selected members of the legislature and the executive branch. So if you have some insight or expertise that you would like to share, it will be broadly disseminated.

Looking to the future, we now have a discussion list that members can join. **Geoffrey Brown**, our information services officer, has set it up for us, and we think it will quickly become a valuable resource.

We are looking forward to more activities with the committees as well. **Amy Iannone** has set up a **Construction Risks Committee**, which has already held meetings. If you are interested, be sure to contact Amy. **Marty Brown** has just formed the **Legislative and Regulatory Affairs Committee**. If you are interested in joining his committee, contact him. You'll find their contact information on the last page. ■

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of the authors or the editor and do not
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**Casey on
Coverage**

The “Occurrence” Requirement and What it Means

By Timothy F. Casey, Kelley, Casey & Moyer PC, tcasey@kcmlaw.com

The “occurrence” requirement is a central component in a typical general liability insurance policy. In a typical general liability insurance policy, the insuring agreement provides in part that the insurer agrees to pay those sums that the insured becomes legally obligated to pay because of bodily injury or property damage to which the insurance applies, provided that the bodily injury or property damage is caused by an “occurrence.”

In the “definitions” section, many policies define the term “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions” or some variation of this language. The term “accident” generally is not further defined in the policy, but longstanding Michigan case law has held that an “accident” is an “undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected.” *Guerdon Industries, Inc v Fidelity & Casualty Co New York*, 371 Mich 12, 18-19; 123 NW2d 143 (1963).

Thus, for the policy potentially to apply, the bodily injury or property damage must be caused by a happening by chance, something fortuitous and not anticipated or expected. In applying this requirement to various factual situations, Michigan courts over the years have focused on both the act and the consequences, and on whether those should be determined from the standpoint of the insured or from the standpoint of the injured party.

In *Frankenmuth Mutual Ins Co v Masters*, 460 Mich 105; 595 NW2d 832 (1999), the Michigan Supreme Court provided some clarity to this issue, while repudiating conflicting rationales of other cases decided a few years before *Masters*. In *Masters*, the insureds intentionally set a fire, intending to cause smoke damage to their store inventory to collect insurance. The fire, however, actually extensively damaged the clothing store and spread to other businesses, causing collateral damage. The question presented was whether there was an “occurrence” under the insureds’ policy.

The policy definition of “occurrence” stated that it meant an accident, and the Court held that the

determination of whether there was an accident should be framed from the standpoint of the insured, not the injured party. The Court also held that the appropriate focus of the term “accident” must be on both the injury-causing act or event and its relation to the resulting property damage or personal injury. An insured need not act unintentionally for the act to constitute an accident, and therefore an occurrence. When an insured does act intentionally, a determination must be made whether the consequences of that intentional act either were intended by the insured or reasonably should have been expected because of the direct risk of harm intentionally created by the insured’s actions. When an insured intends to cause damage, there is no “occurrence” regardless of whether the resulting injury is different from the injury intended.

Under the facts presented in the *Masters* case, then, the court held that viewed from the standpoint of the insured, the fire was caused by an intentional act and that the insured intended property damage. Therefore, there was no “accident” and thus no “occurrence,” even though the actual harm that resulted was more extensive than the harm intended by the insured.

Shortly thereafter, in *Nabozny v Burkhardt*, 461 Mich 471; 606 NW2d 639 (2000), the Supreme Court applied the *Masters* analysis in the factual context of a fight. The insured intended to trip another individual to get him to the ground, but did not intend to break the other person’s ankle, which is actually what resulted. The Court held that there was no “accident,” since the injury that resulted reasonably should have been expected, even if it was not the specific harm intended by the insured.

The Michigan Supreme Court reached a different conclusion in applying the above rules in *Allstate Insurance Co v McCarn*, 466 Mich 277; 645 NW2d 20 (2002). In that case, the insured intentionally pointed a gun at a person and pulled the trigger and the gun fired, killing the other individual. The insured, however, testified that he believed the gun was unloaded when he pulled the trigger. In determining whether there was an “occurrence,” the court first discussed the *Masters* case,

stating:

What this essentially boils down to is that, if both the act and the consequences were intended by the insured, the act does not constitute an accident. On the other hand, if the act was intended by the insured, but the consequences were not, the act does constitute an accident, unless the intended act created a direct risk of harm from which the consequences should reasonably have been expected by the insured. *Id.* at 282-283.

The Court went on to hold that a subjective, not objective, standard is to be used in determining whether the insured should reasonably have expected the consequences. The Court concluded that a subjective test was consistent with the rule established in *Masters* that the consequences of the insured's action must either have been intended or reasonably expected by the insured.

Applying those principles to the facts before it, the Court held that there had been an "accident" and thus an "occurrence," since the insured subjectively believed the gun was not loaded.

Another type of factual context involving the "occurrence" requirement pertains to claims based on defective workmanship. In *Hawkeye-Security Insurance Co v Vector Construction Co*, 185 Mich App 369; 460

NW2d 329 (1990), a contractor had poured concrete, but later testing revealed the concrete was defective, requiring it to be removed and repoured. The Court addressed the issue of whether the damage was caused by an "occurrence" and held that the defective workmanship, standing alone, was not the result of an occurrence, adopting a rule that the fortuity element of "accident" is not within the scope of a failure of workmanship. When the defective workmanship causes damages to property of others, however, courts do find the "occurrence" requirement is met as to such damages. *Radenbaugh v Farm Bureau General Insurance Co*, 240 Mich App 134; 610 NW 2d 272 (2000); *Hastings Mutual Insurance Co v Mosher, Dolan, Cataldo & Kelly, Inc*, unpublished decision of the Michigan Court of Appeals, Docket No 265621 (May 18, 2006); leave granted, 478 Mich 860 (2007); grant vacated, 480 Mich 928.

In summary, the "occurrence" requirement has several facets requiring analysis in any particular fact scenario. ■

The views expressed in this article are those of the author and do not necessarily represent the views of the author's law firm or its clients and do not constitute legal advice as to any particular matter.

Michigan's New Captive Insurance Legislation

By Zachary Fryer, Krolikowski, Capelli & Fryer, zach@thegoodfirm.com

Michigan recently enacted legislation allowing the formation and operating of captive insurance companies on terms specifically intended for them. While captive insurance companies are widely used, their existence is little known outside of the insurance industry, and the details of their purposes, uses, and manners of operation are not universally known even within the industry. This article will discuss Michigan's new captive insurance law, while providing some general background on captive

insurers, and additionally discussing potential next steps so that the benefit of the law for Michigan businesses and the Michigan economy may be maximized.

Concept of Captive Insurance

A large and growing proportion of liability exposures for large organizations are insured, or otherwise funded for, through a variety of mechanisms commonly referred to as alternative risk financing. Among these mechanisms, one of the most common is captive insurance.

Captive insurance is not a precisely defined concept, but, in general, it is an arrangement where coverage of an insured is provided by an insurance company that is controlled by one or more of its major insureds

The Court indicated that there could be no trademark or trade dress infringement without advertising, so the advertising requirement in the coverage was met by the nature of the allegations.

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and is not offering insurance to the general public. To be considered captive insurance, the insurer must be a separate legal entity from the insured, and be able to legally write insurance in its domicile (which in nearly all cases means that it holds a license as an insurer). An arrangement where the supposed insurer is not a legal entity but simply a separate bank account of the covered party is not captive insurance but rather self-insurance.

The essence of captive insurance is that the insurer is able to transact insurance business, yet is not formed to write insurance for the general public with a general profit motive, but rather primarily to serve a purpose for its owner or owners.

In concept, a captive insurer can be formed under the insurance laws intended for the formation of conventional, commercial carriers. Some captives are formed under these laws. However, the laws regulating commercial insurers are intended to protect the general public from the insurer's insolvency, poor business decisions, or sharp dealing, with little regard for the cost imposed on the insurer. Accordingly, these laws typically require considerable, seven- or even eight-figure capital investments to commence operations, and a very high level of ongoing regulation, which may include restrictions on the policy forms that may be used or the premiums that may be charged, required coverage provisions, and other consumer-protection type measures.

Most captive insurance programs do not benefit from this high level of regulation, and many programs are viable and actuarially sound with lower levels of capitalization than the statutory minimums for commercial insurers. Further, because typically some or all of the insureds of the captive will be actively involved in its management, the need to protect the insureds against unskilled or opportunistic management is greatly lessened compared to arm's-length commercial arrangements.

As a result, a number of countries and U.S. states have enacted laws specifically aimed at the formation and regulation of captive insurance companies, on a different basis from the regulation of commercial market insurers. Leading U.S. domiciles include Vermont (first in the U.S. and third globally), Hawaii, and South Carolina; leading foreign or "offshore" domiciles include Bermuda (first globally) and the Cayman Islands (second globally).

. . . many U.S. states that are captive domiciles have modeled their laws on the laws of other captive domiciles, and Michigan's captive law is no exception . . .

These domiciles have well-established reputations in the insurance industry and solidly established laws and regulatory environments, and, with the exception of South Carolina, have been host to captive insurance companies for decades.

As in many areas of commerce, competing domiciles tend to pay close attention to each other and to copy successful provisions of their captive insurance laws. Due to this competition, the laws of many major domiciles bear very close resemblance to each other, and a concept introduced in one domicile may be copied and enacted by other domiciles within a few years or even less time. In the U.S. states that are major captive domiciles, typical features of their captive insurance laws include a separate chapter of the relevant insurance code, providing a different set of requirements for captive insurance companies from the requirements applicable to conventional insurers; lower capital requirements than for conventional insurers; varying requirements for the ability to insure parties that are not owners of, or related to owners of, the captive; common types of captives such as pure, association, and industrial insured; differing tax treatment for captives relative to conventional insurers; and many other distinctions intended to provide a lower regulatory burden and greater flexibility for captives. As will be discussed below, Michigan's legislation contains most of these typical features in its core provisions in chapter 46.

Michigan's Captive Legislation

Senate Bills 1061 and 1062 were introduced in the Michigan legislature on January 24, 2008, and approved by the governor on March 13, 2008. The legislation moved swiftly through both houses with little controversy—the only notable opposition was from the Office of Financial and Insurance Services (OFIS¹), and it does not appear that OFIS made strong attempts to actually stop its passage. As indicated in the February 14, 2008 minutes of the House Standing Committee on Insurance, and in a

The most basic type of captive allowed is the pure captive, defined as a captive that insures only the risks of its parent, affiliated companies, and a defined category of controlled unaffiliated business.

press release by Representative Byrum issued February 21, 2008, the legislation was supported by Jackson National Life Insurance Company, a major life insurer based in Lansing. It appears that Jackson National's interest in the legislation is in using a provision for "special purpose financial captives," which is discussed below.

As noted previously, many U.S. states that are captive domiciles have modeled their laws on the laws of other captive domiciles, and Michigan's captive law is no exception, showing considerable similarity in many ways to the captive laws of prominent domiciles such as Vermont and South Carolina.

Outline of the Legislation

Michigan's captive law was enacted as three new chapters—46, 47, and 48—of the Insurance Code of 1956 (MCL 500.100 *et seq.*). Chapter 46 contains all the general provisions pertaining to captives in the broad and most common sense. Chapter 47 contains provisions allowing the formation of special purpose financial captives, a very specialized offshoot of captives generally. Chapter 48 contains provisions for the creation of protected cell insurance companies, which are to be used in connection with an insurance securitization arrangement involving a special purpose financial captive formed under Chapter 47, or for sponsored captives formed under certain provisions of Chapter 46. While this article will briefly discuss Chapters 47 and 48, the general captive provisions in Chapter 46 are likely to be of greatest interest to most participants in the insurance marketplace.

Chapter 46 sets out a framework for the creation and regulation of captive insurance companies. The general approach is to make this chapter an all-inclusive body of law for captives formed or regulated under it, so that other provisions of Michigan's insurance laws do not apply unless specifically stated to apply.² Chapter 46 defines several types of captives that may be formed, as well as other relevant terms used in the chapter.³ The captives that are authorized include association captives, branch captives, industrial insured captives, pure captives, special

purpose captives, and sponsored captives. Because there are significant differences among these types in intended usage and operating requirements, each will be discussed separately.

Types of Captives Permitted

Pure captive. The most basic type of captive allowed is the pure captive, defined as a captive that insures only the risks of its parent, affiliated companies, and a defined category of controlled unaffiliated business.⁴ This is the most common and readily recognized type of captive. Under the Michigan legislation, a pure captive may insure only the stated risks; for this purpose, controlled unaffiliated business is defined as a company that has a contract with the parent or an affiliate of the captive, and whose risks are managed by the captive.⁵ The intent of this provision may not be obvious, but appears to be aimed at arrangements where a business has separate ownership from the captive's owner, but has an ongoing relationship with it. For instance, this might be used where one company is a supplier of goods to the captive owner, that entity is interested in having shared insurance with the captive owner, and it is willing to submit to the risk management provisions of the captive to do so. Such arrangements may be beneficial in reducing both actual risks, through risk management, and the liability costs of those risks by having a joint insurance arrangement. A pure captive must have capital and retained earnings of at least \$150,000, or \$250,000 if it is a nonprofit corporation.⁶

A captive can write all lines of insurance, other than "worker's compensation insurance, long-term care insurance, critical care insurance, personal automobile insurance, or homeowners insurance, or any component of these coverages."

Branch captive. Next in order of complexity is a branch captive, which is simply an alien (non-U.S.) captive insurer receiving a license to operate in Michigan as a captive insurer.⁷ Branch captives have very limited regulation in Michigan; they are, however, required to establish a trust fund containing the sum of the capital and retained earnings that would be required for the captive, and the reserves on its insurance policies.⁸ For this purpose, reserves are defined to include reserves for

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losses, allocated loss adjustment expenses, incurred but not reported losses,⁹ and unearned premiums.¹⁰ The branch captive must also file with the commissioner of Office of Financial and Insurance Regulation (OFIR) all reports and statements that it files with its domicile regulator, and must do so within 60 days after the fiscal year-end.¹¹

Group captives. Two types of group captives form the next categories: association captives and industrial insured captives. Each of these structures is intended for covering the risks of multiple unrelated insureds. An **association captive** is formed to insure the members of an association that has been in existence at least one year,¹² with that provision following common provisions of other captive domiciles and intended to preclude the creation of an association solely for the purpose of allowing a group captive to be formed. Similarly, the law authorizes **industrial insured captives**, which may insure a group of industrial insureds.¹³

As with other insurers, and most licensees of any kind, the captive's license may be suspended or revoked for a variety of reasons, including insolvency, failure to pay fees due under the captive law, failure to make required filings, failure to pay judgments against it, and various other failures.

Industrial insureds are defined as insureds that use a full-time risk manager or insurance buyer or an insurance consultant, which have aggregate annual premiums of at least \$25,000 for all risks, and which have at least 25 full-time employees.¹⁴ This concept is also common among states with captive laws, and is borrowed from other common insurance law provisions that in many states authorize industrial insureds to purchase insurance with less regulation than is applied to other insurance purchasers, the idea being that any business which meets the definition will be sufficiently sophisticated that it does not need protection from poorly run insurers, but rather can make well-informed decisions to optimize its coverage. Both association and industrial insured captives may be formed as stock or mutual companies, or limited liability companies.¹⁵ The capital and retained earnings requirement for these forms range from \$300,000 for an

industrial insured captive organized as a stock company or LLC, to \$750,000 for an association captive organized as a mutual company.¹⁶

The two remaining types of captive authorized are highly specialized. First is the catch-all category of **special purpose captives**, which is a category allowing OFIR discretion to approve captives not fitting within the other definitions.¹⁷ The rules for special purpose captives are deliberately flexible and largely within OFIR's discretion. It seems reasonable to predict that as a brand-new captive domicile, Michigan likely will not see any significant number of special purpose captives formed in the near future, and any that are licensed may well be very similar to one of the more clearly defined categories, but failing in some minor respect to meet the definition of another category.

Finally, the captive legislation allows for **sponsored captives**, in which the captive is formed by investors to provide a captive shell for unrelated parties that seek to use it.¹⁸ Similar structures are present in many captive domiciles, and many are used as, and referred to as, "rent-a-captives." These are arrangements where investors create the captive, not for the purpose of underwriting their own risks, but only for the purpose of having a financial vehicle that they can market to unrelated parties that desire to obtain some of the benefits of operating a captive insurer, without the required capital investment and administrative involvement to have a separate captive of their own. Michigan's implementation of this concept includes the structure of a protected cell arrangement, which, in various forms, has become common among leading captive domiciles. This concept is that one company may create separate cells (also termed portfolios or accounts under the laws of some other captive domiciles) which segregate its risks; these cells are like separate companies from an asset and liability perspective, but are all part of the same company for governance purposes. Accordingly, while the legislation permits a sponsored captive to be formed as a stock insurer, nonprofit corporation, or limited liability company,¹⁹ these options will be somewhat complicated by the overlay of the protected cell concept. A sponsored captive must have at least \$500,000 in capital and retained earnings, unless certain special requirements are met.²⁰

Generally Applicable Requirements

Most regulatory requirements are applicable to all of the authorized types of captives. A captive can write all lines of insurance, other than “worker’s compensation insurance, long-term care insurance, critical care insurance, personal automobile insurance, or homeowners insurance, or any component of these coverages.”²¹ The apparent intent of this limitation is twofold: the primary goal is to avoid having captives writing personal lines of coverage, such as homeowners and personal automobile, because the captives are not intended to insure individuals and do not have guaranty fund protection; and the secondary, more specific goal is to keep workers’ compensation out of captives, since it has customarily been treated differently from other lines of insurance. This type of limitation is common among state captive insurance laws and is unlikely to be a significant restriction for typical captive programs.

Before transacting business, a captive is required to obtain a certificate of authority and to appoint a registered agent.²² However, a Michigan captive is also required to have its principal place of business within Michigan and to hold at least one meeting of its board of directors (or other managing body) in Michigan each year.²³ These requirements are also common among state captive insurance laws. One goal of such requirements is to ensure that the domicile state obtains an economic benefit from allowing captives to be formed and licensed. It also serves to facilitate regulatory interaction with the captive.

In addition to various routine and basic corporate and regulatory requirements, a new captive must pay a \$10,000 fee for its application, and will also be required to pay for the cost of a regulatory examination. The regulatory examination may either be performed by OFIR staff, in which case OFIR may charge an additional fee of \$2,700, or may be performed by outside consultants to OFIR, in which case OFIR will bill the captive for the actual, reasonable cost of those consultants.²⁴ OFIR issued a request for proposals regarding such consulting services in the spring of this year.

Captives formed in Michigan are exempted from the 1.25 percent tax on premiums that applies to other insurers.²⁵ However, Michigan captives are instead subject to an “annual renewal fee” that is graduated, in a stepped pattern, based on the annual premiums paid to the captive.²⁶ This results in what is effectively a tax at a rate of between 0.1 percent and 0.2 percent, or possibly lower rates for some large captives. While this is a very favorable

rate relative to the rates imposed on conventional insurers, once again it is comparable to, though on the low end of, captive-specific tax rates imposed by other states that are captive domiciles.

Investment Restrictions

Conventional insurers are subject to fairly stringent limitations on their investments, which typically result in a majority of their investments being in fixed-income securities with high credit quality ratings. Such investments are typically stable but have modest returns. One benefit that most captive domiciles offer to captives is the ability to make a wider range of investments than conventional insurers. Michigan is no exception, exempting pure captives and special purpose captives from the investment limitations in Chapter 9 of the Insurance Code.²⁷ Such captives may, however, be required to provide a written investment plan to the commissioner of OFIR, and may be prohibited from making specific investments that are deemed to threaten the solvency or liquidity of the captive.²⁸ As a practical matter, it is likely that OFIR will require captives to submit a fairly detailed investment policy that may result in restrictions not that different from those applicable to conventional insurers; however, captives might be permitted to invest somewhat more of their assets in equities, or given more flexibility in choices of credit quality for fixed income investments. In addition, a pure captive may be allowed to make loans to its parent company or affiliates, subject to prior written approval from the commissioner of OFIR.²⁹

The provisions for sponsored captives allow the creation and operation of entities commonly known in the insurance industry as rent-a-captives.

In contrast, association and industrial insured captives are subject to many of the same investment limitations that apply to conventional insurers, contained in Chapter 9 of the Insurance Code.³⁰ However, the commissioner of OFIR may provide such captives some discretion in the valuation and rating methods used.³¹ The likely rationale for restricting the investments of these captives, in contrast to the investments of pure captives, is that industrial insured and association captives are typically group captive arrangements, with less power on the part of each member to control the investments, and potentially farther reaching effects if poor investments result in financial problems for the captive.

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License Suspension or Revocation

As with other insurers, and most licensees of any kind, the captive's license may be suspended or revoked for a variety of reasons, including insolvency, failure to pay fees due under the captive law, failure to make required filings, failure to pay judgments against it, and various other failures.³² In addition, a variety of other requirements are created by the legislation, such as annual regulatory filings, specific mechanisms of and requirements regarding formation and governance, and other detailed provisions.

A special-purpose financial captive is a vehicle that would be formed and used by an insurance company for the purpose of reinsuring certain of its risks, and then issuing securities to other investors, backed by that special vehicle.

Sponsored Captives

Although sponsored captives are also authorized and regulated by the provisions of chapter 46, they differ in many respects from the other types of captives allowed by that chapter. As noted, sponsored captives are essentially insurers where the capital and infrastructure for the company is put up by investors, and the ability to use that capital and structure is rented out to other parties. As a result, there are both the need to accommodate a more complicated corporate structure than for the other captives authorized, and the need to provide some level of protection for both the users of sponsored captives and any other parties that might be harmed by defects in such arrangements.

Sections 4663 through 4669 contain specific provisions relating to sponsored captives. The sponsor of such a captive must be an insurer, reinsurer, or insurance holding company formed within the U.S., or a captive insurer formed under Michigan law.³³ A risk retention group cannot be a sponsor.³⁴

Michigan's version of the sponsored captive arrangement contemplates that any participant will use its own separate protected cell. Section 4663 sets out a number of

restrictions and protections for such protected cells. Three key provisions are:

(b) Each protected cell shall be accounted for separately on the books and records of the sponsored captive insurance company to reflect the financial condition and results of operations of the protected cell, net income or loss, dividends or other distributions to participants, and other factors may be provided in the participant contract or required by the commissioner.

(c) The assets of a protected cell shall not be chargeable with liabilities arising out of any other insurance business the sponsored captive insurance company may conduct.

(d) No sale, exchange, or other transfer of assets shall be made by the sponsored captive insurance company between or among any of its protected cells without the consent of the protected cells.³⁵

As noted above, the protected cell concept is that only one company exists, but within that company there can be individual cells that, for liability and accounting purposes, are like discrete companies.

The business written by a sponsored captive through each protected cell must meet one of three conditions: it must be fronted by an insurer authorized to write by the laws of any state (or authorized in any jurisdiction if it is a subsidiary of an insurer authorized to write in a state), be reinsured by a reinsurer authorized or approved in Michigan, or post a trust fund to secure its liabilities.³⁶ Note that fronting, within the captive insurance industry, means an arrangement in which an authorized insurer issues policies to the insured, but then reinsures the risks on those specific policies to a captive insurer that has a relationship with the insured. The term "fronted" is not defined in the Michigan captive legislation, but this is presumably the meaning intended. A participant in a sponsored captive is also limited to insuring only its own risks through the arrangement, unless otherwise approved by the commissioner of OFIR.³⁷

“Rent-a-Captives”

The provisions for sponsored captives allow the creation and operation of entities commonly known in the insurance industry as rent-a-captives. Rent-a-captives are relatively common in the more established captive domiciles and serve a purpose in facilitating programs that provide their users some of the benefits of full captive arrangements, including participation in the loss experience of the program, while providing less commitment and investment than required for such other captive arrangements. The availability of this option may provide some entrepreneurs with a way to create new Michigan-sponsored captives that may, in turn, provide additional insurance options, particularly for mid-sized businesses.

Special-Purpose Financial Captives

The apparent driving force behind the captive legislation, special-purpose financial captives are authorized, and governed in most details, by new chapter 47 of the Insurance Code of 1956. A special purpose financial captive is a vehicle that would be formed and used by an insurance company for the purpose of reinsuring certain of its risks, and then issuing securities to other investors, backed by that special vehicle. Such an arrangement combines elements of reinsurance, captive insurance, and securitization, and is a highly specialized transaction.

Chapter 47 sets out a parallel set of regulatory requirements for special-purpose financial captives, which the statute abbreviates as “SPFC.” Many of the requirements are the same or similar to those imposed on other captives under chapter 46, but there are many additional requirements as a result of the considerable difference in purpose and operation between an insurance securitization vehicle and a more conventional captive insurer. An SPFC may be organized as a stock corporation, limited liability company, mutual company, partnership, or “other form of organization approved by the commissioner.”³⁸ Minimum capital is set at only \$250,000 if the SPFC is organized under the captive insurance provisions of chapters 46 and 47 (rather than as a conventional insurer which seeks to utilize chapter 47), but the commissioner may require additional capital.³⁹

An SPFC is limited to insuring or reinsuring only the risks of a specifically designated counterparty, which will generally be a corporate parent or affiliate of the SPFC, and it may not issue any other insurance or indemnity

Although a new concept in Michigan entity law, the protected cell concept is similar to that existing in a number of other captive insurance domiciles, both domestic and offshore.

contracts other than a specially defined SPFC contract.⁴⁰ Like a chapter 46 captive, an SPFC must have a certificate of authority from OFIR, must have a registered agent in Michigan, must maintain its principal place of business in Michigan, and must have at least one meeting annually of its governing board in Michigan.⁴¹ An SPFC has the same application fee and review fee as for a chapter 46 captive, and pays an annual renewal fee in lieu of other taxes, at the same rates of approximately 0.1 percent to 0.2 percent of annual premiums.⁴² Chapter 47 sets out detailed provisions regarding the use of protected cells by an SPFC and the procedures and requirements for an SPFC’s issuance of securities.

. . . with many well-established domiciles competing for business, it is unrealistic to expect a sudden flood of captive business in Michigan.

Like other securitization vehicles, the SPFC is likely to be used primarily by large businesses—in the case of the SPFC, large commercial insurers—which desire to adjust their financing and balance sheet by moving liabilities to a separate entity which can issue securities independently of the main insurance company. This option was clearly sufficiently attractive to one major insurer for it to support the passage of the legislation, and other carriers may also seek to avail themselves of this option.

Provisions for Protected Cells

Chapter 48 of the captive legislation provides specific provisions for protected cell companies. This relatively brief chapter overlaps somewhat with provisions in chapters 46 and 47 that also address certain aspects of the operation of protected cells, in the context of sponsored captives and SPFCs, respectively. The key features of the concept of the protected cell, outlined above, are clearly stated in the following provisions of chapter 48—first, the concept that the cell is not a separate entity or legal person from the company of which it is a part:

The creation of a protected cell does not create, with respect to that protected cell, a legal person

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separate from the protected cell company. Amounts attributed to a protected cell under this chapter, including assets transferred to a protected cell account, are owned by the protected cell company, and the protected cell company shall not be, and shall not hold itself out to be, a trustee with respect to those protected cell assets of that protected cell account. Notwithstanding this subsection, the protected cell company may allow for a security interest to attach to protected cell assets or a protected cell account if in favor of a creditor of the protected cell and as otherwise allowed under applicable law.⁴³

... in order to create and support a captive insurance industry in Michigan, it would be beneficial for interested businesses and professionals to form a Michigan captive insurance association . . .

Second, the concept that despite its status as part of a single company, contracts and other legal documents pertaining to the cell and its assets must separately identify the relevant cell:

The protected cell assets of a protected cell shall not be charged with liabilities arising out of any other business the protected cell company may conduct. All contracts or other documentation reflecting protected cell liabilities shall clearly indicate that only the protected cell assets are available for the satisfaction of those protected cell liabilities.⁴⁴

And finally, the concept that assets of a cell are available only to creditors of that specific cell and not to creditors of other cells or of the company in general:

Protected cell assets are only available to the creditors of the protected cell company that are creditors for that protected cell and are entitled, in conformity with this chapter, to have recourse to the protected cell assets attributable to that protected cell. Protected cell assets are absolutely protected from the creditors of the protected cell company that are not creditors for that protected

cell and who, accordingly, are not entitled to have recourse to the protected cell assets attributable to that protected cell. Creditors for a protected cell are not entitled to have recourse against the protected cell assets of other protected cells or the assets of the protected cell company's general account. Protected cell assets are only available to creditors of a protected cell company after all protected cell liabilities have been extinguished or otherwise provided for in accordance with the plan of operation relating to that protected cell.⁴⁵

Although a new concept in Michigan entity law, the protected cell concept is similar to that existing in a number of other captive insurance domiciles, both domestic and offshore. In some other domiciles, the protected cell type of entity is also available for use by non-insurance companies. For now, at least, this concept will be available in Michigan only for the specified types of insurance entities.

Other Items of Note

One captive structure that is permitted by many U.S. states, but not present in the Michigan captive legislation, is the reciprocal. This is especially notable since Michigan law allows reciprocals in the general insurance context.⁴⁶

A reciprocal, or inter-insurance exchange, is an arrangement in which the insureds are deemed to insure each of the other insureds, on a reciprocal basis, through exchanging insurance contracts via an attorney-in-fact. No corporate entity is needed for this structure, though as a matter of standard practice the attorney-in-fact will usually be a corporation. The insureds become subscribers to the exchange by purchasing an insurance policy (they often are also required to sign a separate participation agreement). The attorney-in-fact for the exchange receives premiums, issues policies, manages assets, and pays claims in a similar manner as if it were simply an incorporated insurer.

While a reciprocal structure may appear to have little practical benefit compared to the corporate structures offered, it sometimes has a significant tax benefit in the captive insurance context. Specifically, due to an interplay of certain provisions of the Internal Revenue Code for insurance companies, and other provisions regarding

tax-exempt organizations, a reciprocal structure may allow a group captive that is partially or fully owned by tax-exempt organizations to operate with a much lower federal income tax burden than if it were formed as a corporation. A detailed discussion of the tax treatment of reciprocals is outside the focus of this article. However, the author notes that the omission of a reciprocal structure option is a potential drawback for attracting the formation of group captives owned by tax-exempt organizations. While it is possible that OFIR could authorize a reciprocal captive under the provisions for special purpose captives, it would be preferable to have reciprocals expressly authorized by name. Therefore, whenever refinements to the Michigan captive law are considered, it would be worth analyzing the possibility of specifically authorizing reciprocal structures as an option for association and industrial insured captives.

Other Framework Needed

The enactment of a captive law for Michigan is an extremely positive first step toward expanding Michigan's economy with a new type of business and offering an additional risk management and financial option for Michigan and neighboring state businesses that could benefit from owning or using a captive insurer.

However, with many well-established domiciles competing for business, it is unrealistic to expect a sudden flood of captive business in Michigan. Instead, the enactment of legislation is a crucial first step in what is likely to be a sequence of events leading to an active captive insurance market in the state. Other states and foreign domiciles that have been successful in attracting and retaining captives have several key features in common: a positive and comprehensive captive law, which Michigan now has; a stable and pro-business regulatory environment, so that companies looking at where to form a captive will be persuaded that a formation in the domicile will result in a long-term, stable environment with well-respected regulation that is not inflexible; and a base of service providers with expertise in the areas relevant for captives. Successful domiciles also generally have an active captive insurance trade association that seeks to lobby for the industry and organize interested parties for joint efforts to enhance the business environment.

Therefore, to create and support a captive insurance industry in Michigan, it would be beneficial for interested businesses and professionals to form a Michigan captive insurance association, which could market the state as a

domicile for captives, and provide a meeting place for the interested and experienced service providers to the captive industry to coordinate their efforts. It would also be very beneficial for OFIR to indicate its regulatory intentions regarding captive insurance companies with as much specificity as possible. Even if OFIR determines to take a relatively cautious approach to the licensing and regulation of Michigan captives, it would be very helpful for its positions to be clear, so that parties interested in forming captives in Michigan can have a reasonable idea of the concepts that are likely to receive OFIR's approval, and of proposals that may be better off marketed to other domiciles.

The Outlook

Michigan enters the legal marketplace of captive insurance domiciles at a time when more and more states are enacting captive laws; subsequent to Michigan's legislation, Connecticut enacted its own captive law in June, becoming the 28th state to do so. Captive insurance is becoming a more common concept after decades of obscurity, and has become mainstream in the circles of major business. Much as the LLC concept was once novel and is today mundane, captive insurance programs are on track to progress from novelty to commonality. The enactment of Michigan's captive legislation provides a valuable opportunity for Michigan to gain business in a growing and knowledge-based industry. However, many steps and considerable work by a range of people and organizations in Michigan will be necessary for Michigan to create a significant captive insurance business. ■

Zachary Fryer, a founding member of Krolikowski, Capelli & Fryer, PLLC, is a graduate of the Northwestern University School of Law and of Michigan State University. His experience includes representing captive insurance companies and their owners in a variety of insurance and self-insurance arrangements. He has worked with captives domiciled in South Carolina, Hawaii, Kentucky, Nevada, and Arizona, as well as offshore captives, segregated cell companies, and rent-a-captives domiciled in the Cayman Islands, Bermuda, and Barbados. His e-mail address is zacj@thegoodfirm.com.

Endnotes

- 1 The governor signed Executive Order 2008-02 on February 1, 2008, which, effective as of April 6, 2008, reorganized the Office of Financial and Insurance Services and renamed it the Office of Financial and Insurance Regulation, and therefore subsequent references in this article are to OFIR rather than OFIS.

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**Insurance
Case
Summary**

Significant Insurance Decisions

By Deborah A. Hebert, Collins, Einhorn, Farrell & Ulanaoff, deborah.hebert@ceflawyers.com

Supreme Court Opinions

One-Year-Back Rule Not Applicable To Insurance Fraud Claims

Cooper v Auto Club Ins Co
481 Mich 399; 751 NW2d 443 (2008)

Plaintiff, whose two daughters were severely injured in a motor vehicle accident, sued her auto insurer for fraud after learning that she was paid less than the statutorily allowed amounts for attendant care services. She claimed that defendant made false representations about her coverage to induce her to accept the hourly rates paid. These payments were made over a period of several years, and Allstate moved for summary disposition on claims payable more than one year before the filing of the complaint. But the Supreme Court held that the one-year statute of limitations of MCL 500.3145(1) applied only to contract claims for the recovery of PIP benefits, not to common law fraud claims. A common law claim for fraud is “conceptually distinct from a no-fault action because (1) a fraud action requires an insured to prove several elements that are different from those required in a no-fault action,” 481 Mich at 407, “such as deceit, misrepresentation, or concealment of material facts.” 481 Mich at 409. “A fraud action is not subject to the one-year-back rule.” 481 Mich at 407.

Court of Appeals Opinions—Published

OFIS Rules Re Credit Reports and Policy Rates

Insurance Institute of Michigan, et. al. v Commissioner, Financial & Insurance Services
___ Mich App ___ (2008) (Docket No. 262385)

In a three-way opinion, with one judge dissenting, the Court of Appeals reversed a permanent injunction that would have done away with rules promulgated in 2005 by the Office of Financial and Insurance Services (OFIS) prohibiting the use of credit reports to set policyholder rates or otherwise determine the availability of insurance. Much of the discussion revolves around issues of procedure under the Administrative Procedures Act. Two members of the panel addressed the merits of

the rules but reached opposite conclusions. In the end, the case was decided on a purely procedural ground: it was not a proper case for an original action.

Insurer’s Neglect In Timely Responding to a Complaint May Not Be Imputed to the Insured

Shawl v Spence Bros, Inc.
___ Mich App ___ (2008) (Docket No. 275271)

Upon being served with a complaint arising out of a construction site accident, the general contractor timely tendered its defense to its CGL insurer. The complaint was mishandled by the insurer, and a default was entered, which the trial court declined to set aside. On appeal, the Court observed that Michigan lacked “definitive case law on the issue of whether an insurer’s or its intermediaries’ negligence ought to be imputed to the insured” in assessing excusable neglect and good cause for setting aside a default. The Court adopted the “well-reasoned rule” of *Walters v Arenac Circuit Judge*, 377 Mich 37, 46; 138 NW2d 751 (1966) and held that “[a] defendant who diligently turns over a case to an ultimately negligent insurer should not be denied his or her day in court. The defendant is not “obligated to call daily to see whether the insurer did what it had contracted and accepted a premium to do.” ___ Mich App ___, quoting *Walters, supra* at 46. The insured, however, must still establish a meritorious defense to warrant setting aside the default.

Standard Commercial UM Endorsement Operates as an Excess Policy

Berkeypile v Westfield Ins Co
___ Mich App ___ (2008) Docket No. 274177

Relying primarily on the limits of liability section of the standard form UM endorsement (ISO) for business auto policies (particularly its non-duplication of benefits clause), the Court of Appeals held that the coverage afforded is an extra layer of insurance that sits atop the applicable liability policies. Because the endorsement does not expressly state that limits will be reduced by the insured’s recovery in tort, the policy limits are not reduced by those recoveries. UM coverage provides the insured supplemental, excess coverage up to policy limits

until the insured is made whole. An application for leave is pending in the Supreme Court.

Court of Appeals Unpublished Opinions
Allstate Recovers on Fraud Claims

Allstate Ins Co v Broe

Decided August 21, 2008 (Docket No. 274809)

This is a must-read opinion for anyone involved in the litigation or compensation of closed-head injuries. The Court provides a lengthy and detailed discussion of the evidence concerning costs and services associated with rehabilitative treatment for traumatic brain injuries, and its discussion has relevance well beyond the no-fault context. In the end, the Court found sufficient evidence on the record to support the jury’s verdict for Allstate of \$3,000,000, representing the total in payments made by Allstate on the basis of fraudulent billing practices, which included billing for services the provider was not qualified to offer and charging fees beyond what was reasonable and customary.

Construction and GL Coverage—Occurrence Requirement and Property Damage Exclusions

West American Ins Co v Ammar Shell Investors II, LLC

Decided July 15, 2008 (Docket No. 278518)

In this case, the Court analyzed CGL coverage for a general contractor who was sued by the project owner after one of the subcontractors demolished a canopy that

covered several gas station pumps. The subcontractor mistakenly believed that the demolition was part of the project. The Court held that the damage was the result of an “occurrence,” defined by the insurance contract as an accident, because it was unexpected and unintended from the standpoint of the insured general contractor. It also declined to apply the j(5) property exclusion, which precludes coverage for damage to “that particular part of real property” that is being worked on if the work is being performed “on [the insured’s] behalf,” because the work of demolishing the canopy was not performed for the benefit of the insured. Coverage was barred, however, under the j(6) exclusion for property damage to “your work” as defined in the policy.

Personal Auto Policy Applies Even Though the Insured is Operating a Leased Vehicle Without the Leasing Company’s Consent

Farm Bureau Gen’l Ins v Duncan

Decided August 14, 2008 (Docket No. 277662)

Farm Bureau’s personal auto policy excluded tort liability coverage for accidents that occurred while the insured was “using a vehicle without permission to do so.” Its insured suffered a heart attack and lost control of the rental vehicle he was operating, which resulted in injury to his passengers. The insured had been given permission to drive the vehicle by the person who rented it, but the rental agreement with National Car Rental prohibited operation by anyone other than the person signing the contract. Farm Bureau was required to defend and indemnify the insured against the lawsuit filed by the injured passengers. “The plain language of the policy . . . excludes coverage if the insured uses a vehicle without some kind of formal authorization. The problem in this case is that the policy does not explicitly specify from whom the permission must be given.” Because the insured had permission from the person who rented the vehicle, coverage was not excluded.

Policy Cancellation Upheld

Home-Owners Ins Co v Wellinger

Decided August 5, 2008 (Docket No. 275472)

The insured leased a vehicle through GMAC and insured it with Home-Owners under a six-month policy. He failed to renew the policy by paying the premium for the next six months. Home-Owners sent a notice to the

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Significant Insurance . . .

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address on file, informing the insured that the effective cancellation date was May 1, 2005. It notified GMAC a couple of weeks later that the effective cancellation date was May 19, 2005. The insured was involved in an accident on May 3, 2005. Because Home-Owners' policy only applied "to accidents and losses which happen during the policy period," the insured was denied coverage. But GMAC was reimbursed for the loss of the vehicle because of the later effective cancellation date.

Insured's Insolvency Does Not Preclude Product Liability Coverage Under a Policy With a High SIR

Gulf Underwriters Ins Co v McClain Industries, Inc.
Decided August 5, 2008 (Docket No. 273768)

Gulf Underwriters issued a product liability policy to its insured with an SIR of \$250,000. This SIR obligated the insured to pay the first \$250,000 in defense costs/indemnity as a condition of coverage. But the policy also stated the insured's bankruptcy or insolvency "will not relieve us of our obligations under this Coverage part." When the insured became insolvent, and failed to comply with its SIR obligation on a litigated matter, Gulf Underwriters denied coverage. But the Court agreed with the insured "that the insolvency provision provides an exception to the requirement that [the insured] must satisfy the SIR endorsement limit before Gulf Underwriters is required to defend and indemnify defendants." To hold otherwise "renders the insolvency provision nugatory, which is contrary to principles of contract

interpretation." Gulf Underwriters did, however, have the right to a money judgment against the insured to recover the SIR.

Declaratory Judgment Action Cannot Resolve Potential Claims

Farm Bureau Mut Ins Co v Graphics House Sports
Decided June 17, 2008 (Docket No. 277659)

In this factually and procedurally complicated case involving unsolicited fax advertisements and class action claims under the Telephone Consumer Protection Act, 47 USC § 227 et. seq., Michigan courts were asked to decide Farm Bureau's coverage obligations for "potential liability and a threat of nationwide litigation." The Court held that these "claims are merely speculative and rest upon contingent future events that may not occur." Declaratory judgment actions on coverage are not available when there is no actual controversy. And as to coverage for claims pending in a class action in Louisiana, the Court deferred to coverage action pending in that state.

Title Insurer's Coverage Obligations End with the Transfer of the Property

Proto-Cam, Inc v Transamerica Title Ins Co
Decided June 26, 2008 (Docket No. 276443)

Once the insured voluntarily transferred ownership of real property to a holding company with which it shared common ownership, the insured's title insurer no longer owed a duty to pay the insured's costs in defending a quiet title action. The insured retained no ownership interest in the property. ■

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**The
Drafting
Table**

Sloppy Writers, Fussy Readers, Hostile Eyes

By Hal O. Carroll, *Vandever Garzia, PC*, hcarroll@VGpcLAW.com

The world of writing and drafting holds many mysteries. One is why so many people who can't spell go into the sign-making business. Often this takes the form of the so-called "rural plural." A sign in Brighton offers "Office Suite's for Rent." Apparently, the suite still is for rent. Another sign at a local pub advises "biker's welcome." One at a time, apparently. A related mystery is why these are called rural plurals (should it be rural plural's?) when they almost always appear in urban areas.

Here's another mystery, a new one. We now often hear

Many people ride bicycles, some ride unicycles, but
no one rides a semicycle.

that some person or thing is "one of the only" ones. What does "one of the only widgets" mean? Somewhere there must be a group of "only widgets," separate and distinct from the non-only ones.

Then there's "bi-" and "semi-." Is a "bi-monthly" published twice a month or every two months? It should be "bi-monthly" for two months and "semi-monthly" for every half month. "Bi-" mean "two." Many people ride bicycles, some ride unicycles, but no one rides a semicycle.

These are all common solecisms that we see and hear in ordinary speech. They are either trivial, annoying, or amusing depending on how fussy you are.

Not all solecisms are so benign. To ordinary folk, the statements "all apples are not red" and "not all apples are red" may sound identical, but they are not. One means some are red, one means none is red. Again, in ordinary speech, we can skip over that, but put it in a document and it will lie in wait.

Here's another mysterious usage that creeps into briefs and sometimes into opinions. This is the increasingly common slash splice. We will hear and read things like "my client will receive/accept the check." The check was "signed/sent" last week."

What in the world is this? Someone must know because more and more people use it. Does the slash (we may as well give it the fancy name "virgule") mean "and"? Does it mean "or"? We have those words, and they are easy to

say. Therefore we infer that it must mean something else. If the virgule means something else, what does it mean? If the author knows, then the author has an obligation to tell us.

This is what is offensive about using the slash. The author is saying, intentionally or not, that there is some kind of relationship between the two linked terms but that he or she can't be bothered to explain it so it's the reader's job to figure it out. This is a per se violation of the writer's code. It is always the writer's job to make things plain.

So in writing such as letters and briefs, the slash-splice is offensive and may annoy a reader.

In the drafting of legal documents, that kind of clarity can be dangerous. Using the slash-splice in a contract, whether generic, indemnity, or insurance, can be risky, just because it is unclear. And things that are unclear are made clear by litigation.

The cases that reflect this best are cases involving checks in which the payee is in the form "Fred Jones/Susan Smith." The question is a simple one, but the answer is not. Does the slash as used here mean "and" or does it mean "or?" If it means "and," then both must sign and the bank is liable if it pays when only one has endorsed it. If the virgule means "or," then either can endorse it and take all the money.

If one of those names is yours, I think you would like to know. Well, the good news is that the question has been answered in several states. A Texas court said it means "or."¹ A federal district court in New York said it was ambiguous and therefore should be read as an "and" to protect both parties.² Tennessee seems to side with Texas.³ Connecticut joins Texas and Tennessee.⁴ So, by a majority of 4 to 1, it means "or." Further research might change the percentage somewhat and Michigan does not seem to have weighed in on this issue. Everyone comfortable using it now?

The point of all of this is that in operative legal documents, a higher standard is necessary. What might be annoying or amusing in everyday life can be dangerous in the world of legal documents. No lawyer

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The Drafting Table

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should be happy with an 80 percent chance of success on an issue when the issue should not even be an issue in the first place. The goal of drafting is not to win fights but to prevent them.

Besides, every drafter knows, or should know, that he or she is drafting for hostile eyes. The reader of your drafted legal document is not sitting down in a comfortable chair before a cozy fire looking to be entertained and willing to overlook little slips of the pen. Just the opposite. The reader is sitting in an office chair, searching diligently for just those slips of the pen.

And the court that will end up reading it is just about the fussiest of all readers. Having to put reasons in writing in an opinion tends to concentrate the faculties, and when a judge is writing about writing, the analysis tends to be intense and critical.

That's why the courts don't really recognize slips of the pen as a category of contract language. The words are there and they mean what they say. When what they say is unclear, and the rule contra proferentem applies, leading to construction against the drafter. Even under Michigan's recent change in this, where the rule is to be applied, not by the court, but by the trier of fact, the end result is the same, only it will cost your client more to get there.

What's the point of this current fulmination? It is that this kind of sloppy word use can actually be dangerous to an insurer and an insured. If you see a rural plural in a manuscript policy form drafted by the insurer, it tells you something about the drafter's skill. More specifically, it

tells the insured or the insured's attorney seeking coverage to look even more closely for errors, because the drafter was language-challenged.

Drafters are fussy about language because they have to be. To be honest, they probably start out fussy and then get into drafting, rather than the other way around. But fussiness is critical. So it's not just your word choices that matter, it's also the links/conjunctions you put between them. ■

Endnotes

- 1 *New Wave Technologies, Inc v Legacy Bank of Texas*, 2008 WL 2553519 (unpublished).
- 2 *Tamman v Schniazi*, SDNY, 2004 WL 1637000.
- 3 *RP Industries, Inc v U S Aluminum Corporation Carolina*, Tenn Ct App (2003), 2003 WL 22345470.
- 4 *Highland Tank & Mfg Co v First Union National Bank*, Conn Super 2000, 200 WL33156611.



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Of New Policies and Old: How Michigan's "Renewal Rule" Could Affect Your Client's Coverage

By Joseph A. Kuiper, Warner Norcross & Judd LLP, jkuiper@wnj.com

Introduction

Like all contracts, insurance policies are generally governed by their plain language. Barring any ambiguity, there is no mystery as to what a policy covers and does not cover. But there are some cases when even the plain language of a policy might not be controlling. A prime example of this phenomenon arises in the context of renewal policies. When the insurer issues a renewal policy to its insured, it has an obligation to put the insured on notice of any changes that reduce coverage when compared to the existing policy. If the insurer fails to meet its obligations under this so-called "renewal rule," the insured may be entitled to coverage that otherwise would not be available. This article provides an overview of the renewal rule and some of the interesting applications it has received by the courts. Understanding this rule gives insureds and their attorneys a unique and potentially valuable tool in insurance coverage litigation.

General Rule

In most circumstances, a party cannot escape its contractual obligations by pleading ignorance—failure

If the insurer makes a change to the renewal policy that reduces the insured's coverage, the insurer must give notice of the change.

to read a contract before signing it does not relieve the signer of its obligations. For the most part, this is true with insurance policies as with other contracts. Thus, an insured is ordinarily obligated to read its insurance policy and raise questions concerning coverage within a reasonable time after issuance.¹ An insured who fails to do so is bound to the terms of the policy, just as if the insured had read them.

But courts recognize an exception to this rule in the context of renewal policies.² When an insured renews its coverage from one policy year to the next, it is entitled to *assume* that the renewal policy contains the same terms and conditions as the expiring policy and is relieved of its obligation to read it.³ If the insurer makes a change to the renewal policy that reduces the insured's coverage, the insurer must give notice of the change.⁴ If the insurer fails

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Of New Policies and Old . . .

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to do so, courts hold that the change is unenforceable and that the insured is entitled to the more favorable coverage found in the earlier policy.⁵ This so-called “renewal rule” can be found at work in cases around the country.

In *Farmers Petroleum Coop, Inc v Mutual Serv Cas Ins Co*, for example, the insured sought coverage under a policy issued in 1986 that had been renewed annually through the date of the incident in 1994.⁶ As originally issued, the policy would have provided coverage for the claim, but the insurer made a change to the policy in 1991 that made coverage unavailable.⁷ The Michigan Court of Appeals held that the insurer had failed to give proper notice of the change. The Court noted that, under established law, “[w]here a renewal policy is issued without calling to the attention of the insured a reduction in coverage, the insurer is bound to the greater coverage in the earlier policy.”⁸ Applying that rule, the Court found that the insurer had failed to meet its obligations: “Nothing in the notice form that followed the amendments in 1991 called attention to a withdrawal of coverage” in the renewal policy.⁹ Thus, the Court held that the insurer was bound to provide coverage under the

The renewed policy with different terms is a counter-offer and provides the insured with an opportunity to accept or reject the proposed changes.

more favorable, pre-1991 policy language.¹⁰

The renewal rule is based on a straightforward application of contract law. An insured’s request for a renewal of coverage is nothing more than an offer to enter into a new contract (the renewal policy) on the same terms and conditions as the expiring one. If the insurer does not wish to enter into such a contract, and instead will only enter a contract with different terms, it must inform the insured and describe how the new policy would be different from the outgoing one. The renewed policy with different terms is a counter-offer and provides the insured with an opportunity to accept or reject the proposed changes.

Contract Reformation, Not Estoppel

The remedy imposed by the renewal rule is also grounded in contract. Under the law of Michigan and other jurisdictions, a contract may be reformed to reflect

the intent of the parties when the negotiations were marked by “a mistake on the part of [one party] and knowledge of the mistake and concealment thereof on the part of the [other party], both producing [an] inequitable result.”¹¹ In an early case applying the renewal rule, *Connecticut Fire Ins Co v Oakley Improved Bldg & Loan Co*, the U.S. Court of Appeals for the Sixth Circuit held that a “clear[] case for reformation exists” when during negotiations for a contract, one party is mistaken and the other party knows of the mistake “and t[akes] advantage of it, or by his own conduct or representations l[eads] him into such a mistake.”¹² Applying that standard, the court held that when an insurer issues a renewal policy without notifying the insured of a reduction in coverage, the insured is entitled to have the policy reformed to reflect the coverage of the earlier policy.¹³

The Sixth Circuit recently confirmed this understanding of the renewal rule in *ADBA v Northfield Ins Co*, a case that demonstrates why the renewal rule’s basis in contract reformation is important to insureds.¹⁴ In that case, the insurer argued that the renewal rule was based on principles of estoppel, rather than reformation, and that the insured must therefore prove the elements of estoppel, including things like detrimental reliance on the policy term at issue, to benefit from the rule.¹⁵ This would have significantly increased the insured’s burden by requiring it to prove that it appreciated and relied on the older, broader policy term when it purchased the policy—something that would be difficult to do in many cases since, for insureds, the full meaning of a policy term may not be evident until the policy is needed.

The Sixth Circuit found the insurer’s argument unconvincing: “Despite Northfield’s assertions to the contrary, we find no authority to support its contention that the renewal rule requires detrimental reliance by the insureds, and find numerous cases that have applied the rule with no discussion of estoppel or reliance.”¹⁶ This holding is consistent with the treatment of the renewal rule by courts around the country,¹⁷ which holds that the rule applies whenever an insurer reduces coverage in a renewal policy without giving proper notice.¹⁸ There is no requirement that the insured prove the elements of estoppel to benefit from the renewal rule.

What Notice is Required?

The law imposes strict obligations on insurers to give

notice about changes to renewal policies. Three basic rules must be followed, each of which is discussed below.

It is not enough to tell the insured to read the policy.

Under case law from Michigan and other jurisdictions, the insurer must do more than simply tell the insured to read the renewal policy.¹⁹ In *ADBA v Federal Ins Co*, the insurer made a change to the renewal policy and, rather than notify the insureds, simply attached a cover letter instructing the insureds to “READ [THE] POLICY CAREFULLY to determine rights, duties, and what is and is not covered.”²⁰ The court found that instruction insufficient to put the insureds on notice of the change: “The policies issued by Federal to the insureds from year to year were, in fact, renewal policies. Thus, the question is not whether the insureds read the policy in which the change occurred, but whether Federal properly called the reduction in coverage to the insureds’ attention.”²¹ The court concluded that Federal had failed to provide adequate notice: “[O]ther than a general admonition to read the policy carefully, Federal did not inform Plaintiffs that advertising injury coverage had been reduced,” and thus was “bound to provide coverage under the earlier, more extensive definition of advertising injury.”²²

There is no requirement that the insured prove the elements of estoppel to benefit from the renewal rule.

It is not enough to tell the insured that the policy has been revised.

The insurer must also do more than notify the insured that the policy has been changed in some way. Courts hold that the insurer has an affirmative obligation to call the insured’s attention to “the *reduction* in coverage, and not merely to the fact that [the] policy has been revised.”²³ In one Michigan case, the insurer added a new exclusion to the policy and sent a brochure and cover letter informing the insured about certain changes, but the court found both to be insufficient.²⁴ The court found the letter lacking because it listed a number of changes but did not state that a new exclusion had been added, and the brochure inadequate because it “consisted of a single unemphasized reference in a twelve-page booklet,” and thus did not explain that the policy’s coverage was being reduced.²⁵

It is not enough to simply attach an endorsement to the renewal policy.

An insurer must also be specific when relying on policy endorsements. Merely attaching an endorsement to a renewal policy is not sufficient to put the insured on notice of a change. This is true for two reasons.

First, because an insured has no duty to read a renewal policy, the insurer must notify the insured that the endorsement is attached to the policy or the insured is not on notice. In *American Cas Co v Rahn*,²⁶ a renewal policy was issued with a new endorsement that reduced the insured’s coverage. Upon receiving the policy, the insured was not aware of the endorsement and believed for a short time that coverage had been renewed without change.²⁷ The court found that the insurer had agreed to renew the policy and “there is no evidence or allegation by [the insurer] that it alerted [the insured] to the fact that the . . . [e]ndorsement was attached.”²⁸ Thus, the court concluded, “[the insurer] may be bound by the greater terms of the [earlier] policy.”²⁹

Second, even if the insurer gives notice of a new endorsement, it must also explain that the endorsement reduces the insured’s coverage when compared with the outgoing policy, since an endorsement with technical policy language does not put the insured on notice that coverage is being reduced. In *Canadian Universal Ins Co v Fire Watch*,³⁰ the insurer attached an endorsement that reduced the policy’s coverage by changing only one key word in a relevant definition. The court held that, because the insurer “did not provide a written explanation notifying [the insured] that the endorsement substantially reduced its insurance coverage,” the endorsement was void and could not be enforced.³¹

The Renewal Rule Binds Excess Insurers to Changes Made by Underlying Carriers

Another notable aspect of the renewal rule is its application to excess insurers. Like any other insurer, an excess insurer is liable for changes it makes to its own policy without notice to the insured. However, an excess insurer may also be bound to a change made by an *underlying carrier*, if the change has the effect of reducing the insured’s coverage under the excess policy. This could occur when the excess policy either incorporates specific policy terms (such as definitions) from the underlying policy, or follows form over the underlying policy.

Continued on next page

Of New Policies and Old . . .

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Although case law on this issue is scant, the one court to have considered the issue held that the excess insurer was bound by the changes made by the underlying carrier in these circumstances.

In *ADBA v Northfield Ins Co*, the excess insurer issued a policy that followed form over a primary policy issued by a different carrier.³² When originally issued, the primary policy contained a broad definition of “advertising injury,” making the coverage more favorable to the insured, but when the policy was renewed after several years, the primary carrier inserted a narrower, less favorable definition. In a suit by the insured against the primary carrier, the trial court held that the primary carrier had failed to give proper notice of the change, and thus was bound by the earlier definition of advertising injury. However, in a later suit against the excess insurer, the same court held that the excess insurer, despite its position as a form-following carrier, was not the one responsible for narrowing the insured’s coverage, and thus was not bound to provide coverage under the older, more favorable definition.

. . . even if the insurer gives notice of a new endorsement, it must also explain that the endorsement reduces the insured’s coverage when compared with the outgoing policy, since an endorsement with technical policy language does not put the insured on notice that coverage is being reduced.

On appeal to the Sixth Circuit, the court reversed, holding that the excess insurer was bound by the primary insurer’s failure to give proper notice.³³ The court explained its ruling as follows: “[The] question . . . is whether an excess carrier . . . is bound as a matter of law by the underlying carrier’s failure to comply with the renewal rule. We believe that the answer is ‘yes,’ because the ‘follow form’ linkage between an excess insurer and the primary insurer should logically apply to procedural as well as substantive obligations to their common insured. In effect, an excess insurer who lives by the sword must die by the sword.”³⁴

The court also believed that Northfield, as an excess carrier, was in a better position than the insureds to analyze changes in the underlying policy from year to

year.³⁵ The court reasoned as follows: “Th[e] triangular relationship between the primary insurer, the excess insurer, and the insured presents the classic problem of which one of the two relatively ‘innocent’ parties must suffer when the ‘wrongdoer’ causes a loss. In the present situation, we believe that Northfield, as the excess insurer, was in a much better position than the insureds to analyze unannounced changes in the underlying policy that it had agreed to follow. . . .”³⁶ Therefore, the court held that Northfield, like the primary carrier, was bound to provide coverage under the earlier, more favorable policy definition.

The practical effect of the Sixth Circuit’s ruling is that an excess insurer is bound by a primary insurer’s failure to comply with the renewal rule. Under the court’s ruling, the burden is on the excess insurer to review the underlying policy for changes made by the primary carrier from year to year, and to put the insured on notice of any such changes at risk of not being able to enforce them.

Conclusion

The renewal rule is a valuable tool for insureds and their attorneys. The rule applies any time an insurer reduces coverage in a renewal policy without giving proper notice. There are several things a policyholder can insist on: the insurer must notify the insured that the policy has been reduced in coverage; it is not enough to tell the insured to read the policy; if an endorsement is attached, the insurer must give notice of the endorsement and explain how it reduces coverage. The rule applies to both primary and excess carriers, and follow-form excess insurers can be bound by changes made by the primary insurer without proper notice. Attorneys who are aware of these rules may have the ability to change the otherwise plain terms of a renewal policy to something more favorable to their client. ■

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Endnotes

- 1 See *Koski v Allstate Ins Co*, 213 Mich App 166, 170 (1995), rev'd on other grounds, 456 Mich 439 (1998) (citations omitted).
- 2 *Id.* (citing *Parmet Homes, Inc v Republic Ins Co*, 111 Mich App 140, 145 (1981)).
- 3 See *Koski*, 213 Mich App at 170; *Parmet Homes*, 111 Mich App at 145; *Amway Distributors Benefits Association ("ADBA") v Federal Ins Co*, 990 F Supp 936, 942 (WD Mich 1997) (citations omitted).
- 4 See *Koski*, 213 Mich App at 170; *Parmet Homes*, 111 Mich App at 145; *ADBA*, 990 F Supp at 942-43.
- 5 See *Koski*, 213 Mich App at 170-71; *Parmet Homes*, 111 Mich App at 145; *ADBA*, 990 F Supp at 942 (holding that the insureds were entitled to the benefit of an earlier, more favorable definition of "advertising injury"); *JC Wyckoff & Assoc v Standard Fire Ins Co*, 936 F2d 1474, 1494 (6th Cir 1991); *Government Employees Ins Co v United States*, 400 F2d 172, 174-175 (10th Cir 1968) ("While the renewal of an insurance policy constitutes a separate contract to be governed by general contract principles, it is the general rule that an insurance company is bound by the greater coverage in an earlier policy where the renewal contract is issued without calling to the insured's attention a reduction in policy coverage"); *Gaston-Lincoln Transit, Inc v Maryland Cas Co*, 20 NC App 215, 222-23 (1973), *aff'd* 285 NC 541 (1974).
- 6 1997 WL 33344435, *1 (Mich Ct App July 22, 1997) (unpublished).
- 7 *Id.*
- 8 *Id.*
- 9 *Id.*
- 10 See *id.*
- 11 *Retan v Clark*, 220 Mich 493, 496 (1922); *accord Barryton State Sav Bank v Durkee*, 325 Mich 138, 141-42 (1949); *Davis v Keys*, 252 Mich 580, 583-84 (1930); *Liberty Mut Ins Co v Michigan Catastrophic Claims Assoc*, 2001 WL 1314805, *6 (Mich Ct App Oct 26, 2001) This is the legal underpinning of the renewal rule.
- 12 80 F2d 717, 719-20 (6th Cir 1936) (quoting 4 Page on Contracts, § 2218 (2d ed.)).
- 13 See *id.*
- 14 323 F3d 386 (6th Cir 2003). The author represented the insureds.
- 15 See *id.* at 393.
- 16 *Id.* (citations omitted).
- 17 See, e.g., *American Cas Co v Glaskin*, 805 F Supp 866, 872 (D Colo 1992) (holding that the renewal rule "is most analogous to the cause of action for contract reformation" (quoting 3 Corbin on Contracts § 614 n21 (1960)); *Benton v Mutual of Omaha Ins Co*, 500 NW2d 158, 160 (Minn Ct App 1993); *Allstate Ins Co v Zampedro*, 1983 WL 6040 (Ohio Ct App 1983) (unpublished) (quoting *JR Roberts & Sons, Inc v National Ins Co*, 2 Ohio App 463 (1914)); *Gaston-Lincoln Transit*, 20 NC App at 222-23; *Maryland Cas Co v Kramel*, 80 So2d 897, 899-900 (La Ct App 1955) (quoting 29 AmJur Insurance § 241, p 237; and citing 44 CJS Insurance § 285, p 1133); *Thomas v Connally Ins Agency*, 43 Ohio Misc 5 (Ohio Mun Ct 1974); *Lumbermen's Ins Co v Heiner*, 74 Ariz 152, 157 (1952); see also 2 Couch on Insurance § 27:2, pp 27-5, -6 (3d ed 1997) (discussing reformation and stating that "[a] renewal [policy] may be reformed to show that it was to provide the same coverage as the original policy"); 2 Couch on Insurance §§ 29:41-42, pp 29-48, -51 (same); 4 Matthew Bender, *The Law of Liability Insurance* 17-98, -99 (2001) (same); 44 CJS Insurance, § 285, p 1133 (same); 29 AmJur Insurance, § 253, pp 244-45 (same).
- 18 See, e.g., *Koski*, 213 Mich App at 170-73 (applying renewal rule with no discussion of reliance or other elements of estoppel); *Kung v Kung*, 2001 WL 1511648, *2-3 (Mich Ct App Nov 27, 2001) (unpublished) (same); *Taylor v Omaha Prop & Cas Ins Co*, 739 F Supp 1069, 1072-73 (ED Va 1990) (same); *Canadian Universal Ins Co v Fire Watch, Inc*, 258 NW2d 570, 574-75 (Minn 1977) (same); *Gaston-Lincoln Transit*, 201 SE2d at 222-23 (same); *Bauman v Royal Indem Co*, 174 A2d 585 (NJ 1961) (same); see also 2 Couch on Insurance §§ 27:2, 29:40-42 (3d ed 1997); 4 Matthew Bender, *The Law of Liability Insurance* § 1729 (2001); 1 Windt, *Insurance Claims and Disputes* § 6:9 (4th ed 2001).
- 19 See *ADBA*, 990 F Supp at 943 ("[An insurer] may not rely on a general instruction to read the policy carefully as notice of a specific reduction in coverage"); *Koski*, 213 Mich App at 170-71 (citing *Parmet Homes*, 111 Mich App at 145); *Farmers Petroleum*, 1997 WL 33344435, *1 (Mich Ct App July 22, 1997) (unpublished).
- 20 990 F Supp at 942.
- 21 *Id.*
- 22 *Id.* at 942-43; *accord Koski*, 213 Mich App at 172 (holding that notice was insufficient where insurer sent a letter telling the insured to "take a few minutes to read [the] new policy"); *Farmers Petroleum*, 1997 WL 33344435 at *1 ("The instruction to read the policy was insufficient to constitute [proper] notice").
- 23 *Koski*, 213 Mich App at 171; *accord JC Wyckoff*, 936 F2d at 1494 (noting that under Michigan law, the insurer must call the insured's attention to a "reduction in coverage").
- 24 See *Koski*, 213 Mich App at 171-72.
- 25 See *id.*
- 26 854 F Supp 492 (WD Mich 1994).
- 27 See *id.* at 501.
- 28 *Id.*
- 29 *Id.* However, the court declined to exercise the remedy normally imposed in such a case, since the facts showed that the insured's ignorance of the reduction in coverage caused no harm before his obtaining actual knowledge of the change. See *id.*
- 30 258 NW2d 570, 574-75 (Minn 1977).
- 31 *Id.* at 575; *accord Benton v Mutual of Omaha Ins Co*, 500 NW2d 158, 160 (Minn Ct App 1993) (finding an attached rider form inadequate because it "contains a full, technical description of benefits, but without signaling which provisions are new").
- 32 323 F3d 386 (6th Cir 2003).
- 33 *Id.* at 393.
- 34 *Id.* The court added: "We note, however, that 'although there is no contractual relationship between a primary and a[n] excess insurer, it is commonly understood that the primary insurer owes the 'true' excess insurer the same standard of care it owes to the insured.' Thus, as a general proposition, an excess insurer might have an indemnity action against the primary insurer for the latter's failure to notify the insureds of the changes in the underlying renewal policy." *Id.* (Citations omitted).
- 35 *Id.*
- 36 *Id.*

Policy Form Compliance and the Office of Financial and Insurance Regulation

By Kenneth M. Ross, Commissioner

My recent appointment as commissioner of the Office of Financial and Insurance Regulation (OFIR) provides me with the opportunity to highlight our agency's efforts to protect Michigan consumers in a variety of ways. I want to take this chance to focus attention on an often-overlooked but nonetheless important means of consumer protection: insurance form filing review.

In *Rory v Continental Ins Co*,¹ the plaintiffs, who were injured in an automobile accident, filed a claim with the defendant insurer for uninsured motorist benefits. The defendant denied plaintiffs' claim on the basis of a clause in the insurance contract requiring uninsured motorist claims to be filed within one year of the accident.² The plaintiffs filed suit based on the defendant's denial of plaintiffs' claim, and both the trial court and the Michigan Court of Appeals held the one-year period of limitations set forth in the insurance contract was unreasonable.³

The Michigan Supreme Court reversed the Court of Appeals, stating that "the judiciary is without authority to modify unambiguous [insurance] contracts or rebalance the contractual equities struck by the contracting parties...."⁴ In so holding, the Supreme Court noted the review of insurance contracts was a function specifically reserved for the commissioner of insurance:

Clearly, the Legislature has assigned the responsibility of evaluating the "reasonableness" of an insurance contract to the person within the executive branch charged with reviewing and approving insurance policies: the Commissioner of Insurance.⁵

What the Supreme Court may or may not have known was that former Insurance Commissioner D. Joseph Olson exempted many insurance forms from review in an exemption order issued on January 29, 1997.⁶

In response to the *Rory* case, my predecessor, Commissioner Linda A. Watters, established the Rory Group—a committee comprised of OFIR staff supported with legal assistance from the Office of the Attorney General. The Rory Group was charged with identifying deceptive or otherwise objectionable

insurance policy clauses and providing the commissioner with recommended courses of action for each clause.

Clauses causing concern to various individuals have been brought to the attention of the Rory Group in a number of ways:

- through data calls by OFIR for the production of certain policy forms (last done in 2006);
- through policy forms submitted with complaints from consumers and/or their attorneys;
- through referrals from the NAIC; or
- through referrals from other consumer advocate sources (legislators, etc.)

The Rory Group was charged with identifying deceptive or otherwise objectionable insurance policy clauses and providing the commissioner with recommended courses of action for each clause.

These clauses were then reviewed by the Rory Group and evaluated, taking into account legality, as well as industry and public impact. Clauses found to be "inconsistent, ambiguous, or misleading" or that contain "exceptions and conditions that unreasonably or deceptively affect the risk purported to be assumed"⁷ could be subject to a variety of potential actions by OFIR, including (1) the promulgation of rules, (2) issuing notices of disapproval, (3) issuing prohibition orders, and (4) issuing public warnings or advisories regarding the use of such clauses in insurance contracts.

The specific clause at issue in the *Rory* case required a claim against the insurer for uninsured motorist coverage to be filed within one year of the date of the accident, which was significantly shorter than the time period afforded by statute for bringing such claims (six years from the denial of coverage). Further investigation revealed the use of these shortened limitation of action clauses was not merely confined to no-fault insurance policies. Consistent with recommendations made by the Rory Group, OFIR promulgated administrative rules prohibiting prospective

use of these clauses and requiring insurers using forms incorporating the shortened limitation of action clauses to file such forms with OFIR.⁸

Another type of clause identified by the Rory Group and addressed in a similar manner were so called “discretionary clauses,” which gave insurers the final say in claim decisions under a particular policy and effectively eliminated any meaningful review of claim denials. As to these discretionary clauses, the Rory Group proposed, and OFIR promulgated, administrative rules prohibiting prospective use of discretionary clauses and requiring insurers using forms containing such clauses to file the forms with OFIR.⁹

Most recently, a public hearing was held with regard to the Rory Group’s work and more specifically, on the issues of electronic form filing and modification of Order No. 97-010-M. At the public hearing, OFIR received and considered both oral and written testimony regarding the public’s desire for policyholder protection and industry’s concerns relative to any chilling effect additional regulatory controls may have on the industry’s ability to bring innovative products to market in an efficient and cost-effective manner.

While most jurisdictions require that insurance forms be filed and reviewed by insurance regulators on the front end, Michigan does not. Since the issuance of Order No. 97-010-M, Michigan has operated on a hold/no file basis with respect to many insurance forms. However,

movement toward a more traditional approach appears probable if some insurers continue to be what might be termed overly aggressive in the clauses they draft. The experience of the Rory Group has made it clear to me that, particularly in the personal lines area, it is good public policy for OFIR to devote scarce resources to policy form review.

I invite all insurers with questions or comments concerning the Rory Group or the form review process to contact my chief of staff, Joe Garcia, at (517) 373-7466 or via e-mail at garciaj7@michigan.gov. ■

Editor’s note: This article first appeared in Insurance Legal News, a quarterly publication of the Insurance Task Force at Dickinson Wright, PLLC.

Endnotes

- 1 *Rory v Continental Ins Co*, 473 Mich 457 (2005).
- 2 *Rory* at 462.
- 3 *Rory* at 463.
- 4 *Rory* at 461.
- 5 *Rory* at 475 (footnote omitted).
- 6 Order No. 97-010-M.
- 7 MCL 500.2236(5).
- 8 R 500.2211-500.2212.
- 9 R 500.2201-500.2202.

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|---------------------------------|--------------------------------|--------------------------------|--------------------------|
| 2 MCL 500.4625(1). | 13 MCL 500.4601(n) and (o). | 24 MCL 500.4603(9). | 34 MCL 500.4665. |
| 3 MCL 500.4601. | 14 MCL 500.4601(n) and (o). | 25 MCL 208.1235(4). | 35 MCL 500.4663. |
| 4 MCL 500.4601(y). | 15 MCL 500.4619(2). | 26 MCL 500.4625(5). | 36 MCL 500.4665. |
| 5 MCL 500.4601(k). | 16 MCL 500.4611(1). It appears | 27 MCL 500.4639(2). | 37 MCL 500.4667(4). |
| 6 MCL 500.4611(1)(a) and | that there is not an express | 28 MCL 500.4639(2). | 38 MCL 500.4707(1). |
| (3)(a). | statement of the capital | 29 MCL 500.4639(3). | 39 MCL 500.4709. |
| 7 MCL 500.4601(e) and (f). | requirement for an industrial | 30 MCL 500.4639(1). | 40 MCL 500.4711. |
| 8 MCL 500.4611(7). | insured captive organized as a | 31 MCL 500.4639(1). | 41 MCL 500.4705(2). |
| 9 Also known as “IBNR,” this | mutual company. | 32 MCL 500.4637. | 42 MCL 500.4705(9). |
| is a reserve for losses that | 17 MCL 500.4601(bb). | 33 MCL 500.4665. It is not | 43 MCL 500.4803(3). |
| are actuarially forecast but | 18 MCL 500.4601(cc) and | clear whether captives formed | 44 MCL 500.4805(1). |
| which are not yet known to | (dd). | under the laws of states other | 45 MCL 500.4807(1). |
| the insurer as actual, specific | 19 MCL 500.4619(1). | than Michigan are intended | 46 See chapter 72 of the |
| claims. | 20 MCL 500.4611(e). | to be permissible sponsors, or | Insurance Code, MCL |
| 10 MCL 500.4611(7). | 21 MCL 500.4603(1). | impliedly excluded due to the | 500.7200 et seq. |
| 11 MCL 500.4621(7). | 22 MCL 500.4603(2). | listing of Michigan captives | |
| 12 MCL 500.4601(c) and (d). | 23 MCL 500.4603(2). | as permitted sponsors. | |

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